

CANADA / JUDGMENT

Upm Raflatac, Inc. v. Okanagan Label & Print Ltd.

2022 BCSC 1154

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1154 UPM Raflatac, Inc. v. Okanagan Label & Print Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

UPM Raflatac, Inc. v. Okanagan Label & Print Ltd.,

2022 BCSC 1154

Date: 20220708

Docket: S1813270

Registry: Vancouver

Between:

UPM Raflatac, Inc.

Plaintiff/Defendant by Counterclaim

And

Okanagan Label & Print Ltd.

Defendant/Plaintiff by Counterclaim

Before: The Honourable Madam Justice Warren

Reasons for Judgment

Counsel for the Plaintiff/Defendant by Counterclaim via videoconference:

J. Buysen

K. Campbell

Counsel for the Defendant/Plaintiff by Counterclaim via videoconference:

S. Kelly

Place and Date of Hearing:

Vancouver, B.C.

May 17, 2022

Place and Date of Judgment:

Vancouver, B.C.

July 8, 2022

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Introduction

[1] In this proceeding the plaintiff, UPM Raflatac, Inc. ("UPM"), seeks judgment in the amount of \$184,100.23 plus contractual interest in respect of unpaid invoices for label paper it supplied to the defendant, Okanagan Label & Print Ltd. ("OKLP"), between July 2017 and February 2018. OKLP concedes that it owes UPM the amount claimed but it says that other label paper it purchased from UPM was defective and, by counterclaim, it seeks to recover the amount it paid for the allegedly defective paper (\$8,909.54) plus additional damages for breach of contract (which it quantifies at \$115,683.08). OKLP asserts the right to set off its counterclaim against UPM's claim. UPM says that OKLP's counterclaim is subject to a contractual limitation of liability clause that limits UPM's liability to the invoiced value of the allegedly defective paper (\$8,909.54).

[2] UPM has applied, by summary trial, for:

a) a declaration that UPM's general sales conditions form part of the sales contracts in issue;

- b) a declaration that OKLP owes UPM \$184,100.23 plus interest calculated in accordance with the general sales conditions (12% per annum from the date of each invoice);
- c) a declaration that UPM's general sales conditions limit OKLP's counterclaim to the invoiced value of the allegedly defective paper (\$8,909.54); and
- d) an order that OKLP pay UPM \$184,100.23 plus interest at 12% per annum from the date of each invoice, less a holdback of \$8,909.54 (the invoiced value of the allegedly defective paper).

Background

- [3] UPM is a global manufacturer and supplier of pressure sensitive label paper for a variety of industries, including the wine and spirit industries. OKLP operates a label business in Penticton, British Columbia, focused on designing, manufacturing, and printing labels that its customers then affix to their products (primarily wine bottles).
- [4] UPM's customers select a type of label paper as well as an adhesive, the choice of which depends on several factors such as the type of product that the paper will be affixed to and the conditions under which it will be applied. The label paper is usually sold to customers in large rolls of 5,000 to 10,000 feet. UPM's customers run the label paper through a printing press to create distinct labels that are then sold to an end user, such as a winery, to be affixed to the final product.
- [5] OKLP has been a customer of UPM since 2012. Between 2012 and 2018, OKLP placed hundreds of orders with UPM for over a million dollars worth of products. It is not disputed that each transaction was carried out in the same manner.
- [6] OKLP emailed a purchase order to UPM. The purchase order identified the product that OKLP wanted to purchase and the unit price. Within two or three days of receiving a purchase order, UPM sent an electronic order confirmation to OKLP. Each order confirmation was generated from a standardized template and included the order number, dispatch date, estimated delivery date, label paper sales code, quantity, price, UPM's website address, and terms of payment. Of particular significance, each order confirmation also included the following statement:

Additionally the General Sales Conditions of UPM Raflatac are applied.

- [7] Representatives of OKLP, including OKLP's founder and president, James Parker, and OKLP's general manager, Bob Holmes, received and reviewed each order confirmation, usually within a day of receipt, to confirm the product, receiving date, and price.

- [8] After issuing an order confirmation, UPM dispatched the order for delivery to OKLP. Within three days of delivery, UPM emailed an invoice to OKLP. Each invoice was generated from a standardized template and included the amount due, the terms of payment, and the overdue interest rate of 12% per annum. Of particular significance, each invoice also included the following statement:

The General Sales Conditions of Raflatrac Group for labelstock products and services shall exclusively apply unless agreed otherwise. The terms will be provided to you upon request and are also available at www.upmraflatrac.com.

- [9] Mr. Parker and Mr. Holmes reviewed each invoice.

- [10] During the material time (between 2016 and 2018), UPM's general sales conditions remained substantively the same but were updated from time to time. At any given time, the current version of UPM's general sales conditions was available on its website.

- [11] UPM's general sales conditions in place in 2016 included the following terms:

5. PAYMENT

5.1 Payment shall be made in accordance with the term of payment and at the time or times agreed upon in the contract [45 days net from the date of each invoice].

5.2 If the Buyer defaults in making any payment on the date agreed upon in the contract, the Seller shall be entitled to charge interest on the amount overdue starting from the date of invoice until the invoice has been paid in full. The effective rate shall be stated on the invoice [12% per annum].

