
CANADA / JUDGMENT

Copcan Contracting Ltd. v. Ashlaur Trading Inc.

2010 BCSC 150

COURT

Supreme Court of British Columbia

DECIDED

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2010 BCSC 150 Copcan Contracting Ltd. v. Ashlaur Trading Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Copcan Contracting Ltd. v. Ashlaur Trading Inc.,

2010 BCSC 150

Date: 20100201

Docket: S53318

Registry: Nanaimo

Between:

Copcan Contracting Ltd.

Plaintiff

And:

Ashlaur Trading Inc.

Defendant

Before: The Honourable Mr. Justice Bracken

Reasons for Judgment

Counsel for the Plaintiff:

J. L. Hunter, Q.C. and M. B. Rankin

Counsel for the Defendant:

G. A. Phillips

Place and Dates of Trial/Hearing:

Nanaimo, B.C.

July 20, 21, 22, 23, 24,
27, 28, 29, and 31, 2009

Place and Date of Judgment:

Nanaimo, B.C.

February 1, 2010

Nature of the Action

- [1] The plaintiff Copcan Contracting Ltd. ("Copcan") seeks payment from the defendant Ashlaur Trading Inc. ("Ashlaur") in the amount of \$888,242.21 being the balance of monies Copcan claims is due and owing by Ashlaur pursuant to a contract to perform log harvesting and road building on behalf of Ashlaur. Copcan says that the contract was made in connection with a timber sales contract that Ashlaur had acquired and the work was to be done in an area near Belize Inlet, British Columbia known as Trevor Lake.
- [2] Copcan says the agreement was partly in writing and partly oral, but that it was essentially a contract where the charges were to be on an hourly basis for labour, materials and equipment together with certain additional charges to cover administrative costs.
- [3] Ashlaur says that the contract between it and Copcan was based on certain itemized equipment and services listed on a handwritten "rate sheet" that was prepared by Copcan and provided to Ashlaur. It says further that it was understood and agreed that the work was to be performed at a total cost not to exceed \$40 per cubic metre of timber harvested and that the work was to be completed within 70 days.
- [4] Ashlaur says that the work was not completed within 70 days and that the amount claimed by Copcan for the work and services it performed and provided exceeds \$40 per cubic metre. Ashlaur also claims that Copcan charged for equipment and services for which Ashlaur did not agree to pay and for hours that were not performed.
- [5] It also alleges that Copcan did not complete the work properly and that it left valuable wood behind as waste for which Ashlaur had to pay a waste assessment to the B.C. Government. It also claims that it lost revenue as a result of the wood left behind and it seeks damages from Copcan by way of its counterclaim for the losses incurred by the delay in completion of the agreement and for the waste assessment and the lost revenue respecting valuable wood left behind at the site.

Background

- [6] Copcan is a road building and timber harvesting company that operates from its offices in Nanaimo, British Columbia. Its business is divided almost equally between logging operations and road construction and other non-logging construction work. The company is a family-run business owned by Bryan Gregson and operated by he and his sons Dave Gregson and John Gregson. It has been actively carrying on its business since 1985. Copcan and the Gregsons have a close relationship with Don Banasky who is a long-time friend of the family. Mr. Banasky operates a company known as Falltech Logging Ltd. ("Falltech"). The nature of the work that is typically undertaken by Mr. Banasky and his company is timber falling in connection with the logging operations of Copcan.
- [7] While Copcan frequently works in areas that are not logging-related, it is experienced in logging operations and the company has been involved in a number of what are referred to as "stump to dump" logging operations. These logging operations involve going into an area where a timber license has been acquired and falling the timber, pulling the felled timber from the bush by cable, a process called "yarding", and then mechanically "processing" the trees by removing branches and non-marketable material, and finally hauling the finished logs to the water's edge where it is "dumped" into the water and organized into booms to be towed to a suitable location for marketing.
- [8] Ashlaur is a small log trading company that carries on the primary business of purchasing timber sales by bidding for the right to harvest by auction from the Provincial Government's B.C. Timber Sales Program. It then arranges for a logging contractor to harvest the timber. It bids on many timber sales and on average obtains six or seven each year. Before bidding on any timber sale, the principals of the company, Doug Saunders and Tom Pick, visit the site of the sale to assess the potential market value of the timber and to estimate the costs of harvesting. They then determine a bid level that they believe will enable Ashlaur to profitably harvest the sale. In each timber sale, there is an upset price or stumpage price the government imposes and Ashlaur's bid is in addition to that cost.
- [9] Both Doug Saunders and Tom Pick have extensive experience in the forestry industry and have been operating Ashlaur since 1992.

The Timber Sale Purchased by Ashlaur

- [10] In 2007, British Columbia timber sales advertised Timber Sale A72688, located near Belize Inlet on the central coast of British Columbia. The sale was made up of three old-growth cut blocks within a few kilometres of each other. The blocks were all located near Trevor Lake. Ashlaur had purchased another old-growth sale in the same area in 2005, arranged to harvest the sale and had profited by the operation. It utilized a logging contractor known as Beban Logging and the cost of the sale on a cubic metre basis was in the range of \$31 or \$32 per cubic metre.

- [11] After visiting the site and assessing the value of the timber and the cost that it anticipated in harvesting that timber, Ashlaur submitted a bid of \$74.64 per cubic metre and was awarded the Belize Inlet sale on March 29, 2007. There were three other bidders on the sale and the next highest was approximately \$11 lower than the bid of Ashlaur. The other two were approximately \$14 and \$26 below the Ashlaur bid.

Nature of the Action

- [12] Copcan seeks payment of money that it says remain owing on a logging contract which was made between it and Ashlaur in June of 2007. Ashlaur alleges that the contract was based at least in part on the volume of wood harvested and says that it was understood that the total cost of the contract would be no more than \$40 per cubic metre of wood produced. Alternatively, Ashlaur says that if the contract is determined to be an hourly-based contract, then the cost was restricted to the items listed on the rate sheet that was prepared.
- [13] It also alleges that machine and labour hours that Copcan charged are excessive. It alleges that time was charged for equipment that was not agreed to be utilized and at rates that were in excess of those agreed to. Ashlaur also claims that it was only to be charged for production hours and not time spent moving the equipment from place to place or for "down time" while the equipment was being serviced or fuelled. Ashlaur also alleges that Copcan charged for mechanic's time, time spent at on-site safety meetings and for training sessions and other non-production-related labour hours.
- [14] Ashlaur says that Copcan added an unauthorized surcharge of 10% to most of the subcontractors' bills contrary to agreement and to representations that were made to it at the time the contract was made that subcontracted equipment and materials would be charged at cost. It also alleges that a significant fuel charge was added as a result of Copcan's mismanagement of the fuel usage.
- [15] In its counterclaim, Ashlaur seeks damages for delay, the cost of a waste assessment that was imposed by British Columbia Forests, and a loss of revenue that could have been earned from the wood that was left behind as waste. It seeks to set off its counterclaim against any amounts found due and owing to Copcan.

