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| JUDICIAL CENTRE | CALGARY |
| APPLICANT | CROWN CAPITAL PARTNER FUNDING LP, by its manager, CROWN PRIVATE CREDIT PARTNERS INC. |
| RESPONDENT | RBEE AGGREGATE CONSULTING LTD. |
| DOCUMENT | **BRIEF OF LAW OF RMC CONSTRUCTION MATERIALS LTD.** |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | RMC CONSTRUCTION MATERIALS LTD.<br><br>**Attention: Chris Zelyas**<br>Dentons Canada LLP<br>2500 Stantec Tower<br>10220 - 103 Avenue NW<br>Edmonton, AB T5J 0K4<br>Phone: (780) 423-7387<br>Facsimile: (780) 423-7276<br>Dentons file: 573989-3 |

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## I. INTRODUCTION AND OVERVIEW

1. In these proceedings, FTI Consulting Canada Inc. (the "**Receiver**") requests an award of $4,485,480.64 in damages, plus interest, against RMC Construction Materials Inc. ("**RMC**"). Its claim relates to invoices issued by RBee Aggregate Consulting Ltd. ("**RBee**") for the alleged provision of aggregate and hauling services. This Honourable Court's initial decision in this matter was overturned by the Alberta Court of Appeal ("**ABCA**") and remitted for rehearing.

2. RMC respectfully submits that the Receiver's claim fails on two grounds. First, the Receiver has failed to adduce sufficient evidence to discharge its burden to establish that the aggregate and hauling services claimed in the invoices were actually provided to RMC. The Receiver's reliance on the mere issuance of invoices, without evidence proving delivery, does not satisfy the Receiver's burden to force RMC to pay in excess of $6,500,000 in damages and interest.

3. Second, even if the Receiver had been able to provide adequate evidence supporting its claim, RMC has raised a valid defence of equitable set-off based on the fact that RBee overbilled RMC by 504,336 tonnes and $7,106,857.50 worth of aggregate over the life of the Project. RMC accurately calculated the extent of the overbilling on the basis of contemporaneous project records which demonstrate the amount of aggregate provided by RBee. When compared to the amounts invoiced by RBee, its significant overbilling becomes clear. Because RBee's overbilling far exceeds its claim under the invoices, RMC owes RBee nothing. The Receiver's attempts to defeat RMC's set-off fail on the evidence and applicable law.

4. The Receiver argues that none of this matters because RMC had a contractual right to verify the amount of each and every aggregate delivery made by RBee. The Receiver argues that RMC was not allowed to conduct a single end-of-project reconciliation, and that RMC forfeited its right to contest the validity of the invoices by choosing not to exercise its right to have a third party verify the amounts of aggregate claimed within 60 days of each and every delivery of aggregate by RBee during the project.

5. The Receiver ignores governing case law, including statements from the ABCA in relation to this very matter, which provides that for a claim or defence to be contractually barred, the agreement at issue must expressly and clearly state this as a consequence. The agreement between the parties contains no such language. The Receiver's argument further errs in failing to apply well-established contractual interpretation principles explicitly mentioned to be applicable to this matter by the ABCA, such as the need to consider surrounding circumstances and the nature of the concrete and aggregate industry. The result urged by the Receiver—whereby RMC would be made to pay many millions of dollars for aggregate not actually delivered—should not prevail.

6. The Receiver also claims that RMC's evidence in support of its set-off defence is unreliable. To the contrary, RMC's evidence comes from first-hand sources who were actually present on the Project, and whose analysis of RBee's overbilling are based on contemporaneous project records and accurate calculations. The Receiver has adduced no evidence that RMC's analysis is in any way faulty, and instead simply speculates that the Project records *may* have somehow been inaccurate. This is insufficient to defeat RMC's set-off defence, particularly in light of the compelling and uncontradicted evidence put forth by RMC in support of its set-off.

7. RMC therefore requests that the Receiver's application be dismissed with costs payable forthwith.

## II. FACTUAL BACKGROUND

### A. The Project

8. RMC is a major supplier of concrete for infrastructure, commercial, and residential projects. It is one of Canada's largest independent concrete producers.[1]

9. On April 19, 2018, RMC entered into a contract with the Aecon-Flatiron-Dragados-EBC Partnership ("**AFDE**"). RMC agreed to supply AFDE with concrete for construction of the generating stations spillway for the Site C hydroelectric dam and generating station project located near Fort St. John, British Columbia (the "**Project**").[2] AFDE is the prime contractor and the British Columbia Hydro and Power Authority ("**BC Hydro**") is the owner with respect to the Project.[3] Timely provision of sufficient amounts of concrete for construction of the Project was of paramount importance as, pursuant to their contract, RMC would be assessed $25,000 in liquidated damages for each day that concrete was unavailable on a "day of pour" (the "**Liquidated Damages**").[4]

### B. The Agreement

10. Aggregate is a key material used in the production of concrete.[5] To ensure that RMC could meet its demanding concrete production obligations for the Project, RMC entered into an agreement dated May 7, 2018 with RBee, whereby RBee would crush and supply RMC with specified minimum

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[1] Affidavit of Nicholas Burak, sworn on December 23, 2022 ("**First Burak Affidavi**t"), para 3.

[2] First Burak Affidavit, para 4; Transcript, Cross-Examination of Scott Marshall, held January 11, 2023 ("**Marshall Cross-Examination**"), 12:3 – 12:24.

[3] First Burak Affidavit, para 4.

[4] First Burak Affidavit, para 61 and Exhibit "A"; Transcript, Cross-Examination of Nicholas Burak, held January 11, 2023 ("**First Burak Cross-Examination**"), 13:20 – 13:24.

[5] First Burak Cross-Examination, 13:25 – 13:26.

amounts of various types of aggregate per season, which RBee was to produce and stockpile on the Project site (the "**Agreement**").[6] The Agreement contained the following key terms:[7]

(a) Under s. 1 and Schedule "D", RBee was to supply a specified minimum amount of various types of aggregate to the Project site and stockpile thereon (the "**Stockpile**") each season;

(b) Under s. 1 and Schedule "B", RBee's entitlement to payment by RMC was based on the quantity of aggregate products that it *actually delivered* to the Stockpile on a unit rate basis (a specified rate per tonne of each type of aggregate) (the "**Payment Provision**");

(c) Under s. 5, RMC had the right to subject RBee's claimed quantities of supplied aggregate to a third-party verification within 60 days of its delivery to the Project site and Stockpile (the "**Verification Option**"). The Agreement was silent as to the method of verification and did not impose any consequences of non-verification, including no bars to RMC's ability to challenge the amount of aggregate claimed to have been provided by RBee at any time and no bars to a right of set-off in relation to the same;

(d) Under s. 18, in the event the Agreement was terminated, RBee would only be entitled to payment for aggregate actually delivered and verified up to the date of termination;

(e) Under s. 22, any differences between RMC and RBee in relation to the Agreement had to follow a detailed dispute resolution process, with no reference to such process being inapplicable where aggregate was delivered without verification having occurred under the Verification Option; and

(f) Under s. 33, the governing law pertaining to the interpretation of the Agreement and adjudication of this dispute is the law of British Columbia (the "**Governing Law Provision**").

