

CANADA / JUDGMENT

Stratus Contracting Ltd. v. Zimmerman

2018 BCSC 2308

COURT

Supreme Court of British Columbia

DECIDED

27 December 2018

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2018 BCSC 2308 Stratus Contracting Ltd. v. Zimmerman

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Stratus Contracting Ltd. v. Zimmerman,

2018 BCSC 2308

Date: 20181227

Docket: S067666

Registry: Vancouver

Between:

Stratus Contracting Ltd.

Plaintiff

And

Grant Zimmerman and Wilson King LLP

Defendants

Before: The Honourable Mr. Justice Tindale

Reasons for Judgment

Counsel for plaintiff:

J.M. Duncan

E.A. Sukkau

Counsel for defendants:

P.M.J. Arvisais

Place and Date of Trial:

Prince George, B.C.

June 4 - 8, 2018;

June 11 - 14, 2018;

June 18 - 22, 2018;

June 28 & 29, 2018

Place and Date of Judgment:

Vancouver, B.C.

December 27, 2018

- [1] The plaintiff Stratus Contracting Ltd. ("Stratus") claims damages against the defendants in negligence and breach of contract.
- [2] The defendant Grant Zimmerman is a solicitor who has been a member of the Law Society of British Columbia since 1994 and practices in the City of Prince George.
- [3] The defendant Wilson King LLP is a law firm operating in the City of Prince George.
- [4] The defendants are opposed to the relief claimed by Stratus.

Background

- [5] Stratus was incorporated in July 1995 and is in the business of providing trucking services in the forest industry near MacKenzie, British Columbia. Darren Gibson is the sole owner and operator of Stratus.
- [6] In January 2000 Mr. Gibson on behalf of Stratus began negotiations for the trucking portion of a dewatering contract with Donohue Forest Products Inc. ("Donohue"). Dewatering is the process of removing logs from the water by a stationary crane known as a Colby Crane and loading the logs on trucks for transport to primary storage areas on the mill site.
- [7] By February 2000 Mr. Gibson was also in negotiations with Donohue for the trucking portion of a Cut-to-Length reclaim contract and a Sludge/Ash hauling contract.
- [8] A reclaim contract involves hauling raw logs from the primary storage areas on the mill to the Infeed Deck which is a secondary storage area in the mill where logs are placed prior to processing them.
- [9] Mr. Gibson contacted Mr. Zimmerman in February 2000 for the purpose of drafting a contract between Stratus and Donohue.

- [10] By March 2000 Mr. Zimmerman had provided a draft contract to Mr. Gibson in relationship to the dewatering and reclaim contract. Of particular relevance to this litigation is clause 1.4 which states:

The parties shall review the rates set out in paragraph 1.0, above, on an annual basis, as soon as reasonably possible after the anniversary of the Commencement Date to ensure that Stratus maintains a minimum 12% net profit per annum. The parties agree to amend the rates at the end of their annual review to maintain a 12% annual net profit for Stratus. If the parties do not agree to a proposed amendment to the rates arising out of the annual review, either of the parties may request the disagreement be decided by arbitration as set out in Part 15.

("Rate Review Clause")

- [11] On May 12, 2000 representatives of Donohue verbally advised Mr. Gibson that Stratus had been awarded a five year dewatering log hauling contract as well as a five year log reclaim contract. At this time Stratus also had hauling contracts with Finlay Navigation Limited Partnership ("Finlay") to offload logs from the Williston Transporter on the Williston Lake and transport them to the Slocan MacKenzie operations. Stratus was also hauling ore for Finlay and was a subcontractor with Finlay on a reclaim contract. Finally Stratus was also doing off-road log hauling.
- [12] Stratus began performing the reclaim work in April 2000 and the dewatering work in May 2000 however the parties did not sign a contract until August 29, 2000 ("Dewatering Contract"). By that time Donohue had merged with Abitibi Consolidated Inc. ("ACI"). The Dewatering Contract did not include a volume rate for the transport of Cut-to-Length logs but rather ACI would pay Stratus an hourly rate of \$79.55 for this service. In effect ACI had eliminated the reclaim portion of the work that Stratus had been doing.
- [13] The Dewatering Contract contained the Rate Review Clause at clause 1.5.
- [14] Stratus was also awarded a wood chip and hog hauling contract ("Chip and Hog Contract") for a period of five years starting on November 1, 2000 by ACI. Chips are the small pieces of leftovers from the logs being processed at a sawmill and hog is the bark removed from the logs at the sawmill. The Chip and Hog Contract was not drafted by Mr. Zimmerman however it included the Rate Review Clause.
- [15] Stratus began experiencing difficulties in performing the Dewatering Contract and the Chip and Hog Contract. By the beginning of 2001 Stratus was having financial difficulties and entered into negotiations with ACI to resolve these difficulties.
- [16] By the end of 2001 Stratus hired Richard Foulston a lawyer to assist in the negotiations with ACI. On July 24, 2002 Stratus filed a writ of summons commencing an action against ACI ("ACI Action").

- [17] The trial in the litigation between Stratus and ACI commenced June 7, 2004 and completed on October 8, 2004. Mr. Justice Meiklem's Reasons for Judgment were released on May 12, 2005 and are indexed as Stratus Contracting Ltd. v. Abitibi Consolidated Inc. 2005 BCSC 709.
- [18] Mr. Justice Meiklem awarded Stratus \$79,310.50 and awarded ACI \$205,904.50 on their counterclaim.
- [19] On November 27, 2006 Stratus and Darren Gibson as plaintiffs commenced the within lawsuit.
- [20] On July 22, 2013 Darren Gibson was removed as a party to this proceeding.

Evidence

Plaintiff

Darren Gibson

Direct Examination

- [21] Darren Gibson has worked in the forestry industry since approximately 1987. In June 1995 he secured a log hauling contract with Finlay. Mr. Gibson incorporated Stratus on June 30, 1995.
- [22] Mr. Gibson testified that over the years Stratus grew and had a number of different contracts. By January 2000 the major sources of income for Stratus were from contracts with Finlay moving wood from the Williston Transporter and Slocan operations. In addition Stratus did off-highway logging and hauled ore for Kemess Mines.
- [23] The ore hauling contract with Kemess Mines ended in October 2000. Mr. Gibson testified that he did not bid on that contract because he had just married and he wanted to live closer to his home community of MacKenzie. He decided to focus Stratus on the business of off-highway log hauling.
- [24] Mr. Gibson testified that at the end of 1999 Stratus owned nine trucks and six trailers.
- [25] Mr. Gibson testified that in January 2000 he heard of a potential opportunity to obtain a dewatering and reclaim contract with Donohue. On January 20, 2000 Mr. Gibson met with Mr. Creusot and Mr. Kovacs from Donohue and discussed what contracts he should bid on. The different contracts were a dewatering contract, a reclaim contract and the hauling of sludge and ash.
- [26] Mr. Gibson had another meeting with Mr. Godfrey the purchasing manager for Donohue on January 26, 2000. Mr. Gibson provided a number of letters to Donohue with regard to Stratus' proposed rates.

- [27] Mr. Gibson testified that he lowered the proposed rates as he was talking to Mr. Godfrey about obtaining multiple contracts and Donohue wanted the lowest rate in exchange for providing Stratus with a net profit of 12% each year. Mr. Godfrey referred to this concept of maintaining a 12% net profit as "continuous improvement".
- [28] Mr. Gibson drafted a letter dated February 17, 2000 to Mr. Godfrey which outlined his proposal for the dewatering contract as well as the reclaim contract and a sludge and ash haul contract. That letter can be found at Exhibit 46 tab 6.
- [29] Mr. Gibson testified that on February 19, 2000 he met with Mr. Godfrey and discussed the three contracts and was told that Donohue wanted a 5% reduction in Stratus' rates if they were awarded two or more contracts.
- [30] Mr. Gibson contacted Mr. Zimmerman on February 25, 2000 as he was seeking a lawyer to draft a precedent contract that he could use for multiple contracts with Donohue.
- [31] Mr. Gibson testified that he had a brief conversation in the morning of February 25, 2000 with Mr. Zimmerman and then later met in his offices at Wilson King. Mr. Gibson testified that he discussed the various contracts and rates as well as the proposed volumes with Mr. Zimmerman.
- [32] Mr. Gibson also testified that he discussed the "continuous improvement" concept with Mr. Zimmerman. Mr. Gibson testified that he discussed the 12% net profit clause with Mr. Zimmerman and that Donohue wanted the lowest rate possible.
- [33] Mr. Gibson told Zimmerman that he had a further meeting on February 28, 2000 with Donohue. Mr. Zimmerman told Mr. Gibson to wait until after that meeting because Donohue may have a template contract which they might want to use.
- [34] Mr. Gibson testified that he needed four trucks and five trailers for the dewatering work and two trucks and two trailers for the reclaim work.
- [35] Mr. Gibson testified that he made it clear to Donohue that he required a 12% net profit over each year of the proposed five-year duration of the contracts.
- [36] Mr. Gibson testified that he had a number of conversations by telephone with Mr. Zimmerman. Mr. Zimmerman faxed a draft Project Contract to Mr. Gibson on March 8, 2000 which included the Rate Review Clause.
- [37] Mr. Gibson testified that Mr. Zimmerman did not warn him that the Rate Review Clause was prospective not retroactive in its operation. Mr. Gibson testified that he hired a lawyer to protect Stratus because Donohue was getting the lowest possible rate from Stratus.
- [38] Mr. Gibson testified that he paid Mr. Zimmerman's account and relied on the draft Project Contract to finalize a deal with Donohue. Mr. Gibson testified that Mr. Godfrey told him that that Stratus was awarded the dewatering work and the reclaim work.

