

CANADA / JUDGMENT

Inferor Corporation v. Mackenzie Sawmill Ltd.

2020 BCSC 1572

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1572 Interfor Corporation v. Mackenzie Sawmill Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Interfor Corporation v. Mackenzie Sawmill Ltd.,

2020 BCSC 1572

Date: 20201026

Docket: S1812515

Registry: Vancouver

Between:

Interfor Corporation

Plaintiff

And

Mackenzie Sawmill Ltd., Pacific Lumber Remanufacturing Inc., Riverside Forest Products Inc.,
Riverside Forest Products (2018) Inc., West Rim Fibre Corp., 0761979 BC Ltd., 1162183 BC Ltd.,
Avtar Sidhu, Rajdeep Singh Sohi

Defendants

In Chambers

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

September 3, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 26, 2020

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Introduction

- [1] The defendants seek declaratory relief on a summary trial.
- [2] The action concerns a Chip Supply Agreement (the "CSA") made in 2006, under which Mackenzie Sawmill Ltd. ("MSL") agreed to supply wood chips to Interfor Corporation ("Interfor") from its sawmill in Surrey, British Columbia. I will refer to the sawmill as it stood in 2006 as the "Mackenzie Mill".
- [3] Wood chips are a natural by-product of sawmilling operations and an important input in pulp mill operations. Interfor does not operate a pulp mill, but it is a former owner of the Mackenzie Mill and is contractually committed to supplying wood chips from the Mackenzie Mill to Catalyst Paper Corporation ("Catalyst") for use in its pulp mill. Interfor entered into the CSA in fulfillment of its contractual commitment to Catalyst.
- [4] Between 2010 and 2014, a series of fires at the Mackenzie Mill stopped production and ruined the mill. MSL stopped providing wood chips to Interfor. It is common ground that art. 8.5 of the CSA permitted this. Article 8.5 is a "force majeure" clause. Its broader effect and implications, in the circumstances of this case, lie at the heart of the dispute in this case.
- [5] MSL did not rebuild the Mackenzie Mill. Instead, another company or companies associated with MSL's owners built a new sawmill at the same address. When the new sawmill began operations, its owners began selling wood chips produced from the new mill's operations to third parties, at higher prices than those provided under the CSA. When Interfor learned of this, it objected, and this action is the result.
- [6] Interfor sues MSL, the owners and operators of the new sawmill, and other persons alleged to be related to them. It maintains that the CSA continued in force following the fires, and that the new mill's owners are alter egos of MSL and bound by the CSA accordingly. Alternatively, it claims against the other defendants for conspiracy and inducing MSL to breach its contract with Interfor.
- [7] The defendants seek an order that MSL was discharged from all its obligations under the CSA by the fires. They ground their argument on article 8.5 of the CSA and, independently, on the doctrine of frustration.
- [8] This is the defendants' second application for judgment on a summary trial. In the first, they sought judgment only on the basis of their interpretation of art. 8.5 of the CSA, without reference to the doctrine of frustration. In written reasons indexed at 2020 BCSC 416, I dismissed the original application. I found that the issue of contractual interpretation was

interwoven with the defence of frustration such that it would not be appropriate to determine the former while leaving the latter to be resolved at trial. This time, the defendants seek judgment on both issues on the same factual record as before.

- [9] Interfor opposes the application. It still maintains, but now only weakly, that the matter is not suitable for disposition on a summary trial. Alternatively, it seeks a declaration that is the converse of the order sought by the defendants. That is, it seeks a declaration that the fires did not discharge MSL from all of its obligations under the CSA, whether pursuant to art. 8.5 of the CSA or by virtue of the doctrine of frustration.
- [10] For reasons I will address in the course of this decision, I am satisfied that the following issues of contractual interpretation and application are suitable for summary disposition by declaratory relief:
1. Were MSL's obligations under the CSA permanently discharged pursuant to art. 8.5 by the fires that ruined the Mackenzie Mill?
 2. Was the CSA frustrated by the fires that ruined the Mackenzie Mill, bringing MSL's obligations under the contract to an end?