11. Contrary to the Receiver's assertion at paragraph 12 of its Brief that the Agreement was drafted exclusively by RMC, its terms were finalized through negotiations between the parties, with RBee and its legal counsel participating in its drafting following an initial draft being provided by RMC.[8]

## C. RBee's Supply of Aggregate Products

[6] First Burak Affidavit, para 5 and Exhibit "A".

[7] First Burak Affidavit, paras 5-6 and Exhibit "A".

[8] First Burak Cross-Examination, 34:10 – 35:9; Transcript, Cross-Examination of Nicholas Burak, held November 21, 2025 ("**Second Burak Cross-Examination**"), 5:23 – 5:27.

12. RBee proceeded to supply RMC with sufficient quality aggregate during the 2018 to 2021 crushing seasons, which typically ran from about May to October, depending on the weather.[9] During this period, RBee was the sole aggregate supplier to RMC and with respect to the Project as whole.[10] All of the aggregate supplied by RBee was delivered to the Stockpile on the Project site, which was empty upon the commencement of RBee's performance of the Supplier Agreement.[11]

13. RMC constructed two batch plants on the Project site to produce the concrete (the "**Batch Plants**").[12] The Batch Plants were immediately adjacent to the Stockpile.[13] All of the aggregate delivered by RBee to the Stockpile was subsequently consumed in RMC's on-site Batch Plants to produce concrete, except for the 4,170 tonnes of winter abrasive material that was used for sanding roads at the Project site. The amount of winter abrasive delivered is not at issue in this dispute.[14]

14. RBee periodically invoiced RMC during the 2018 to 2021 crushing seasons for the quantities of aggregates that it claimed to have delivered to the Stockpile, generally once per month. Until the fall of 2021, RMC paid RBee's invoices without exercising the Verification Option. RMC did not exercise the Verification Option on every delivery because it had no reason to suspect that RBee's claimed quantities were materially inaccurate. RMC had not experienced shortages in aggregate and it was meeting its concrete production obligations in respect of the Project.[15] Exercise of the Verification Option for each and every delivery would have constituted a significant administrative burden and RMC's main focus was to ensure that it was producing enough concrete to meet its obligations to AFDE. This required payment of RBee's invoices in a timely manner to ensure that RBee had sufficient cash flow to keep supplying the aggregate products that were absolutely critical to RMC's concrete production for AFDE.[16]

15. RMC's uncontradicted evidence is that, consistent with standard practice in the industry, it anticipated completion of a final reconciliation upon the completion of RBee's performance under the Agreement (the "**Final Verification**").[17] This eliminated a continuous administrative burden of constantly verifying amounts during the course of a job in favour of doing so once at the end.[18] RMC communicated this expectation through conversations held with RBee, and it was understood

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[9] First Burak Affidavit, para 60.

[10] First Burak Cross-Examination, 17:16 – 17:25.

[11] First Burak Cross-Examination, 24:16 – 24:18; First Burak Affidavit, para 24.

[12] First Burak Affidavit, para 4.

[13] First Burak Affidavit, Exhibit "C"; Second Affidavit of Nicholas Burak, sworn on January 28, 2023 ("**Second Burak Affidavit**"), para 16.

[14] First Burak Cross-Examination, 28:22 – 28:27, 29:1 – 29:14; Second Burak Affidavit, para 17.

[15] First Burak Affidavit, para 9-10, 12, 15.

[16] First Burak Affidavit, paras 15-16; First Burak Cross-Examination, 38:2 – 38:13.

[17] First Burak Affidavit, paras 13, 15; Second Burak Affidavit, para 23.

[18] First Burak Affidavit, para 15.

by RBee.[19] This was also consistent with the practice of the parties with respect to the smaller projects that commenced and concluded while RBee's performance on the Project was ongoing.[20]

### D. RMC's First Concerns in the Fall of 2021

16. It was not until the end of the 2021 crushing season that RBee's billings raised concerns for RMC. After RMC received RBee's October 31, 2021 invoice #23256 (the "**October Invoice**") in about mid-November 2021, it first became apparent that RBee had invoiced RMC for significantly more product, both in terms of quantity and monetary value (before GST), than had been anticipated and estimated by the parties under the Agreement.[21] Yet RMC would need to continue its production of concrete into 2022 because the Project had experienced delay.[22]

17. RBee purported in the October Invoice to have delivered a total of 195,058 tonnes of aggregate to the Stockpile in that month—significantly more than the average of just under 61,000 tonnes that RBee claimed to have delivered across its previous monthly invoices for 2021.[23] The October Invoice was also for a monetary amount significantly higher than the others issued by RBee beforehand. Its $3,326,753.63 claim was higher than the next larger invoice by over $638,000, and was nearly double the amount of third largest invoice.[24] RMC also discovered, in about October 2021, that RBee had been invoicing RMC for greatly higher quantities of aggregates than it was actually delivering on another project (the "**Vogel Pit Project**"),[25] which raised concerns as to potential overbilling by RBee on the Project.

18. Given the totality of this information that RMC learned in the fall of 2021, RMC believed these issues were serious enough to warrant the completion of a quantity verification not just with respect to RBee's October 2021 claimed deliveries, which were particularly suspect, but all of RBee's claimed deliveries over the course of the Project. In December of 2021, RMC advised RBee that it would conduct the Final Verification that it had always planned on performing upon the conclusion of RBee's performance—but earlier on.[26] RMC also advised that it understandably chose to suspend any further payment of RBee's invoices, including the September and October Invoices,

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[19] First Burak Affidavit, para 13; First Burak Cross-Examination, 39:17 – 40:6.
[20] Second Burak Affidavit, paras 22-23.
[21] First Burak Affidavit, para 17-18.
[22] First Burak Affidavit, paras 11, 18.
[23] First Burak Affidavit, Exhibit "B".
[24] First Burak Affidavit, Exhibit "B". Contrary to the Receiver's position.
[25] First Burak Affidavit, para 20.
[26] First Burak Affidavit, para 21.

pending this reconciliation.[27] At this point, RBee would have been alerted to the possibility that it may not be able to collect its corresponding accounts receivables for RMC.[28]

**E. RMC's Quantity Verification**

19. In his Affidavit sworn December 23, 2022 (the "**First Burak Affidavit**"), Nicholas Burak, Vice President and Chief Financial Officer of the RMC Group of Companies Ltd., provides a comprehensive account of how he calculated and verified the quantity of aggregates actually delivered by RBee on the Project up through October 31, 2021 (the end of the 2021 crushing season). It should be noted that Mr. Burak's expertise is not simply limited to financial matters. As part of his role as Vice President, he oversees RMC's operations team and has personally visited the Project site in excess of 20 times.[29] He interfaces regularly with RMC's quality control team. Mr. Burak has over a decade of experience in the concrete industry.[30]

20. Mr. Burak relied on two key types of contemporaneous records to complete his verification:[31]

(a) **RMC's Batch Records**, which together recorded the cumulative amount of aggregate products taken from the Stockpile and consumed in RMC's concrete production in its Batch Plants as of October 31, 2021. Through RMC's automated batching system, all amounts of aggregate brought from the Stockpile were weighed and recorded. The measurements of the aggregate in the batch records were accurate, as the scales at RMC's Batch Plants were independently certified, audited by Concrete BC, and confirmed to meet the required minimum tolerances.

(b) **The AFDE Survey**, which was a topographic laser scan survey of the Stockpile conducted by AFDE on October 31, 2021, which showed the amount of aggregate delivered to the Stockpile but not yet removed and consumed in RMC's concrete production at the Batch Plants as of October 31, 2021.