The Issues

- [16] The central issue in the case is to determine the nature of the contract; that is, whether it was an hourly rate time and charges contract and if so, what were its terms. Alternatively, it is argued that the contract was an hourly contract, but with a cap imposed of \$40 per cubic metre of production.
- [17] If it is an hourly-based contract, there are several sub-issues that must be resolved. First, whether it was a term or representation in the contract that the cost of production would not exceed the cost of approximately \$40 per cubic metre.

- [18] In addition, Ashlaur alleges that Copcan over-billed the cost of subcontractors and suppliers including the addition of a 10% surcharge to each bill which is alleged to be an amount exceeding \$300,000.
- [19] It is also alleged that Copcan billed excessive charges for machine time. It is alleged that Copcan mismanaged the fuel logs and that fuel charges of approximately \$82,000 are improper.
- [20] Ashlaur also alleges that the hourly rates were only to be incurred for "production time"; that is, time spent actually harvesting wood and excluding the time spent moving, fuelling and servicing or repairing machines. It is also alleged that Copcan billed for machines that were not agreed upon by the parties as part of the contract. The amount of \$5,245 is said to be unauthorized charges in this category. The equipment included a grader, a backhoe and a hiab truck, the latter being a truck with a crane attached to it.
- [21] Copcan also billed for mechanic's hours in the amount of \$15,352 and Ashlaur claims there was no agreement to pay for a mechanic on the job site. It also alleges that it was not to be billed for the sub-contracted boats used to transport the crew from camp to the work site each day. Copcan also billed for the cost of repairing one of the boats that was damaged in the course of the job.
- [22] It is alleged that Don Banasky billed for time that he did not work on the project and for supervision hours and that he "padded" his bills. Ashlaur also claims that Copcan billed for time not spent by its logging supervisor Jim Saunders.
- [23] In its counterclaim, Ashlaur says that it was billed for additional labour, camp and other costs as a result of Copcan's failure to complete the job within what it says was the agreed upon time of 70 days. Ashlaur claims that the delay resulted in a loss of sales revenue and based on then current market conditions, it lost \$105,098.46 in revenue plus a loss of profit of \$100,000 due to declining prices resulting from the delay. Ashlaur claims damages in the amount of \$749,322.57.

The Contract

- [24] It seems to be common ground that the forest industry is made up of a small, close-knit group of individuals and businesses and as a result, it is uncommon to have a detailed written contract on most logging operations. It is alleged that most contracts are simply negotiated and performed without any difficulty. It is also common to enter into arrangements for contract logging on the basis of volume of production. Indeed, Ashlaur says that it had not, previous to this contract, made any arrangement for logging services other than by a volume-based price.
- [25] Copcan became aware of Ashlaur through its employee Jim Saunders, who is the brother of Doug Saunders, one of the principals of Ashlaur. Jim Saunders was aware that Ashlaur had acquired the logging license for the Trevor Lake area and was looking for a logging

contractor. He was also aware that Ashlaur had made inquiries with other logging contractors, including a contractor that had completed another contract for them in the same area in 2005. None of the contractors that Ashlaur had contacted were able to take on the entire job although one was prepared to log a portion of the area at a price in the range of \$40 per cubic metre of production. Another contractor provided a bid in the range of \$35 per cubic metre of wood produced plus the cost of road construction, but in the end, neither was not able or willing to do the job.

- [26] Jim Saunders discussed the proposal with his brother Doug Saunders and suggested that Copcan had some experience in that area and might be willing and available to do the job.
- [27] John Gregson is one of the managers of Copcan. He has a B.Sc. in Forestry and a diploma in Forestry Technology from B.C.I.T. He has been involved in about 50 stump to dump logging jobs. The Trevor Lake job is the largest volume contract that he had worked on, but he had worked in similar sized areas as a logging contractor on previous occasions.
- [28] Some preliminary discussions were held, and then on May 29, 2007, Jim Saunders, Don Banasky and Doug Saunders flew to Trevor Lake to look at the site. They walked over the area to be logged and assessed the work and potential cost of the operation. They then flew on to a camp owned by W & D Logging, another logging company that operated in the same area. The purpose of that stop was to see if the camp was available for use by Copcan for the Ashlaur job. They left with the understanding that the camp was available.
- [29] Copcan said that it was understood that Ashlaur was to be responsible for the camp, including making the arrangements for the camp. Because Copcan had a good relationship with W & D Logging and Doug Saunders apparently did not, Copcan took the lead in the discussions. Doug Saunders in his evidence denied any difficulty with his relationship with W & D Logging and said that the arrangements were made through Copcan because it was always understood to be part of its overall responsibility.
- [30] After that trip, the parties felt optimistic enough to arrange a meeting at Copcan's offices in Nanaimo. The meeting was held on June 12, 2007 and was attended by Don Banasky, Dave Gregson, John Gregson, Jim Saunders and Doug Saunders. Bryan Gregson was in the office that day and was present for portions of the meeting, but did not stay for the entire discussion as he was content to let his sons and Don Banasky take responsibility.
- [31] At that meeting, discussions were held about the overall costs of the job. It is clear that Doug Saunders and Tom Pick, the other principal of Ashlaur, had firmly fixed in their minds that the job could be done for \$40 per cubic metre of production. They held this view based on their own assessment of the site, having travelled to the site and walked over it and independently assessed the potential cost of production that might come from the contract, and secondly, as a result of their knowledge of the prior logging license they had completed in the same area two years earlier by Beban Logging at a volume-based price well below \$40 per cubic metre.

- [32] Doug Saunders agreed in cross-examination that the amount of \$50 was mentioned as a likely volume cost of production in the course of the meeting, but he cannot recall who said it other than it was one of the Gregsons. Doug Saunders was not concerned with that comment as he believed that it was simply Copcan's inexperience that led them to that conclusion and he believed the cost would be less than \$50 per cubic metre and well within the price range that Ashlaur expected.
- [33] Copcan did not agree with the \$40 per cubic metre cost estimate and expressed the opinion that the job would cost at least \$48 to \$53 per cubic metre of production. Copcan was not prepared to do the job on a volume-price basis in any event.
- [34] The evidence is in conflict in this area as Doug and Jim Saunders both recall that the \$40 per cubic metre price was discussed, but neither recalls the higher price as being clearly stated by Copcan as the price the job would likely come in at. Jim Saunders said that the Gregsons did not agree that the job could be done in the \$40 to \$42 per cubic metre range. On cross-examination he thought that someone may have said the cost would be more like \$50 than \$40 per cubic metre.
- [35] Don Banasky and John Gregson do recall the discussion. John Gregson said that he believed the job would be at least \$47 to \$52 per cubic metre. Again, even though there was a discussion about a cubic metre price, John Gregson and Copcan were clear in saying that the job was only to be taken on an hourly rate basis with some of the equipment to be supplied in accordance with the rate sheet that was prepared at the meeting.
- [36] It is also clear that Doug Saunders knew and agreed that the job would not be a volume-based or price per cubic metre job, but rather an hourly rate for labour and machinery and certain subcontracts were to be arranged at cost. Copcan says that only some of the equipment and services to be utilized were set out on the rate sheet; others were simply arranged by Copcan in the course of the job and billed through Copcan's invoices to Ashlaur. Copcan says that it was understood that subcontracted services were to be charged at cost plus 10% to cover administration costs.
- [37] Doug Saunders said in his evidence that he would not have agreed to pay a cost plus 10% for items such as the grapple yarder machine as he knew that would amount to a lot of money. In late October of 2007, when the costs began to alarm Ashlaur, Doug Saunders contacted Bryan Gregson with a request that the subcontractor bills, in particular the grapple yarding bill, be sent directly to Ashlaur for payment so that they could save the 10% cost. No complaint was made about the cost being added. Bryan Gregson initially agreed to that and then later changed his mind after speaking with his administrative staff and advised that it would create problems within Copcan's office. Doug Saunders was then advised that Copcan could not agree to the change and agreed to revert to the original arrangement.