Background

- [11] The Mackenzie Mill was constructed in 1938. Interfor purchased it in 1991.
- [12] In the 1980s, Fletcher Challenge Canada Limited ("Fletcher Challenge") owned and operated pulp mills and sawmills in British Columbia. In 1991, it sold its sawmills to Interfor (then known as International Forest Products Limited). In exchange, Interfor agreed to sell all of the chips produced at its sawmills, including the Mackenzie Mill, to Fletcher Challenge. They entered into a Chip and Pulplog Supply Agreement dated December 30, 1991 (the "CPSA").
- [13] Catalyst is a successor to Fletcher Challenge. The obligations originally owed by Interfor to Fletcher Challenge under the CPSA are now owed to Catalyst.
- [14] Article 23.1 of the CPSA required Interfor to make it a condition of any sale of the Mackenzie Mill that the purchaser agree to be bound by the CPSA to the extent of its interest in the Mackenzie Mill. Interfor remained bound by its obligation to supply to Fletcher Challenge (and now Catalyst) wood chips produced at the Mackenzie Mill.
- [15] Rajdeep (Rob) Sohi incorporated MSL in 2006 and is the sole beneficial owner of MSL. Mr. Sohi and members of his family own various companies named as defendants.
- [16] In June 2006, Interfor agreed to sell the Mackenzie Mill to MSL. MSL agreed to enter into the CSA, which is dated September 29, 2006. The CSA contains many references to the CPSA, described as the "Catalyst Agreement". The recitals to the CSA refer to Interfor's obligation to sell chips produced at the Mackenzie Mill to Catalyst and state that:

D. As a condition of completion of the sale and purchase of the Purchased Assets under the Purchase Agreement, Interfor has requested and MSL has agreed to enter into this Agreement to sell and supply Chips produced at the Mill or from the Logs to Interfor, on the basis herein provided, so that Interfor may sell and supply such Chips to Catalyst under the Catalyst Agreement.

[17] The first of the fires took place on November 12, 2010. It rendered the Mackenzie Mill unusable. The mill stopped producing lumber and chips.

[18] A second fire broke out on January 25, 2011. It destroyed significant portions of the Mackenzie Mill.

[19] On February 11, 2011, MSL delivered a notice to Interfor. The notice was signed by Mr. Sohi and stated:

As per Article 8 of the Chip Supply Agreement between MacKenzie Sawmill Ltd. and International Forest Products Limited dated the 29th day of September, 2006, please accept this letter as notification that MacKenzie Sawmill Ltd. will be curtailing their supply of wood chips to International Forest Products Limited for a yet to be determined period of time. This curtailment is due to MacKenzie Sawmill experiencing downtime due to a small fire at the mill on November 12, 2010 followed by a second fire at the mill on January 25, 2011 in which we suffered severe damage. As time and future events dictate, MacKenzie will continue to provide updates as to the time status of our chip supply curtailment.

[Emphasis added.]

[20] MSL decided not to repair the Mackenzie Mill and steps were taken to demolish it. The demolition was not yet complete when a third fire destroyed most of what remained of the Mackenzie Mill on October 31, 2014. At some point after this, MSL's insurer paid it approximately \$20.2 million in connection with the fire losses.

[21] Notwithstanding MSL's advice on February 11, 2011, that it would "continue to provide updates", MSL did not notify Interfor of the decision to demolish the Mackenzie Mill or that other parties were building a new mill at the same address.

[22] On July 20, 2018, after Interfor had commenced an arbitration against MSL, MSL's counsel formally advised Interfor of its position that the new mill was not owned by MSL and that it was "entitled to shut down its operations without liability to Interfor". Interfor subsequently discontinued the arbitration and commenced this action on November 21, 2018.

Analysis

Overview of the issues

[23] Legal analysis of both issues in this summary trial begins with the interpretation of the CSA.

