

CANADA / JUDGMENT

Creation Technologies Inc. v. Honeywell ASCa Inc.

2006 BCSC 938

COURT

Supreme Court of British Columbia

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2006 BCSC 938 Creation Technologies Inc. v. Honeywell ASCa Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Creation Technologies Inc. v. Honeywell ASCa Inc.,

2006 BCSC 938

Date: 20060619

Docket: S031991

Registry: Vancouver

Between:

Creation Technologies Inc.

Plaintiff

And

Honeywell ASCa Inc.

Defendant

Before: The Honourable Madam Justice Dillon

Reasons for Judgment

Counsel for the Plaintiff

C. A. Schuld

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Date and Place of Trial/Hearing:

January 9-13, 2006

Vancouver, B.C.

Introduction

- [1] The plaintiff, Creation Technologies Inc. ("Creation"), claims against the defendant, Honeywell ASCa Inc. ("Honeywell"), for breach of contract in failure to pay \$130,508.59 for excess inventory after the plaintiff manufactured electronic components for the defendant. Creation says that it equitably assumed rights under a shared schedule agreement between Honeywell and Aimtronics Corporation ("Aimtronics") after Creation purchased the assets of Aimtronics. The plaintiff also says that an oral agreement, either collateral to or independent of the shared schedule agreement, was reached on September 18, 2001 for the defendant to purchase the excess inventory. In the alternative, the plaintiff says that Honeywell's dealings constitute estoppel with respect to the excess inventory and that Creation relied upon these promises to its detriment. Finally, the value of any excess inventory is in issue.
- [2] The defendant says that there is no basis to the plaintiff's claim. There is no evidence to support equitable assumption as the Aimtronics agreement with Honeywell was not assumed by Creation, Honeywell did not agree to an assumption, and no notice was given. Honeywell argues that no agreement on any essential terms was reached on September 18, 2001, and that the relationship between plaintiff and defendant was governed by the terms of purchase orders which created no obligation upon Honeywell to purchase excess inventory. Honeywell says that the plaintiff has not proven damages and has failed to mitigate.

Facts

- [3] Creation is a contract manufacturer ("CM") of component electronic assemblies and circuit boards that are used in finished products for original equipment manufacturers ("OEM") such as Honeywell, who manufactures components for commercial and military aircraft. Honeywell is an amalgamation of Honeywell Inc. and AlliedSignal Aerospace ("Allied"). Suppliers to OEMs have to be specifically approved as a CM for aeronautics components by the OEM. Once approval is obtained, a purchase order can be issued. If no approval is obtained, no relationship ensues. The purchase orders contain terms although these can be subject to a broader supply agreement.

- [4] The components for circuit boards are unique to each product and require specific handling and traceability, depending on the customer's needs. In the aeronautics industry, inventory has a short shelf life and must be re-certified or it has no value. Due to constant enhancement of products, inventory can become obsolete so that inventory liability is a real concern. There is also the practice of excess parts buying to cover error and failed components. Creation used a bill of materials itemizing every component used in manufacture in order to track inventory. The inventory practices of Aimtronics are unknown. Leftover inventory that can only be used for one customer is common and called "excess inventory". It generally is something to be minimized and avoided. Excess inventory is held for the next build for a customer or reviewed when a customer "disengaged" so that the excess inventory is billed to the customer. Sometimes, the excess inventory is amortized into the price of the product, especially in a discrete order. However, excess inventory costs generally depend upon each contract with a customer depending on what is specifically negotiated between a CM and an OEM.
- [5] By agreement of November 12, 1996, Allied contracted with Pachena Industries Ltd. ("Pachena"), as CM, to provide components to Allied, as OEM, for incorporation into Allied's aerospace products ("the Pachena agreement"). The Pachena agreement provided:

In the event of cancellation, in whole or in part, of any quantity of items not delivered or scheduled to be delivered, AlliedSignal's liability shall be limited to costs incurred by Pachena for a) completed products for the eight weeks of firm commitment, b) any special to order material held by Pachena within the rolling window twelve month MRR that is not used in the normal course of producing any other product and c) work in progress within the product lead times stated in Schedule A hereto.