- [38] All of the participants at the June 12th meeting described the meeting as being relaxed and friendly and that there was a broad discussion of what was required to perform the job. The discussion included what equipment was needed and it was understood that as Copcan did not have a grapple yarder machine as well as other necessary equipment, Copcan would arrange to rent the needed equipment from other contractors.
- [39] The rate sheet that was prepared at the meeting itemized equipment that Copcan thought would be needed to complete the job and each piece of equipment was listed with an hourly rate assigned to it. The equipment included loaders, a feller buncher, wood processors and rock trucks that were owned by Copcan. It was also understood that in addition to the grapple yarders that they would require a rock drill as well as a falling contractor and a trucking contract. The trucking contract was to be charged at \$1,485 (including 10% surcharge) and falling was to be at the rate of \$600 per man per day.
- [40] Some of the machines listed on the rate sheet had a 10% additional charge to the hourly rate. Copcan said that the 10% surcharge was added as compensation for the rugged terrain and remoteness of the site. Copcan said that this was discussed with Doug Saunders and agreed to by Doug Saunders on behalf of Ashlaur.
- [41] Ashlaur claimed that the 10% added to the machines was for the purposes of covering administration costs. It alleged that the surcharge was to cover the cost of administering the contract, paying and checking the bills and other related responsibilities.
- [42] Some of the items were listed as "N/C" which was agreed to mean no charge. Those items were the ambulance, the fire truck, shop truck, the Sea-can (a metal storage container), and a fuel truck. Other items were expressed to be "cost plus 10%". Those items included the mobilization barge, the low-bed and water taxi. Airplane flights were to be charged at cost.
- [43] Labour charges were set for operators at \$65 per hour and supervision at \$75 per hour. There was also a note that Ashlaur was to be responsible for room and board and water taxi. John Gregson's understanding was that Ashlaur was to be responsible for arranging the camp accommodation, water taxi and grapple yarding.
- [44] It is common ground that the rate sheet was discussed and prepared at the June 12th meeting, and that a copy was given to Doug Saunders. It is also common ground that Tom Pick at Ashlaur's office saw the rate sheet either the same day or the day after and that he and Doug Saunders discussed the proposal. Tom Pick said that he was not comfortable entering into a time and charges based contract but felt that if Doug Saunders believed it was consistent with the budget they had set for the job he was agreeable.
- [45] A copy of the rate sheet with the notation "1,080 cubic metres/day, 70 days" was produced in evidence. Ashlaur says that note reflects the agreement made at the June 12th meeting that the daily wood production on the job would be 1,080 cubic metres per day and that the job would take 70 days from start to finish. Copcan denies that provision was a term of the agreement or that the rate sheet had that notation on it when it was given to Doug Saunders.

It appears from the evidence that Doug Saunders or Jim Saunders wrote that notation at a later time as a reflection of what Ashlaur says was agreed to at the meeting.

- [46] There is a notation in Doug Saunders' diary that referred to "hauling days" as days when logs were hauled during the production schedule. Given the usual schedule of 10 days in working and 4 days out, Copcan says that the number of days when wood was hauled worked out almost exactly to the schedule that was contemplated by the parties at the meeting of June 12th.
- [47] Doug Saunders agreed that the issue was to ensure that the project was completed by November before the weather changed. He said that Copcan assured him that it could be done in 70 days although he could not recall who actually said it even though it was to him a key issue. He denied that there was any agreement for a 10% surcharge on things such as the grapple yarder. He said it was his understanding that he would only be charged for the cost of subcontracted work and equipment. He did agree that at one point, on October 16, 2007, that he asked Bryan Gregson if they could pay the subcontractors directly to save the 10% administration fee. He confirmed that Bryan Gregson initially agreed and then changed his mind after talking to staff.
- [48] All of the equipment was loaded on a barge and towed to the Trevor Lake site. Actual logging and road building started in mid-July and the first load of logs was hauled to the water on July 21, 2007. Ashlaur received its first invoice August 22, 2007 and paid it. It also paid the next three invoices that were received at intervals after August 31, 2007.
- [49] Ashlaur agreed that certain things necessary for the job were not listed on the rate sheet. In fact, Ashlaur did pay for some of the additions to the rate sheet that were included in the first four invoices it received. Copcan seems to take the position that once the job was determined as an hourly contract, which it understood was agreed, there was essentially nothing that was necessary to complete the job that it was obligated to pay for as part of its own overhead costs or as a free contribution to the job.
- [50] The invoices that were prepared and sent to Ashlaur, of which some were paid, contained considerable detail of the hourly rates and the time calculations along with copies of any invoices that Copcan had paid. Ashlaur had a system in place to review each invoice it received from any source. It had a policy that it would not pay on a copy or a bill received by fax. Each invoice was checked to ensure that all of the time was accurately compiled and that it was authorized. A stamp was placed on the face of the invoice and it passed through the hands of two employees before being finally checked and payment authorized by Tom Pick.

Position of the Plaintiff

- [51] Copcan says that the contract was a partly written and partly oral contract that Copcan would complete the logging of the license that Ashlaur had in the Trevor Lake area and would bill for all of its costs. It says that the rate sheet was simply a list of some of the equipment needed and the rates that Copcan would charge for the equipment listed. It says that there was an understanding that other charges, including labour and additional equipment and services, would also be incurred and billed to Ashlaur.
- [52] Copcan submits that everything necessary to carry out and complete the contract would be charged at Copcan's hourly rates or on a cost plus 10% basis. It says that the 10% was added as an administration fee for the time and trouble taken to find suppliers, advance money to suppliers, and to supervise and deal with any invoicing from its suppliers. It says that it did not charge for any equipment that was not necessary and that it only charged for work and services actually performed.