- [39] Stratus began working for Donohue on the reclaim work in April 2000 and the dewatering work in May 2000 however an agreement was not signed until August 29, 2000. Exhibit 46 tab 26 is the Dewatering Contract that was signed between ACI and Stratus. In that document the Rate Review Clause appears at paragraph 1.5. Of particular note Stratus was not awarded the cut to length portion of the reclaim work at Site II. This portion of the contract was worth approximately \$400,000 annually.
- [40] Mr. Gibson testified that he signed the Dewatering Contract because Stratus had already committed to the equipment expenses for the dewatering and reclaim work and he felt that the Rate Review Clause would protect Stratus. Mr. Gibson also testified that it would cost Stratus a substantial amount of money if he did not sign the Dewatering Contract.
- [41] Mr. Gibson testified that he began work in April and May 2000 because he believed he had an agreement even though he did not have a signed contract.
- [42] Mr. Gibson testified that he also bid on a chip and hog haul contract. He learned of this contract in July or August 2000. On November 1, 2000 he signed a Chip and Hog Contract on behalf of Stratus. This included the Rate Review Clause.
- [43] Mr. Gibson testified that Stratus began experiencing problems with the Dewatering Contract because the Colby Crane cycle times for loading the trucks was 38% slower than had been represented. The Colby Crane also broke down on a number of occasions. As a result of these problems Stratus's costs increased.
- [44] Mr. Gibson testified that because of the problems Stratus was experiencing on the Dewatering Contract the Rate Review Clause was important.
- [45] Mr. Gibson testified that Mr. Zimmerman never confirmed with him what Mr. Gibson meant by net profit. Mr. Zimmerman never told him that he should come back and review the final contracts with him.
- [46] Mr. Gibson testified that when he entered into the Chip and Hog Contract Mr. Zimmerman was not his lawyer and did not give him any advice with regard to that agreement. He testified that he relied on Mr. Zimmerman's skill in drafting the Rate Review Clause which he inserted into the Chip and Hog Contract.
- [47] Mr. Gibson testified that Stratus also began having problems on the Chip and Hog Contract because ACI implemented a new automated scale system which drastically increased the times that it took to load their trucks.
- [48] Mr. Gibson testified that he approached ACI because of the difficulties Stratus was having. Mr. Gibson testified that Stratus was losing \$20,000 per month. On February 9, 2001 ACI and Stratus entered into an agreement whereby ACI among other things advanced \$27,000 to Stratus. Stratus agreed not to claim waiting time for any of the year 2000 dewatering issues. That agreement has been marked as Exhibit 46 tab 40.

[49] Mr. Gibson testified that he saw Mr. Zimmerman in February 2001 and discussed the difficulties he was having with the Dewatering Contract as well as the Chip and Hog Contract. Mr. Gibson testified that he spoke to Mr. Zimmerman about Stratus maintaining a 12% net profit. Mr. Gibson testified at that time his primary concern was the Chip and Hog Contract.

[50] Exhibit 46 tab 46 is a letter dated February 27, 2001 drafted by Mr. Gibson to ACI which he also sent to Mr. Zimmerman to review. That letter reads in part:

I relied on ACI's representations that we would be able to maintain a 12% net profit when I entered into the agreement and would not have entered into it otherwise. In the event that no other remedy can be found, in order to make up for the costs that have resulted in increased delivery times and the introduction of a new truck, the rates must be increased to the following:

Chips \$5.15/ BDMT

Hog \$1.88/1000 kg

Such rates should be applied to the amounts hauled since the date we added the additional truck, January 24, 2001. I welcome any dialogue in regards to this matter and if you have any further questions or comments do not hesitate to contact me.

[51] Mr. Gibson testified that he discussed the February 27 2001 letter with Mr. Zimmerman and Mr. Zimmerman advised him that the Rate Review Clause should protect him.

[52] On March 26, 2001 Mr. Gibson testified that Stratus received a letter from ACI in response to his letter of February 27, 2001. Mr. Gibson testified that Mr. Zimmerman advised him to sign the letter because there was no mention of not living up to the rate Review Clause. In that letter ACI in part stated the following:

Dewatering:

- Abitibi Consolidated Inc. will provide for a \$25,000 payment to Esso Resources towards Stratus Contracting Ltd. account. Reimbursement will not be required if in the opinion of Abitibi Consolidated Inc. after 4 weeks of dewatering commencement any and all excessive delay time concerns have been negated.

Chip/Hog Haulage:

- Abitibi Consolidated Inc. will provide for a \$26,000 payment to Esso Resources towards Stratus Contracting Ltd. account. Reimbursement will not be required if in the opinion of Abitibi Consolidated Inc. on Oct 31, 2001 that the haulage of both products have been completed in a cost-effective manner and that Stratus Contracting Ltd. is prepared to enter into a second year period.

In the event of not being successful in either of the above Abitibi Consolidated Inc. will reserve the right to deduct the advanced amount from any outstanding invoices from Stratus Contracting Ltd. by way of signed acknowledgement below Stratus Contracting Ltd. releases Abitibi Consolidated Inc. from any further claims for past performance issues under any one of these contracts.

- [53] Mr. Gibson testified that he did not sign the March 26, 2001 letter until he received advice from Mr. Zimmerman on April 25, 2001. Mr. Gibson testified that Mr. Zimmerman told him not to walk away from the agreement because it may be a breach of contract. Mr. Gibson testified that Mr. Zimmerman said that the Rate Review Clause should protect him.
- [54] Mr. Gibson testified that on August 29, 2001 he met again with Mr. Zimmerman who was now at the law firm of Heather Sadler Jenkins. Mr. Gibson testified that Mr. Zimmerman stated during that meeting that he could have written the Rate Review Clause stronger.
- [55] On August 31, 2001 Mr. Zimmerman sent a letter to ACI. In that letter Mr. Zimmerman stated the following "In order for Stratus to maintain a 12% net profit for the 1st year of the Dewatering Contract Darren Gibson has calculated that Abitibi is required to pay approximately \$135,000". It is interesting to note that Mr. Gibson initially instructed Mr. Zimmerman to demand a payment of \$77,996.92 as a reasonable payment for year one of the Dewatering Contract.
- [56] Exhibit 46 tab 63 is an agreement dated September 7, 2001 in which ACI agreed to pay Stratus \$42,000 that was to be used to pay for trailers that Stratus had purchased and other outstanding payables. Mr. Gibson testified that he signed this agreement and he understood that it would not eliminate the option to negotiate for a 12% net profit.
- [57] Exhibit 46 tab 65 is a letter dated October 2, 2001 from ACI advancing Stratus \$56,696.03 on a without prejudice basis in reference to the Dewatering Contract. These funds were to be used by Stratus to pay outstanding loans to the Royal Bank of Canada. Mr. Gibson signed this letter on behalf of Stratus.
- [58] Mr. Gibson testified that he met Mr. Zimmerman on October 10, 2001 as negotiations with ACI had come to a standstill. At that time Mr. Zimmerman referred Mr. Gibson to a litigation lawyer Richard Foulston.
- [59] Mr. Foulston began negotiations with ACI. Exhibit 46 tab 67 is a letter dated December 14, 2001 from Wade Kaskiw controller for ACI to Mr. Gibson outlining ACI's final offer to resolve the outstanding issues with Stratus. In that offer ACI proposed a payment of \$77,594 to Stratus for year 1 of the Dewatering Contract and a further payment of \$79,310.50 for year 2 of the Dewatering Contract. This offer amounted to a payment of \$156,904.50 less the advances of that ACI had made to Stratus as follows:

Feb 9th Advance \$26,104.47

Sept 7th Advance \$42,000

Oct 2nd Advance \$56,696.03

- [60] Mr. Gibson testified that this offer was not accepted and on May 9, 2002 Stratus terminated the Dewatering Contract with ACI.
- [61] Mr. Gibson testified that he was billed \$109,775.53 by Mr. Foulston to conduct the litigation against ACI. Mr. Gibson testified that he still owes \$8,428.54 to Mr. Foulston.
- [62] Mr. Gibson testified that if he did not enter into the Dewatering Contract and the Chip and Hog Contract he would have continued operating Stratus doing work for Finlay and off highway logging.
- [63] Exhibit 47 tab 112 is a General Ledger Report for Stratus for the period July 1, 1999 to June 30, 2000 which outlines the equipment that Stratus owned at that time.
- [64] Exhibit 47 tab 116 is a list of equipment that Stratus sold in 2002 and 2003.
- [65] Mr. Gibson testified in 2004 two of the Western Star trucks owned by Stratus were seized by a bailiff. In October 2002 the Canada Revenue Agency seized the accounts of Stratus.
- [66] Mr. Gibson testified that Exhibit 9 is a copy of an insurance policy for the period commencing September 28, 2001 which attaches a schedule summarizing the equipment that was owned by Stratus and attaching a value to that equipment of \$1,206,250.