6. QUALITY OF GOODS

6.2 The Buyer shall check the quality of delivered goods upon receipt. If the quality is not in accordance with the quality contracted for, then the Buyer has to inform the Seller in writing immediately.

6.3 Claims for defects of quality shall be made by the Buyer as soon as the defect is discovered, but at the latest within three (3) months from the time the goods are discharged at the place of the Buyer's warehouse.

6.5 The Buyer shall whenever considered necessary by the Seller allow the inspection of the whole delivery including the defective goods as well as non-defective goods by the Seller or its representative. In case inspection of the whole delivery is not possible, the liability of the Seller shall not exceed the invoice value of the defective goods that the Seller has had the possibility to inspect.

6.6 The buyer shall bear the burden of proof for the defective goods.

8. WARRANTY, LIMITATION OF DAMAGES AND WAIVER

Warranty: The Seller warrants to the Buyer that the products sold shall be free from defects in material and workmanship and shall comply with all specifications expressly agreed in writing by the Seller to be applicable to this sale. No other warranty, express or arising by operation of law or trade usage or otherwise implied, including without limitation the warranty of merchantability and the warranty of fitness, shall exist. All such warranties are hereby disclaimed by the Seller and waived by the Buyer. There are no warranties which extend beyond those expressly given herein.

8.1 Defective goods shall be replaced by goods of agreed quality as soon as possible. The replacement shall be carried out by the Seller without cost to the Buyer. The parties may alternatively agree upon a price-reduction or a reimbursement of the price paid in order to compensate the Buyer for the difference in the value of goods of agreed quality and defective goods. The liability of the Seller shall not apply to defects due to causes arising after the risk of goods has passed on the Buyer. Replacement of defective goods or a price reduction shall exclude any other remedies of the Buyer pertaining to inferior quality of the goods delivered. Defective goods replaced or reimbursed as aforesaid shall upon request of the Seller be placed at the disposal of or returned to the Seller.

8.2 When either party is liable in damages to the other under the contract, these shall not include consequential damages. Damages shall in no case exceed the invoiced value of any single delivery or part thereof that has been delayed or defective. In the event that the Seller can prove that the specification provided by the Buyer has been duly complied with, no liability for damages exists.

8.3 If one party alleges a breach of contract by the other party, he must take all necessary and reasonable measures to mitigate the loss.

8.4 The failure of either party at any time to require performance by the other party of any provision hereof shall in no way effect the full right to require such performance at any time thereafter. Nor shall the waiver by either party of a breach of any provision hereof be taken to be a waiver of any succeeding breach of such provision or a waiver of the provision itself.

[12] The general sales conditions were revised on two occasions during the material time, but there were no substantive changes made to the material provisions. For example, the preamble to clause 8 and clause 8.2 in the 2016 version were not changed in the first revision and, in the second revision, those became clauses 6.1, 7.2, and 7.3:

6.1 The Products are at the moment of delivery free from defects in material and workmanship and shall comply with all specifications expressly agreed in writing in the Sales Agreement to be applicable to the sale. No warranty, express or arising by operation of law or trade usage or otherwise implied, including without limitation the warranty of merchantability and the warranty of fitness, shall exist. All such warranties are hereby disclaimed by the Supplier and waived by the Purchaser. There are no warranties which extend beyond those expressly given herein. Purchaser must make its own qualification and suitability testing before using Supplier's products as the suitability of Supplier's products in Purchaser's own or its customers products is solely on Purchaser's responsibility.

7.2 The Supplier shall in no circumstances be liable for any indirect, consequential, incidental or punitive damages or losses incurred by the Purchaser in connection with the Products or the Sales Agreement including but not limited to loss of profits, revenue, production or goodwill.

7.3 In the event of the Supplier being liable in damages under any Sales Agreement, the damages shall be limited to (1) any proven direct damages (but excluding loss of revenues or profits) incurred by the Purchaser up to the amount equal to the purchase prices of the products giving rise to such claim (ii) to 10,000 euros if the liability is not arising from or relating to a Product.

- [13] Mr. Parker reviewed UPM's general sales conditions at the commencement of the business relationship between OKLP and UPM. He read the reference to the general sales conditions on the invoices. He knew that the general sales conditions were available on request and that he could access the general sales conditions on UPM's website.
- [14] OKLP never objected to the general sales conditions. It routinely ordered goods from UPM pursuant to the order process described above and then received and used the goods.
- [15] Between June 2016 and May 2017, OKLP ordered, and UPM delivered, label paper in the total invoiced amount of \$45,080.58 (the "Disputed Goods"). The Disputed Goods were ordered and delivered in the usual manner: that is, with a purchase order, order confirmation, and invoice. Each order confirmation and invoice expressly stated that the general sales conditions applied. OKLP paid the invoices associated with the Disputed Goods.
- [16] In March 2017, Mr. Parker verbally complained to UPM about some of the Disputed Goods. In August 2017, OKLP submitted a written defect claim to UPM, alleging that some of the Disputed Goods had adhesion and moisture problems (the "Defect Claim").
- [17] The Defect Claim identified certain rolls of label paper that were allegedly defective. The allegedly defective rolls reflected \$8,909.54 of the total amount that had been paid in respect of the Disputed Goods. In addition to the \$8,909.54, OKLP claimed \$115,683.08 in consequential damages including, among other things, product testing and investigation expenses, and the costs associated with removing defective labels from its customers' bottles, printing new labels, and reapplying new labels.
- [18] Between September 2017 and January 2018, UPM and OKLP exchanged numerous emails concerning the Disputed Goods in an attempt to resolve the Defect Claim.
- [19] Between July 2017 and February 2018, OKLP ordered, and UPM delivered, additional label paper in the total invoiced amount of \$184,100.23 (the "Unpaid Goods"). The Unpaid Goods were ordered and delivered in the usual manner: that is, with a purchase order, order confirmation, and invoice. Each order confirmation and invoice expressly stated that the general sales conditions applied. OKLP did not pay the invoices associated with the Unpaid Goods.