21. Mr. Burak added the Stockpile quantities, as reflected in the October 31, 2021 AFDE Survey, to the cumulative amount of aggregates removed from the Stockpile and consumed in concrete production at the Batch Plants as of October 31, 2021, as detailed in the Batch Records, to

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[27] First Burak Affidavit, para 21.

[28] First Burak Affidavit, para 21. The Receiver, at para 35 of its Brief, argues that the evidence of the December 2021 phone call whereby RMC advised RBee of its concerns with overbilling and of its decision to conduct a reconciliation, constitutes hearsay. In response, we note that the Receiver itself repeatedly relies on unsworn statements it claims to have received from RBee management and of alleged construction experts who were not made available for cross-examination. In this context, and in the context of a Commercial List matter with tight timelines, we submit that the occurrence of this phone call, which was not contradicted, should be accepted.

[29] First Burak Cross-Examination, 11:5 – 11:17.

[30] First Burak Cross-Examination, 61:25 – 62:4.

[31] First Burak Affidavit, paras 22-27, 40, Exhibits "C" and "D".

determine the total quantity of aggregates actually delivered by RBee as of October 31, 2021. All aggregate products delivered by RBee were placed in the Stockpile and the only aggregate products removed from the Stockpile were taken to RMC's Batch Plants. Therefore, the amount of aggregate left in the Stockpile as of October 31, 2021 and the amount of aggregate recorded at the Batch Plants as of October 31, 2021 accurately reflected the total amount of aggregate delivered on the Project by RBee up through October 31, 2021.[32] The Receiver inexplicably proclaims at paragraph 85 of its Brief that a precise Final Verification "is impossible". Yet it is clear that adding the amount of aggregates in the Stockpile as of October 31, 2021 to the amount of aggregates recorded at the Batch Plants as of the same date makes such a calculation entirely possible, given that these two sources of information account for all aggregate delivered as of that date.

### F. RMC's Quantity Reconciliation

22. Once RMC obtained the quantity of aggregates in the Stockpile from the AFDE Survey, converted from cubic meters to tonnes, and the total tonnes of aggregates removed from the Stockpile and consumed in RMC's Batch Plants from the Batch Records, both as of October 31, 2021, it then proceeded to reconcile the sum of those quantities with the quantities that RBee purported to have delivered, for which it invoiced RMC.

23. The First Burak Affidavit provides detailed evidence as to how Mr. Burak performed the RMC Product Reconciliation, which disclosed that RBee had invoiced RMC for over 500,000 more tonnes of aggregate than it actually delivered.[33] Under Mr. Burak's Product Reconciliation, it was the equivalent of RBee having overcharged RMC by $7,106,857.50, not including GST.[34]

24. It was not until after the Receiver's appointment in March of 2022 that RMC was notified that RBee had generated invoice #23311 dated December 31, 2021, in the amount of $181,758 for claimed hauling services related to its supply of aggregate to RMC in November and December 2021 (the "**December Invoice**" and, collectively with the September Invoice and October Invoice, the "**Unpaid Invoices**").[35] As there was nothing to substantiate that RBee actually performed this hauling, such as supporting weigh tickets or load slips, and the Agreement did not provide for separate hauling charges, RMC also understandably declined to pay this invoice.[36] In response to

[32] First Burak Affidavit, paras 27, 49, 65.

[33] First Burak Affidavit, para 54; Second Burak Affidavit, para 14.

[34] First Burak Affidavit, para 54; Second Burak Affidavit, para 14.

[35] First Burak Affidavit, para 57.

[36] First Burak Affidavit, para 55, 57. Contrary to the Receiver's assertion at paras 33-34 and 98 of its Brief, the evidence cited by the Receiver does not show or establish that RBee performed or completed any hauling work whatsoever. Mr. Burak's evidence is clear that RMC only paid for hauling services when they were substantiated and verified, which is not the case in relation to the hauling services claimed in the Unpaid Invoices.

paragraphs 33 and 98 of Receiver's Brief, RMC disputes the hauling charges that form parts of the Unpaid Invoices, just as it did in the prior proceedings in this matter.

25. RMC had successfully worked with RBee and completed several other projects during the course of the Project, wherein RMC performed end-of-project reconciliations of the amounts of aggregate produced by RBee to resolve any billing issues (the "**Previous Projects**").[37] RMC therefore assumed that RBee must have made some type of error in calculating its aggregate quantities, as opposed to intentionally overbilling RMC, and there was no acrimony between the parties.[38]

26. After RBee was placed in placed into receivership in March 2022, RMC urgently needed a new aggregate supplier so that it could continue to meet its own obligations to provide concrete to AFDE and avoid significant Liquidated Damages under the agreement with AFDE. Through the receivership process, A-1 Quality Belting Ltd. ("**A-1**"), a company controlled by the principal of RBee (Bernie Reed), purchased all of RBee's on-site equipment for aggregate crushing and processing. A further company controlled by Mr. Reed, 2128222 Alberta Ltd., operating as Paragon Custom Crushing ("**Paragon**"), with A-1's permission was to operate the equipment and offered to continue supplying aggregate to RMC at the same prices set out in the Agreement. RMC had little choice but to accept this scenario, as it would have otherwise taken weeks, if not months, to find a different replacement aggregate supplier and have them mobilize their own equipment and commence aggregate supply. This was an urgent situation as there was not sufficient aggregate remaining in the Stockpile to meet production requirements. Accordingly, RMC engaged with Mr. Reed's new companies to supply aggregate at the same rates as provided for under the Agreement with RBee, as the prices in the Agreement remained at fair market value in 2022.[39]

### G. History of the Within Proceeding and RBee's Overarching Bankruptcy Proceedings

27. The within Application was initially heard before this Honourable Court, culminating in a written decision on December 18, 2023.[40] RMC appealed this decision and on April 3, 2025, the ABCA provided its reasons for allowing the appeal and remitting the Application back to this Court for a rehearing (the "**Appeal Decision**").[41] In the Appeal Decision, the ABCA made various important holdings, including the following:[42]

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[37] First Burak Affidavit, para 13, 60; Second Burak Affidavit, para 23.

[38] First Burak Affidavit, paras 60; First Burak Cross-Examination, 18:3 – 18:13, 69:13 – 69:17.

[39] First Burak Affidavit, paras 61-63, and Exhibit "A"; Second Burak Affidavit, para 24; First Burak Cross-Examination, 13:20 – 13:24, 76:5 – 76:12; Nicholas Burak's First Responses to Undertakings, #9 and #11.

[40] *Crown Capital Partner Funding LP v RBee Aggregate Consulting Ltd*, 2023 ABKB 724.

[41] *Crown Capital Partner Funding LP v RBee Aggregate Consulting Ltd*, 2025 ABCA 117 ("**Appeal Decision**").

[42] Appeal Decision at paras 18-19, 21-26, 32.