Cross-Examination

- [67] Mr. Gibson agreed that he started work on the Dewatering Contract in May 2000 and signed the Dewatering Contract in August 2000.
- [68] Mr. Gibson testified that he reviewed the documents in this case to refresh his memory.
- [69] Mr. Gibson was asked on cross-examination whether Stratus prior to entering into the contracts with ACI lost money and he said he did not recall that. However on June 15, 2004 during the trial of the ACI Action he said the following at page 234 of that transcript:

Line 11 Q. No, I'm going to suggest to you, sir, that historically it had either broken even or lost money. I will come to 99 in a moment, but I'm going to suggest to you that historically the business had broken even or lost money.

Line 16 A. Yes.

- [70] Mr. Gibson agreed that he incurred significant debt in order to obtain the equipment needed for Stratus.
- [71] Mr. Gibson could not recall the details of negotiating the contract with Finlay and was unable to find a written contract before 1999. He testified that he lost a number of the documents of Stratus in a fire in 2009.

[72] Exhibit 14 is a letter that Mr. Gibson drafted on behalf of Stratus to Finlay regarding the Williston Transporter Contract. He agreed that Mr. Zimmerman did not draft this letter. In that letter Mr. Gibson stated the following:

Contract duration to be Five (5) years from the date of signing with annual review of rates to ensure Stratus Contracting Ltd. a minimum profit margin of 12%.

[73] Mr. Gibson also included rates to be charged in Exhibit 14. When it was put to Mr. Gibson that he would not be able to land the Finlay contract if he did not offer rates for the first year Mr. Gibson agreed that is what he was proposing in his bid.

[74] Mr. Gibson testified that he did not meet Mr. Zimmerman until 2000.

[75] Mr. Gibson testified that he could not remember answers that he had given in 2010 which was eight years ago. He testified that when he attended at an examination for discovery in 2010 he had just retained a lawyer and had not looked at the documents for years.

[76] Mr. Gibson agreed that the Dewatering Contract that was executed in August 2000 had been reformatted. Mr. Gibson could not recall if he formatted the contract or prepared it. He could not remember inserting various representations into the contract.

[77] Mr. Gibson agreed that the ore hauling contract would end in 2000. Mr. Gibson also agreed that contract represented 25% of Stratus' revenue.

[78] Mr. Gibson agreed that Mr. Zimmerman did not draft the Chip and Hog Contract.

[79] Mr. Gibson agreed that he started the Dewatering Contract without a signed agreement. He agreed that the Dewatering Contract that Mr. Zimmerman drafted had included a reclaim component in it. Mr. Gibson also agreed that when he signed the Dewatering Contract in August 2000 ACI removed the reclaim component from that contract. He agreed that ACI demanded a 5% decrease in the rates despite the fact that he was not receiving multiple contracts.

[80] Mr. Gibson testified that Stratus was committed and that they had incurred many expenses including buying trailers to do the reclaim work. Mr. Gibson agreed that it was a huge financial hit for Stratus not to be awarded the reclaim work. Mr. Gibson agreed that he signed that contract because Stratus already made a number of expenditures for that work.

[81] Mr. Gibson agreed that the loss of the reclaim work amounted to a loss of revenue of approximately \$400,000.

[82] Mr. Gibson disagreed on cross-examination that he came up with the idea that the 12% profit was retroactive well after contracts had been signed. He was not sure whether or not Mr. Godfrey told him about the concept of "continuous improvement" in January 26, 2000 or February 10, 2000.

- [83] Mr. Gibson testified that he told Mr. Zimmerman that he wanted to use the Rate Review Clause as a precedent. When it was put to Mr. Gibson that there are no documents that would suggest that was the case Mr. Gibson says he remembered that after reviewing the documents.
- [84] Mr. Gibson agreed on cross-examination that he did not consult with Mr. Zimmerman before signing Exhibit 46 tab 40. Mr. Gibson said that despite the fact that he would be claiming no waiting time for any 2000 dewatering issues he understood that the 12% net profit was still going to be up for discussion. Mr. Gibson conceded that it would eliminate waiting time however he would still be able to negotiate for a 12% profit for year one of the Dewatering Contract.
- [85] Mr. Gibson on cross-examination said that his immediate concern was initially with the Chip and Hog Contract. Mr. Gibson testified that he drafted a letter to ACI (which suggests that the Chip & Hog rates should be increased as of January 24, 2001) which is found at Exhibit 46 tab 46 in relationship to the Chip and Hog Contract because that was an issue that needed to be resolved.
- [86] Mr. Gibson was asked why he did not ask ACI to renegotiate the rates on the Chip and Hog Contract if he thought it was retroactive. Mr. Gibson said that he thought it was best to negotiate with ACI and he believed that Stratus would be protected at the end of the year.
- [87] Mr. Gibson testified that with regard to Exhibit 46 tab 47 (which is the offer from ACI to pay Stratus \$25,000 on the Dewatering Contract and \$26,000 on the Chip and Hog Contract) he consulted with Mr. Zimmerman on April 25, 2001 before he signed that agreement. It was however put to him that he in fact accepted the money prior to any meeting with Mr. Zimmerman. Mr. Gibson was shown Exhibit 47 tab 113 which are the General Ledger Reports for Stratus that show payments of \$25,000 and \$26,000 from ACI being received by Stratus on April 15, 2001.
- [88] Mr. Gibson said those amounts appear to be the payments however he did not have any backup entries for these documents and could not say what dates the bookkeeper was using. He then testified again that backup entries were burnt in a fire.
- [89] Mr. Gibson denied that when he met Mr. Zimmerman on August 31, 2001 that was the first time that they discussed that the Rate Review Clause was retroactive.

Rick Foulston

- [90] Mr. Foulston is a lawyer who practices commercial and construction litigation in Prince George. He became a member of the Law Society of British Columbia in 1994.
- [91] Mr. Foulston after reviewing his file opening list testified that he opened a file for Stratus near the end of November 2001. He has known Mr. Gibson since Mr. Gibson was a teenager.

- [92] Mr. Foulston testified that Mr. Zimmerman had referred Mr. Gibson to him. Mr. Gibson brought the Dewatering Contract and the letter that Mr. Zimmerman had sent to ACI on August 31, 2001 with him.
- [93] Mr. Foulston asked Mr. Gibson to explain to him the Rate Review Clause. He said this clause was unique to him. Mr. Foulston also asked Mr. Zimmerman about the rate Review Clause and Mr. Zimmerman explained to him that it was an adjustment clause for years 1- 5. Mr. Foulston asked Mr. Zimmerman why he used the word "maintain" in his letter of August 31, 2001 when discussing the 12% net profit. Mr. Zimmerman told him that Stratus was to maintain a 12% profit in each of years of the contract.
- [94] Mr. Foulston testified as to the negotiations with and offers from ACI.
- [95] Mr. Foulston testified that the Rate Review Clause certainly could have been a lot clearer.
- [96] Mr. Foulston gave evidence as to his involvement in the ACI Action. He also testified that after his file was closed he gave everything to Mr. Gibson except copies of his billings and notes. This would have been around 2007 or 2008.
- [97] On cross-examination Mr. Foulston agreed that over time his memory has become a bit foggy though he still has some recollection of the events in question.
- [98] Mr. Foulston agreed that the Rate Review Clause had totally different wording than found in a "cost-plus" contract.
- [99] Mr. Foulston agreed that he gave Mr. Gibson the opinion that the Rate Review Clause because it used the word "maintain" would allow Stratus to maintain a 12% profit in each year of the contract.
- [100] Mr. Foulston agreed that he did not call Mr. Zimmerman at the trial between Stratus and ACI. He said he thought it would be a violation of the parol evidence rule.

Stephen Ross

- [101] Mr. Ross is a retired lawyer who was qualified as an expert in forestry law practice. Mr. Ross provided two reports which can be found at Exhibit 39 tabs 1 and 4. The first report prepared by Mr. Ross is dated September 14, 2012 and the second report is dated October 17, 2013.
- [102] Mr. Ross testified that in his experience forestry contracts by nature are complex and usually have terms that are extensively defined. Mr. Ross also testified that forestry contracts should set out the volume of work that the contractor is entitled to receive.
- [103] Mr. Ross testified that in his practice he would ask the client after providing a draft contract if the client wanted him to review the final agreement.

[104] Mr. Ross in his report dated September 14, 2012 in discussing the Rate Review Clause stated the following at page 11:

Clause 1.4 does not read that way. The rate review process in the Regulation does not operate that way. It is not standard practice in the logging industry to adjust rates retroactively after they have been paid, unless they have been paid on a provisional rate basis because the parties could not agree on final rates for the year, and the logging had to be done before that agreement could be reached. Owners and license holders require certainty in their logging costs as much as contractors do, and there is no certainty in rates that can be retroactively adjusted after they have been paid, year after year. If Clause 1.4 was intended by Mr. Gibson to operate retroactively in the first year of the term of the Draft Project Contract, then it would operate retroactively in each of the remaining four years of that term.

An annual retroactive rate adjustment provision is so unusual in the logging industry that a reasonably prudent solicitor who was instructed to include such a provision in a logging agreement would have clearly and unequivocally described it in Clause 1.4. Because it would have undoubtedly been opposed by the owner/license holder, the solicitor should also have confirmed those instructions in writing with his client, and advised him of the difficulty that provision would create in negotiating a final contract with the owner/license holder.