- [24] The legal doctrine of force majeure gives effect to a force majeure clause - in this case art. 8.5 of the CSA - according to its terms. Art. 8.5 is not a standard form clause and the question is therefore one of mixed fact and law; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [Sattva]; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at paras. 36-48. Decisions involving the interpretation of other force majeure clauses entered into in different circumstances are of little assistance. The question is: what is the legal effect of this clause, in the particular circumstances of this case?
- [25] The legal doctrine of frustration involves the court's refusal to enforce a contract according to its terms in circumstances that were unforeseen when the contract was made. The doctrine is tightly circumscribed. The court must ask whether the unforeseen circumstances "totally affect the nature, meaning, purpose, effect and consequences of the contract"; *KBK No. 138 Ventures Ltd. v. Canada Safeway Limited*, 2000 BCCA 295 [KBK] at para. 14, quoting *Folia v. Trelinksi* (1997), 14 R.P.R. (3d) 5 (B.C.S.C.) at para. 18. This inquiry is grounded in an interpretation of the contract and its application in the particular circumstances of the case.
- [26] Frustration is not a doctrine that negates contractual obligation. Rather, it identifies unexpressed limits to the obligations undertaken by the contracting parties. These limits are consistent with the purpose, express terms, and allocation of risks established by the contract.
- [27] Accordingly, the first question I must address is the interpretation and application of art. 8.5 in the circumstances of this case. That will resolve the first issue. In light of that conclusion, I may turn to the second question of the availability of the defence of frustration.
1. Were MSL's obligations under the CSA permanently discharged pursuant to art. 8.5 by the fires that ruined the Mackenzie Mill?

Principles of contractual interpretation

- [28] The parties' arguments are wide-ranging. Reading the CSA as a whole, in the light of the circumstances in which it was made, they invoke recitals, statutory definitions, related articles, and the provisions of the CPSA.
- [29] The parties do not contest the principles of contractual interpretation that I must apply, citing *Sattva* at paras. 47-50, *Water Street Pictures Ltd. v. Forefront Releasing Inc.*, 2006 BCCA 459 [Water Street] at paras. 24-28, and *Athwal v. Black Top Cabs Ltd.*, 2012 BCCA 107 at paras. 42-48. These principles are settled and I will not rehearse them at length. The following points are particularly important in this case:
- a) The contract must be read as a whole; *Water Street* at para. 24;
 - b) The contract must be read in the light of the surrounding circumstances, known to the parties at the time of contracting; *Sattva* at para. 47;

- c) What must be determined is what the parties intended by the words they used. Contextual evidence must not be permitted to overwhelm the wording of the agreement; *Water Street* at para. 24, citing *Black Swan Gold Mines Ltd. v. Goldbelt Resources Ltd.* (1996), 25 B.C.L.R. (3d) 285 (C.A.) at para. 19;
- d) However, words in isolation do not have an immutable or absolute meaning. They often take their meaning from the context; *Sattva* at paras. 47-48;
- e) It is important to consider the purpose of the agreement and the nature of the relationship established by the agreement; *Sattva* at para. 48; and
- f) What is required is a practical, common-sense approach not dominated by technical rules of construction; *Sattva* at para. 47.

The nature and purpose of the CSA

[30] The recitals of the CSA refer to the CPSA and state that the purpose of the CSA is to provide to Interfor chips that it is obliged to sell to Catalyst under the CPSA. I have already quoted recital D above and repeat it here in the context of the other recitals:

A. Interfor and MSL are the parties to that certain agreement (the "Asset Purchase Agreement") made as of June 23, 2006, as amended, under which MSL has agreed to purchase from Interfor a lumber manufacturing facility located at 11732 - 130th Street, Surrey, British Columbia (the "Mill") and certain related assets more particularly described therein;

B. Following completion of the sale and purchase of the Mill, MSL will conduct certain timber processing operations at the Mill and, in respect of such operations, will produce coniferous wood chips suitable for use in manufacturing pulp ("Chips");

C. Interfor is a party to that certain chip and pulplog supply agreement (the "Catalyst Agreement") dated December 30, 1991, as amended, between Catalyst Paper Corporation ("Catalyst") (formerly Fletcher Challenge Canada limited), both in its own right and as a successor to the interest of Crown Forest Industries Limited, and Interfor, under which Interfor has agreed, inter alia, to sell Chips produced at the Mill to Catalyst; and

D. As a condition of completion of the sale and purchase of the Purchased Assets under the Purchase Agreement, Interfor has requested and MSL has agreed to enter into this Agreement to sell and supply Chips produced at the Mill or from the Logs to Interfor, on the basis herein provided, so that Interfor may sell and supply such Chips to Catalyst under the Catalyst Agreement.