The lead times in Schedule A were November 15, 1996 to November 15, 1999. The standard terms for Allied purchase orders were included as terms of this agreement. It was conceded that some of the excess inventory of Aimtronics related to the Pachena agreement but has not been specifically identified.

- [6] Pachena's role as a CM to Allied ceased. Aimtronics took over and supplied components to Allied through its Mississauga, Ontario, plant pursuant to a shared schedule agreement dated October 21, 1999 ("the shared schedule agreement"). Clause 8 of the shared schedule agreement said:

8. Liabilities

The Supplier is expected to use good business judgment for allocating its resources and obtaining materials for production. Since there is some risk of obsolescence for any part, speculation in procurement of special materials, building subassemblies or finished goods, should be kept to a reasonable minimum. However, if AlliedSignal should cause the Supplier's material to become obsolete by cancellation or design change, AlliedSignal will support good business judgment and assume liability up to the cost of four weeks worth of finished goods, four weeks worth of work in process and four weeks of long-lead components or raw material.

[Emphasis in original]

This limited Honeywell/Allied's liability for excess inventory to four weeks. This liability was modified by a quotation attached to the agreement for the manufacture of two circuit boards called the "604" and "605" boards. These boards are components of survival beacons used on aircraft. With respect to these two circuit boards, it said:

EXCESS MATERIAL/NCNR PARTS

If no follow-up order has been placed 90 days after completion of this contract, Allied Signal Aerospace will be responsible for the cost of all excess material listed in this Quotation or accumulated throughout the contract, including all items listed on page 1 of this quotation. [sic] parts. This includes all NCNR and MOQ parts listed on page 5.

- [7] In 2001, AimGlobal Technologies Company Inc., the parent of Aimtronics, experienced financial difficulty. Aimtronics advised Honeywell that it could no longer provide the 604 and 605 boards and indicated that a merger was planned but did not identify Creation. Honeywell had experienced significant problems with Aimtronics not only related to financial difficulty but poor delivery and quality, requiring intervention at times. Honeywell still wanted Aimtronics to complete the outstanding purchase orders for 604 and 605 boards while it searched out a new CM for the 604 and 605 boards. Creation was interested in purchasing Aimtronics as it was one of its largest competitors and entered into negotiations for the asset purchase of Aimtronics that included the Mississauga plant and supply contracts that Aimtronics maintained, including the shared purchase agreement. Prior to completion of an asset purchase agreement, Creation wanted to meet with and discuss future business relations with Aimtronics major customers, including Honeywell.
- [8] David Pettigrew ("Pettigrew") was the Vice-president of business development for Creation. He took no part in operations or sales generally but dealt with initial communications with customers and development of relationships. He was, however, aware of general practice in the industry as described above in paragraphs 3 and 4. He was interested in new opportunities arising from Aimtronics customers at the Mississauga plant. The first thing that he did was set up meetings with key customers, including Honeywell. Creation's purchase of Aimtronics had not yet been completed and negotiations were underway at the time, causing the president of Aimtronics to be less than forthright with Creation. He did not inform Pettigrew that Honeywell had terminated its relationship with Aimtronics and that Aimtronics was in the process of completing the last build for Honeywell. Pettigrew was quickly briefed for the Honeywell meeting by Frank Piccolo ("Piccolo"), a general manager of Aimtronics. Pettigrew focused on ongoing growth and not current builds. Because he considered excess inventory to be a major element in customer relations, he asked Piccolo about excess inventory and was told that there was about \$134,000 in excess inventory outstanding. Pettigrew did not know how this figure was arrived at or the details of the inventory but thought that it related to current inventory and projects. He was unaware of the Pachena agreement, the shared schedule agreement, or any contracts between

Aimtronics and Honeywell. He was unaware of the terms of any proposed agreement for the asset purchase of Aimtronics. Pettigrew assumed that if Creation went forward as a supplier to Honeywell, it would create its own contracts and continue in the interim with "business as usual". He went into the meeting with Honeywell to establish new business, not to negotiate a supply agreement. He said that the latter never crossed his mind.