- [20] In or around January 2018, Jeff Buchanan, a UPM representative, concluded that OKLP had failed to demonstrate any defects in the Disputed Goods. He communicated this conclusion to Mr. Parker.
- [21] In or around March 2018, UPM denied the Defect Claim. At that time, OKLP stopped ordering label paper from UPM.
- [22] There is no dispute that OKLP owes UPM for the Unpaid Goods. However, OKLP claims a right to set off the amount of the Defect Claim.

Positions of the parties

[23] UPM emphasizes that the action involves two distinct claims:

1. Its claim that OKLP owes it \$184,100.23 plus interest at 12% per annum from the date of each invoice for the Unpaid Goods. OKLP does not contest that it owes this amount but claims the right to a set off.
 2. OKLP's claim that some of the Disputed Goods were defective. It seeks to recover the amount paid for those (\$8,909.54), plus consequential losses (\$115,683.08). In addition to denying that any of the Disputed Goods were defective, UPM says that its general sales conditions were incorporated into each sales contract and limit OKLP's claim to the invoiced value of any defective goods.
- [24] UPM stresses that the Court is not asked, on this application, to determine whether any of the Disputed Goods were defective. The sole issue to be determined on this application is whether OKLP's counterclaim is limited to the value of any defective goods.
- [25] UPM notes that on a summary trial, the court may grant judgment "either on an issue or generally" if it is able to find the facts necessary to decide the matter and it would be just to do so. It says the narrow issue that must be decided at this time is neither factually nor legally complex. In addition, UPM submits the resolution of this issue will promote judicial efficiency by determining whether OKLP's claim, at its highest, is worth \$8,909.54 or about \$125,000, which will inform how (or whether) such a claim is pursued.
- [26] On the merits, UPM says when the parties' conduct is considered as a whole, it is clear that its general sales conditions applied to all the sales in issue. UPM submits that the limitation of liability in the general sales conditions clearly applies to OKLP's counterclaim, was not unconscionable at the time the sales contracts were made, and is not contrary to public policy. Accordingly, UPM submits that OKLP's counterclaim is limited to the invoiced value of the allegedly defective goods.

- [27] OKLP submits that this matter is not suitable for resolution by summary trial because ascertaining the applicable contractual terms is too complex and the evidentiary record is insufficient. In particular, OKLP says that to determine the applicable contractual terms it is necessary to consider the commercial context including industry standards and the history of the dealings between the parties, and there is insufficient evidence in the record to make findings about those matters.
- [28] In the alternative, OKLP says if a summary trial is suitable, the parties reasonably understood they would not be bound by the general sales conditions. Further, OKLP submits that even if the general sales conditions apply to OKLP's purchases from UPM, OKLP is not bound by the limitation of liability. In addition, OKLP submits that it was an implied term of the sales contracts that "the party responsible for the defective products will reimburse the other parties for the costs and expenses associated of [sic] dealing with those defective products".

Issues

- [29] The question of whether any of the Disputed Goods were defective is not before the Court on this application. The issues are:
1. Is this matter suitable for summary trial?
 2. If yes, do UPM's general sales conditions form part of the sales contracts between UPM and OKLP that are in issue?
 3. If yes, do the general sales conditions limit OKLP's counterclaim to the invoiced value of the allegedly defective goods (\$8,909.54)?

Analysis

Suitability

- [30] Pursuant to Rule 9-7(15) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, the court may grant judgment "either on an issue or generally" where it is able to find the facts necessary to decide the matter and is of the opinion that it would not be unjust to do so.
- [31] In *Ferrer v. 589557 B.C. Ltd.*, 2020 BCCA 83, the Court of Appeal endorsed the factors identified in *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 485, as relevant to the determination of whether it is appropriate to hive off an issue in litigation for summary trial. However, at para. 28 the Court suggested that not all the factors will be relevant in each case and cautioned against taking a "checklist approach" to the assessment. As stated by Griffin J. (as she then was) in *Greater Vancouver Water District*:
- [110] In summary, the authorities in BC, including *Hryniak*, 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.

[32] As mentioned, OKLP submits that this matter is not suitable for resolution by summary trial because ascertaining the applicable contractual terms is too complex and the evidentiary record concerning the commercial context, including industry standards and the history of the dealings between the parties, is insufficient.

[33] I do not agree. I have no difficulty concluding that this matter is suitable for resolution by summary trial.