[Emphasis added.]

[31] Under Part 21 of the CPSA, Interfor's obligation to supply chips to Catalyst may be extended by Catalyst indefinitely, so long as Catalyst is not in default under the agreement.

[32] Under art. 9, the CSA continues in effect until it is terminated:

- a) By the dissolution, winding-up, bankruptcy, liquidation or insolvency of MSL;
- b) By either party exercising a right of termination on the other party's default, as defined in art. 10; or
- c) By Interfor upon giving at least 12 months' notice in writing.

MSL does not have a right corresponding to Interfor's right to terminate the CSA without cause, by giving notice in writing.

- [33] While the CSA remains in force, the parties' obligations in connection with chips to be supplied under the agreement are mutual. Under art. 2.1, MSL is obliged to sell to Interfor, and Interfor is obliged to purchase for sale to Catalyst, all "Available Chips" up to a stipulated maximum volume. "Available Chips" are defined as the chips produced by MSL from the Mill. (There is a second component of the definition that is irrelevant for present purposes.) Under art. 2.2, Interfor has an option to purchase excess chip volume generated by MSL from its other operations. Under art. 2.3, MSL may sell to third parties any excess chip volume that Interfor does not take up.
- [34] Under art 11.1 of the CSA, MSL may only sell, transfer or otherwise dispose of the Mill to an assignee that has agreed, as a condition of the purchase, to be bound by the CSA.
- [35] Taking these provisions together, I find that the nature and purpose of the CSA are clear. It is an agreement of indefinite duration to secure for Interfor the supply of chips generated by the Mackenzie Mill's operations, so that Interfor may fulfill its own obligation to supply chips to Catalyst under the CPSA. MSL's obligation to supply chips to Interfor is limited to chips actually produced from the Mill and further qualified by art. 8.5.

Art. 8.5: the force majeure clause

- [36] The defendants maintain that art. 8.5 contemplates a temporary or permanent cessation of MSL's obligation to deliver chips under the CSA, depending on the circumstances. Interfor maintains that it only contemplates a suspension of MSL's obligation to deliver chips.

- [37] Art. 8.5 states:

8.5 If, at any time while this Agreement is in force, MSL shuts down or curtails the operation of the Mill due to fire, strike or other labour disruptions, lockout, sabotage, shipwreck, riot, war, flood, extraordinary breakdown, laws or regulations, Court order, act of any government body or agency, act of God, blockade, civil commotion or disobedience (lawful or unlawful) or as a result of Interfor reducing or discontinuing its purchases of Chips under this Agreement, or for any reason whether similar or dissimilar to the foregoing and which MSL considers sufficient to justify curtailing or shutting down its operations, then MSL, without liability, may discontinue or curtail the production and delivery of Chips to Interfor.

[Emphasis added.]

- [38] Three points are immediately clear. First, the operation of art. 8.5 is triggered by a shutdown or curtailment of the Mackenzie Mill's due to fire, as occurred here, or for other reasons such as a strike, labour disruption, or civil commotion. Second, the clause recognizes that it is up to MSL to decide whether to curtail or shut down its operations and, if it does, permits it to discontinue or curtail the production and deliver of chips to Interfor. Third, the clause admits of the possibility that a shutdown or curtailment may be temporary or effectively permanent. This is so because the operation of the clause may be triggered by strikes, labour disruptions, and civil commotion, all of which are often temporary in nature. Other possible triggering events, such as legislation rendering the Mill's operations illegal, would be permanent in nature.
- [39] It follows that the clause contemplates a temporary suspension of MSL's obligation to deliver chips under the agreement. A "discontinuance" under art. 8.5 may be temporary. It may also be permanent. The language of art. 8.5 in isolation does not indicate, one way or the other, whether the clause might also effect a permanent cessation of MSL's obligation, as contended by the defendants, in the case of the destruction of the Mackenzie Mill by fire.
- [40] That art. 8.5 contemplates shutdowns or curtailments that may be temporary or permanent in nature is further confirmed by art. 8.8, which imposes on the parties an obligation to notify each other of scheduled or unanticipated shutdowns or curtailments. The notifications must state, among other things, the anticipated duration and estimated effect of the event. This was the context for the notice delivered by MSL on February 11, 2011, following the second fire, notifying Interfor that the supply of chips from the Mackenzie Mill would be curtailed "for a yet to be determined period of time".

