

CANADA / JUDGMENT

Interfor v. MacKenzie Sawmill Ltd.

2020 BCSC 416

COURT

Supreme Court of British Columbia

DECIDED

19 March 2020

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2020 BCSC 416 Interfor v. MacKenzie Sawmill Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Interfor v. MacKenzie Sawmill Ltd.,

2020 BCSC 416

Date: 20200319

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

Counsel for the Plaintiff:

R.J. Kaardal, Q.C.

J.E. Roos

Counsel for the Defendants:

C.J. Overholt, Q.C.

V. Petrenko

Place and Dates of Hearing:

Vancouver, B.C.

March 2-3, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 19, 2020

Introduction

- [1] This 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".
- [2] 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.
- [3] Between 2010 and 2014, a series of fires at the Mackenzie Mill stopped production. 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, are very much in issue.
- [4] 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.
- [5] 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.

- [6] The matter comes before me on the defendants' application for declaratory relief on a summary trial. They seek an order that MSL was discharged from all its obligations under the CSA by the fires. Article 8.5 of the CSA is central to their argument.
- [7] Interfor opposes the application. It maintains that the matter is not suitable for disposition on a summary trial. Alternatively, they seek a declaration that is the converse of the order sought by the defendants. That is, they seek a declaration that the fires did not discharge MSL from all of its obligations under the CSA, pursuant to art. 8.5 of the CSA.
- [8] Accordingly, there are two issues:
1. Have the defendants raised an issue that is suitable for disposition on a summary trial?
 2. If so, what is the appropriate order or declaration?

Background

- [9] The Mackenzie Mill was constructed in 1938. Interfor purchased it in 1981.
- [10] 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").
- [11] Catalyst is a successor to Fletcher Challenge. The obligations originally owed by Interfor to Fletcher Challenge under the CPSA are now owed to Catalyst.
- [12] 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.
- [13] 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.
- [14] 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.

- [15] The first of the fires took place on November 12, 2010. It rendered the Mackenzie Mill unusable. The mill stopped producing lumber and chips.
- [16] A second fire broke out on January 25, 2011. It destroyed significant portions of the Mackenzie Mill.
- [17] 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.]

- [18] 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.
- [19] 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.
- [20] 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.

1. Have the defendants raised an issue that is suitable for disposition on a summary trial?

Legal framework

- [21] Supreme Court Civil Rules [Rules], R. 9-7 governs the summary trial procedure. It permits the court to grant judgment, on an issue or generally, on motion materials without hearing oral evidence tested by cross-examination before the court at a trial. R. 9-7(15)(a) imposes two conditions under which an application for judgment on a summary trial must be refused:
- (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or

(ii) the court is of the opinion that it would be unjust to decide the issues on the application,

[22] The first of these conditions requires the judge hearing the application to make a factual determination concerning the evidence before the court.

[23] The second condition engages an exercise of discretion as to whether it is unjust to decide the issues on a summary trial. Considerations bearing on the exercise of this discretion are canvassed in many cases.

[24] The exercise of the discretion can be challenging where, as in this case, summary determination of one issue will leave other issues to be determined at trial, a process sometimes termed "litigating in slices"; *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Limited*, 2002 BCCA 138 at para. 7 [Bacchus]; *Ferrer v. 589557 B.C. Ltd.*, 2020 BCCA 83 at para. 37 [Ferrer].

[25] In *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 485 [GVRD], Justice Griffin, as she then was, undertook a thorough and particularly helpful review of the authorities. She concluded:

[110] In summary, the authorities in BC, including *Hryniak v. Mauldin*, 2014 SCC 7], make clear that the factors the court must consider on applications to determine by summary trial only part of the issues in the lawsuit are:

- a) whether the court can find the facts necessary to decide the issues of fact or law;
- b) whether it would be unjust to decide the issues by way of summary trial, considering amongst other things:
 - i. the implications of determining only some of the issues in the litigation, which requires consideration of such things as:
 - (1) the potential for duplication or inconsistent findings, which relates to whether the issues are intertwined with issues remaining for trial;
 - (2) the potential for multiple appeals; and
 - (3) the novelty of the issues to be determined;
 - ii. the amount involved;
 - iii. the complexity of the matter;
 - iv. its urgency;
 - v. any prejudice likely to arise by reason of delay; and
 - vi. the cost of a conventional trial in relation to the amount involved.

[26] In *Ferrer* at para. 28, Groberman J.A., speaking for the Court, described this list as a "good indication" of the factors to be considered, though not a checklist.