- [9] David Silver ("Silver") was in the strategic group purchasing department of Honeywell and team leader for purchase of the 604 and 605 boards. He took the lead role in negotiation with suppliers and was responsible for their performance. He dealt with purchase contracts from CMs daily. Honeywell did not buy excess inventory generally but would do so in a shared schedule agreement if parts were to become obsolete and were needed for further production. Parts had to be certified for compliance. In the summer of 2001, Silver was aware of the 40 day window for excess inventory for Aimtronics under the shared schedule agreement and was of the view that there was no outstanding obligation for excess parts at that time except for 604 and 605 parts provided that there was a further purchase order within 90 days. Piccolo had sent him an email concerning an excess inventory claim for \$134,000 which Honeywell ignored as an unfounded request from a company in dire financial straights. Silver knew Honeywell's specific immediate requirements for the 604 and 605 boards as the beacons were a regular commodity for Honeywell that was in high demand. These needs had been discussed with Aimtronics but Honeywell had placed purchase orders with a new CM, Selectron. This new CM would not be up and running on production until 2002. Honeywell needed a secure supply until then and was interested in anyone who was about to take over Aimtronics, although it had otherwise written Aimtronics off. However, Honeywell was unfamiliar with Creation or its business history and was sceptical of anyone who was taking over operations at the Mississauga plant. Silver had not contemplated a purchase order with Creation prior to September 18, 2001.
- [10] Pettigrew from Creation and Piccolo from Aimtronics met with David Silver ("Silver") and Ken Germane from Honeywell on September 18, 2001. There was no agenda for the meeting. Germane kept notes. Pettigrew sought to identify business opportunity, address outstanding excess inventory liability, and introduce Creation to Honeywell. He was surprised to quickly learn that Aimtronics had severed its relationship with Honeywell the previous month and that Honeywell had already placed purchase orders with Selectron. However, Silver indicated that the door for future business opportunity was never closed.
- [11] Silver's main concern was to ensure that the final build of the 604 and 605 boards was completed and to revise the quantity. He considered this meeting as information only but was prepared to consider Creation for completion of the final purchase order. The outstanding purchase orders were reviewed. There was discussion about the past delivery delay due to the inability of Aimtronics to secure parts because of lack of credit. Silver wanted Creation to come on as a new CM, not to take over from Aimtronics. He told Pettigrew that Creation had to be approved as a new CM. Pettigrew assured Silver that Creation would make sure that the final purchase orders would be completed,

contemplating that Creation would have to purchase parts for the completion and considering that there would be excess inventory.

- [12] Pettigrew said that he told Silver that there was \$134,000 in excess inventory already but that Creation would buy additional components to meet Honeywell's requirements for the final build. Silver needed the 604 and 605 boards by November, leaving little lead time, but Pettigrew said that he would do the best he could to meet this target date. Silver agreed that excess inventory was discussed but only in relation to the 604 and 605 final build. Neither Pettigrew nor Silver knew how much inventory was needed for the 604 and 605 final build.
- [13] Pettigrew said in direct testimony that he told Silver that he needed Honeywell to cover the \$134,000 excess inventory and that this number would change. He said that Silver said 'something to the effect of' he would 'cover for the inventory.' Pettigrew understood that the value of the inventory could not be determined until the final order had been completed, but thought that the approximate value would be 'covered'. Silver did not ask for any details or documentation. Pettigrew said that he accepted this as a commitment just as he had committed to the final build. Pettigrew understood that the purchase orders would include the builds and excess inventory. He said that he asked that the \$134,000 of excess inventory that Honeywell was purchasing be included in the purchase order, with a final amount to be determined.
- [14] However, in cross-examination, Pettigrew acknowledged that this was the first time in his experience that an OEM had ever orally agreed to purchase excess inventory and that it was not usual to do so. Creation also usually had a written agreement to deal with excess inventory. There was no such written agreement between Honeywell and Creation at any time. Pettigrew said that he told Silver that Creation would operate under the current relationship but had no idea what that was. Creation never gave notice to Honeywell that it was performing its obligations to Honeywell under any obligation other than between Creation and Honeywell. Specifically, Creation never gave notice to Honeywell that it was performing any obligations or that it had acquired any rights under the shared schedule agreement. Pettigrew was uncertain whether Creation's claim in this action was based upon the shared schedule agreement. He had no idea how or whether Aimtronics had acquired rights from Pachena. He had no idea if Creation acquired Aimtronics rights under either the Pachena agreement or under the shared schedule agreement and did not bother to find out throughout this litigation, even though he was Creation's principal witness. When the shared schedule agreement was placed before him, Pettigrew conceded that Honeywell had only agreed to pay for excess inventory related to the 604 and 605 boards as defined in paragraph 6 above. Regardless of any written contractual terms and practice in the industry, Pettigrew said that on September 18, 2001, he agreed both to a new agreement and to build according to the current agreement, even though Creation had yet to finalize an asset purchase agreement with Aimtronics and had represented to the public that a merger was planned. Basically, all that Pettigrew could say was that Silver agreed to cover for \$134,000, the content of which Pettigrew had absolutely no knowledge. He was unaware that older