Art. 8.1: the other force majeure clause

- [41] Art. 8.1 provides parallel protection for Interfor in the event of a shutdown or curtailment of operations by Catalyst. The wording of art. 8.1 parallels that of art. 8.5, except that (1) the protection is triggered by a shutdown or curtailment of operations by Catalyst, not Interfor, and (2) art. 8.1 expressly limits the protection afforded to Interfor to "the period of such shutdown or curtailment". Art. 8.1 states:

8.1 If, at any time while this Agreement is in force, Catalyst shuts down or curtails the operation of its pulp production facilities or Chip unloading facilities due to weather conditions, fire, strike or other labour disruptions, lockout, sabotage, shipwreck, riot, war, flood, extraordinary breakdown, laws or regulations, Court order, act of any government body or agency, act of God, blockade, civil commotion or disobedience (lawful or unlawful) or for any reason whether similar or dissimilar to the foregoing which Catalyst considers sufficient to justify curtailing or shutting down its operations, then Interfor, without liability, may discontinue or curtail the purchase and acceptance of deliveries of Chips from MSL for the period of such shutdown or curtailment.

[Emphasis added.]

- [42] In light of the presence of the words, "for the period of such shutdown or curtailment", in art. 8.1, the defendants emphasize their absence in art. 8.5. They submit that this indicates an intention that MSL's right to discontinue or curtail purchases under art. 8.5 is not necessarily limited to the period of the shutdown or curtailment giving rise to the right. It may sometimes be permanent, even if the shutdown or curtailment comes to an end.
- [43] I do not give great weight to this argument. The defendants accept that a shutdown or curtailment of the Mackenzie Mill's operations of a minor nature would not bring their obligations under the CSA to an end. While I think they are correct to make that concession, it implies into art. 8.5 the limiting words expressly contained in art. 8.1. The difference in the wording of the two articles is inconsequential.
- [44] The triggers that engage the operation of the force majeure relief under arts. 8.1 and 8.5 are different. Under art. 8.1, it is a shutdown or curtailment of operations by Catalyst, a third party to the CSA. Under art. 8.5, it is a shutdown or curtailment of operations by MSL. Where force majeure under art. 8.1 is invoked, art. 8.7(a) limits MSL's ability to enter into agreements for the disposition of the chips it is not supplying to Interfor by reason of the force majeure. There is no corresponding obligation placed on Interfor in the event of a force majeure invoked by MSL under art. 8.5. Arguably, therefore, the effect on MSL of a force majeure event under art. 8.1 is more onerous than the effect on Interfor of a force majeure event under art. 8.5. This may be a reason for the inclusion in art. 8.1 of limiting language - "for the period of such shutdown or curtailment" - that is merely implicit in art. 8.5.

The "Business" and the "Mill"

- [45] The defendants submit that the fires that ruined the Mackenzie Mill brought MSL's business to an end. For example, in addressing the frustration issue, they submit:
80. The Mill was destroyed by fires. The Mill was, in the words of the parties, "the Business". It would be absurd to think that you could get blood out of a stone, that you could continue to get chips out of a demolished and useless Mill.
- [46] This submission is overstated because the agreements distinguish between the Mill and the Business.
- [47] The CSA was preceded by an Asset Purchase Agreement ("APA") by which MSL agreed to purchase the Mill and other assets from Interfor. The APA is referenced in Recital A to the CSA (quoted above). The "Business" is not defined in the CSA but it is defined in the recitals of the APA, which state:

A. Seller owns a lumber remanufacturing facility (the "Mill") known as MacKenzie Sezai Mill and located at 11732 -130th Street, Surrey, British Columbia, and certain related assets more fully described herein, and carries on the business (the "Business") of manufacturing lumber products and selling such products.