(a) The words of s. 5 of the Agreement containing the Verification Option "were ambiguous" and "are open to alternative interpretations and do not on their face express conclusively that the volume delivered was as stated in the invoice";

(b) "Nothing in the Agreement expressly set out specific consequences if RMC did not verify the invoices, such as a waiver of rights, or expressly stated RMC could not dispute the invoices after the time limit for third-party verification", "Verification clauses are to be strictly construed", and pursuant to s. 22 of the Agreement "access to dispute resolution was generally possible";

(c) "… nothing in the Agreement expressly excluded a final verification"; and

(d) "… because the Agreement was ambiguous, the chambers justice ought to have considered the relevant extrinsic evidence filed by RMC when interpreting the Agreement", which expressly includes the Second Burak Affidavit and "the evidence of Mr. Burak regarding industry practice" and in relation to Mr. Burak's "observations regarding aggregate production projects seen during his 12 years of working with RMC".

28. The Receiver also acts as RBee's Trustee in Bankruptcy. Counsel for RMC received notice from the Receiver and Trustee about the status of RBee's bankruptcy proceedings. Through the bankruptcy proceedings, the Receiver and Trustee filed various documents, including an Application, a Trustee's Report, and a Brief in relation to the Application (collectively, the "**RBee Bankruptcy Documents**"). The Receiver and Trustee pled in the Application that RBee made transactions "with the intent to defraud, hinder, or delay RBee's creditors" and engaged in preferential or fraudulent transactions, with the related Report and Brief providing the Receiver and Trustee's conclusion that RBee had "materially overstated the value of RBee's assets", provided "inflated values", and made a "clear overstatement" of the value of its equipment.[43]

## III. <u>ISSUES</u>

29. There are three primary issues which RMC submits ought to be decided in its favour:

(a) That the Verification Option in the Agreement should not be interpreted as barring RMC's right to dispute the Receiver's claim on the Unpaid Invoices;

(b) That the Receiver has not met its burden to prove that RBee actually provided the quantities of the goods and services for which it claims in the Unpaid Invoices, such that

[43] RBee Bankruptcy Documents (Application, filed August 17, 2023, para 8; First Report of FTI Consulting Canada Inc. ("**Trustee Report**"), dated March 21, 2025, paras 40, 51(d); Brief of the Applicant, filed April 23, 2025, paras 36, 95).

RMC is not liable to pay the Unpaid Invoices; and

(c) In the event this Honourable Court finds that the Receiver met its burden with respect to the Unpaid Invoices, which RMC submits is not the case, that RMC has established a defence of set-off for an amount in excess of what is claimed in the Unpaid Invoices, such that the Receiver's claim should fail in any event.

There is also a preliminary evidentiary issue as to the relevance of the RBee Bankruptcy Documents, which we shall address as an initial matter.

## IV. ARGUMENT

### A. The RBee Bankruptcy Documents Are Relevant

30. RMC is entitled to rely on the RBee Bankruptcy Documents as informal admissions or admissions against interest in other proceedings, given that they satisfy the legal test for the same articulated by this Honourable Court in *1808882 Alberta Ltd v. Moderno Ventures Ltd*.[44] Namely, informal admissions are *prima facie* admissible where they are "made in a sufficiently formal manner to ensure that the party making the admission has considered its words carefully", with the Court also considering "whether an admission was made inadvertently or hastily; whether it was made with knowledge of the facts, and whether new facts have come to light since the admission was made".[45]

31. The Receiver has consented to the inclusion of the RBee Bankruptcy Documents in this proceeding.[46] This Court has considered documents containing informal admissions without a separate application for the same, including in circumstances involving evidence and pleadings from prior actions where the applicant was involved in those actions or represented by the same counsel, knew the evidence and pleadings, and could not claim surprise.[47]

32. The RBee Bankruptcy Documents and the admissions therein were made in a sufficiently formal manner and considered carefully, as they are pleadings or evidence filed before this Honourable Court. Additionally, RBee's bankruptcy proceedings are clearly related to the within Application, given that the within Application arises out of RBee's bankruptcy. It is also noted that the Receiver and the Trustee of RBee are the same entity, represented by the same counsel. The Receiver and Trustee act as an Officer of the Court, meaning that they are to act and present evidence in an impartial, transparent, even-handed, and non-adversarial manner.[48] As such, the Receiver made

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[44] *1808882 Alberta Ltd v. Moderno Ventures Ltd*, 2018 ABQB 885 ("***Moderno Ventures***") at para 97.

[45] *Moderno Ventures* at para 97.

[46] Brief of Law of the Receiver, filed February 26, 2026 ("**Receiver's Brief**"), para 30.

[47] *Alberta Rules of Court*, Alta Reg 124/2010 at Rule 6.11(1)(f); *Condominium Corporation No 022 6956 v Mercier*, 2023 ABKB 125 at paras 43-44; *Rigco North America LLC v ExxonMobil Canada Ltd.*, 2007 ABQB 311 at para 14.

[48] For example, see: *Beetown Honey Products Inc., Re*, 67 OR (3d) 511, 2003 CanLII 32918 (ON SC) at paras 22-23.

the admissions contained in the RBee Bankruptcy Documents with full knowledge of the facts concerning RBee's bankruptcy and presented the same in a transparent manner.

33. The RBee Bankruptcy documents are clearly relevant to the issue of RBee's overbilling and under delivery of aggregate. They establish that RBee has a history of overstating its assets and the value of the same. They also establish that the Receiver has acknowledged that RBee has engaged in fraudulent or preferential transactions in the past. This is directly contrary to the position that the Receiver is taking in the within Application, which is that RBee's Unpaid Invoices can be trusted on their face as sufficient evidence of the amount of aggregate and hauling services provided. The fact that the Receiver itself, acting as Trustee in RBee's bankruptcy, has alleged that RBee and its principal have engaged in inappropriate, preferential, and fraudulent transactions, including materially overstating the value of its assets and equipment, undermines any claim that RMC should be made to pay millions of dollars simply on the basis of invoices issued by RBee without proof of delivery being provided. This is particularly the case given that the invoices in question were issued at a time when RBee was, by the Receiver's own admission in the Rbee Bankruptcy Documents, effectively insolvent and taking steps to defraud, hinder, or delay RBee's creditors. Specifically, the Receiver asserted that RBee was insolvent by at least early 2021, and then subsequently engaged in 293 preferential transactions where over $6,000,000 worth of assets were transferred to related parties from June of 2021 through February of 2022, as well as clearly overstating the value of its equipment in April of 2021.[49]

**B. The Verification Option Does Not Bar RMC's Right to Dispute the Unpaid Invoices**

34. The proper interpretation of the Agreement is relevant to both the Receiver's failure to meet its burden of proof in relation to the Unpaid Invoices and RMC's defence of set-off.

35. The Agreement is to be interpreted by reading the contract as a whole and by giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract, including the mutual and objective intentions of the parties as expressed in the words of the contract and objective evidence of the background facts at the time of the execution of the contract. It is also relevant to the interpretation of the Agreement that the Court should know the commercial purpose of the contract and the market in which the parties are operating. Principles relevant to the determination of surrounding circumstances and the objective intentions of the parties include:[50]

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[49] RBee Bankruptcy Documents (Trustee's Report, paras 26, 51(d) and Brief of the Applicant, paras 19, 88, 95, 96, 116).

[50] *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53 at paras 47, 57-58; *Trico Developments Corporation v El Condor Developments Ltd*, 2020 ABCA 132 at paras 28-32; *Thunder Bay (City) v CN Rail*, 2017 ONSC 3560 at para 43.