inventory had to be re-certified for use in aeronautics and otherwise had no value.

- [15] Silver testified that he told Pettigrew that Honeywell would 'do the right thing' in relation to the excess inventory that would be accumulated from the 604 and 605 final build. Silver said that he knew that Selectron would need inventory; that it made business sense for Selectron to buy the inventory at the end of the build; and that Honeywell could broker a deal for Selectron to buy the excess inventory. Silver said that Selectron was specifically mentioned at the meeting. Pettigrew agreed that Silver said that Honeywell would 'do the right thing' in reference to Selectron. He agreed in cross-examination that he only later understood what that had meant, namely that Honeywell would encourage Selectron to purchase the excess inventory. Silver at first denied that Pettigrew mentioned an exact amount for excess inventory at the meeting but later said that he could not recall whether the \$134,000 figure in relation to Aimtronics was mentioned. He denied that he ever indicated that Honeywell would issue a separate purchase order for excess inventory. Silver's limit for approval of a purchase order was \$50,000 at the time and anything larger required higher specific signing authority. Silver said that he never considered Creation anything other than an interim supplier.
- [16] The meeting ended with Piccolo assigned to purchase the additional parts needed to complete the build and Silver was to provide updated purchase orders with revised quantities and delivery dates.
- [17] There is no documentation of any agreement reached on September 18, 2001. Germane's notes do not support that the excess inventory of \$134,000 was discussed. The notes indicate discussion of the parts that Aimtronics had on hand and the fact that there would be leftover inventory after the final build. Pettigrew said that the document to confirm would have been the purchase order but he did not need it as his agenda was clear. He was confident that he would receive the appropriate purchase order but could not wait for it because time was of the essence to secure the necessary parts.
- [18] Creation's purchase of Aimtronics was through a purchase and sale of assets ("the asset purchase agreement") dated for reference September 26, 2001. It included the following definitions:
1. Definitions
 - (d) "Business" means that part of Aimtronics' electronic manufacturing service business which is conducted through its Mississauga Division and from the Premises and which includes supplying the customers in Schedule "G" annexed hereto;
 - (l) "Part A Inventories" means those inventories of raw materials, packaging, sub-assemblies, work-in-progress and finished goods used in connection with the Business which are listed on Part A to Schedule "I" annexed to this Agreement or referred to in section 3(4)(b);