B. Seller wishes to sell the Business, including the Mill and such related assets, and Buyer wishes to purchase the Business, the Mill and such related Assets from Seller, in each case on the terms and conditions set forth herein.

[48] The Mill is an asset utilized in the conduct of the Business. There are intangible assets as well, addressed in clause. 1.1.7 of the APA. The Mill and the Business are not synonymous. From the point of view of the agreements, the Mackenzie Mill might be ruined without bringing an end to the Business. If MSL were to promptly rebuild an identical mill from insurance proceeds, the Business would continue notwithstanding the destruction of the original mill. There would be a question as to whether the new mill should be considered as the "Mill" within the contemplation of the CSA, but there would be no doubt that the Business continued in existence.

Assessment

[49] I conclude that MSL's obligations under the CSA were not permanently discharged under art. 8.5 by the fires that ruined the Mackenzie Mill.

[50] MSL is not obliged to operate the Mill and generate chips, but if it does, until the CSA is terminated, it must sell the chips to Interfor. To recapitulate my findings to this point:

- a) The CSA is an agreement of indefinite duration to secure for Interfor a supply of chips generated by the Mackenzie Mill's operations, so that Interfor may fulfill its own obligation to supply chips to Catalyst under the CPSA;
- b) Art. 8.5 is concerned with the operations of the Mackenzie Mill, not MSL's business as a whole;
- c) Art. 8.5 contemplates temporary suspensions of operations and the delivery of chips by MSL to Interfor; and
- d) The CSA distinguishes between the suspension of the obligation to supply or purchase chips under arts. 8.5 and 8.1, and the termination of the agreement under art. 9.

[51] The defendants submit that the CSA does not impose on MSL an obligation to rebuild the Mackenzie Mill and start producing chips again, following the fires. I agree. That is not the question at hand. The question is whether the contractual obligation persists if there is or could be a new "Mackenzie Mill" to which the CSA would apply.

[52] The question of whether a new mill at the same address as that of the former Mackenzie Mill is one to which the CSA applies is not before me on this application. Nor am I tasked with deciding whether there has been a termination of the CSA pursuant to art. 9.

[53] The defendants' argument presupposes that some fires triggering the operation of art. 8.5 are so serious as to give rise to permanent consequences and a termination of the contract, while the effects of other fires might be merely temporary. They would distinguish a fire in a broom closet that shut down operations for a month from the fires that ruined the

Mackenzie Mill in this case. There is nothing in the text of art. 8.5 to support the proposition that the legal effect of the clause is different in the case of more and less serious fires, and no guidance to be drawn from the CSA as a whole as to where the line would be drawn.

- [54] The difference between the parties' positions only matters if the Mackenzie Mill can be rebuilt (or a new mill that would constitute the "Mill" under the CSA can be built in its place). On any view of the matter, MSL is only obliged to deliver Available Chips it has produced from the Mackenzie Mill. If the Mill cannot be rebuilt, MSL's obligation to perform under the CSA is permanently suspended, and there is no practical difference between a permanent suspension and a termination of the contractual obligation. In the case where the Mill can be rebuilt and it does make a difference, it is difficult to see how the suspension of the obligation under art. 8.5 becomes a termination of the contract pursuant to art. 9.
- [55] In sum, taking a practical and common sense approach, in my opinion, art. 8.5 provides only for the suspension, and not for the termination, of MSL's contractual obligations under the CSA.
2. Was the CSA frustrated by the fires that ruined the Mackenzie Mill, bringing MSL's obligations under the contract to an end?