[34] The relevant factors weigh heavily in favour of summary trial. Specifically:

- I can find the necessary facts - indeed, there is no material conflict in the evidence;
- the amount involved is modest;
- the issues are neither factually nor legally complex; this is a straightforward contract claim where the central facts are not in dispute;
- the resolution of the issues will promote judicial efficiency because knowing whether OKLP's claim is limited to the value of the allegedly defective goods will inform the parties' assessment of whether it is economic to proceed with a conventional trial;
- determining the issues raised on this application will not result in delay; and
- the issues raised do not overlap with the substance of OKLP's claims, there is no risk of inconsistent findings, and no unfairness results from determining them in advance of the other issues at trial.

[35] OKLP's submission that the evidentiary record is insufficient does not advance its position. It is well settled that a party facing a summary trial is obliged to bring forward all of its case or risk having judgment go against it: *Spring Hill Farms Limited Partnership v. Nose*, 2014 BCCA 66 at para. 20. It was incumbent on OKLP to "take the steps necessary to be prepared for a summary trial" by ensuring the evidentiary record was complete: *Tut v. Evershine Land Group Inc.*, 2022 BCCA 63 at para. 34.

The terms of the sales contracts

[36] There is no countersigned sales contract between the parties. Rather, as explained, OKLP's orders were all fulfilled by an exchange of forms: a purchase order, order confirmation, and invoice.

[37] UPM submits that in such circumstances, the applicable contractual terms may be ascertained though a strict offer and acceptance analysis or through a broad and equitable assessment of the reasonable understanding of the parties in all the circumstances. As authority for the latter approach, UPM cites S.M. Waddams, *The Law of Contracts*, 7th ed. (Toronto: Canada Law Book, 2017) and *Butler Machine Tool Co. Ltd. v. Ex-Cell-O Corporation (England) Ltd.*, [1979] 1 All E.R. 965 (C.A.).

[38] In Waddams at para. 79, the author described the rules of contract formation in these terms:

Our rules of contract formation do not require use of special formulas. The question in each case is whether the conduct of the party sought to be bound, taken as a whole, including what has been said and done as well as what has been written, would lead a reasonable person in the position of the other party to believe that the former had manifested his assent to a particular set of terms.

[39] In Butler at p. 968, Lord Denning put it this way:

I have much sympathy with the judge's approach to this case. In many of these cases our traditional analysis of offer, counter-offer, rejection, and acceptance and so forth is out-of-date. The better way is to look at all the documents passing between the parties and glean from them, or from the conduct of the parties, whether they have reached agreement on all material points, even though there may be differences between the forms and conditions printed on the back of them.

[40] OKLP agrees that in ascertaining the contractual terms applicable to its purchases of label paper from UPM, it is necessary to broadly and equitably assess the reasonable understanding of the parties. Accordingly, this is the approach I will take, bearing in mind that the goal is to ascertain the objective intentions of the parties using a practical, common-sense approach: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 47, 49.

[41] I start by observing that the record establishes the following unconverted facts relevant to the objective assessment of the parties' intentions:

- from the commencement of the commercial relationship between the parties in 2012, all of OKLP's orders with UPM were filled in the three-step manner described above: with a purchase order from OKLP, followed by an order confirmation from UPM, and then an invoice from UPM sent shortly after delivery;
- each order confirmation and invoice stated that UPM's general sales conditions applied to the transaction;
- OKLP routinely ordered goods from UPM pursuant to the order process described above and then received and used the goods supplied by UPM;
- OKLP's founder and president, Mr. Parker, reviewed vendor terms and conditions at the time of OKLP's first engagement with a vendor;
- Mr. Parker saw or read UPM's general sales conditions;
- over the material time, representatives of OKLP, including Mr. Parker and Mr. Holmes, reviewed each UPM order confirmation and invoice;
- Mr. Parker knew that the general sales conditions would be provided to him on request and could be accessed on UPM's website; and
- OKLP never objected to the application of UPM's general sales conditions.

[42] It has often been held that facts like these establish a course of conduct demonstrating an intention to be bound to standard terms and conditions incorporated by reference into a sales contract. I will cite some examples referred by UPM in its submissions.

[43] In *Henry Kendall & Sons v. William Lillico & Sons Ltd.*, [1969] 2 A.C. 31 (H.L.), the claimants bought bird food from the defendant (S.A.P.P.A.), which contained a toxic mold that caused the birds to die. The defendant purchased the food from a third party (Grimsdale). It had placed over 100 orders with Grimsdale. For each order, Grimsdale delivered a contract note that incorporated certain terms and conditions by reference, including a limitation of liability clause. At p. 113, Lord Pearce concluded that the seller's terms and conditions had been incorporated into the contract by reference, writing:

In the present case, S.A.P.P.A. had regularly received more than a Hundred similar contract notes from Grimsdale in the course of dealing over three years. They knew of the existence of the conditions on the back of the contract note. They never raised any query or objection (Havers J. page 267). The Court's task is to decide what each party to an alleged contract would reasonably conclude from the utterances, writings or conduct of the other. The question, therefore, is not what S.A.P.P.A. themselves thought or knew about the matter but what they should be taken as representing to Grimsdale about it or leading Grimsdale to believe. The only reasonable inference from the regular course of dealing over so long a period is that S.A.P.P.A. were evincing an acceptance of and a readiness to be bound by, the printed conditions of whose existence they were well aware although they had not troubled to read them. Thus the general conditions became part of the oral contract.