Another factual assumption provided to me (No. 9 above) is that there is a dispute as to what Mr. Gibson told Mr. Zimmerman about the 12% clause applying to each year of the Draft Project Contract, including the first year. If Mr. Zimmerman did not receive instructions from Mr. Gibson that the rates paid to Stratus by Donahue during the first and each subsequent year of the term of the Draft Project Contract were intended by Mr. Gibson to be adjusted at the end of the first and each subsequent year after they had been paid, then I do not believe that a reasonably prudent solicitor, knowledgeable regarding the rate adjustment practices in the logging industry, would necessarily have asked Mr. Gibson whether he intended Clause 1.4 to be applied retroactively in each year of that term, or would have recommended such retroactive application of Clause 1.4.

[105] Mr. Ross agreed that he reviewed the two reports prepared by Tim Bezeredi both dated May 15, 2013. Mr. Ross testified that his October 17, 2013 report was in response to Mr. Bezeredi's reports.

[106] Mr. Ross was also asked a number of hypotheticals with regard to his procedure in papering logging contracts in situations that Mr. Gibson found himself in.

[107] On cross-examination Mr. Ross agreed that he has never been retained to draft a dewatering contract.

Robert MacKay

[108] Robert Mackay is a chartered accountant and business valuator. He was qualified as an expert in business valuation specializing in litigation support with a focus on economic loss claims.

- [109] Mr. MacKay initially provided two reports which can be found at Exhibit 39 tabs 5 and 7 dated April 27, 2012 and December 13, 2017 respectively.
- [110] Mr. MacKay's report of December 13, 2017 was a limited critique report commenting on a November 23, 2016 report prepared by Greg Williamson.
- [111] Mr. MacKay also provided a third report which has been marked as Exhibit 25 dated June 15, 2018. In that report Mr. MacKay revised his income loss calculations to reflect the evidence of Mr. Gibson with regard to four Kenworth trucks owned by Stratus and repairs and maintenance expenses for the year 2000.
- [112] Mr. MacKay opined in Exhibit 25 that Stratus' income loss after taking into account the revisions with regard to the Kenworth trucks and repairs and maintenance expenses for the year 2000 are as follows:

Using a 25% discount rate-Low Range \$948,000-High Range \$1,078,000.

Using a 30% discount rate-Low Range \$893,000-High Range \$1,008,000

- [113] Mr. MacKay testified that the loss of income calculations included the following categories:

- i. Loss of gross profit;
- ii. Interest costs;
- iii. Other increased costs;
- iv. Savings or increases in fixed costs; and
- v. Cost of equipment

- [114] Mr. MacKay agreed that his reports were not a business valuation but rather a loss of opportunity to generate income calculation.

- [115] Mr. MacKay agreed that he calculated an income stream for Stratus and projected it to the year 2010. Mr. MacKay then deducted the cost of the pre-ACI equipment of Stratus and the cost of replacing it and then added back the amount that Stratus received for selling the ACI equipment.

Defendant's Evidence

Grant Zimmerman

- [116] Grant Zimmerman is a solicitor who practices law in Prince George British Columbia. He became a member of the Law Society of British Columbia in 1995. He is currently a partner at the law firm of Heather Sadler Jenkins.
- [117] Mr. Zimmerman testified that in 2000 he did not consider himself an expert in forestry law nor did he hold himself out to be an expert in that area.

- [118] Mr. Zimmerman testified that he was retained on behalf of Stratus to draft a hauling contract. He testified that he would normally speak to the client, receive instructions and then draft a contract on the behalf of the client. Mr. Zimmerman has a recollection that he spoke to a senior lawyer in his then law firm of Wilson King about the Dewatering Contract. He does not have any independent recollection of these events.
- [119] Mr. Zimmerman testified as to the meaning of his notes and abbreviations. He stated that Exhibit 46 tab 14 which is a contract between Finlay and Stratus was in his files however he did not draft this document because it is not in the same format as documents he would have drafted.
- [120] Mr. Zimmerman testified that Exhibit 46 tab 20 is a note he made on March 7, 2000. He testified that one of the notations reads "Rate to be renegotiated 12% profit". Mr. Zimmerman testified that the amount of profit a client receives is a business decision of the client and he would not give advice in that area.
- [121] Mr. Zimmerman does not have a specific recollection of that meeting
- [122] Mr. Zimmerman testified that Rate Review Clause is not a standard form clause and it would have been based on instructions he received from Mr. Gibson.
- [123] Mr. Zimmerman testified that he does not have any independent memory with regard to the instructions that he received from Mr. Gibson or meetings he had with Mr. Gibson or Mr. Foulston.
- [124] On cross-examination Mr. Zimmerman agreed that he had not drafted a dewatering or reclaim contract in the past. He also agreed that he had limited knowledge in the area of forestry practices.
- [125] Mr. Zimmerman agreed that he obtained precedents for the Dewatering Contract from Mr. Gibson. He testified that he would have received the Finlay contract from Mr. Gibson.
- [126] Mr. Zimmerman agreed that Mr. Gibson paid him for all of his services.
- [127] Mr. Zimmerman testified that he did not remember any specific conversations with Mr. Gibson. Mr. Zimmerman also testified that he remembers speaking to Mr. Foulston however he does not remember any conversations with regard to maintaining a 12% profit.
- [128] Mr. Zimmerman testified that with regard to the letter drafted by him on August 31, 2001 to ACI this occurred a year after he drafted the Rate Review Clause in the midst of a number of problems that Stratus was having with ACI. This letter represented a position being put forward by Stratus.
- [129] Mr. Zimmerman testified in cross-examination that he would not have any expectation that Mr. Gibson or Stratus would use the Rate Review Clause on other contracts as a precedent.

Tim Bezeredi

- [130] Tim Bezeredi is a lawyer and was qualified as an expert in the drafting of forestry operation contracts with particular attention to hauling contracts.
- [131] Mr. Bezeredi prepared two reports both dated May 15, 2013 on behalf of the defendants which can be found at Exhibit 39 tabs 2 and 3.
- [132] Mr. Bezeredi opined at page 8 of his May 15, 2013 report found at Exhibit 39 tab 2 to the following:
1. a reasonably prudent solicitor in acting for a contractor in respect of a single phase tracking/hauling contract such as the Stratus contract would assume and conclude, absent specific and clear instructions to the contrary, that the annual rate review or adjustment clause in the contract should only operate prospectively, not retrospectively;
 2. when presented with the Draft Stratus Hauling Contract, a reasonably prudent solicitor would have concluded that (i) the Stratus Annual Rate Review Clause, as it appeared in that draft, was intended to operate only prospectively, not retroactively, and that absent instructions to the contrary this was the parties' intention, and (ii) the Draft Stratus Hauling Contract, viewed in its entirety and taken as a whole, was consistent with prospective not retroactive rate adjustments; and
 3. a reasonably prudent solicitor acting for Stratus instructed to draft an annual rate review clause in the circumstances found as a fact by the Honourable Mr. Justice Meiklam in the 2004 Reasons for Judgment in the Abitibi Action, would have drafted an annual rate review clause operating only prospectively, not retroactively.
- [133] Mr. Bezeredi's report found at Exhibit 39 tab 3 was written in response to the report of Mr. Ross dated September 14, 2012.
- [134] On cross-examination Mr. Bezeredi disagreed that he would put a volume guarantee in a contract unless he was expressly instructed to do so. He testified that major companies do not guarantee volume numbers.
- [135] Mr. Bezeredi testified that he would draft a contract without knowledge in the forestry industry if he was given specific instructions as to what to include in the contract.
- [136] Mr. Bezeredi testified that he read the Rate Review Clause as operating prospectively. He did not find the clause unusual because it looked to him to be a prospective rate review clause.
- [137] Mr. Bezeredi agreed on cross-examination that he had never heard of a "continuous improvement" clause before. He agreed that he would want to know what that meant if it was to be incorporated into a contract.

[138] Mr. Bezeradi agreed that a retroactive rate review and adjustment clause in a contract is highly unusual. He agreed with Mr. Ross that a reasonably prudent solicitor would not draft such a clause unless he was specifically instructed to do so.

Greg Williamson

[139] Greg Williamson is a chartered accountant and business valuator. Mr. Williamson was qualified as an expert in business valuations and the quantification of income loss.

[140] Mr. Williamson provided a limited critique report of Mr. MacKay's report dated April 27, 2012. Mr. Williamson's report can be found in Exhibit 39 tab 6.

[141] Exhibit 40 was an amended Scope of Work summary which supplemented the report of Mr. Williamson.

[142] Mr. Williamson opined that Stratus "was not consistent in its ability to generate positive net income and certainly wasn't generating positive cash flow either prior to or after the Abitibi Contracts".

[143] Mr. Williamson opined that Stratus calculated its hourly revenue based on a 12% markup on costs rather than implied 12% margin.

[144] Mr. Williamson opined at paras. 102 and 103 of his report dated November 23, 2016 to the following:

102 Even if Stratus had quoted the Contract to generate in the range of a 12% contribution margin, it would have been an insufficient margin to cover the other expenses and overheads and resulted in Stratus generating losses from the Dewatering Contract.