The parties' positions

- [56] The defendants submit that the Mackenzie Mill lies at the foundation or root of the contractual obligation undertaken by MSL in this case. They say that the obligation was frustrated when the Mill was destroyed. They compare this case to *Taylor v. Caldwell* (1863), 122 E.R. 309 (Q.B.), in which a contract to let a music hall for four concerts was frustrated when the hall was destroyed by fire. Justice Blackburn held that:

in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.

- [57] The defendants also cite *Krell v. Henry*, [1903] 2 K.B. 740 (C.A.) as extending the concept of frustration "to include the effective destruction of the purpose at the root of the contract".
- [58] The defendants submit that, if art. 8.5 fails to make full provision for the eventuality of a fire destroying the Mackenzie Mill, then the doctrine of frustration steps in to fill the gap.
- [59] Interfor submits that the modern legal test of frustration is not to be taken from *Taylor v. Caldwell* and *Krell v. Henry*, but from cases such as *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58 [Ellis-Don] and *KBK*. Accepting that an inquiry into the purpose of the contract is relevant, they say that the correct legal question is whether the fires fundamentally changed the nature of the obligation imposed on MSL under the CSA. They contend that MSL's obligation to supply chips was suspended but not terminated, and could be revived.

- [60] Interfor further submits that there can be no frustration where the risk of the event is contemplated and addressed in the contract. In this case, the risk is contemplated and addressed to the extent provided by art. 8.5.
- [61] Interfor accepts that, in principle, there could be frustration of the CSA, despite the presence of a force majeure clause in art. 8.5. An example would be if the mill site were to vanish from the face of the earth in an earthquake, leaving no possibility that the Mill might be rebuilt. However, Interfor submits, that is not this case.

The modern law of frustration

- [62] Ellis-Don is a leading modern decision. Speaking for the Court at para. 54, Justice Binnie rejected Blackburn J.'s reasoning in *Taylor v. Caldwell* that frustration results from an implied condition in the contract. Rather, he held that frustration occurs when a situation has arisen for which the parties have made no provision in the contract and performance has become "a thing radically different from that which was undertaken by the contract" (at para. 53, quoting *Peter Kiewit Sons' Co. v. Eakins Construction Ltd.*, [1960] S.C.R. 361 at 368, itself quoting *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] A.C. 696 (H.L.) at 729. At para. 55, Binnie J. added that the doctrine requires a supervening event that:

would have had to alter the nature of the appellant's obligation to such an extent that to compel performance despite the new and changed circumstances would be to order the appellant to do something radically different from what the parties agreed to under the contract.

- [63] While *KBK* preceded *Ellis-Don*, it applied the "radical change in obligation" test from *Davis Contractors* that was later approved in *Ellis-Don* (at paras. 13-15). Speaking for the Court at para. 14, Justice Braidwood also adopted a more detailed statement of the test for frustration developed by Sigurdson J. in *Folia* at para. 18:

In order to find that the contract at issue has been frustrated the following criteria would have to be satisfied. The event in question must have occurred after the formation of the contract and cannot be self-induced. The contract must, as a result, be totally different from what the parties had intended. This difference must take into account the distinction between complete fruitlessness and mere inconvenience. The disruption must be permanent, not temporary or transient. The change must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as concerns either or both parties. Finally, the act or event that brought about such radical change must not have been foreseeable.

[Emphasis of Braidwood J.A.]

- [64] In *Veritas Geophysical (Nigeria) Limited v. Energulf Resources Inc.*, 2010 BCSC 1253 at paras. 43-48, Justice Harris (as he then was) reviewed *Ellis-Don* and *KBK*. He explained the decision in *Krell* through the application of the modern test of a radical or fundamental change in obligation.