- (m) "Part B Inventories" means those inventories of raw materials, packaging, sub-assemblies, work-in-progress and finished goods used in connection with the Business which are listed on Part B to Schedule "I" annexed to this Agreement;
- (t) "Purchase Price" means the purchase price to be paid by Creation to Aimtronics for the Purchased Assets as provided in Section 3(1) and as adjusted, if necessary, pursuant to Sections 3(4), 5(l)(e), and 9(9);
- [19] The purchase price included Part A and Part B inventories. Creation paid for book value of Part A inventory and payment for Part B inventory was to be based upon monthly payment for that inventory which Creation was able to utilize or sell less an administration fee. Creation was under no obligation to generally purchase Part B inventory and could sell it as thought best, not necessarily for book value. No inventory was reserved for specific customers or contracts although Part A and B inventory included inventory for various OEMs including Honeywell and some of it dated back to Pachena. The purchased assets included " all right , title and interest under all contracts and agreements together with the full benefit of all outstanding orders for the purchase and sale of inventory including all right, title, and interest under the contracts and agreements described in Schedules "C" ". The shared schedule agreement was listed in Schedule C along with the "purchase order terms and conditions" of Allied. The evidence did not establish what price, if any, the plaintiff paid for Part B inventory.
- [20] Creation sought a seamless transition for the Aimtronics Mississauga plant and kept Aimtronics' employees, parts, documentation, and standards intact, for the most part. No effort was made to distinguish Honeywell inventory at the Mississauga plant.
- [21] Mr. Pettigrew instructed Jeff Lambkin, regional sales director for Creation, to manage the relationship with Creation and Honeywell, including production of the remainder of the 604 and 605 boards. Lambkin was told to produce the boards as quickly as possible in an effort to secure more work in the future. He knew, however, that the 604 and 605 production was a final build. There was difficulty obtaining parts from suppliers after September 11, 2001, so Creation began immediately to begin preparation and planning of the 604 and 605 boards based upon the oral understanding of September 18, 2001 as understood by Pettigrew.
- [22] Silver began the approval process for Creation as a CM to Honeywell for "last time buys and repair/replacement orders". Creation produced its ISO certification for this process. Approval of Creation as a CM for Honeywell required four specific approvals from higher authorities than Silver within Honeywell in Canada as well as U.S. approval. Honeywell gave instructions for Creation to proceed on October 17, 2001.
- [23] On November 1, 2001, Honeywell issued purchase orders nos. 350131 and 350132 to Creation and delivered Honeywell's standard purchase order terms and conditions. These were different from any purchase orders issued under the shared purchase agreement and were separate from that agreement, according to Silver. The purchase order terms and conditions create no obligation for Honeywell to purchase excess inventory from Creation. The

purchase orders formed the sole basis of any contract with Honeywell, absent another incorporated supply agreement. The 604 and 605 boards were to be paid as a unit price that included all materials. Pettigrew testified that he did not think to look at the terms of the purchase orders at all. He was unaware of the shared schedule agreement and did not consider it to form obligations or commitments for Creation.

- [24] Pettigrew agreed in cross-examination that the plaintiff accepted the terms of the purchase orders. Invoices from the plaintiff to the defendant referred to these purchase orders. Creation began production of the final builds on November 2, 2001.
- [25] In late November, 2001, Honeywell emailed an inquiry as to the expectation for excess inventory after the builds in order to assist Creation in procurement of parts. However, that email related only to a specific part that was identified and the history described by Silver. Lambkin overread this email as a positive sign that there would be an exchange for excess inventory generally and as concurrence with the information that Pettigrew had given him. He was unaware that the part in question had been purchased by Honeywell directly to assist Aimtronics when its credit problems prevented them from purchasing this necessary part so that any of these specific parts that Aimtronics had were owned by Honeywell.
- [26] The purchase orders were satisfied in February 2002 and Honeywell paid for the boards. Honeywell issued no other purchase orders and Creation supplied no more products to Honeywell.
- [27] At the end of February 2002, Lambkin sent Honeywell a complete list of inventory that it had on hand related to Honeywell totalling \$129,702. This was based upon cost as at 2002 including exchange rates for February 2002. Lambkin was, however, not knowledgeable about the contents of the inventory or how it was prepared. He did not know what criteria had been used to create the document. He did not know what contracts governed each part listed or whether it related to prototype, special, or ongoing builds. He acknowledged that the parts included inventory from Aimtronics who used a different system of inventory control. There was no evidence that Creation ever verified the inventory spreadsheet as accurate even though Aimstronics had been in serious financial disarray and was eventually delisted. Lambkin acknowledged in cross-examination that some of the inventory listed dated back to 1997, that older inventory had no value, and that there was a greater chance of error in inventory control of older parts. Lambkin did not know whether some of the parts had been paid for. He agreed that the active excess inventory for the 604 and 605 boards was \$14,726.97.
- [28] Silver said that this was the first time that Creation had requested payment for excess inventory related to Aimtronics. Honeywell requested an audit for quality and quantity, not unexpected in the industry. Silver put the inventory to his auditor but made it clear to Creation that Honeywell was only interested in looking over the 604 and 605 parts inventory from the final build. Silver informed Lambkin that the inventory contained components that were dead or cancelled and no longer needed by Honeywell. The plaintiff broke down its