(a) Not sanctioning "contractual interpretations disconnected from economic reality" and interpreting contracts "'in accordance with sound commercial principles and good business sense'";

(b) Considering whether an interpretation would lead to "a very unreasonable result";

(c) Interpreting the contract according to "the nature or custom of the market or industry in which the contract was made"; and

(d) The reasonable expectations of participants in the industry.

36. The Appeal Decision makes clear that the Agreement must be interpreted with consideration of the "relevant extrinsic evidence filed by RMC" and "the evidence of Mr. Burak regarding industry practice". Contrary to the Receiver's repeated assertions that the Agreement and Verification Option was clear and unambiguous,[51] the contractual interpretation exercise is entirely necessary, as the Appeal Decision directly states that the Verification Option clause is ambiguous. It is not appropriate to vary or ignore the Appeal Decision's findings in this regard as implicitly requested by the Receiver, given that those findings are binding on this Honourable Court.

### 1. The Plain and Ordinary Meaning of the Agreement

37. The Verification Option in s. 5 of the Agreement (the Payment Provision) reads as follows:

> Each provision of Products shall be invoiced separately. Subject to the terms of this Agreement, Customer shall pay each invoice no later than sixty (60) days from the date of the invoice at the address set forth in such invoice . . .
>
> All payments from Customer to Supplier will be subject to third party verification (the "**Verifications**") of volume of Products, and a certification will emanate from Customer or its designates within sixty (60) days of delivery. Supplier's entitlement to payment will be based on such Verifications, and subject to the terms of this Agreement.[52]

38. RMC's interpretation of this clause is that it had the right, but not the obligation, to arrange for third party verification of the volume of aggregate each time RBee provided a delivery of same. The Receiver agrees with this interpretation, stating at paragraph 13(e) of its Brief that this clause created a right that could be exercised if RMC chose to do so. While a certification "will" emanate within 60 days of delivery, this was only a requirement if RMC hired a third party to conduct the verification. This did not, on its plain language, render such verification mandatory.

39. Importantly, the Verification Option does not contain any language specifying the consequence that the Receiver urges in this matter: that RMC became prohibited from later verifying the amounts delivered and from disputing the amounts claimed in the invoices. As explicitly held by the ABCA:

[51] Receiver's Brief, paras 4, 66, 82.
[52] First Burak Affidavit, Exhibit "A", section 5.

"Nothing in the Agreement expressly set out specific consequences if RMC did not verify the invoices, such as a waiver of rights, or expressly stated RMC could not dispute the invoices after the time limit for third-party verification… [and] nothing in the Agreement expressly excluded a final verification".[53]

40. RMC agrees with the Receiver's statement at paragraph 90 of its Brief "that provisions should be read in a way that gives effect to all provisions, avoiding interpretations that would render any other provision ineffective or redundant". Indeed, the Verification Option itself expressly stipulates twice that it is "subject to the terms of this Agreement". Turning to the other terms of the Agreement, it is fundamental to the Agreement that RMC was only obliged to pay for the amount of aggregate actually supplied by RBee.

41. Under the Payment Provision of the Agreement, RBee's entitlement to payment by RMC was based on the quantity of aggregate products that it actually delivered to the Stockpile. Specifically, s. 1 of the Agreement states as follows in relevant part:

> The price of the Products [as defined in Schedule "B"] to Customer [meaning RMC] shall be the price of such Products as set forth on Schedule "B", unless amended by Customer in accordance with the terms of this Agreement.[54]

42. Schedule "B" of the Agreement sets out the Products as being the various sizes of aggregate to be delivered by RBee, and the unit prices (prices per tonne) applied to each size of aggregate.[55]

43. Accordingly, under the ordinary and grammatical language of the Agreement, RMC was obliged to pay a price for the aggregate based on application of a price applicable to each tonne of aggregate delivered. Because the price to be paid is a unit price, RMC had no obligation to pay for any tonnes of aggregate not actually delivered. This was not a fixed price contract and RMC was not to be bound by the volumes RBee claimed in its invoices—RMC had to pay a price to RBee based on the actual tonnes of aggregate delivered.

44. This is confirmed by s. 18 of the Agreement, which provided that, in the event of termination, RBee's compensation "shall be limited to payment for product actually delivered and verified".[56] The Receiver's assertion at paragraph 84 of its Brief that this clause has no relevance because the Agreement was not terminated should be rejected. This would create an absurd result where RMC would have to pay for aggregate invoiced but not actually delivered if the Agreement was not terminated, but RMC would not have to pay for the same if the Agreement was terminated. RMC's view is that s. 18 should be considered as fortifying the proposition supported by other terms of the

[53] Appeal Decision at paras 21, 24.

[54] First Burak Affidavit, Exhibit "A".

[55] First Burak Affidavit, Exhibit "A".

[56] First Burak Affidavit, Exhibit "A".

Agreement—namely that it was the intention of the parties that RMC should only have to pay for aggregate actually delivered, not just an amount printed on an invoice. This permits s. 18 to be read in harmony with the intention of all other clauses of the Agreement.

45. As such, the Receiver's interpretation of the Verification Option, which would mandate that RMC pay for more aggregate than it actually received, is inconsistent with the other terms of the Agreement, which are clear that RMC only has an obligation to pay for what was delivered.

46. Additionally, the dispute resolution provisions of the Agreement strongly support the interpretation that RMC was permitted to dispute the legitimacy of invoices even if it had not exercised the Verification Option. Specifically, the dispute resolution processes set out in s. 22 of the Agreement are to apply to "any differences between the Parties as to the interpretation, application, or administration of this Agreement" and mandates numerous steps to be taken by the parties in case of such a dispute, including considerations by the parties at the management level, escalation to the senior management level, with 30 days of consideration at this level, a potential mediation process, and a potential arbitration process. On its plain language, s. 22 sets out the process to follow when <u>any</u> differences arose under the Agreement, including those with respect to invoices and payment. As noted by the Appeal Decision, under s. 22 of the Agreement, "access to dispute resolution was generally possible".[57] As such, it would be incongruent to interpret the language of the Verification Option as barring the dispute resolution process with respect to invoices if RMC did not exercise its right to verify every delivery. The Verification Option does not on its plain language limit the breadth of application of s. 22 in such circumstances, and the broad availability of dispute resolution processes with respect to any differences between the parties supports an interpretation that the Verification Option was not intended to have such an effect.

47. The Receiver argues at paragraph 87 of its Brief that RMC's interpretation of the Verification Option would render the Agreement's risk of loss provision inoperable. RMC fully acknowledges that the Agreement placed the risk of loss of aggregate *once delivered by RBee* on RMC. However, the risk of loss provision is not relevant to the issue in this case, which is how much aggregate RBee actually delivered. The provision does not apply, on its plain terms, until RBee actually delivered the aggregate in question, while what is at issue here is what RBee delivered.

48. RMC's interpretation of the Verification Option does not render the risk of loss provision inoperable. If there was credible evidence that RMC misplaced, lost, or destroyed aggregate that RBee showed it had delivered, then of course RMC could not argue that RBee's invoices should be discounted on that basis. But again, that is not at issue here. Rather, it is up to the Receiver, stepping into RBee's shoes, to prove what was delivered in the last three invoices. As will be discussed below,

[57] Appeal Decision at para 23.

there is no evidence of the loss of any aggregate after delivery to RMC from RBee in these proceedings, so the risk of loss provision is not relevant.