Application of the law in this case

- [65] In my opinion, MSL's obligations under the CSA were not frustrated by the fires that ruined the Mackenzie Mill, for the following reasons.
- [66] The destruction of the Mackenzie Mill by fire did not totally affect the nature, meaning, purpose, effect, and consequences of the CSA for the parties. The contract was to secure for Interfor a supply of chips generated by the Mackenzie Mill's operations, to the extent that chips were generated. MSL's obligations were suspended but not terminated while the Mackenzie Mill was shut down. There remained the possibility that the Mill might be rebuilt.
- [67] The possibility of fires damaging the Mackenzie Mill was foreseeable in this case, and was expressly contemplated in art. 8.5. The possibility that fires might not only damage the Mill but completely ruin or destroy it was obviously foreseeable. What happened in this case is not a different kind of event from that expressly contemplated by art. 8.5.
- [68] MSL was not obliged to rebuild the Mill, but if it did, the revival of the obligation to supply to Interfor chips from the restored operation would not work hardship on MSL. Far from imposing on MSL an obligation that was radically different from that undertaken under the CSA, the revived obligation would be the same as before. The circumstance of having rebuilt the Mill would not render the obligation to supply chips to Interfor fundamentally more onerous.
- [69] Much of the defendants' argument is grounded in the mistaken premise that the Mill was synonymous with the Business. They also focus attention to the asset purchase under the APA rather than chip supply under the CSA. Referring to the APA, they contend as follows:
49. The fundamental purpose of the parties' contract was to transfer that Mill from Interfor to Mackenzie in return for \$10 million. Within that, under the CSA, Mackenzie was to provide defined amounts of chips from the Mill to Interfor.
50. The supervening event is clear. In fact, while catastrophic and devastating, it is simple. The three fires destroyed the Mill. The fires destroyed "the Business".
51. The fires thus destroyed the root and foundation of the parties' 2006 contractual relations, including the ability of Mackenzie to produce and provide chips to Interfor.
52. Fire is an archetypal frustration event. It is the supervening, frustrating event in the founding decision on frustration, *Taylor v. Caldwell*.

- [70] I disagree with this analysis. In determining when MSL's obligation under the CSA was frustrated, one must focus on the nature, purpose, meaning, and effect of the CSA, not the APA. The inquiry mandated by the modern law of frustration is not a search for the root or foundation of the parties' contractual relations. The modern law asks whether the result of the fire is a radical change in the obligation imposed on MSL under the CSA. The answer to that question is no.
- [71] Accordingly, I find that the CSA was not frustrated by the fires that ruined the Mackenzie Mill. The fires did not bring MSL's obligations under the contract to an end.

Suitability for summary trial

- [72] In my earlier reasons, 2020 BCSC 416 at paras. 21-31, I reviewed the requirements of Supreme Court Civil Rule 9-7, which governs the summary trial procedure, and authorities bearing on the availability of a summary trial where, as in this case, summary determination of issues will leave other issues to be determined at trial. I will not repeat that discussion. At paras. 37-41, I identified the following considerations as favouring summary determination of the interpretive issue by summary trial:
- a) The issue is confined in scope and, as an issue of contractual interpretation, is the kind of issue the courts have decided in chambers since at least the 19th century;
 - b) A decision either way would significantly reduce the uncertainty in the litigation and improve the prospects for its resolution;
 - c) The amounts involved in the litigation are substantial and the issue is not particularly complex;
 - d) The interpretive issue does not engage an important, rare and unsettled question of law, the record is documentary, and there are no questions of credibility.
- [73] These considerations equally favour summary determination of the frustration issue.
- [74] Earlier, I found that the decisive obstacle to summary determination was the interweaving of the interpretive issue with the frustration issue to be addressed at trial. That is no longer a concern.
- [75] Examinations for discovery have not yet taken place and I am told that my decision on this application may assist the parties in resolving the scope of the examinations.
- [76] Given what is at stake, I think that an appeal of this judgment is likely. It would be the defendants who would appeal, and it is they who seek summary determination. The trial date will be lost, but there is doubt as to whether it is maintainable in any event.
- [77] I conclude that the issues canvassed in these reasons are suitable for disposition on a summary trial. I am able to find the facts necessary to decide the issues and it is just to decide them in the circumstances.

Disposition

[78] For these reasons, I declare:

- a) MSL's obligations under the CSA were not permanently discharged under art. 8.5 by the fires that ruined the Mackenzie Mill;
- b) The CSA was not frustrated by the fires that ruined the Mackenzie Mill.

"Gomery J."

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