inventory list at the end of May 2002 and resent the information in late August. Selectron, the competitor who had taken over production of the 604 and 605 boards, did an audit in May 2002, but it was never fully completed. It was followed by request for certification of compliance documentation and purchase orders for each part. This was never completely provided.

- [29] Negotiation had ensued over the inventory problem. Pettigrew calculated the excess at \$50,000 for excess related to the 604 and 605 final build and \$80,000 for all other builds that Aimtronics had done for Honeywell over a period of time. There was no real basis for these calculations as Pettigrew could not tell what parts of the Part A or Part B inventory related to Honeywell and could not say what Creation paid for which specific parts. Pettigrew maintained in testimony that his understanding going into the September 18, 2001 meeting was that there was \$134,000 excess inventory related to Honeywell from Aimtronics and when Honeywell wanted completion of the 604 and 605 boards, he would only do so if the excess was paid. He said that he went in with the figure of \$134,000 and that, in the end, there was \$130,000, some related to the final build of 604 and 605 boards and some not. He could not specify how this figure was calculated. Silver made it clear by September 2002 that Honeywell took no responsibility for excess parts but would arrange for Selectron to make an offer for the parts.
- [30] Pettigrew said that he expected Honeywell to purchase the 604 and 605 parts and then resell then to Selectron. Silver said that there was no deal for excess inventory but that he would try to get Selectron to buy the 604 and 605 final build parts. Selectron offered \$25,000 for the parts, approximately 50 cents on the dollar, but Creation turned this down. The figures for the 604 and 605 final build, including excess inventory from Aimtronics that were produced by the plaintiff show an excess inventory of \$14,726.97. The inventory has no value today.

Discussion

- [31] I have concluded that, on September 18, 2001, Honeywell said that it would process approval of Creation as a CM for the final build of the 604 and 605 boards pursuant to purchase orders, and Creation said that it would prepare for production of the boards subject to the purchase orders, once obtained. No contractual agreement was reached except to produce the 604 and 605 boards pursuant to purchase orders on the prior condition that Creation would be approved as a CM. Pettigrew's evidence that there was agreement by Honeywell to pay \$134,000 for excess inventory related either to Aimtronics inventory or to the final build excess inventory is not supported on the balance of the evidence and is improbable.
- [32] The plaintiff has not proven that Silver probably orally agreed to pay for excess inventory in the amount of \$134,000. The notes of the meeting and subsequent lack of documentation support this view. Pettigrew could not recall what Silver had said that led him to conclude that there was agreement on the excess inventory and Silver said that he did not agree at all but only indicated that Honeywell would 'do the right thing' with respect to the excess inventory on the final build of the 604 and 605 boards. Silver had no authority to agree to a

\$134,000 purchase order. It is further unlikely that he would have agreed because he was of the view, correctly as it turns out, that there was not outstanding liability under either the Pachena agreement or the shared schedule agreement for Honeywell to pay for Aimtronics' excess inventory. Honeywell had ignored Aimtronics' earlier request in this regard and it is unlikely that Silver would have agreed to it in September 2001 when there was only a few months left before Selectron would begin production and when Honeywell had no further interest in Aimtronics who had ended the relationship. Both Silver and Pettigrew were unaware of the details of any agreement between Creation and Aimtronics and, in any event, there was no agreement at the time. Silver knew the process for approval of Creation as CM and intended Creation to be a new interim supplier only. Silver could only agree to initiate the approval process for Creation as a new interim CM. There was no precedent for an agreement for Honeywell to pay for excess inventory in the candid manner that Pettigrew described. Pettigrew was overly ambitious to obtain Honeywell business on favourable terms, the particulars of which he was not aware. His suggestion of an "agreement" is vague given the particulars of the Honeywell/Aimtronics/Pachena relationship, the lack of any formal relationship between Creation and Aimtronics at the time, and the specifics of inventory realities in this industry.