49. Given that the plain language of the Agreement does not support the Receiver's position, it then requests at paragraphs 80-82 of its Brief that the Court apply the doctrine of "*expression unius est exclusion alterius*". The Receiver asks this Court to hold that, by including the Verification Option in the Agreement, the parties must have intended to exclude the possibility of any other mechanism by which RMC could challenge or dispute any invoices delivered by RBee.

50. The courts are incredibly cautious in applying the *exclusion alterius* principle. As stated by the Saskatchewan Court of Appeal, "its application calls for a considerable measure of caution lest too much be made of it". The Court noted that the maxim "can be a dangerous master to follow for a number of reasons", and endorsed the following statement made in P.-A. Côté's text on the interpretation of legislation: "Since it is only a guide to the legislature's intent, *a contrario* reasoning should certainly be set aside if other indications reveal that its consequences go against the statute's purpose, are manifestly absurd, or lead to incoherence and injustice."[58]

51. These cautions apply here. The Verification Option itself states that it is subject to the other terms of the Agreement, which make clear that the parties' intention was for RMC to only pay for what was actually delivered, and which left open broad dispute resolution provisions in case of a disagreement on any invoices. The Receiver's requested interpretation flies in the face of the plain language of Agreement itself, and would mandate that RMC pay for whatever amount of aggregate is invoiced, regardless of the amount delivered, and would preclude the dispute resolution processes that are specifically provided for. This is precisely the type of absurd, incoherent and unjust result that the Court in *Dorval* warned against.[59]

### 2. The Objective Intention of the Parties and Surrounding Circumstances

52. The Appeal Decision expressly stated that relevant extrinsic evidence, including the evidence of Mr. Burak regarding industry practice, must be considered when interpreting the Agreement.[60] The evidence in this regard is overwhelmingly in RMC's favour.

53. The parties always intended to perform a final quantity verification upon the conclusion of RBee's performance on the Project, consistent with standard industry practice.[61] Mr. Burak's evidence is

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[58] *Dorval v Dorval*, 2006 SKCA 21 ("***Dorval***") at paras 13-16.

[59] We note that the Receiver's reliance on the *BCR Properties* decision on this point is misplaced. The effect of applying the maxim there was not to bar a claim or defence, and it was not contradicted by the terms of the contract. To the contrary, the Court noted at para 34 that the parties themselves had recognized that the appraiser's mandate was limited, consistent with the result suggested by application of the maxim. No similar circumstances exist here.

[60] Appeal Decision at paras 25, 32-33.

[61] First Burak Affidavit, para 13; Second Burak Affidavit, para 23.

that he believed RBee to understand that RMC would perform the Final Verification or a single reconciliation at the end of the Project, with this resulting in a final corresponding payment or refund, both because it is standard industry practice and because RMC and RBee had done so on the Previous Projects.[62] Although the Receiver disputes the relevance of the Previous Projects, the Receiver requested undertakings from Mr. Burak to determine the number of prior contracts between RMC and RBee and to produce copies of supply agreements.[63] Clearly, the Receiver believed these Previous Projects were indeed relevant to this matter.

54. The evidence in relation to industry practice was that a Final Verification or single reconciliation of product actually delivered was common industry practice, as it eliminated a continuous administrative burden of constantly engaging in third party verification throughout the Project.[64] To this effect, Mr. Burak relied on his extensive 12 years' experience working with RMC, one of Canada's largest independent ready-mix concrete producers, to attest to the industry standard in relation to multiple aggregate production projects in which he has been involved.[65] The Appeal Decision was explicit in noting that Mr. Burak's "observations regarding aggregate production projects seen during his 12 years of working with RMC" must be considered.[66]

55. The evidence in cross-examination confirmed that this expectation had also been understood by RBee and the intention that RBee's entitlement to payment was based on aggregate actually delivered.[67] Furthermore, after the Appeal Decision, Mr. Burak was again cross-examined by the Receiver, and his evidence again confirmed that RMC had always intended to perform the Final Verification, as well as that the industry practice or standard is "to review what was actually provided and reconcile that balance and pay for what was actually provided".[68] The Answers to Undertakings provided in relation to the Second Burak Cross-Examination further confirm the same. These Answers to Undertakings show that RMC completed final verifications and reconciliations with respect to other contracts it had with RBee. They also provide supporting documents and email correspondence which show that RMC calculated the amounts of aggregate and materials delivered by RBee to RMC and reconciled these calculations with previously issued invoices, which would result in updated invoices with credit given for any overages billed by RBee.[69]

[62] First Burak Affidavit, para 13; Second Burak Affidavit, para 23.
[63] Nicholas Burak's Second Responses to Undertakings, #2 and #3.
[64] First Burak Affidavit, para 15.
[65] First Burak Affidavit, paras 2-3; Second Burak Affidavit, para 7.
[66] Appeal Decision at para 32.
[67] First Burak Cross-Examination, 37:23 – 37:35, 39:17 – 40:6.
[68] Second Burak Cross-Examination, 6:26 – 7:16.
[69] Nicholas Burak's Second Responses to Undertakings, #4.

56. It is abundantly clear that the objective intention of the parties and the surrounding circumstances not only coincide with the plain and ordinary meaning of the Agreement as articulated above, but they also avoid a commercially unreasonable interpretation disconnected from economic reality, which would be to force RMC to pay millions of dollars for aggregate that was not actually delivered. It is clear that forcing payment for overbilled and underdelivered aggregate and denying the intended Final Verification would also not coincide with the standard practice in the aggregate and concrete industry and the market in which RBee and RMC were operating.

57. In contrast to the assertions in the Receiver's Brief, RMC's interpretation of the Agreement is not seeking to dispute the amount of aggregate delivered through "extra-contractual means" or to add in an "implied term" of Final Verification to the Agreement.[70] To the contrary, RMC's interpretation of the Agreement is that it is fundamental to the Agreement itself that RBee is paid for only the aggregate it actually delivered, as well as that the Final Verification was not expressly excluded by the Agreement. The extrinsic evidence and surrounding circumstances are clear regarding the proper interpretation of the Agreement itself without any "extra-contractual" means or implied terms, being that the Verification Option was not meant to be the sole mechanism to verify and dispute the aggregate actually delivered. The Final Verification was understood between the parties and, more importantly, is an industry standard that was available under the Agreement for this purpose.

58. The Receiver relies on the entire agreement clause at s. 26 of the Agreement.[71] The Receiver's assertions that s. 26 excludes the Final Verification effectively excludes the consideration of extrinsic evidence and surrounding circumstances. The jurisprudence clearly establishes the opposite. Entire agreement clauses do not preclude consideration of the surrounding circumstances and understanding and intention of the parties, which is distinct from adding terms into a contract and which would ignore the fundamental principles of contractual interpretation.[72] As RMC's interpretation of the Agreement does not seek to add any terms to the Agreement, RMC's interpretation of the Agreement based on the surrounding circumstances is not at odds with s. 26.

### 3. RMC's Interpretation is Consistent with Case Law and Legislation

59. The case law is clear that explicit, unequivocal words must be used in a contract to exclude a party's pre-existing substantive right or defence. It is also clear that not exercising a right under a contract does not prohibit a party from pursuing other remedies available to it. This applies to both RMC's right to dispute the Unpaid Invoices and its right to a set-off defence under the Agreement.

[70] Receiver's Brief, paras 3, 85.

[71] Receiver's Brief, paras 13(g), 19, 72.