103 As discussed earlier, based on Stratus' approach to calculating its rates the Company was, at best, expecting to generate a contribution margin in the range of 10.71% and given the 5% discount factored into the rate the contribution margin was more in the range of 6%. Both are significantly less than the contribution margin needed to cover the other expenses and overheads in the range of 15.1% to 16.3%.

[145] Mr. Williamson agreed in cross-examination that he did not look at the profitability of the Chip and Hog Contract.

Position of the Parties

Plaintiff

[146] The plaintiff claims against the defendants for damages resulting from breaches of the duty of care each owed to the plaintiff and for breaches of terms of the contract with the plaintiff.

- [147] The plaintiff argues that the Rate Review Clause that Mr. Zimmerman drafted was ambiguous as to its application and it did not clearly indicate that it applied retroactively in the first year of the agreement.
- [148] The plaintiff argues that Mr. Zimmerman also breached his duty of care and the implied terms of the contract with the plaintiff by failing to provide a clause which would protect work volumes for both the dewatering and reclaim work, as well as accounting for representations regarding volumes, crane cycles and operational conditions.
- [149] The plaintiff argues that they relied on Mr. Zimmerman's skill as a lawyer to draft the Rate Review Clause which would guarantee a 12% net profit in each year of the contract.
- [150] The plaintiff argues that they commenced reclaim operations in April 2000 and dewatering operations in May 2000 believing that the Rate Review Clause protected them from losses in each year of the contract.
- [151] The plaintiff argues that had they known that the Rate Review Clause did not operate retroactively they would not have entered into any agreement with ACI and would have just continued on with their current operations.
- [152] The plaintiff argues that they are entitled to be put in the position they would have been in but for the breaches of the duty of care. The plaintiff says they would not have entered into the contract, would not have lost the reclaim work, would not have suffered increased costs as a result of crane operations and yard conditions and would not have sued ACI but for the defendants actions. The plaintiff says it is entitled to damages in the range of \$956,000 and \$1,085,000.
- [153] The plaintiff notes that Mr. Gibson testified that Mr. Zimmerman did not provide him any advice regarding the operation of the Rate Review Clause. Mr. Zimmerman also did not give Mr. Gibson any advice about including volumes in the contract; did not tell him that he should bring the final version of the contract to him for review; did not provide him with any advice regarding work protections and did not tell him that the Rate Review Clause only worked prospectively.
- [154] The plaintiff argues that Mr. Gibson testified that he specifically instructed Mr. Zimmerman to include a "continuous improvement" rate review clause in the Dewatering Contract.
- [155] The plaintiff argues that Mr. Zimmerman in his evidence testified that the Rate Review Clause represents the instructions he received from Mr. Gibson.
- [156] The plaintiff notes that as recorded in the general ledgers between March 10, 2000 and March 18, 2000 they purchased five trailers and modified them for the dewatering work and the reclaim work. The plaintiff commenced the reclaim work in April 2000 and the dewatering work in May 2000.

- [157] The plaintiff argues that based on the documentary evidence it is more likely that Mr. Gibson learned about the loss of the reclaim work near the end of August 2000. Mr. Gibson testified that the loss of the reclaim work represented a loss of approximately \$450,000 to Stratus.
- [158] The plaintiff argues that notwithstanding ACI did not give them the reclaim work and ACI demanded a lower rate for the Dewatering Contract, Mr. Gibson signed the Dewatering Contract because Stratus had already began the work and made substantial capital expenditures. Mr. Gibson testified that he believed the plaintiff was protected by the Rate Review Clause.
- [159] The plaintiff argues that they began the Chip and Hog Hot contract in November 2000. There were a number of operational problems relating primarily to the automatic scale system. Mr. Gibson consulted with Mr. Zimmerman with regard to these problems. As a result Mr. Gibson sent the letter which is found at Exhibit 46 tab 46 to ACI. The plaintiff concedes that it is not clear on the evidence who drafted which portion of that letter. The plaintiff argues that they proposed an immediate rate review in that letter.
- [160] The plaintiff argues that Mr. Gibson's evidence was that on or about March 15, 2001 he sought a formal review of the first year rates and asked that they be changed retroactively. The plaintiff argues that the March 26, 2001 letter from ACI which can be found at Exhibit 46 tab 47 is some evidence that a formal rate review was requested because it says the following:
- After careful consideration of the various points that you brought to our attention regarding the circumstances which pertain to the additional cost component that you experienced on both the Dewatering and Chip/Hog haulage to propose the following resolution .
- [161] The plaintiff argues that by the end of August 2001 most of the issues between them and ACI had been resolved other than the issue of the retroactive review of the first year of the Dewatering Contract. On August 29, 2001 Mr. Gibson and his father met with Mr. Zimmerman.
- [162] The plaintiff argues that the draft letter from Mr. Zimmerman dated August 31, 2001 which can be found at Exhibit 46 tab 54 speaks to the Rate Review Clause being retroactive.
- [163] The plaintiff further argues that the second draft letter prepared by Mr. Zimmerman which is found at Exhibit 46 Tab 58 speaks to the plaintiff being compensated to achieve a 12% net profit. Mr. Gibson had input as to the content of this letter. In particular Mr. Gibson wanted the payment from ACI to be changed from \$77,996.92 to \$135,000.
- [164] The final version of the letter of Mr. Zimmerman dated August 1, 2001 which was sent to ACI can be found at Exhibit 46 tab 60. That letter reads in part the following:

Paragraph 1.5 of the Dewatering Contract dated for reference March 15, 2000 sets out that the parties are to review the rates to ensure that Stratus maintains a minimum 12% net profit per annum. In the first year of performing the Dewatering Contract Stratus has not achieved a 12% net profit but rather has suffered a loss. The Dewatering Contract provides for an adjustment to ensure that Stratus remains financially viable. We further remind you that the losses suffered are directly attributable to Abitibi's refusal to negotiate further further payment to ensure the 12% net profit is maintained is causing significant financial impact on Stratus. Darren Gibson has advised Abitibi on many occasions of such financial impact. Please find here with a copy of a Final Notice from WCB which was faxed to Stratus on today's date. As you can see the situation is critical. Yet, Abitibi is still refusing to negotiate payments which Stratus is entitled to pursuant to the Dewatering Contract.

In order for Stratus to maintain a 12% net profit for the 1st year of the Dewatering Contract Darren Gibson has calculated that Abitibi is required to pay approximately \$135,000

[165] The plaintiff notes that Mr. Foulston testified that he spoke to Mr. Zimmerman about his belief regarding the Rate Review Clause.

[166] The plaintiff argues that both Mr. Ross and Mr. Bezeredi agreed that the Rate Review Clause did not act retroactively.

[167] The plaintiff argues that Mr. MacKay has quantified the losses they suffered.

[168] The plaintiff argues that Mr. Gibson gave a clear explanation as to why despite a number of prior inconsistent statements that his evidence on trial was accurate. Mr. Gibson testified that he was not properly prepared nor had he reviewed the documents when he attended at prior examinations for discovery and the trial of the ACI Action.

[169] Mr. Gibson testified that he has now refreshed his memory and reviewed all of the documents related to this case in detail.

[170] The plaintiff also argues that Mr. Gibson was not specifically asked when he was confronted with some of the prior inconsistent statements whether that statement was true. The plaintiff argues that there is no indication whether Mr. Gibson actually adopted the statement.

[171] The plaintiff also argues that Mr. Gibson when confronted with some of the prior inconsistent statements answered that they were true at the time. The plaintiff argues this does not necessarily mean that Mr. Gibson adopted the statement but rather that he was trying to do his best at being truthful when he made the statement.

- [172] The plaintiff does concede that there may be concerns with the evidence of Mr. Gibson because of the many years that have passed however they argue there is evidence that corroborates Mr. Gibson's evidence in the form of the documents on this case and Mr. Foulston's evidence. The plaintiff concedes that Mr. Foulston's evidence and the August 31, 2000 letter from Mr. Zimmerman are only circumstantial indicators of what his instructions from Mr. Gibson were in 2000.
- [173] The plaintiff argues that there is no written retainer in Mr. Zimmerman's file and that where there is any doubt as to the scope of the retainer that must be resolved against the lawyer: *Bergman v. Williams*, 1980 CarswellBC 219.
- [174] The plaintiff argues that the Dewatering Contract drafted by Mr. Zimmerman was deficient in a number of respects. It did not protect work volumes or provide for work protections. The plaintiff also argues that it did not provide that the rates were conditional on the number of contracts awarded. There was also nothing in the contract with regard to operational standards affecting cycle times.
- [175] The plaintiff argues that Mr. Zimmerman breached the duty of care owed to them by not drafting a rate review clause that operated retroactively after the first year. This is a breach of Mr. Zimmerman's duty to carry out his client's instructions.
- [176] The plaintiff argues that the evidence is clear that Mr. Zimmerman did not take any reasonable steps to become familiar with the law governing log hauling contracts or becoming familiar with the applicable statutes.
- [177] The plaintiff argues that Mr. Zimmerman took little or no reasonable steps to become reasonably skilled and competent in relationship to the drafting of the Dewatering Contract.
- [178] The plaintiff argues that Mr. Zimmerman did not give them any meaningful advice regarding the Dewatering Contract.
- [179] The plaintiff argues that Mr. Gibson signed the Dewatering Contract even though he knew the plaintiff did not receive the reclaim work because he believed that he was protected by the Rate Review Clause.
- [180] The plaintiff argues that but for the negligence of Mr. Zimmerman they would not have suffered any damages. Mr. Gibson testified that the plaintiff entered into the Dewatering Contract because they believed to the Rate Review Clause operated retroactively to protect them against losses in the first year.
- [181] The plaintiff argues that they suffered damages even in relationship to the reclaim work which ultimately was not awarded to them.
- [182] The plaintiff argues that the damages awarded in this case are for loss of opportunity.