Position of the Defendant

- [53] Ashlaur appears to agree that the contract was in essence an hourly-rate contract, but says that the chargeable hours were for the pieces of equipment and items listed on the rate sheet only. It says that the equipment listed was what Ashlaur and Copcan agreed was needed along with some other items that were to be obtained from other suppliers.
- [54] Ashlaur also says that the hourly rates for equipment were only to be charged for hours that the machines were actually engaged in production of wood ("production time") and excluded such things as servicing and breakdown time, as well as time spent moving from one part of the job to another.
- [55] It was also agreed that Copcan would obtain the necessary equipment for grapple yarding from an outside source and the actual cost would be charged to Ashlaur. Ashlaur says there was to be no 10% surcharge added to that bill.
- [56] Ashlaur also says that the cost of \$40 per cubic metre was a reasonable volume cost for the entire job.
- [57] Ashlaur claims that Copcan billed excessively and charged for hours that were non-productive, unnecessary or simply not worked. It also claims that it was charged for fuel that was not used or alternatively, that the fuel controls were so poorly managed that there should be no allowance for additional fuel charges. Ashlaur also argues that it was a term of the contract that the work would be completed within 70 days from start to finish.

Ashlaur's Counterclaim

- [58] Ashlaur says that the job was not performed within the agreed upon time of 70 days and as a result it incurred unnecessary costs for additional time spent on the job and that it lost sales revenue due to a falling market. It also claims that the amount of waste left behind at the site was excessive and that it had to pay a penalty to B.C. Forests of \$35,670.
- [59] Ashlaur also claims that it lost a significant amount of revenue on account of marketable wood left behind as waste. It says that the sales revenue that it lost as a result is between \$263,103.11 and \$613,652.57.

The Law

- [60] Copcan relies on the principle laid down many years ago in *Smith v. Hughes* (1871), L.R. 6 Q.B. 597 at 607 (D.C.) where Blackburn J. stated:

If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was consenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

- [61] Copcan argues that even though Ashlaur has repeatedly denied liability for any costs that were not listed on the rate sheet, it is clear that invoices containing all of the detail of the costs incurred, including any 10% surcharges or the cost of equipment used in addition to the equipment listed on the rate sheet, was detailed on the Copcan invoices, checked by Ashlaur in their office administration, and paid.
- [62] Copcan says that Ashlaur clearly understood that Copcan would only take on the job on an hourly basis and not a volume-based production cost. Ashlaur was aware of the nature of the work to be done and the necessary labour and equipment needed to complete the job. Copcan says that Ashlaur must have understood that there would be other charges over and above the rate sheet and that the cost was to include everything necessary to complete the job.
- [63] Copcan also relies on *St. John Tug Boat Co. Ltd. v. Irving Refinery Ltd.*, [1964] S.C.R. 614 which held that in appropriate circumstances, an agreement can be implied from the conduct of the parties. The court cited with approval a passage from *Anson on Contracts*, 21st ed. at p. 28, where it is stated:

The test of such a contract is an objective and not a subjective one, that is to say, the intention which the law will attribute to a man is always that which his conduct bears when reasonably construed, and not that which was present in his own mind. So if A allows B to work for him under such circumstances that no reasonable man would suppose that B meant to do the work for nothing, A will be liable to pay for it. The doing of the work is the offer; the permission to do it, or the acquiescence in its being done, constitutes the acceptance.

- [64] Finally, Copcan relies on *Greenhill Properties (1977) Ltd. v. Sandcastle Recreation Centre* (1988), 39 C.L.R. (2d) 205 at paras. 92-93:
- [92] I am satisfied that there was contract between these parties. It is clear that the August, 1991 "estimate" was not a fixed quote and does not constitute their contract. At the same time, the figures that were provided to the defendants between March, 1993 and June, 1993 did not constitute a quote or a fixed price or set out the terms of their contract. Rather, the best evidence of the contract between the parties is set out in the various invoices which I find evidence the agreement between them.
- [93] While I find that prior to commencing construction in March, 1993 there was no consensus between the parties as to the terms of the construction contract, the subsequent tendering of invoices and the subsequent payments and actions of the parties once those invoices were received by the defendants allows an objective reasonable opinion to be formed that the terms of their contract were as set out in the invoices. The defendants must be taken to have reviewed the invoices. They then forwarded the invoices to the Credit Union and Mr. Penny in order that construction draws could be obtained in order that the invoices could then be paid. The plaintiff continued to work on the job and induce sub-contractors to work on the job as the invoices continued to be paid.
- [65] Ashlaur refers to *Dan Galloway Design & Construction Ltd. v. LaPlante* (2003), 125 A.C.W.S. (3d) 987, 2003 BCSC 1194, for the proposition that the onus of proving an enforceable contract on the terms that it alleges lies upon the plaintiff on a balance of probabilities. Any ambiguity should be resolved in favour of the defendant. Ashlaur says that on the evidence it is not clear whether Ashlaur had to pay for items that were not listed on the rate sheet and that ambiguity should be resolved by restricting the obligation of Ashlaur to pay only for the services set out in the rate sheet.
- [66] In *Ballard (c.o.b. D.B. Trucking and D.B. Contracting) v. Roga Contracting Ltd.*, [1995] B.C.J. No. 1278 (S.C.), the positions of the parties were so conflicted that the court held that the parties were operating under a mutual mistake, and instead determined the matter on the basis of quantum meruit. Again, Ashlaur argues that there is such a conflict in this case and if there is to be a charge for equipment and services beyond what was contemplated on the rate sheet it should be assessed on a quantum meruit basis. Ashlaur says that the best estimate of that value is \$40 per cubic metre of wood produced.
- [67] Similar results occurred in *Catalyst Paper Corp. v. Companhia de Navegação Norsul* (2008), 296 D.L.R. (4th) 513, 2008 BCCA 336, where the court found that the parties had failed to reach agreement on all essential terms. See also *Fibercom Systems Inc. v. Rogers Cable Inc.* (2005), 138 A.C.W.S. (3d) 63, 2005 BCSC 419.

- [68] Ashlaur also argued that there can be no finding that Ashlaur is barred from challenging the accounts by a promissory estoppel as the party relying on that doctrine must first establish that the other party has, by words or conduct, made a clear and unequivocal promise or assurance, and that in reliance on the promise or assurance, Copcan acted on the promise or representations or changed its position in some way in reliance upon it. I accept that the outcome of this case does not turn on the issue of promissory estoppel.
- [69] Ashlaur submits that the evidence indicates that the contract in this case was that Ashlaur was to pay for all logging services in the stump to dump operation at the rates and costs set out on the rate sheet for the equipment and services listed on the rate sheet and nothing more. If the agreement is not restricted to the items on the rate sheet, then Copcan should be remunerated on the basis of quantum meruit for anything over and above the rate sheet costs. Ashlaur says that the best evidence or estimate of value is the \$40 per cubic metre volume-based price that it says was not only its estimate but a proven price for a logging operation only two years previously in the same area.