- [44] In *Harster Greenhouses v. Visser International*, 2011 ONSC 2608, the Court undertook a similar analysis and came to the same result.
- [45] In that case, a defendant (Plantech) brought a crossclaim alleging the equipment it purchased from another defendant (Visser) was defective. Visser brought an application to stay the crossclaim based on a forum selection clause in its general conditions. Plantech denied that the forum selection clause was part of the contract.
- [46] Plantech had purchased equipment from Visser for over 10 years. Between 1999 and 2002, some 35 sales contracts were concluded between the parties, with Visser's quotations and order confirmations each containing a statement incorporating its general conditions by reference. In November 2002, the parties entered into a written distribution contract. The distribution contract provided that the terms and conditions would apply to sales under the contract but did not attach such terms. After the distribution contract was signed, Plantech purchased the equipment in issue. Visser's order confirmation for that specific sale stated: "All our transactions are subject to our general conditions (please turn over)." There was a dispute about whether the conditions were actually attached. The Court assumed they were not.
- [47] Plantech asserted that the agreement for the sale of the equipment in question had no conditions attached. Plantech also claimed that it never turned its mind to the forum selection clause and it never expressly agreed to it. Justice Strathy disagreed, writing:
- 52 Taken in the context of the long-standing relationship between the parties, both before and after the Distribution Contract, including the several hundred transactions in which General Conditions were incorporated in the contractual documentation, there is no doubt that the General Conditions, specifically the law and forum selection clause, were incorporated into both contracts between the parties.
- 53 The clause was plainly a term of the Distribution Contract. I find that a forum selection clause as contained in the General Conditions was also incorporated into the sale contract for three reasons: (i) it had become a term of the agreement between Visser and Plantech as a result of their course of dealing and its incorporation into hundreds of previous contracts; (ii) it was incorporated by reference into the contract by the wording on the bottom of the front page of the Order Confirmation; and (iii) it was specifically incorporated on the pre-payment invoice which was received, acknowledged and paid by Plantech.
- 54 The fact that Plantech apparently never inquired about the terms and conditions, never objected to them, and never paid any attention to them, is irrelevant. They were contractual terms agreed upon by the parties.
- [48] The question is whether there is other evidence that persuades me that the parties did not intend the general sales conditions to apply, notwithstanding the course of conduct summarized above.

[49] OKLP submits that aspects of the commercial context demonstrate that the parties did not intend to be bound by the general sales conditions. Specifically, OKLP says:

- the general sales conditions contain a provision that purports to require the buyer to make defect claims within three months of delivery, but it is not possible to inspect an entire roll of label paper within three months, it is industry practice to accept defect claims during the stated shelf-life of the product, and defect claims have been accepted by UPM six to 12 months after delivery; and
- the provision in the general conditions limiting UPM's liability to the value of the allegedly defective goods is inconsistent with what Mr. Parker was told about UPM's intentions and/or practice between 2004 and 2007 when, in capacities other than as a representative of OKLP, he dealt with UPM; the parties' course of dealings since 2012; and industry standards.

[50] I will deal with each in turn.

[51] OKLP says that the evidence demonstrates the parties did not intend OKLP to be bound by the provision in the general conditions that requires the buyer to make defect claims within three months of delivery, and submits that the fact they did not intend for that provision to have effect suggests they did not intend the limitation of liability provision to have effect or they did not intend to be bound by the general sales conditions at all. I do not agree. The evidence falls far short of demonstrating that the parties did not intend OKLP to be bound by the provision in the general sales conditions that requires the buyer to make defect claims within three months of delivery.

[52] OKLP relies on the examination for discovery evidence of Lee Green, a representative of UPM, who admitted that the label paper at the end of a reel can only be tested when the reels are changed, and that he is aware of defect claims having been made during the six to 12 month period after the product was delivered.

[53] However, there is no evidence about whether reels are typically changed within three months of delivery and Mr. Green said nothing about whether defect claims made after the three-month deadline in the general sales conditions are or were ever accepted by UPM.

[54] OKLP relies on Mr. Holmes' evidence to the effect that the industry standard is to accept defect claims during the shelf-life of a product, as noted on the product's spec. sheet. He says this makes sense because quality issues can arise in a part of a roll of paper that is not observable until the roll is unwound. He says that the spec. sheets for the products OKLP purchased from UPM state a shelf-life of two years. He also says that at no point during his dealings with UPM did anyone ever tell him that UPM was not following industry standards or direct his attention to anything to indicate its warranty period was different from the shelf-life.