Defendants

- [183] The defendants argue that the plaintiff has taken 18 years to advance their case to trial. The defendants say that none of the witnesses to the events have any reliable evidence to give. It is the defendants' position that Mr. Gibson has over the past 1 ½ years reconstructed a version of events so as to give rise to a claim against Mr. Zimmerman.
- [184] The defendants argue that the plaintiff has not discharged their onus on a balance of probabilities that Mr. Zimmerman or Wilson King LLP breached any standard of care or has caused any damages to the plaintiff.
- [185] The defendants argue that there is no evidence that ACI did not make best efforts to provide the volume of logs anticipated and in fact the plaintiff received approximately 80% of what it budgeted for.
- [186] The defendants argue that the evidence does not establish that the plaintiff would have done anything differently but for the alleged breaches.
- [187] The defendants argue that Mr. Gibson's evidence amounts to a reconstruction of events based on his review of the documents.
- [188] The defendants note that Mr. Gibson gave evidence at an examination for discovery in 2003 and then at the trial of the ACI Action in 2004. He also gave evidence and examination for discovery in this litigation in 2010 and then in February 2018.
- [189] The defendants argue that while Mr. Gibson gave a detailed narrative on direct examination which has little resemblance to the evidence that he gave on examination for discovery in 2010.
- [190] The defendants argue that Mr. Gibson's explanations for some of the inconsistencies in his prior statements as unsatisfactory. Mr. Gibson says that he did not properly prepare to give his evidence on these previous occasions.
- [191] The defendants note that Mr. Gibson at this trial gave evidence that he did not recall the precise words used by representatives of Donohue in relationship to representations he says were made as to the cycle times of the Colby Crane. However the defendants note that Mr. Gibson deposed at his examination for discovery in February 2018 that Mr. Kovacs spoke the words "were representing to you that 16 will be the minimum cycle time". Mr. Gibson agreed that was true but tried to backtrack on his evidence and say that he did not mean to imply the word represented was used.
- [192] The defendants argue that Mr. Gibson's evidence should be rejected in its entirety.
- [193] The defendants argue that the evidence of Mr. Foulston is very limited in its scope. He is a long time friend of Mr. Gibson's and he believes he recalls in a 10 minute telephone conversation approximately 17 years ago that Mr. Zimmerman used the word "maintain" because Stratus was going to maintain a 12% profit throughout the term of the contract.

- [194] The defendants argue that Mr. Zimmerman was advancing the position of Stratus in his August 30, 2001 letter. The defendants argue that given Mr. Foulston did not call Mr. Zimmerman at the trial of the ACI Action or speak to him again suggests that he knew Mr. Zimmerman was just explaining his client's position during their phone call.
- [195] The defendants argue that Mr. Foulston's explanation that he did not call Mr. Zimmerman at the trial of the ACI Action because of the parol evidence rule is inconsistent with his actions of waiving privilege over Mr. Zimmerman's drafts of the Dewatering Contract.
- [196] The defendants also note that Mr. Foulston's legal opinion of the Rate Review Clause was that it operated to maintain a profit of 12% throughout the term of the contract.
- [197] The defendants argue that given the unreliability of these witnesses, this matter should be decided based on the documents.
- [198] The defendants argue that the plaintiff was awarded the Dewatering Contract by February 7, 2000 because that appears in a number of the documents. Those being Exhibit 15 which is a timeline Mr. Gibson prepared for Mr. Foulston on December 7, 2001 and Exhibit 16 which is the handwritten draft prepared by Mr. Gibson of Exhibit 15.
- [199] Also Exhibit 46 tab 86 is the writ of summons filed by the plaintiff in the ACI Action which states the following at para 13:

On or about February 7th 2000 DFP instructed Stratus to proceed with the proposal verbally and Stratus began mobilizing equipment fleet to service of the contract and manufacturing the special experimental log trailers required.

- [200] The defendants argue this occurred prior to any meeting that Mr. Gibson had with Mr. Zimmerman. The defendants also argue that Mr. Gibson took the position that there be a 5% discount to the Dewatering Contract so that he could secure additional contracts as evidenced in his letter of February 17, 2000 to Mr. Godfrey which is found in Exhibit 46 tab 6.
- [201] The defendants argue that there is no reliable evidence as to what was discussed between Mr. Gibson and Mr. Zimmerman as to the Rate Review Clause.
- [202] The defendants note that even Mr. Ross opines that if Mr. Zimmerman was not specifically instructed by Mr. Gibson that the rates were to be adjusted after each year then it is his belief that a reasonably prudent solicitor knowledgeable in the logging industry would not necessarily have asked Mr. Gibson if he intended the rate to be retroactive.
- [203] Mr. Bezeradi also agrees with that point.
- [204] The defendants argue that based on the evidence the Rate Review Clause had the prospective effect that both experts solicitors opined a reasonably prudent solicitor would have assumed it was to have absent specific and clear instructions from the client to the contrary. The defendants say there were no instructions to the contrary in this case.

[205] The defendants argue that there is no evidence that Mr. Zimmerman was aware that the Dewatering Contract was not signed immediately or that the reclaim work was cancelled. There is also no evidence that Mr. Zimmerman was aware that the plaintiff began working on both of these contracts without a signed agreement.

[206] The defendants argue that Mr. Gibson was invited to bid on the Chip and Hog Contract in July 2000. Exhibit 46 tab 34 is the tender for the Chip and Hog Contract which clearly states the following:

Term: 2 or 3 year term with prices firm for 1 year and any price change for the duration of the term to have a detailed breakdown of the components that would require a change (+ or -) to the initial year's price. (DFPI) will consider a term up to 5 years if significant cost reductions are committed to and attained.

[207] There is no evidence that Mr. Zimmerman was consulted or drafted the Chip and Hog Contract. Mr. Gibson inserted the Rate Review Clause into the Chip and Hog Contract knowing that the tender said that the "prices firm for 1 year". The defendants argue that Mr. Gibson knew in or about August 2000 that the language of the Rate Review Clause was prospective and not retrospective in nature.

[208] The defendants also argue that the evidence clearly establishes that Mr. Gibson despite the fact that he did not receive the reclaim work and still had to give a discounted rate for the Dewatering Contract in August 2000 he nonetheless signed the Dewatering Contract without any consultation from Mr. Zimmerman.

[209] The defendants argue that Mr. Gibson would not have agreed in February 9, 2001 not to claim any waiting time for the year 2000 dewatering issues if he truly believed that he could retroactively review the year 1 rates on the Dewatering Contract. Mr. Zimmerman was not consulted with regard to this agreement.

[210] The defendants argue that with regard to the letter sent by Mr. Gibson to ACI on February 27, 2001 found at Exhibit 46 tab 46 it is not clear whether Mr. Zimmerman "ghost wrote" some or all of this letter. The defendants also argue that the content of the letter is inconsistent with Mr. Gibson believing that there was an entitlement to a retroactive rate review because Mr. Gibson demanded in that letter that the rates be increased not retroactively to the start date of the Chip and Hog contract of November 1, 2000 but rather to a date when additional costs were incurred by the plaintiff on January 24, 2001.

[211] The defendants further argue that the letter of March 26, 2001 found at Exhibit 46 tab 47 which Mr. Gibson signed is inconsistent with the view that the plaintiff was entitled by March 15, 2001 to a retroactive increase in its year one rates.

- [212] The defendants argue that it is clear on the evidence that Mr. Gibson accepted the terms of the March 26, 2001 letter by April 15, 2001. This is because the plaintiff's own general ledgers show payments of \$25,000 and \$26,000 respectively as of April 15, 2001. The defendants argue that Mr. Gibson's evidence is unreliable when he says that he spoke to Mr. Zimmerman about this agreement at his meeting of April 25, 2001.
- [213] The defendants also argue that there is no evidence that Mr. Zimmerman was ever provided with the March 26, 2001 letter and there is no evidence that Mr. Zimmerman was aware that the plaintiff had waived any of their claims relating to the dewatering issues.
- [214] The defendants argue that Mr. Zimmerman in his letter of August 31, 2001 was taking an adversarial position on behalf of his client
- [215] The defendants argue that the onus of proving a breach of the standard of care of Mr. Zimmerman is on the plaintiff. The evidence discloses that Mr. Zimmerman was not consulted or retained to do anything with regard to the revised Dewatering Contract which omitted the reclaim work that the plaintiff signed. He was not retained to advise on the Chip and Hog Contract which the plaintiff entered into.
- [216] The defendants argue that the standard of care is not perfection. The defendants say that Mr. Zimmerman only failed to anticipate that Mr. Gibson might eventually make the assertion that the Rate Review Clause was to be applied retroactively.
- [217] The defendants agree that the test for causation is whether the loss alleged would have occurred but for any breach the court might find.
- [218] The defendants argue that despite the fact that the plaintiff was not awarded the reclaim work and still had to provide a discounted rate Mr. Gibson signed the Dewatering Contract. The defendants say that these changes did not deter Mr. Gibson from signing the contract so even assuming a breach of a duty on the part of Mr. Zimmerman, Stratus would have proceeded on the contract in any event.
- [219] The defendants argue that they are not responsible for any of the litigation fees incurred by the plaintiff with regard to the ACI action. Mr. Zimmerman only referred the plaintiff to a litigator Mr. Foulston. The litigation was pursued on the advice of Mr. Foulston which turned out to be erroneous.
- [220] The defendant's argue that the lack of profitability of the ACI contracts has a number of causes which are unrelated to the wrongful conduct alleged by the plaintiffs.
- [221] The defendants also argue that ACI advanced to Stratus an amount totaling \$205,904.50. \$155,800.03 of these advances were on account of the Dewatering Contract. The defendants argue this amount is greater then the alleged losses by the plaintiff with regard to the year 1 of the Dewatering Contract. The plaintiff did not repay these advances to ACI therefore there is no loss.