- [33] Pettigrew said that he would not have committed to complete the final build, requiring purchase of new parts, if Silver had not agreed or had been vague about payment of the \$134,000 for excess inventory. However, he also instructed Lambkin to oversee an evolving relationship that Pettigrew hoped would still lead to new business through Creations' impressive performance of the final build. Pettigrew did not review the purchase orders when they came in. I conclude that Pettigrew wanted Honeywell's business and saw this as an opportunity to perform well so that Honeywell would continue with Creation in some way in the future. Pettigrew would have entered into the final build regardless of Silver's position on the Aimtronics excess inventory claim as had been described to Pettigrew by Piccolo just before the meeting. It is not accepted that Pettigrew would have turned down Honeywell's business based upon the limited and candid information that Pettigrew possessed when he went into the meeting. Pettigrew could not reconcile the different figures for inventory put forward at various times by the plaintiff and had no commitment to do anything on behalf of Aimtronics at the time that he met with Silver.
- [34] There was no consensus on September 18, 2001 on any of the essential terms of an oral agreement as it relates to excess inventory. The inventory in question was not identified. In fact, Pettigrew did not really know what inventory he was referring to on September 18, 2001, and could not identify it at trial. There was no agreement on price or how it would be calculated. I have rejected Pettigrew's evidence that there was an overall agreement for \$134,000.

- [35] The entire agreement between Creation and Honeywell is contained in the purchase orders. There is no obligation for Honeywell to purchase excess inventory. The conduct of the plaintiff in invoicing by reference to these purchase orders and in fulfilling the purchase orders without further inquiry constitutes acceptance of the terms of the purchase orders and indicates that no final or any other agreement was reached on September 18, 2001.
- [36] There is no evidence that notice was given to Honeywell of any assumption of either the Pachena agreement or of the shared schedule agreement. There is no evidence that Honeywell was aware of an assignment of these agreements to Creation. Notice of an assignment had to have been given to Honeywell for an equitable assignment to have occurred (*Lee v. K-Leigh Holdings Ltd.*, [1997] B.C.J. No. 2808 at paras.13 and 15 (S.C.)). Honeywell did not consent to an assumption. It was established that Creation would have to have been specifically approved as a CM before it could manufacture anything for Honeywell. Therefore, Honeywell's consent was required for assumption of the Pachena or shared schedule agreements. None was sought or obtained.
- [37] In any event, Aimtronics had no excess inventory under the shared schedule agreement. By the terms of the agreement, there was no outstanding excess for which Honeywell was liable. Also, it had sold its entire inventory to Creation on September 26, 2001.
- [38] Finally, in the event that it is found that a contract for excess inventory was reached or equitably assigned, the plaintiff has not proven that it suffered damages and it failed to mitigate. There was \$14,727.97 apparent excess inventory on the 604 and 605 final builds that were subject to the purchase orders. The remainder of the claim relates to the Aimtronics inventory. There was insufficient identification of this inventory and no attempt made to distinguish inventory from the Pachena agreement and the shared schedule agreement. The evidence of Lambkin about inventory was not reliable as he could not identify the inventory process that led to the making of the spreadsheets and had no specific knowledge about the inventory, or how it specifically related to any of the agreements. The plaintiff did not accept the selection offer that would have covered the excess inventory from the final build of the 604 and 605 boards and there was no evidence that the plaintiff otherwise attempted to recover any costs.

Conclusion

- [39] The plaintiff's claim is dismissed. Counsel have requested to speak to the matter of costs.

"J.R. Dillon, J."

The Honourable Madam Justice J.R. Dillon

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