Discussion

- [70] Both Doug Saunders and Tom Pick said that most contracts in the forest industry are on a volume of production based price. The close-knit nature of the industry results in many contracts that are based on trust and are not written or written in detail. This contract was no exception.
- [71] Ashlaur had estimated its budget for logging at a cost of approximately \$40 per cubic metre and the principals of Ashlaur firmly believed that it could be done at that price. Ashlaur has always contracted on a volume-based price in previous logging contracts and while they have never actually performed a logging operation of their own, they were familiar with the cost of a logging operation similar to the one at Trevor Lake from prior licenses that they have successfully won.
- [72] It is clear that Ashlaur wanted to do this contract on a volume-based price as well, but Copcan was not prepared to take the contract on that basis. Ashlaur had already contacted other contractors, some of whom had worked for them on prior occasions, including Beban Logging which had logged a license in the same area in 2005. None of the contractors approached by Ashlaur were available or wanted to take on the whole job. One of the contractors provided a price bid of \$34.83 per cubic metre of wood produced, plus the cost of the road construction, but it later indicated that it could not take the job on.
- [73] The evidence indicates that while Doug Saunders tried to arrange the contract on a volume of production based price that is not the way it was undertaken by Copcan. Doug Saunders agreed in his evidence that he understood Copcan would only do the job on an hourly basis.

- [74] It is also clear that Doug Saunders was aware that the principals of Copcan and Don Banasky were firm in their belief that the cost of logging would be well in excess of \$40 per cubic metre of wood produced and that the cost was likely to be more in the range of \$50 per cubic metre of production. Doug Saunders, based on his own experience and the assessment that he and Tom Pick had done of the project, did not believe the Copcan estimate was accurate.
- [75] Doug Saunders and Tom Pick remain convinced that the realistic cost of logging the Trevor Lake area should have been very close to their estimate of \$40 per cubic metre on a stump to dump job. They based their opinion on the cost of logging of a similar area two years earlier and their own assessment of the project after walking the area and independently estimating the cost.
- [76] That view was never held by Copcan. While there is some evidence that other logging contractors shared Ashlaur's cost estimate, none of them were available or willing to actually take the job on. It is clear, on the evidence, that Ashlaur agreed that the job was to be done on a hourly rate or cost plus basis. There is some evidence of the agreed upon equipment and rates for that equipment in the rate sheet, but it is also clear on the evidence that both parties were aware other equipment was likely needed and that it would be acquired from other sources and suppliers and that Copcan would pass the cost on to Ashlaur.
- [77] The principals of Copcan testified that it was understood that sub-contracted services arranged by Copcan would be charged at the cost of those services plus 10%. The rate sheet contemplates a 10% surcharge for items such as the mobilization barge, low-bed, and other rented equipment. Copcan says that a 10% surcharge is common in the industry and it was accepted by Ashlaur in the discussions between Doug Saunders and Bryan Gregson in October 2007 and it was a charge accepted by payment of the first four invoices that Copcan issued.
- [78] As already discussed, Copcan charged an administration fee of 10% on most of the subcontracted services that it engaged. Copcan stated that charge was to cover the cost of administration for its work in contacting and arranging the subcontracted service, making any advance payments, and finally checking and paying the bill when the service was completed. Ashlaur denies that this charge was ever agreed to and denied any liability to pay the charge.
- [79] Copcan submits that cost plus 10% is a standard practice in its business and in the industry and that it was clearly explained and understood by Ashlaur. Again, relying on Greenhill, those charges were clearly present in the invoices and back-up materials sent to Ashlaur which Ashlaur paid. Tom Pick described the process used to check the invoices that were received by Ashlaur from any supplier. First of all, Ashlaur had a firm policy that it would only pay on original bills. It would not pay a bill received by fax or a copy of an original.

- [80] When the bill arrives in Ashlaur's office, a stamp is affixed to the face of the bill and it shows the steps taken in each case to ensure that the hourly rate multiplied by the time is accurate, that the work was authorized, and that the pricing is appropriate. Only then is the bill approved for payment.
- [81] On each of the bills that were approved for payment, Copcan had clearly added 10% to its cost of subcontracted services. Ashlaur paid those bills without any protest.
- [82] The conversation that Doug Saunders had with Bryan Gregson where he asked that the bill for the grapple yarding subcontract be sent directly to Ashlaur for payment so that Ashlaur could avoid the 10% surcharge indicates clearly that Ashlaur was well aware of the surcharge. When Bryan Gregson contacted Doug Saunders to say that Copcan wanted to go back to the original arrangement as direct payment would pose problems in Copcan's administrative office. Doug Saunders agreed to that proposal and Copcan continued to charge invoices at a cost plus basis and for a time at least, Ashlaur paid them.

Conclusion on the Terms of the Contract

- [83] I find that there was a contract between Ashlaur and Copcan, whereby Copcan was to log the Trevor Lake site on a stump to dump type job on the basis that Copcan would charge Ashlaur for the labour and equipment reasonably necessary to complete the job on an hourly basis for the machines and labour, and on a cost plus 10% basis for most subcontracted equipment and services.
- [84] The rate sheet is evidence of agreement on the rates for the majority of the equipment, labour and services necessary to organize and move the equipment to the site, to set up and operate the camp for their crew, and to hire subcontractors and subcontracted equipment for some parts of the work as well as construct the roads.
- [85] I find that the terms of the contract include all of the services and equipment reasonably necessary to complete the work and it is not restricted to the items listed on the rate sheet.
- [86] Where work and services were supplied as necessary parts of the contract, it was agreed that Copcan would charge reasonable rates and would keep accurate records of time spent and materials used. The rate sheet specifically excluded some items as non-chargeable that would be supplied by Copcan as part of the contract. Among the non-chargeable items is a Sea-can which, in fact, was initially invoiced and clearly invoiced in error.
- [87] While Ashlaur believed that the project could be done at a cost of \$40 per cubic metre, it was not a term of the contract nor was it a cap on the hourly or cost plus portions of the contract.
- [88] In summary, Ashlaur and Copcan agreed that Copcan would log the site as a stump to dump job and would charge hourly rates for equipment, materials and labour. It was also agreed that Copcan was to acquire and pay for the services reasonably necessary to complete the job. Some of the equipment and services were itemized and agreed to by way of the rate sheet that was presented by Copcan and accepted by Ashlaur. I find that Ashlaur accepted

and agreed to the imposition of a 10% surcharge on most of the sub-contracts of supply and services.

- [89] Additional equipment and services were used as necessary to complete the work, and as implied in the agreement as a term of the contract, Copcan would utilize all reasonably necessary equipment and that it would charge reasonable rates for all services.
- [90] It was only when the costs began to approach and then exceed the \$40 per cubic metre limit that Ashlaur had fixed as its budget of costs per cubic metre of production that Ashlaur reacted. Up until that point, Ashlaur received the bills, examined the detail that was set out in the bills, including all of the cost plus 10% items and the additional costs for equipment not referred to in the rate sheet. When it realized the budget it had set was going to be exceeded, Ashlaur began to try and put a different interpretation upon the terms of its agreement.
- [91] Tom Pick, who was then most concerned about the costs and responsible for the administration of Ashlaur's office, placed the words "advance on production" on some of the cheques that Ashlaur sent, then paid only part of the amount of invoices received, and finally Ashlaur simply quit paying.
- [92] On cross-examination Tom Pick agreed that on a volume-priced contract, it is not normal to receive pages of detail as well as copies of all invoices and time sheets setting out all of the hourly rates and charges incurred. Normally in a volume-priced contract there is simply an advance or advances on production requested and paid.