- [27] Circumstances that tend to weigh strongly against summary determination of an issue, as opposed to the case, include the following:
- a) The issue in question is interwoven with issues that will remain to be tried, so that the same evidence will have to be examined again and factual findings may be subject to re-evaluation on a more comprehensive record; GVRD at paras. 97-102; Ferrer at para. 36;
 - b) The issue engages an important, rare and unsettled question of law; Bacchus at paras. 25, 29;
 - c) There are material issues of credibility that cannot be justly determined without cross-examination before the court; Mayer v. Mayer, 2012 BCCA 77 at paras. 78-83.
- [28] In *Coast Foundation v. Currie*, 2003 BCSC 1781 at para. 17, Groberman J., as he then was, observed that it is important to consider whether allowing the application will ultimately result in saving court time. He stated:
- [17] Summary trial applications that will not, even if successful, reduce the length of trial, should, in general, be discouraged. The court must recognize the reality that judicial time is a scarce resource.
- [29] Justice Groberman further observed at para. 18, that piecemeal decision-making is rarely efficient and multiple appeals may impede, rather than hasten, the orderly determination of the action. These observations were cited with approval in *Kaler v. Kaler*, 2013 BCCA 57 at para. 24-25 and in Ferrer at para. 34.
- [30] Notwithstanding these challenges, the summary trial procedure is a well-established procedural vehicle in British Columbia; GVRD at paras. 53-60, 63-64. Well and properly utilized, it can be of great assistance in securing the just, speedy and inexpensive determination of a proceeding on its merits in a way that is proportionate to the amount involved, the importance of the issues, and the complexity of the proceeding. This is the object of the Rules (as set out in R. 1-3) and of civil procedure generally; *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 49-51 [Hryniak]; GVRD at paras. 76-77.
- [31] In Ferrer, the Court of Appeal approved a chambers judge's decision to grant judgment on an issue. It was important to the decision in that case that the chambers judge found that an early decision on the issue would benefit the parties, "since a finding in the Applicants' favour could impact the overall resolution of the matter"; Ferrer at para. 16 and 35, referencing the judgment at 2019 BCSC 1004 at para. 7.

Nature of the issue proposed for summary disposition

- [32] The CSA is a detailed commercial agreement prepared by lawyers in the context of a multi-million dollar asset purchase. It is intended to govern future commercial dealings between the buyer and the seller, and their respective successors, for an indefinite period.

- [33] The parties agree that, pursuant to art. 8.5 of the CSA, MSL's decision to stop production at the Mackenzie Mill in consequence of the fires in 2010, 2011 and 2014 justified it in stopping its delivery of wood chips to Intefor. They disagree as to whether the effect was to terminate or merely to suspend MSL's obligations under the CSA. Interfor maintains that MSL's obligation was merely suspended. The defendants seek a declaration that MSL was permanently relieved of its obligation. This disagreement - from this point forward I will refer to it as the interpretive issue - turns on the interpretation of art. 8.5 in the context of the CSA as a whole. The CSA must be read in the context of the surrounding circumstances, as known to both parties, in which it was made; *Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62.
- [34] Until *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [Sattva] was decided, the interpretive issue would have been understood as a question of law. Sattva establishes that it is a question of mixed fact and law. The CSA is not a standard form contract; it was negotiated by two sophisticated commercial entities in light of their particular needs and circumstanceart. While art. 8.5 is recognizable as a "force majeure" clause, common in supply agreements contemplating a course of dealings over a long term, the parties do not suggest that art. 8.5, in particular, utilizes common or routine language requiring a standardized interpretation in the interests of legal consistency; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at para. 36-48.
- [35] Accordingly, the interpretive issue requires consideration of the surrounding circumstances in which the CSA was made and intended to operate, the language of art. 8.5 and the other provisions of the CSA, and their application in the context of production stoppages and the eventual destruction of the Mackenzie Mill by fire.
- [36] The defendants' actions after the fire in 2014 are contested. The parties agree that the record before me on this summary trial application does not permit findings of fact as to what the defendants did and the legal consequences of their actions after that fire. If the defendants are correct that, by 2014, MSL was permanently relieved of its obligations under the CSA, its subsequent actions matter very little and Interfor's claim is significantly narrowed in scope. (There remains an issue as to whether MSL breached a contractual obligation to notify Interfor that the stoppage had become permanent, and the consequences of that breach.) If Interfor is correct and MSL's obligations under the CSA were merely suspended, and not terminated, then what happened after 2014 will have to be addressed at trial.

Analysis

- [37] The following considerations favour summary determination of the interpretive issue on this summary trial application.