[222] The defendants argue that the report of Mr. MacKay is based on a number of assumptions that have not been established in the evidence.

[223] The defendant also argues that the ore haul revenue of approximately \$300,000 has to be deducted from any calculations of damages.

Decision

[224] This solicitor's negligence case involves meetings and telephone conversations that occurred 18 years ago. This case also involves documents which were drafted 18 years ago.

[225] In *Mustapha v. Culligan Canada*, 2008 SCC 27 the court outlined the elements that are required in a successful negligence case at para. 3:

A successful action in negligence requires that the plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach

[226] In *Millican v. Tiffin Holdings Ltd.*, [1964] A.J. No. 103 discussed the standard of care that a lawyer who is a client at paras. 7 and 10:

[7] Lawyers are bound to exercise a reasonable degree of care, skill and knowledge in all legal business they undertake. Their liability arises out of contract. The standard of care and skill which can be demanded from a lawyer is that of a reasonably competent and diligent solicitor. It is not enough to prove that the lawyer has made an error of judgment or shown ignorance of some particular part of the law; it must be shown that the error or ignorance was such that an ordinary competent lawyer would not have made or shown it.

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[10] The obligations of a lawyer are, I think, the following: (1) To be skilful and careful; (2) To advise his client on all matters relevant to his retainer, so far as may be reasonably necessary; (3) To protect the interests of his client; (4) To carry out his instructions by all proper means; (5) To consult with his client on all questions of doubt which do not fall within the express or implied discretion left to him; (6) To keep his client informed to such an extent as may be reasonably necessary, according to the same criteria.

[227] The court in *Carlsen v. Southerland*, 2006 BCCA 214 further clarified the standard of care for professionals at para. 13:

[13] In my opinion, the standard of care that applied in this case was that stated in *Wilson*. The "standard of excellence" to which Dr. Southerland was subjected by the trial judge amounted to a standard of perfection that the law has never, for obvious and good reasons, imposed on physicians and surgeons.

- [228] There were three witnesses called who had factual evidence to give regarding what occurred in the years 2000 to 2002.
- [229] The defendant Mr. Zimmerman had virtually no recollection of his interactions with Mr. Gibson who is the principal of the plaintiff Stratus. Mr. Zimmerman was able to testify about his practices as a solicitor in 2000 and decipher his notes where needed.
- [230] Mr. Zimmerman also testified that with regard to the letter of August 31, 2001 he drafted this letter a year after he drafted the Rate Review Clause and that the letter was a position being put forward by Stratus.
- [231] Mr. Zimmerman also testified that he had no expectation that the Rate Review Clause was going to be used as a precedent in other agreements.
- [232] The case for the plaintiff relies primarily on the evidence of Mr. Gibson and the documents that have been made as exhibits in this case.
- [233] I had considerable difficulty with the evidence of Mr. Gibson. Mr. Gibson testified that he specifically instructed Mr. Zimmerman to draft a clause in his contracts with ACI that would guarantee him a 12% net profit in each of the five years of the contract and would have a retroactive review of the rates charged by Stratus after year 1.
- [234] This case came to trial 18 years after Mr. Gibson's interactions with Mr. Zimmerman. There are no notes in Mr. Zimmerman's file which would suggest that the Rate Review Clause would be retroactive in nature. There is a letter drafted by Mr. Zimmerman on August 29, 2001, more than a year after that clause was drafted, which is some evidence in that regard.
- [235] Mr. Gibson gave evidence at an examination for discovery in the ACI Action in 2003 and gave evidence at the trial in the ACI Action in 2004. In addition Mr. Gibson gave evidence at an examination for discovery in this matter in November 2010 and again in February 2018.
- [236] Mr. Gibson was confronted with a number of inconsistencies during his testimony with his previous testimony given at examinations for discovery and the trial of the ACI Action. Mr. Gibson when confronted with a number of these inconsistencies testified that the prior statements were true at the time.
- [237] Mr. Gibson when confronted with some of the prior inconsistent statements was not asked whether or not the prior statement was true. I agree with counsel for the plaintiff that in those circumstances it cannot be said that Mr. Gibson adopted the prior statement and therefore it cannot be admitted for the truth of its contents: *R. v. F.(C)*, 3 S.C.R. 1183 at para. 31.
- [238] I also agree with counsel for the plaintiff that in the circumstances where Mr. Gibson when confronted with a prior inconsistent and he answered that it was true at the time it cannot be said that Mr. Gibson adopted the prior statement and therefore it cannot be admitted for the truth of its contents: *R. v. F.(C)*, at para. 32.

- [239] The difficulty I have with the evidence of Mr. Gibson is that he said many times during his testimony that his evidence given during this trial was accurate and any previous evidence that he gave may not have been accurate because he only recently reviewed all of the documents in this case to prepare for this trial.
- [240] Mr. Gibson was represented by Mr. Foulston during the examination for discovery and the trial on the ACI Action. Mr. Gibson was also represented by counsel during the examinations for discovery in 2010 and 2018 in this matter.
- [241] I do not accept Mr. Gibson's evidence that he just recently reviewed the documents and refreshed his memory from them. The ACI Action and this matter are of significant importance to Mr. Gibson. Mr. Gibson is not an unsophisticated person. He also presented as quite deliberate in giving his evidence. Mr. Gibson's evidence was that he in fact did not really review the documents in preparation on any of the previous occasions that he testified.
- [242] Mr. Gibson's evidence is that he now has a recollection of the events from 2000 and 2001 after reviewing the documents in detail which only recently occurred.
- [243] It is common sense that the passage of time is going to affect anyone's memory particularly in a case like this where the events occurred 18 years ago. I do not accept that Mr. Gibson's memory is now "refreshed" because he looked at the documents on this file some 18 years after the fact.
- [244] A significant example in the testimony of Mr. Gibson where he is clearly mistaken on a material point is his evidence regarding the March 26, 2001 letter sent to him by ACI regarding the payments of \$25,000 and \$26,000 respectively. Mr. Gibson testified that he spoke to Mr. Zimmerman about this letter on April 25, 2001 before he signed it.
- [245] The plaintiff's own general ledger documents show that these payments were received from ACI by the plaintiff on April 15, 2001. Mr. Gibson when confronted with this tried to suggest that he did not know what date his bookkeeper was using.
- [246] Mr. Gibson could not and did not speak to Mr. Zimmerman about these payments prior to him accepting the conditions of the March 26, 2001 letter. This is a clear example of where Mr. Gibson has reconstructed events to benefit the plaintiff's case as opposed to refreshing his memory.
- [247] Mr. Gibson's actions clearly suggest that his memory of events is not accurate.
- [248] Mr. Gibson testified that he believed that the Rate Review Clause would protect Stratus and ensure that they had a 12% net profit even in the first year. He believed that this clause could be applied retroactively. Mr. Gibson testified that he sought a formal review of the year 1 rates on or about March 15, 2001.
- [249] I have considerable difficulty with these statements for a number of reasons.