[55] However, and as mentioned above, there is no evidence about whether a roll of label paper is typically unwound by OKLP within three months of delivery. Mr. Parker, in his affidavit, makes the point that a roll cannot be properly inspected until it is "unrolled as it's used, so

the standard practice in the industry is that all the parties deal with defective products as the defects are discovered, regardless of how many days after the massive roll was delivered". He does not say rolls are not unwound within three months of delivery and, taken on its own, his affidavit evidence on this point suggests that, typically, OKLP unrolls the paper within "days" of delivery. Mr. Parker's evidence during his examination for discovery suggests that OKLP typically used the label paper purchased from UPM within a few days of receiving it, and during that time conducted a visual test and a test for moisture. The excerpts from his examination for discovery that are in the evidentiary record are somewhat unclear about whether one would expect to discover all defects in the label paper in question through OKLP's use and testing of the paper within a few days of receiving it, but the point is that the record does not establish that a roll of paper is not typically unwound within three months of delivery to OKLP.

- [56] Although Mr. Holmes says that the industry standard is to accept defect claims during the shelf-life of a product, he does not say that this was UPM's practice. While the spec.. sheet attached as an example to his affidavit claims a shelf-life of two years, it also expressly states that all of UPM's products are "sold subject to UPM Raflatac's general sales conditions". I do not accept Mr. Holmes's statement that no one directed his attention to anything to indicate UPM's warranty period was different from the shelf-life because the order confirmations, invoices, and spec. sheets all expressly directed his attention to the general sales conditions.
- [57] I turn now to OKLP's submission that the provision in the general conditions limiting UPM's liability to the value of the allegedly defective goods is inconsistent with what Mr. Parker was told about UPM's intentions and/or practice between 2004 and 2007 when, in capacities other than as a representative of OKLP, he dealt with UPM; the parties' course of dealings since 2012; and inconsistent with industry standards. OKLP relies on the affidavit evidence of Mr. Parker and Mr. Holmes in this respect.
- [58] In his affidavit, Mr. Parker deposed that he has been involved in "several instances" where suppliers of label paper "covered all the expenses and losses caused by defective adhesive". He gives an example from 1998 involving a different supplier (not UPM). He deposed that, in 2004, when he worked for a label company referred to as MLG and before he established OKLP, he advised UPM about getting into the industry and, in the course of doing that, discussed the necessary properties of adhesive paper used for wine and spirit bottles. He says that "based on all [his] various conversations with employees of UPM at the time, and up until [his] dealings with them about the defective adhesive paper at issue here, [he] believed that UPM understood what the industry standards were with regards to what happens if the labels do not stick to the bottles and what their responsibilities were to both the printers who make the labels and the wineries and distilleries". Mr. Parker deposed that while working at MLG, until 2007, he was responsible for purchasing a lot of UPM's label paper and "during that time UPM led [him] to believe they were, and appeared to be, following industry standards" and "[he recalls] that there were claims involving defective goods from UPM when [he] was still at MLG and that UPM dealt with them according to

industry standards and reimbursed for any losses caused by the defective products". He deposed that he left MLG and established OKLP in 2007 and started using UPM's products for OKLP in about 2012, and no one from UPM told him "that they had changed the way they stood behind their products from how they used to from 2004-2007". He deposed that between 2012 and late 2016, OKLP "had a few small claims with [UPM] for defective products and they were all resolved to [his] satisfaction according to industry standards".

[59] Mr. Holmes' evidence on this point was particularly non-specific. He deposed that "all the paper manufacturers and converters" he has dealt with over the past 35 years have "typically" addressed defect claims by, among other things, supplying a credit "to make the printer whole from any losses caused by the defective material".

[60] The reliability of the general evidence from Mr. Parker and Mr. Holmes about it being industry standard to compensate for all losses arising from defective label paper is called into question by specific evidence of the terms and conditions of sale published on the websites of two other label paper suppliers: Kurz and Rotometrics. Mr. Parker's evidence on discovery was that OKLP purchases products from those suppliers. The websites of Kurz and Rotometrics indicate that both sell products subject to terms and conditions that include a limitation of liability provision similar to that included in UPM's general sale conditions. For example:

Kurz- Terms and Conditions

6. Limited Warranty

...In no event shall seller be responsible for exemplary, punitive, indirect, special, consequential, or similar damages, including without limitation, claims for lost profits or production line downtime.

7. Limitation of Liability

Notwithstanding any provision herein to the contrary, and other than as otherwise expressly set forth herein, Buyer acknowledges and agrees that Seller shall have no liability to Buyer in connection with the Goods in excess of the total amount off consideration paid to Seller hereunder .

RotoMetrics (Maxcess)- North America Terms and Conditions

Maxcess's liability to customer for damages with respect to this agreement shall not exceed in the aggregate the fee or price for the particular products or services involved in the claim. In no event shall Maxcess have any liability for incidental, consequential, or special damages including, without limitation, lost revenues, data, or profits.