- [38] The interpretive issue is confined in scope. With one exception that I will address below, it is not interwoven factually with other issues in the litigation. Fundamentally, it is an issue of contractual interpretation. The courts have a long history of deciding this kind of issue in chambers on a petition pursuant to R. 2-1(2)(c) and its predecessors. The procedure is one that descends from the Court of Chancery prior to the amalgamation of the Courts of Law and Equity in the late nineteenth century.
- [39] The defendants seek summary disposition of the interpretive issue and it is clear that, if it is decided in their favour, there will be probably a significant saving of trial time. It is not clear that much trial time will be saved if the issue is decided in Interfor's favour. Interfor says that a decision either way would significantly reduce the uncertainty in the litigation and improve the prospects for its resolution.
- [40] I am told that the amounts involved in the litigation are substantial. The issue is not particularly complex. While the summary trial application took about 1.5 days to argue, about half that time was taken up with the issue of suitability.
- [41] The interpretive issue does not engage an important, rare and unsettled question of law. There are no issues of credibility. The record is largely documentary.
- [42] The following considerations militate against determination of the interpretive issue on a summary trial.
- [43] The defendants plead that the CSA was frustrated by the fire. A contract is frustrated by an event not reasonably contemplated by the parties on entering into the contract that renders performance impossible or impracticable; KBK No. 138 Ventures Ltd. v. Canada Safeway Limited, 2000 BCCA 295 at para. 13-17. A contract cannot be frustrated by an event that is the subject of a force majeure clause such as art. 8.5 of the CSA because the clause demonstrates that the event lay within the parties' contemplation. Bruce MacDougall, Introduction to Contracts, 3rd ed. (Toronto: LexisNexis Canada, 2016) at 294, states:

In the event that a force majeure clause kicks in to end a contract, it is not because the contract is frustrated. Quite the opposite; it is because the contract itself provides for the chain of events; Of course, it is a matter of construction as to whether the force majeure clause applies in the context of what has happened. If the force majeure clause covers certain unusual circumstances but not the one that actually occurs, it can be convincing proof that the parties truly did not foresee that event and so frustration can operate

- [44] The parties agree that the defence of frustration cannot be addressed on this application and any declaration resolving the interpretive issue will have to leave open the possibility that the CSA was frustrated.

- [45] The defence of frustration engages an interpretation of the contract, with a view to determining what contingencies were and were not contemplated by the parties. Accordingly, there is common ground between the defence of frustration and the interpretive issue. The judge addressing the defence of frustration will have to consider the same factual matrix and many of the same contractual provisions. The interpretation of art. 8.5 will have to be addressed. To this extent, the issues are interwoven.
- [46] The interpretive issue is important enough that I have to assume the unsuccessful party will appeal. The action is set for trial for four weeks commencing April 6, 2021. I would think that an appeal could be heard sufficiently far in advance of the trial that the trial would not necessarily have to be adjourned, but there is certainly a risk of an adjournment consequent on a summary determination of the interpretive issue.
- [47] Balancing these considerations, it seems to be that the interweaving of the frustration defence with the interpretive issue is decisive. The interpretive issue is not, at present, suitable for disposition on a summary trial. Notwithstanding the risk to the trial date, in light of its nature and the importance of the interpretive issue to the parties, I would be inclined to decide the interpretive issue on a summary trial if it were not for the frustration issue.
- [48] The parties have fully argued the interpretive issue. It is not clear to me that the frustration defence could not have been argued as well. I had the impression at the hearing, perhaps mistaken, that they had not fully considered its implications coming into the hearing.
- [49] To expedite resolution of these issues, I give the parties leave to pursue a further application for disposition of the interpretive issue together with the frustration issue on a summary trial. Either the defendants or Interfor may apply.
- [50] Hryniak is an important decision dealing with the summary judgment procedure under Ontario's Rules of Civil Procedure, R.R.O. 1900, Reg. 194. The jurisprudence recognizes important distinctions between Ontario's summary judgment procedure and British Columbia's summary trial procedure, but they serve common objectives and recognize common constraints; GVRD at para. 95. Under both procedures, if the court hearing an application for summary disposition is unable to grant judgment, it may give directions to expedite resolution of the case; R. 9-17(17); Hryniak, para. 75. In the exercise of these powers in Ontario, Hryniak urges trial judges to seize themselves of the case as the trial judge; para. 78. This is not a routine practice in British Columbia, but it is sometimes appropriate.
- [51] In my view, because the interpretive issue has already been argued before me, I should seize myself of further proceedings to resolve it summarily. If a further application is brought to address the interpretive issue together with the frustration issue on a summary trial, I am seized of the application. I am not otherwise seized of any applications, nor of the trial of this action.

- [52] To be clear, I am not deciding that, if a further application is brought addressing both the interpretive issue and the frustration defence, it will be suitable for disposition on a summary trial. There may be aspects of the frustration defence that render it unsuitable for summary disposition. If many months were to pass before the application came on for a hearing before me, the increased risk of an adjournment of the trial might render the issues unsuitable for summary disposition, even if they are suitable now.
2. If so, what is the appropriate order or declaration?
- [53] In light of my conclusion that the matter is not, at present, suitable for disposition as a summary trial, I should not address the interpretation issue further.

Disposition

- [54] The defendants' application for judgment is dismissed. Any party may apply pursuant to R. 9-7 for summary determination of the interpretive issue together with the defence of frustration. If such an application is made, I am seized of it, but I am not otherwise seized of anything in this action.
- [55] Costs of this application will be costs in the cause.

"Gomery J."

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Prepared on 25 October 2026 · Esheria