- [250] Mr. Gibson accepted the payments of \$25,000 and \$26,000 by April 15, 2001 from ACI. These actions are inconsistent with Mr. Gibson's evidence that he sought a formal review of the year 1 rates. If the plaintiff had lost as much money as Mr. Gibson said he would have vigorously pursued a review at that time which on his evidence the plaintiff was entitled to do. Also it is inconsistent for Mr. Gibson to accept the terms in the letter of March 26, 2001 if he believed that Stratus was entitled to a retroactive review of the year one rates.
- [251] Mr. Gibson testified that he began work on the Dewatering Contract in May 2000 and the reclaim work in April 2000. He did not however have a signed agreement until August 24, 2000 with ACI. Mr. Gibson testified that he signed that agreement without the plaintiff being awarded the reclaim work and still having to give a 5% discount on the Dewatering Contract even though the plaintiff was not awarded multiple contracts.
- [252] Mr. Gibson testified that he signed the Dewatering Contract in its amended version because the plaintiff had already purchased equipment and he thought the Rate Review Clause would protect the plaintiff.
- [253] Mr. Gibson gave evidence that he was involved in the logging business since approximately 1987 and incorporated Stratus in 1995. It is inconceivable that he would think that the Rate Review Clause would protect Stratus and ensure a 12% profit in a situation where he had already purchased equipment for the reclaim work which he was not ultimately awarded or in a situation where the plaintiff agreed to a 5% reduction in the rates.
- [254] Mr. Gibson gave evidence that one of the significant issues on the Dewatering Contract in the first year was the issue of waiting time of his trucks. Mr. Gibson signed a letter on February 9, 2001 found at Exhibit 46 tab 40 where he among other things agreed not to claim for waiting time for any 2000 dewatering issues. If Mr. Gibson truly believed that the Rate Review Clause was retroactive in its effect he would not have bargained away the waiting time issue which on his evidence was a significant problem for the plaintiff.
- [255] Mr. Gibson also gave evidence with regard to the Chip and Hog Contract. He entered into this agreement without any consultation with Mr. Zimmerman. He testified that he used the Rate Review Clause in that contract. He testified that he thought that clause would operate in the same fashion as in the Dewatering Contract. I do not accept this evidence because the Chip and Hog Tender that Mr. Gibson bid on specifically says that the "prices firm for 1 year and any price change for the duration of the term to have a detailed breakdown of the components...".
- [256] It is clear on the face of the tender that there could not be a retroactive review of the prices for year 1. I find that Mr. Gibson knew the Rate Review Clause operated prospectively.
- [257] I do not accept the evidence of Mr. Gibson that he now remembers having conversations with Mr. Zimmerman that the Rate Review Clause would allow the plaintiff to maintain a 12% net profit even in year 1 or that Mr. Gibson instructed Mr. Zimmerman that the Rate Review Clause should be retroactive in nature for the above noted reasons.

- [258] Mr. Foulston candidly admitted that his memory of some of the events relevant to this case are a bit foggy. He also testified that he did not retain any of the documents from his file other than documents relating to his billings and his notes.
- [259] Mr. Fouston testified that he had a brief conversation with Mr. Zimmerman in the presence of Mr. Gibson near the end of 2001. Mr. Zimmerman explained to him that the rate Review Clause was an adjustment clause for years 1 - 5.
- [260] Mr. Foulston did not have any other discussions with Mr. Zimmerman. He did not call Mr. Zimmerman at the trial of the ACI Action.
- [261] Mr. Foulston was provided with a letter that Mr. Zimmerman drafted on August 31, 2001. Interestingly, while Mr. Foulston had not seen a clause like the Rate Review Clause he clearly was of the opinion that it provided for a review of the year 1 profits on the Dewatering Contract.
- [262] Having reviewed the August 31, 2001 letter as well as the previous drafts of that letter I accept Mr. Zimmerman's evidence that this letter encompassed a position taken by the plaintiff.
- [263] While the August 31, 2001 letter as well as Mr. Foulston's evidence provides some circumstantial evidence that the Rate Review Clause was meant to ensure an annual 12% net profit and was to be applied retroactively that evidence does not convince me that Mr. Gibson instructed Mr. Zimmerman to that effect. Mr. Gibson's actions as I have noted above are entirely inconsistent with his view that the Rate Review Clause is retroactive in nature.
- [264] Both Mr. Ross and Mr. Bezeradi opined that absent specific and clear instructions to the contrary a reasonably prudent solicitor would have drafted an annual rate review or adjustment clause to operate prospectively.
- [265] The plaintiff has not established on a balance of probabilities that Mr. Gibson or anyone else on behalf of the plaintiff specifically instructed Mr. Zimmerman that the Rate Review Clause should operate retroactively.
- [266] I do not find that Mr. Zimmerman breached any duty of care owed by him to the plaintiff.
- [267] I also do not accept that Mr. Zimmerman breached any duty of care owed to the plaintiff with regard to the specific terms in the Dewatering Contract. Mr. Zimmerman testified that he drafted the Dewatering Contract in accordance to Mr. Gibson's instructions. I accept his evidence in that regard.

- [268] The Dewatering Contract that Mr. Gibson ultimately signed with ACI was different than the one drafted for him by Mr. Zimmerman. Mr. Gibson did not contact Mr. Zimmerman with regard to these changes relating to the reclaim work and volume discounts. The evidence does not establish that the Dewatering Contract that Mr. Zimmerman drafted was deficient and in any event Mr. Gibson chose to sign an agreement which was different than the one drafted by Mr. Zimmerman without consulting him.
- [269] Even if I had found that Mr. Zimmerman did breach a duty of care owed by him to the plaintiff I do not accept Mr. Gibson's evidence that he would not have entered into the contracts with ACI if he was aware that the Rate Review Clause did not operate retroactively.
- [270] In *Fong v. Lew* 2015 BCSC 436 Madam Justice Adair in discussing causation in negligence cases stated the following at paras. 33-35:
- [33] The traditional test for determining causation in negligence cases is the "but for" test, which requires the plaintiff to prove on a balance of probabilities that his or her loss would not have occurred but for the negligence of the defendant: see *Newton v. Marzban*, 2008 BCSC 328, at para. 749 (citing *Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 14 and *Resurface Corp. v. Hanke*, 2007 SCC 7, at paras. 21- 22).
- [34] A finding of breach of duty is a separate factual issue from that of causation: see, for example, *Graybiar*, at p.181. Causation cannot be assumed from breach of duty. There must be proof that the breach of duty caused damage or loss to the plaintiff. A plaintiff who proves duty, breach of the standard of care and damages will still be unsuccessful in the action unless the plaintiff proves a causal link between the breach of the standard of care and the damage: see *Graybiar*, at p. 181.
- [35] The causation issues in this case are often based on the assertion that the client would have behave differently (and avoided a loss) if only the client had received proper legal advice. In that respect, I have found the following observation of Nielsen J. (as she then was) in *Newton* to be helpful:
- [761] I adopt the view of Groberman J. in *Sports Pool Distributors Inc. v. Dangerfield*, 2008 BCSC 9 at para. 97 that in cases of professional negligence a bare assertion that a client would have behaved differently if he or she had received proper advice should be viewed with some scepticism. Like Mr. Justice Groberman, I endorse this observation of Southin J.A. in *Hong Kong Bank of Canada v. Touche Ross & Co.* (1989), 36 B.C.L.R. (2d) 381 at 392 (C.A.):

It is always easy for a witness to say what he would have done and for a judge to say he accepts that assertion. But such evidence is, in truth, not evidence of a fact but evidence of opinion. It should be tested in the crucible of reason.

- [271] In the case at bar Mr. Gibson's bare assertion that he would have behaved differently had he received the advice from Mr. Zimmerman that the Rate Review Clause did not protect him for year 1 of the Dewatering Contract is not consistent with his actions. The plaintiff began

performing the dewatering and reclaim work without a signed contract. Mr. Gibson signed the Dewatering Contract despite the fact that over \$400,000 in revenue would not be included in the form of the reclaim work. And Mr. Gibson signed the Dewatering Contract despite the fact that ACI required a 5% rate reduction.

[272] Mr. Gibson also gave evidence that he had already made purchases of equipment with regard to the dewatering and reclaim work. Mr. Gibson gave evidence that the ore hauling contract was coming to an end in 2000. He wanted work which was closer to home and his family. The Dewatering Contract would allow him to fulfil that wish. I find that Mr. Gibson would have signed the Dewatering Contract even if he was aware that it was not retroactive in operation.

[273] The plaintiff has not established that but for the alleged breach with respect to the drafting of the Dewatering Contract they would not have entered into these contracts with ACI.

[274] In *Hussack v. Chilliwack School District No. 33* 2011 BCCA 258 the court explained the difference between causation in fact and causation in law at para. 54:

The losses or injuries sustained by the plaintiff are not compensable unless they were caused in fact and in law by the defendant's negligent conduct. In order to establish causation, the plaintiff must demonstrate first, that the damage was caused in fact by the conduct of the defendant, and second, that the conduct of the defendant was a proximate cause of the loss, or in other words, that the damage was not too remote from the factual cause. This is referred to as causation in law. The remoteness inquiry assumes that but for the defendant's wrongful act, the plaintiff's loss would not have occurred, but places legal limits on the defendant's liability. See: S.M. Waddams, *The Law of Damages*, looseleaf (Toronto: Canada Law Book, 1991) at para. 14.450.

[275] I have already found that the plaintiff has not established causation in fact. While the inquiry into causation ends there I will comment that in my view the plaintiff has not established causation in law. The actions of Mr. Gibson on behalf of the plaintiff after Mr. Zimmerman drafted the Dewatering Contract were unforeseeable.

[276] The plaintiff began the dewatering and reclaim work without a signed agreement. The plaintiff eventually signed the Dewatering Contract without a reclaim component to it and at a discounted rate.

[277] The plaintiff signed the Chip and Hog contract without Mr. Zimmerman's knowledge as well as a lumber haul contract. All of these factors significantly contributed to the financial difficulties of the plaintiff. The reality is that the plaintiff made a number of business decisions which were not foreseeable by the defendants.

Conclusion

[278] The plaintiff has not established that the defendants breached any duty of care owed to them nor have they established that the defendants breached their contract with the plaintiff.

[279] The plaintiff's claims are dismissed.

[280] The defendants are entitled to their costs of this action.

"The Honourable Mr. Justice Tindale"

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Prepared on 27 October 2026 · Esheria