[72] *Nexxtep Resources Ltd v Talisman Energy Inc*, 2013 ABCA 40 at para 29; *IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing*, 2017 ABCA 157 at paras 123-124.

60. The British Columbia Court of Appeal ("**BCCA**") has held that "It is trite law that unless a contract clearly states an intention to exclude rights normally arising from it, such an intention should not be inferred", as well as that "if a party to a building contract is to be deprived of a cause of action, this is only to be done by clear words".[73] More specifically, in *Ainsworth*, a case concerning a construction dispute, the BCCA applied the above principle in holding that the plaintiff owner's failure to exercise its contractually specified right to rectify any deficiencies in the defendant's work, did not otherwise limit the remedies available to the owner for the contractor's breach.[74] This principle has also been applied to set-off claims in construction disputes.[75]

61. As RMC's ability to perform the Final Verification is not expressly excluded by the Agreement, it is clear that RMC's non-exercising of the Verification Option does not prohibit it from seeking compensation for RBee's overbilling found as a result of the Final Verification. This includes challenging the Unpaid Invoices themselves as well as advancing a set-off defence, which is similarly not expressly excluded by the Agreement. Indeed, the Appeal Decision cited *Ainsworth* and expressly cautioned that "Verification clauses are to be strictly construed".[76]

62. Despite the Appeal Decision's clear adoption of the principle in *Ainsworth* as applicable to this matter, the Receiver's Brief ignores the same and urges this Honourable Court to take the erroneous approach of not strictly construing the Verification Option and improperly imposing significant consequences that are not provided for therein.

63. The Receiver is of the view that *Paradigm Holdings Ltd v Ngan & Siu Investments Co* supports its position that, by not exercising the Verification Option, RMC cannot attempt to "exercise other, similar rights."[77] However, a close reading of the decision actually supports the opposite proposition. In fact, the Court in *Paradigm* held that the buyer should have relied on another, similar method of verification, other than that which was expressly provided for in the contract.

64. The basis of the contractual adjustment clause in *Paradigm* was that the purchase price of two strata condominium units "shall be adjusted according to the actual size of the property registered as per Strata Plans for subject strata corporation on a pro-rata bases [sic] upon Completion."[78] The buyer did attempt to invoke the contractual adjustment clause upon the completion date by relying on the Strata Plans in seeking a price reduction. However, the Court held that the buyer could not

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[73] *Ainsworth Lumber Co. v KMW Energy Inc.*, 2004 BCCA 415 at para 19 ("***Ainsworth***"); *First City Development Corp. v Stevenson Construction Co.*, [1985] BCJ No. 2062, 1985 CarswellBC 762 at para 6 (A copy of this authority is added as Appendix "A" to this Brief, as an electronic version is not publicly available).

[74] *Ainsworth* at paras 9, 21.

[75] For example, see: *Swagger Construction Ltd. v U.B.C. et al.*, 2000 BCSC 1839 at paras 12, 23, 33.

[76] Appeal Decision at para 22.

[77] Receiver's Brief, para 92.

[78] *Paradigm Holdings Ltd. v. Ngan & Siu Investments Co. Ltd.*, 2008 BCCA 172 ("***Paradigm***") at para 7.

rely on the contractual method of adjustment (the square footage disclosed in the Strata Plans) because it was obvious that the Strata Plans were not up-to-date and were inaccurate.[79] Rather, the Court held that the buyer should have relied on a different method of verification that was not specified in the contract – by actually measuring the square footage.

65. In *Paradigm*, the buyer was not entitled to rely on a method of verification that was obviously inaccurate, which would have resulted in a significant windfall to the buyer at the expense of the seller.[80] To accept otherwise would result in a commercially insensible result.[81] Similarly in our case, if the Receiver is permitted to simply rely on inaccurate and uncorroborated invoices, this will result in an unjust windfall for the RBee's estate at RMC's detriment. Rather, the sensible approach is to require the Receiver to prove what was delivered, and in the alternative, to permit RMC's set-off defence based on the Final Verification.

66. The Receiver also relies on the *Arrow Transfer Co. v Royal Bank* decision[82] to argue that RMC is barred from disputing the Unpaid Invoices on the basis of performing the Final Verification due to not exercising the Verification Option.

67. In *Arrow Transfer*, the Supreme Court of Canada ("**SCC**") dealt with a lawsuit by a customer against its bank with respect to cheques fraudulently made out and cashed to the customer's detriment. The agreement between the customer and the bank contained a clause whereby the customer had agreed to verify the correctness of each statement of account received from the bank. The clause, as quoted by the Court, provided that if the customer failed, within 30 days of receiving a bank statement, to notify the bank in writing of any alleged omissions, wrongful debits or inaccurate entries, then the account kept by the bank would be conclusive evidence without any further proof that the account was correct. The clause, as quoted by the Court, concluded by stating that the bank would then "be free from all claims in respect of the account". The customer had not provided notification of any debits wrongly made in the account within the 30 day period. The Court applied the plain language of the clause to hold that it provided the bank with a complete defence to the action, expressly noting that "Having failed to perform his contractual duty, the agreement made the statements [of account] conclusive evidence against him".[83]

68. The verification clause in *Arrow Transfer* is clearly distinguishable from the Verification Option in the Agreement. The Verification Option does not stipulate any consequences for or bar any claims

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[79] *Paradigm* at para 27.

[80] *Paradigm* at paras 25, 27.

[81] *Paradigm* at para 24.

[82] *Arrow Transfer Co v Royal Bank*, [1972] SCR 845 ("***Arrow Transfer***") (A copy of this authority is added as Appendix "B" to this Brief, as paragraph numbering is not available in the hyperlinked version).

[83] *Arrow Transfer* at paras 2-5, 7, 13.

of RMC in declining to exercise the Verification Option, whereas the verification clause in *Arrow Transfer* expressly absolved the bank of any responsibility for errors in the account and freed the bank from all claims without further proof that the account was correct if the customer did not provide notice of errors within a stated time period. *Arrow Transfer* therefore is in no way inconsistent with the well-established principle that clear wording is required to deprive a party of a right to advance a claim, as clear wording was provided in the clause at issue in that precedent. This is made clear in the multiple cases that followed *Arrow Transfer*, where the courts have confirmed that clauses which purport to bar claims are to be read strictly, such that any ambiguity will be read in favour of permitting rights of dispute to stand and not be nullified.

69. In *Royal Bank v Larry Creighton Pro. Corp.*, the bank had failed to apply the fixed interest rate agreed to with the customer with respect to several loans. The interest charges were debited against the customer's current account, and the customer challenged its liability for those charges. The bank raised a verification agreement whereby the customer had agreed to notify the bank of any alleged omissions, debits wrongly made or inaccurate entries within 30 days of receiving each account statement. Without such notification, the agreement provided that the account kept by the bank would be conclusive evidence without any further proof that all entries in the account were correct, and the bank would be free from all claims in respect of the account. The interest charges at issue were shown on the account statements rendered by the bank, and the customer had not notified the bank of the issue within the 30-day period.