- [61] Further, and in any event, the general evidence from Mr. Parker and Mr. Holmes about industry standards, on its own, does little if anything to support OKLP's submission that UPM evinced an intention to conform to an industry standard of compensating for consequential losses notwithstanding a clear statement to the contrary in its general sales conditions.
- [62] The more specific evidence from Mr. Parker about UPM adopting industry standards, is unreliable. His evidence that in 2004 he was led to "believe" that UPM understood what the industry standards were and what their responsibilities were is too vague to be given much, if any, weight. He does not provide any details about the basis for this understanding other than his "various conversations" with unnamed employees of UPM. His evidence, that many years ago when he worked with MLG there were instances when UPM reimbursed for losses caused by defective products, cannot be given much weight because there is no evidence about whether UPM was using general sales conditions at that time and, if so, whether they included a limitation of liability provision. His evidence that in more recent years OKLP's few "small claims" with UPM for defective products were resolved "to [his] satisfaction according to industry standards", is ambiguous. He does not actually say that UPM compensated OKLP for consequential losses. Even if it was appropriate to infer that is what he meant, there is insufficient detail to conclude that these instances involving "small claims" established a historical course of conduct that reasonably led OKLP to believe that UPM would not rely on the limitation of liability in the general sales conditions. As already explained in relation to the evidence of Mr. Holmes, I cannot give much, if any, weight to Mr. Parker's statement that no one told him UPM had changed its practice in light of the order confirmations, invoices, and spec. sheets which expressly directed his attention to the general sales conditions.
- [63] In summary, the evidence establishes a long course of dealings between the parties that included an express statement on each order confirmation, each invoice, and at least some spec. sheets to the effect that UPM's general sales conditions applied. Mr. Parker, OKLP's founder and president, and Mr. Holmes, OKLP's general manager, reviewed the order confirmations and invoices. Mr. Parker saw or read UPM's general sales conditions, and he knew they would be provided to him on request and they could be accessed on UPM's website. OKLP never raised any query or objection to the application of the general sales conditions. The evidence about contrary industry standards is vague. In fact, Mr. Parker dealt with other suppliers who stated on their websites that they were using terms similar to the UPM terms in issue here. There is little to support the assertion that UPM adopted or suggested to OKLP that it would adopt an approach to defect claims that was inconsistent with the general sales conditions. In all the circumstances, the only reasonable inference from the commercial context and, in particular, the course of dealing between the parties, is that OKLP evinced an acceptance and readiness to be bound by UPM's general sales conditions. Thus, the general sales conditions became part of the sales contracts between them for the goods in issue.

The limitation of liability provision

[64] In *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 at paras. 121-123, the Supreme Court of Canada held that the following three questions must be answered to assess whether a limitation of liability clause is enforceable:

1. Does the exclusion clause apply to the claims advanced?
2. If yes, was the exclusion clause unconscionable at the time the contract was made?
3. If it was not unconscionable, should the court nonetheless decline to enforce the clause because of an overriding public policy concern which outweighs the very strong public interest in the enforcement of contracts?

[65] The onus is on UPM to establish that the limitation of liability clause applies. However, the onus is on OKLP to establish that the clause is either unconscionable or should not be enforced for public policy concerns: *Ferrer v. Janik*, 2019 BCSC 1004 at para. 12, *aff'd* 2020 BCCA 83.

[66] I start by determining whether the limitation of liability clauses apply. They purport to limit UPM's liability in three ways:

1. There are no warranties other than the products will be "free from defects in material and workmanship and shall comply with all specifications expressly agreed in writing". All other warranties, including any that could be said to arise from trade usage, are expressly "disclaimed by [UPM] and waived by [OKLP]".
2. UPM will not be liable for "consequential damages".
3. Any damages arising from or relating to a product purchased shall not exceed the purchase price or invoiced value of the product.

[67] OKLP seeks damages for breach of contract. In relation to the breach of contract claim, OKLP pleads in its counterclaim:

There was a contract between the parties and the plaintiff breached the contract by not providing goods which met the required specifications and by not providing products that were reasonably fit for their intended use.

[68] The damages sought for breach of contract are comprised of the amount paid for the allegedly defective goods (\$8,909.54) as well as consequential losses (\$115,683.08).

[69] The breach of contract claim is plainly captured by the limitation of liability clauses such that OKLP cannot claim any consequential losses and, irrespective of that restriction, UPM's liability cannot exceed the invoiced value of the products sold (\$8,909.54).

[70] OKLP also seeks, in the alternative, damages for "misrepresentation". In the legal basis of its response to civil claim, the claim is described as follows:

The plaintiff made representations to the defendant that the product supplied was reasonably fit for [its] intended purpose and that it was manufactured following industry standards, the defendant reasonably relied on the representations, and used the plaintiff's products to make labels to sell to [its] customers. Those representations proved to be false, and the defendant has suffered loss, damage and expense as a result.

[71] I agree with UPM that the alleged misrepresentation is akin to an alleged implied warranty.

[72] In *Fraser-Reid v. Droumtsekas*, [1980] 1 S.C.R. 720 at 733, Justice Dickson noted that:

The distinction between representation and warranty is often tenuous. It is said that a representation is that which precedes and induces the contract, whereas a warranty is embodied in, and is given contemporaneously with, the contract.

[73] The Court concluded that a contractual term in the contract for the sale of a house, which read "Providing that the Vendor has disclosed to the Purchaser all outstanding infractions and orders requiring work to be done on the premises ", was not a representation, but a warranty.