Machine Time versus Production Time

- [93] Ashlaur says that the hours billed for the machines used in harvesting was to be restricted to actual "production hours" and not all of the hours that the machine and operator were actually working. Doug Saunders said that this was a topic discussed at the June 12th meeting at Copcan's offices. Copcan denied that there was any such restriction. The representatives of Copcan who attended the meeting deny that any such discussion took place or that there was any restriction on the machine time. Jim Saunders did not have any independent recollection of that issue being discussed at the meeting.
- [94] Jim Saunders did approve almost all of the time sheets that were generated in the project and he was aware that there was no distinction between hours and "production hours" on the time sheets, but he approved them anyway. He made no mention of this to his brother Doug Saunders or to Tim Pick who is Tom Pick's brother and who replaced Jim Saunders as supervisor for a few days when Jim Saunders was away from the project.

- [95] The complaint is that Ashlaur should only be charged for the time that the machine and operator were actually engaged in harvesting or processing wood, and should not be charged for the time the machine was moving from place to place or "walking" or for any downtime for fuelling and servicing. There was evidence that on occasion, a machine might spend as much as 3 hours per day walking from place to place on the job site.
- [96] There was some criticism of the way that the machines were deployed in the evidence of Rob Pridge who worked on the job and who felt the loaders were poorly managed and wasted a lot of time moving from one part of the job to another. Others had no comment or criticism on the efficiency of the equipment management. Jim Saunders made no comment about this inefficiency and believed the job was well run. Indeed, both Jim Saunders and Doug Saunders at various times commented that the job was properly managed.
- [97] There is other evidence to indicate that out of 11 hours of machine operating time, only about 8 or 8 1/2 hours would actually be spent engaged in the harvesting or processing of wood. Copcan takes the position that there is no evidence to support the submission that only production time would be charged. There is nothing to suggest such a restriction on the rate sheet; there are no notes or records in diaries or elsewhere to indicate a restriction of that nature. Copcan says that the hourly rates are calculated to take into account the necessary operating time that is not spent producing wood.
- [98] There was no complaint by Ashlaur or comment by the job supervisor to suggest that this was an issue until Ashlaur saw that it was not going to meet its estimated budget for the cost of producing the volume of wood. On the evidence, I find that there was no agreement or condition that restricted Copcan to charge only for time that was spent in actual production of wood as opposed to actual operating time. I conclude that the agreement contemplated an hourly rate for the time the machines were operating and that includes the time necessary to move the machines from one place of production to another.
- [99] It is also argued that Copcan billed for equipment that was not agreed to, specifically like a backhoe, a grader and a hiab truck. There is evidence that these machines were used on the job and there is no evidence that the use of the machines or the rates or times charged was inappropriate. I find that Copcan is entitled to recover the charges for those machines.

Overbilling of Labour and Machine Hours

- [100] Ashlaur claims that the daily hours billed were in excess of the total hours worked. It submits that there is evidence that one operator, Cormac Byrne recorded his hours over a 4-day period. It is alleged that a comparison of the recorded time by Mr. Byrne and the time actually billed for his work shows a charge of 4 hours for which the operator said that the machine was not said to be running. Ashlaur says that this is some evidence of a pattern or practice of overbilling that has added a significant cost to Ashlaur.

- [101] Another example is that supervision recorded by Jim Saunders was allegedly overbilled to the extent of 31 hours during the job. One of these was a day when Mr. Saunders had started his day in camp and was then flown out after recording 1 1/2 hours of supervision time. He then drove from Port Hardy to his home in Nanaimo. He did not record any billable time other than the 1 1/2 hours of supervision time at the job site. At Copcan's office, his billable time was increased to 11 hours on the stated belief that he likely spent much of his driving time attending to phone calls and other work connected with the project. Ashlaur, however, alleges that there is no cellular phone service for much of the distance covered on that trip.
- [102] Similarly, it is alleged that Don Banasky billed supervision time when Tim Pick was in camp doing the supervision and on August 29th, when he billed 5 1/2 hours of supervision time when he was allegedly only in camp for 1 1/2 hours. On September 7th it is alleged that he billed for 5 hours when he was only in camp for 1 hour.
- [103] I accept Ashlaur's submission that the amount owing should be reduced by the amounts charged for Jim Saunders and Don Banasky related to time that was charged in excess of time actually worked. There is no provision in the terms of the contract that travel time for Jim Saunders getting to and from the job was to be billed at his full supervision hourly rate.
- [104] There are other allegations of billing for time not worked alleged by Ashlaur and while all of them seem relatively minor given the nature of the job, Ashlaur argues that the evidence of overbilling that it has found is a sign of a larger problem of excessive billing by Copcan. It argues that this is one part of the reason the job cost far in excess of what Ashlaur says is a reasonable amount.
- [105] One last example of Copcan's attitude towards billing is that on occasion their workman used the crew boats for recreational fishing after the day's work was completed. Jim Saunders testified that one of the principals of Copcan suggested buying some fishing gear for the crew to use. Copcan said that this could be billed to Ashlaur.
- [106] Once again, there is nothing wrong with Copcan providing some recreational equipment for the crew, but it is not appropriate to bill the cost to Ashlaur. In that instance, Jim Saunders apparently purchased the gear and paid for it personally.
- [107] In a job of the size of this one, with many hundreds of time cards, invoices, and other related documents, it is next to impossible to track and assess each item that has found its way into the invoices. Copcan used its supervisors, mostly Jim Saunders and for a few days Tim Pick, both brothers of the principals of Ashlaur, to ensure that time was accurately recorded and billed. While it must be remembered, notwithstanding the family relationship, both Jim Saunders and Tim Pick were Copcan employees and responsible to Copcan. Nevertheless, they were both called as defence witnesses and any information that they knew contradicted Copcan's position would likely have emerged through their testimony.

- [108] Ashlaur argues that Copcan has overbilled by about 30% and submits that the bill for machine hours should be reduced by that amount. It puts that figure at \$516,622.59. Copcan submits that there is no evidence to support that claim. It points to the evidence of the Copcan office and accounting staff who testified to the steps taken in recording the charges and then describing them in detail on the invoice to Ashlaur. It acknowledges occasional errors, but says that any errors that were uncovered were readily reversed and credited to Ashlaur. It also says that on a job of this size, some errors were simply inevitable.
- [109] Copcan also says that even after the test of cross-examination, no issues of substance have emerged and no problem with the billing has gone unexplained or uncorrected. While there were some disagreements about some of the charges, all of these were discussed and disclosed. Copcan says that there is no evidence of a general practice of overbilling machine or labour time and that there should be no reduction of its account.
- [110] It is my view that Copcan certainly took the approach that if they were performing any work on the project or if there was any cost associated with it, that cost or expense was to be charged to Ashlaur. Copcan took the view that none of the work it performed on the job was to be done as part of its overhead expenses without any cost or charge billed to Ashlaur. It held to that position that this was an hourly or cost plus job and that if work was done in furtherance of the job then there should be a time or disbursement charge entered on the account for Ashlaur.
- [111] Ashlaur claims that on the evidence there should be a 30% reduction of the amount billed for hourly rates. Ashlaur calculates the total amount billed at \$1,722,075.31 for hourly work done by Copcan and Falltech and seeks to reduce that by 30%. I am not entirely clear how Ashlaur reached that figure, but assuming it is correct it is my view that a 30% reduction is not justified on the evidence presented in this case.
- [112] While there are some examples of alleged overbilling and what in my view at least is a generally aggressive approach to the billing process, there is no clear evidence to show a pattern of overbilling as opposed to simply, as Copcan says, a few instances where errors were made in the course of assessing the vast number of documents that recorded time for labour and equipment over more than 100 days of work in a remote location.
- [113] In my review of the time slips and invoices prepared, there are some time slips where amendments have been made, but there is no clear evidence to suggest a pattern of charging more hours than were actually worked for operators or machines. It does not seem reasonable to accept that operators were intentionally recording more time than worked on a regular basis when there is no evidence from Jim Saunders or Tim Pick who were both supervisors on the job to support the allegation. I cannot find that Ashlaur has proven that any reduction of machine hours should be made.

The 966E Loader

- [114] Ashlaur also alleges that Copcan charged excessive machine hours for the 966E loader. This machine was used to push the logs from the logging trucks into the water at the dump site. The evidence indicates that it was used for no more than approximately one of hour of each working day and often for less than one hour per day. The loader is listed on the rate sheet at a cost of \$137.50 per hour. Bryan Gregson felt that it made little economic sense to have the machine sitting idle at the job site and not producing any revenue. He arbitrarily decided to charge a 4-hour daily minimum for the use of that machine. From that point on, the machine, no matter how little or much it was used, was charged at a 4-hour daily minimum.
- [115] Ashlaur was advised rather than consulted about this change and there is no evidence that it agreed with the extra charge. It is my view that it is not open to Copcan to unilaterally change the terms of the agreement from actual hours worked to a 4-hour minimum. The evidence establishes that the 966E loader was used no more than 1 hour each day and the total hours should be reduced accordingly.
- [116] The 966E loader is one of the machines that was listed on the rate sheet and Ashlaur calculates that the total hours charged amounted to \$37,984.38. It is my view that Copcan should only have charged one of out of every four hours and the bill on that account should be reduced to one-quarter of \$37,984.38, or \$9,469.10. I recognize that there was some period of time before the minimum 4-hour rate was imposed that the machine was actually charged out at hours used; however, I balance that with the evidence that on some days the loader was used for something significantly less than even one full hour.

Fuel Charges

- [117] Copcan was responsible for management of the fuel usage for the job. It attempted to carry out this responsibility by creating a book to be used as a fuel log and placing it in a weather-proof box near the fuel tanks. Every time fuel was drawn from the tank, the number of litres and the unit number of the machine or truck fuelled was to be recorded. At the end of the job there was a significant amount of unrecorded fuel use. Copcan alleges that approximately 88,000 litres of fuel were not accounted for by a record in the fuel log.
- [118] Walter Trousdell was the trucking contractor and he gave evidence that he and his drivers recorded every litre of fuel that they drew from the tank in the fuel log. Others apparently claimed they did as well and Copcan does not know where all of the unrecorded fuel went.
- [119] The value of the unaccounted for fuel was stated to be \$82,084.95. In an attempt to resolve the problem, Copcan referred to the operating manuals for each of the machines to determine the hourly consumption rates provided in the manuals and using those consumption rates it then distributed the missing fuel among the various machines.

- [120] Ashlaur takes issue with Copcan's decision on the fuel in two ways. First, it says that the amount of fuel calculated as missing and assumed to have been used by the machines worked out to about 30% more than the hours the machines actually worked. Second, Ashlaur says that this was not an appropriate way to resolve what was essentially mismanagement of the fuel by Copcan.
- [121] It is also to be noted that the consumption per machine would no doubt vary with the way the machine was being used. Undoubtedly, a machine working at the upper end of its limits would consume more fuel than a machine that was moving from place to place. Ashlaur submits that the usage calculation is inaccurate and secondly, it is inappropriate for Copcan to simply pass on its own inefficiency in managing the fuel usage to Ashlaur.
- [122] In my view Ashlaur is correct in that submission. The fact that Copcan claims fuel was unaccounted for is apparently based upon the quantity of fuel it had delivered to the site less what was accounted for. There was no evidence of any method of securing the tanks or the possibility of some other reason for the missing fuel such as leakage. Whatever the cause, it is not appropriate to arbitrarily pass the cost on to Ashlaur. I find that the amount of \$82,084.95 must be deducted from the total invoiced cost to Ashlaur.

Crew Boats

- [123] The rate sheet includes a cost plus 10% for water taxi and Copcan has charged Ashlaur for the cost of the crew boats rented for the purpose of transporting the crew from the camp to the job site and back each working day. Ashlaur says that the crew boats are not the same as water taxi and it should not have to pay for the crew boats. It says that water taxi is understood to mean a hired boat and operator to transport people from Port Hardy to the Trevor Lake area and not the boats used daily for the crew to get to and from work. Copcan says that the two terms are interchangeable and emphasizes that it would not agree to absorb the significant cost of the crew boat rental.
- [124] I accept Copcan's position on this point. It is obvious that boats were required to move the crew from the camp that was some distance away and only accessible by water or air. It is unreasonable and inconsistent with all other aspects of the dealings with the parties to assume that Copcan would absorb that cost itself. I find that Copcan is entitled to be paid for the crew boats at cost plus 10%.

Mechanic's Time

- [125] Copcan had a well-stocked parts truck and a mechanic on the job site when work was being done. It is clear on the evidence that logging machinery, whether new or old, tends to break down under the rigorous conditions of active logging. Ashlaur does not dispute that fact. It disputes the suggestion that the mechanic was part of the cost that it had to absorb. I cannot accept that proposition. The terms of the agreement as determined in these reasons includes costs that were reasonably necessary to carry out and complete the logging

operation. Clearly a mechanic was necessary and was used in the course of the logging operation. I find the cost of the mechanic is a legitimate cost of the contract between the parties.

Summary on the Plaintiff's Claim

- [126] In summary, it is my view that there should be a reduction of the 966E loader charges of \$28,488.29 and an elimination of the fuel charge of \$82,084.95. In addition, I am satisfied that the total invoices should be reduced by the amount of \$4,428 on account of overbilling by Don Banasky and \$2,325 on account of excess hours charged on account of the unrecorded time of Jim Saunders. The total of the reduction of the amount due to Copcan is \$117,326.24.
- [127] Copcan billed Ashlaur for the amount of \$3,332,237 of which \$2,433,612 was paid leaving a balance of \$898,625.21. Some adjustments were made prior to trial to eliminate some items of charges that were included in the total due and the amount claimed after pre-trial adjustments is \$888,242.21. That amount should be reduced by the amount of \$117,326.24 leaving a balance due of \$770,915.97.