[74] Similarly, in *West Coast Title Search Ltd. v. Datamex Ltd.*, [1993] B.C.J. No. 1822, the alleged representation was to the effect that the equipment to be supplied was good equipment, that the supplier was competent to install and maintain and service it, that the equipment was reliable, and that the buyer could return the equipment within 30 days. Justice Melvin found this was a warranty:

52 In accepting Mr. Crooke's evidence, I am satisfied that the plaintiff relied on the representations of Datamex and Datacom and that the representations made were collateral warranties. Although the formal contract, in the form of a purchase order, was between the defendant E & E Datacom Ltd. and the plaintiff, and there are no formal contractual documents between the plaintiff and Datamex Ltd., in my view, representations made by Mr. Kelder on behalf of Datamex to the plaintiff, which induced the plaintiff to enter into the contractual arrangements, are binding on the defendant Datamex in the absence of a contractual arrangement. In that respect counsel for the plaintiff relies on *Murray v. Sperry Rand Corporation et al* (1979), 96 D.L.R. (3d) 113 at 122:

It is, in my opinion, the law that a person may be liable for breach of a warranty notwithstanding that he has no contractual relationship with the person to whom the warranty is given: ...

In the case at bar these were representations made by the defendant Datamex to induce the plaintiff to enter into the arrangement to purchase the equipment in question.

53 Consequently, I am satisfied that the representations made by Mr. Kelder on behalf of Datamex, as described by Mr. Crookes on behalf of the plaintiff, amounted to collateral warranties which bind the defendant Datamex.

- [75] In this case, the alleged representation also amounts to a warranty: it is said to be a promise that the "product supplied was reasonably fit for its intended purpose and that it was manufactured following industry standards". This conclusion is also supported by the fact that, on discovery, Mr. Parker described the representations as amounting to a warranty.
- [76] It follows that the warranty claim is also captured by the limitation of liability clause: OKLP cannot seek damages for the warranties it asserts because UPM disclaimed and OKLP waived such warranties and, irrespective of that restriction, UPM's liability cannot exceed the value of the allegedly defective products sold.
- [77] In *Tercon* at para. 65, Justice Cromwell instructed that in interpreting a limitation of liability clause it is necessary to "consider the exclusion clause in light of its purposes and commercial context as well as its overall terms". As UPM's counsel argues, UPM sells blank label paper to customers for a modest price. The customers use the paper for a wide range of applications. The customer manipulates the label paper by running it through a printing press. It then sends the paper to an end user who manipulates it again by affixing it to a container such as a wine bottle. In that commercial context, the purpose of the limitation clause is to limit UPM's liability for issues that arise after the goods are manipulated further by customers and also to limit UPM's overall liability to avoid the risk of being exposed to a large damages claim on a modest sale.
- [78] In the circumstances, I have no difficulty concluding that, whether framed in contract or tort, OKLP's claim for damages for alleged defective goods falls within the limitation of liability agreed to by the parties.
- [79] Next, I consider whether OKLP has met its burden to establish that the limitation of liability should not be enforced because it was unconscionable at the time the contracts were made or would be contrary to public policy. There is no basis to reach either conclusion.
- [80] In relation to unconscionability, in Geoff R. Hall, *Canadian Contractual Interpretation Law*, 4th ed. (Toronto: LexisNexis, 2020) at 373, the author notes:
- In a purely commercial setting, unconscionability rarely arises as a basis to invalidate a limitation of liability clause, and the second branch of the *Tercon* case can be disposed of quickly.
- [81] There is nothing in the evidentiary record that would support a finding of unconscionability here.
- [82] In *Agfaphoto Canada Inc. v. Overwaitea Food Group Ltd.*, 2008 BCSC 1287, Justice Holmes (as she then was), on a summary trial application, ordered that the plaintiff's claims were limited by an exclusion clause in the parties' contract and in so doing noted that:

41 I cannot accept Overwaitea's submission that to give effect to clause 25 would be manifestly unfair. The parties are both large commercial entities with in-house legal counsel and a long history of negotiated agreements. They can be taken to have understood the implications of the Agreement.

[83] Similarly, there is no public policy reason to not enforce the limitation of liability clause in this case. To the contrary, there is a strong public interest in the enforcement of contracts between commercial entities.

[84] In its application response, OKLP submits that "it was an implied term" of the sales contracts that "the party responsible for the defective products will reimburse the other parties for the costs and expenses associated of [sic] dealing with those defective products".

[85] The basis for finding such an implied term is not clear from OKLP's submission. In any event, the submission cannot be sustained because, irrespective of the circumstances in which the implied term is said to arise, it is well-settled that an implied term cannot be found that is contrary to the express terms of a written contract: *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085 at 1097.

[86] As discussed at length above, UPM's general sales conditions, which were incorporated by reference in each sales contract, contained an express term that a buyer's claim for damages shall be limited to the value of the allegedly defective goods and that UPM shall not be liable for consequential damages. OKLP's submission that there is an implied term to the contrary must fail.

Conclusion

[87] UPM's general sales conditions form part of the sales contracts between UPM and OKLP that are in issue in this proceeding. OKLP owes UPM \$184,100.23 plus interest calculated at 12% per annum from the date of each invoice for the Unpaid Goods. UPM's general sales conditions limit OKLP's set-off claims to the value of the allegedly defective goods (\$8,909.54). OKLP shall pay UPM \$184,100.23 plus interest calculated at 12% per annum from the date of each invoice, less a holdback of \$8,909.54.

[88] As the successful party, UPM shall have its costs.

"Warren J."

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