Counterclaim of Ashlaur

- [128] The first portion of the counterclaim relates to the delay in completion of the job. Ashlaur alleges that the job was only to take 70 days from start to finish. Copcan denies that there was any such restriction and says that the only requirement was that the job be completed before the weather changed and prevented further work.
- [129] The only evidence of a term that required the work to be done in 70 days from start to finish came from Doug and Jim Saunders. No one from Copcan recalls any discussion about it. Jim Saunders prepared a work schedule based on 10 days of work followed by 4 days off. If that work schedule was followed, there clearly was a period of 4 days after every 10 days when no work would be done; thus, increasing the overall time to complete the work. In addition, there were days when it was foggy and helicopters were not able to fly. This was important because as a safety requirement fallers are not allowed to work in remote areas unless the weather conditions are such that a helicopter can fly in to evacuate them to proper medical care. This resulted in additional days when no falling or hauling was done.
- [130] A note in the diary of Doug Saunders referred to "hauling days", meaning days when wood was being hauled from the falling area to the water. If hauling days are used as a measure of the time, then the job only ran over a few days. Given the 10 and 4 work schedule and weather or fog delays, 98 days were required to complete 70 hauling days. The total time for the job from the start to the finish was a total of 101 days. On that calculation, there was only a 3-day overrun of time.

- [131] Ashlaur never made any complaint about delay to Copcan in the course of the job nor is there any evidence that the issue was raised in any of the site visits made by Doug Saunders. There is no communication about delay throughout the job even towards the latter stages of the work.
- [132] I find that the contract did not contain a term that the job was to be completed within 70 days of its commencement.
- [133] Finally, even if there was a delay in completing the work, there is no evidence sufficient to prove any loss or damage that resulted. The only evidence presented on this point was that of Tom Pick who testified about the value of timber in some parts of the market around that period of time. There was no expert or even independent evidence on the issue of a calculated loss.
- [134] I therefore dismiss that portion of the counterclaim on the ground that I do not accept that there was a breach of the contract on the issue of time of completion of the work, nor do I accept that, if there had been such a breach, that any loss or damage has been proven.

Waste

- [135] The next issue is waste. Waste is defined as avoidable or unavoidable waste. Unavoidable waste is not penalized but avoidable waste is assessed by B.C. Forests and a penalty assessed based on the volume of avoidable waste left behind at a logging site. On this job avoidable waste was assessed at \$35,670. Ashlaur said that it has never had a waste assessment anywhere near the range that was assessed on this job.
- [136] Ashlaur claims that it provided a list of the dimensions of the logs it wanted produced. These are known as "bucking specifications" and they are created so that logs are produced to closely match the market demand. Ashlaur wanted the logs cut to 6-inch tops -- meaning the diameter of the wood closest to the top of the tree. Ashlaur says that most of the logs were produced to a diameter of greater than 6 inches meaning that the tops of the trees were cut off further down the tree, thus creating less valuable logs and leaving more waste on the site.
- [137] Ashlaur also says that as the processors could not handle the large butts on some of the logs an excess of waste was left on the stumps.
- [138] Copcan claims that Ashlaur wanted good quality logs and it complied with the bucking specifications insofar as it was able to in processing logs of good quality. It also submits that the waste assessment is partly explained by the fact that a large volume of processing was done at the roadside in one of the blocks and that is where most of the waste was located. There was evidence that the logged areas were relatively free of waste, but the problem was generated with waste piled at the roadside. Also, the area where most of the waste was located is a small portion of the overall job site and the small size of the area combined with the large volume of waste in that area increased the waste assessment.

- [139] Copcan submits that it processed the wood to the bucking standards provided. Rick Kowalzik testified that he operated one of the processors and complied with the specifications provided and the resulting waste was a function of Ashlaur defining its bucking specifications so as to maximize the quality of the wood produced and that direction resulted in many logs with larger than 6-inch tops. Ashlaur claims that the waste is at least in part attributable to Copcan's failure to process logs in accordance with its bucking specifications and also due in part to the use of equipment that was unable to process some of the larger logs.
- [140] Copcan also points to the evidence of the distribution of the waste and says that the issue was not so much the volume of the waste left behind, but the distribution of that waste on the job site that caused the higher penalty. Copcan submits that B.C. Forests allows 35 cubic metres of waste per hectare without any penalty. The allowance is calculated for each block and waste cannot be averaged over the entire job site. In this case, the waste left on one of the blocks was far less than the allowance, but two others had more than the allowed limit and that is where the waste assessment came from.
- [141] There was only one complaint from Doug Saunders on his site visits and that was early in the job in August when he told Jim Saunders that he felt too much waste was being left. After that, there was no complaint on any of the several other visits he made to the site about the amount of waste. Jim Saunders was aware of the early concern of Doug Saunders and said that so far as he was aware the issue was addressed and dealt with in a satisfactory manner.
- [142] Jim Saunders believed that he performed his job as logging supervisor properly. It is likely that if the waste was as significant as Ashlaur now claims, it would have been noted and raised with Jim Saunders and Copcan.

Revenue Lost due to Marketable Wood Left as Waste.

- [143] Tom Pick testified that he could market any wood that was brought to him and said that the clear policy of Ashlaur to its logging contractors has always been "if in doubt, bring it out". But there is an obvious cost to bring small pieces of undesirable wood to market. There is evidence that at least some of that wood was made up of hooked or twisted portions of the tree that were essentially small "chunks" of undesirable wood. If those undesirable pieces of wood were scaled, stumpage would have to be paid in addition to the cost of moving the wood from the site to the market.
- [144] In addition, the evidence of the value of the waste presented is the product of the volume of waste times the selling price for wood of a similar grade. There is no adjustment of the price to consider the size of the wood or any undesirable shape of the wood, or any of the other factors that caused it to be bucked off and left behind in the first place.

- [145] I find that the waste left was to a large degree a function of distribution and the specifications set by Ashlaur for the production of the wood. In the result, the counterclaim is dismissed.
- [146] On this job, approximately 65,000 cubic metres of wood were harvested and about 57,000 sold, leaving a shortfall of about 8,000 cubic metres of unmarketable wood, or approximately 12% of the harvest. On the previous Trevor Lake job, completed by Beban Logging, approximately 48,000 cubic metres of wood were harvested, but only 43,000 sold, being a shortfall of 5,000 cubic metres of unmarketable wood or approximately 10% of the harvest. Notwithstanding the fact that these two figures were very close Ashlaur made no complaint about the difference between harvested and marketable wood on the Beban Logging job.

Conclusion

- [147] I find that Copcan is entitled to its claim in the amount of \$888,242.21 less a reduction of \$117,326.24 for a total judgment of \$770,915.97 together with court order interest. Copcan issued the last invoice December 31, 2007; however, most of the bills were completed by early December. Allowing some time for consideration and discussion of the invoices, it seems reasonable that all court order interest should be calculated from and after February 1, 2008.
- [148] The counterclaim of Ashlaur is dismissed.
- [149] Copcan has been largely successful in its action and is entitled to its costs.

"J. K. Bracken, J."

The Honourable Mr. Justice Bracken

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