70. The ABCA in *Royal Bank* discussed *Arrow Transfer* and then explicitly held that "verification agreements should be strictly construed". Applying this rule, the Court held that the verification agreement did not prevent the customer from contesting the interest rates charged by the bank on the loans. The Court noted that the verification agreement, by its language, applied only to the customer's current account, which did not indicate the rate of interest applied or the period covered by the interest debits. While the customer may have accepted that the interest charges on the loans were to be debited to his current account, this did not amount to an acknowledgement that the interest rates had been proper.[84]

71. This strict approach was followed by the BCCA in *Cavell Developments Ltd. v Royal Bank of Canada,* where the Court again considered a bank account verification clause. The clause specified a 30-day period within which the customer had to notify the bank about inaccurate entries; otherwise, the bank was to be free from claims in respect of the account. The facts were that the bank had been negligent in accepting a directors' resolution specifying a single signing officer, and in accepting cheques drawn on the signature of that single signing officer. The Court refused to

[84] *Royal Bank v Larry Creighton Pro. Corp.*, [1989] 3 WWR 561, 1989 ABCA 53 (CanLII) ("***Royal Bank***") at paras 1-5, 15-16, 18-20.

hold that the verification agreement released the bank from the consequences of its own negligence. The Court held that it would give the verification agreement the same strict construction contemplated in *Arrow Transfer* and *Larry Creighton*, holding that the bank was not entitled to rely on the verification agreement as a defence where the claim against it was for negligence. The Court relied on case law stating that if a contracting party wishes to limit its liability for negligence, it must do so in clear terms.[85]

72. In another case, *Action Petroleum Services Ltd. v Prince Albert Credit Union Ltd.*, the defendant in that case relied upon *Arrow Transfer* to argue that "account verification clauses have long been held to provide banks with protection from law suits of this nature". The plaintiff had sued the defendant in negligence and breach of contract for honouring cheques drawn from its account based on forged signatures. The Court ruled that the plaintiff's claims were not barred by the verification clause, despite the fact that the plaintiff had not provided notice of the issue with the cheques within the required 30-day period. It distinguished *Arrow Transfer* on the basis that the clause before it did not specifically state that non-compliance with the verification clause would result in a release of the defendant.[86]

73. These cases confirm that any contractual clause, including verification clauses, will not deprive a party of a right to seek relief unless they clearly and expressly state this consequence. As explicitly recognized in the Appeal Decision in relation to the "ambiguous" Verification Option, "Nothing in the Agreement expressly set out specific consequences if RMC did not verify the invoices, such as a waiver of rights, or expressly stated RMC could not dispute the invoices after the time limit for third-party verification". As any clause which is purported to bar a claim or right of dispute must be interpreted strictly, the ABCA's explicit recognition that the Verification Option did not actually state that it bars RMC's right to dispute invoices bars the Receiver's interpretation.

74. We note that RMC's interpretation is also consistent with governing legislation, namely the Alberta *Limitations Act*, RSA 2000, c L-12, which applies because these proceedings were commenced in Alberta.[87] The *Limitations Act* specifies a two-year limitation period which commences to run at the point of reasonable discoverability of a claim.[88] The Receiver's interpretation of the Verification Option that RMC is barred from contesting the volume of a delivery if RMC does not, within 60 days of the delivery, provide a third party verification certification, would significantly abridge the two-year limitation period. This result is expressly forbidden by s. 7(2) of the *Limitations Act*, which

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[85] *Cavell Dev. Ltd. v. Royal Bank*, 78 DLR (4th) 512, 1991 CanLII 749 (BC CA) at paras 1, 16, 34-35, 37 (A copy of this authority is added as Appendix "C" to this Brief, as paragraph numbering is not available in the hyperlinked version).

[86] *Action Petroleum Services Ltd. v Prince Albert Credit Union Ltd.*, 1999 SKQB 133 at paras 1-2, 7, 12-13.

[87] *Limitations Act*, RSA 2000, c L-12 ("***Limitations Act***") at s. 12.

[88] *Limitations Act* at s. 3; First Burak Affidavit, para 20-21, 60; First Burak Cross-Examination, 24:3 – 24:15.

provides that "An agreement that purports to provide for the reduction of a limitation period provided by this Act is not valid."[89] The Agreement must be interpreted as being consistent with legislation,[90] and the Receiver's suggested construction falls afoul of this principle.

75. Given that the plain language, surrounding circumstances, and authorities all mandate rejection of the Receiver's claim that RMC's right to dispute the invoices is barred, we must then turn to whether the Receiver has made out its claim, and whether RMC's set-off defence applies.

### C. The Receiver Failed to Meet its Burden Regarding the Unpaid Invoices

76. It is a trite and longstanding principle of law that delivery of goods or services, such as the aggregate and hauling services in this case, must be sufficiently proved by the party seeking recompense for the same. For example, in *Nor-Wes Building Supplies Limited v Arrowsmith*, the BCCA unanimously held that a plaintiff failed in their claim for the value of goods sold and delivered, as "there was not sufficient proof of the delivery and receipt of the goods" and "no sufficient evidence was adduced below to prove delivery", with the only evidence being entries in the plaintiff's leger account that purported to show the said materials were delivered.[91]

77. This common sense principle has been repeatedly reaffirmed in multiple recent precedents. The Ontario Superior Court recently held that "in respect of a claim for services rendered, it is not sufficient for a plaintiff to prove that it sent an invoice and that it was not paid, but rather a plaintiff bears the onus of proving that it actually performed the services that would entitle it to payment". This was upheld by the Ontario Court of Appeal when it expressly agreed with the rejection of the plaintiff's claim to payment for three invoices on the same basis.[92]

78. In *606346 Alberta Ltd. v. Abugov*, this Honourable Court considered a matter where the plaintiff attempted to prove damages by asserting that "invoices themselves could be used as proof of their amounts". The Court held that "there is nothing about an invoice sent in the course of a project that gives the document some type of innate trustworthiness", especially in relation to "invoices for services rendered on a project when the details and the reason for the work are disputed".

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[89] *Limitations Act* at s. 7(2).

[90] *Envision Credit Union v Canada*, 2013 SCC 48 at para 56.

[91] *Nor-Wes Building Supplies Limited v Arrowsmith*, 22 W.W.R. 185, 1957 CanLII 640 (BC CA) at paras 6-8 (A highlighted copy of this authority is added as Appendix "D" to this Brief, as paragraph numbering is not available in the hyperlinked version).

[92] *Amtim Capital Inc. v Appliance Recycling Centers of America*, 2022 ONSC 6877 at paras 126-127; *Amtim Capital Inc. v. Appliance Recycling Centers of America*, 2024 ONCA 225 at paras 22-23; see also: *Mera Software v Intelligent Mechatronic Systems*, 2018 ONSC 5208 at paras 18, 23.

79. In these proceedings, the Receiver has failed to meet its primary burden of establishing that RMC is liable for the amounts billed in the Unpaid Invoices. The Receiver's provision of copies of the Unpaid Invoices is not sufficient to discharge this burden, which requires proof that RBee actually provided the goods and services in the quantities claimed in the Unpaid Invoices. The Receiver has adduced no evidence that the claimed aggregate had actually been delivered. The Receiver has also failed to tender any weigh tickets or load slips that RMC expected to receive to substantiate and verify any of RBee's claimed hauling charges in the Unpaid Invoices.[93] The Receiver's arguments amount to an assertion that the Unpaid Invoices are trustworthy in-and-of-themselves,[94] which is incorrect at law.

80. The Receiver's admissions as to RBee's fraudulent or preferential dealings and the overstatement of the value of its assets in the RBee Bankruptcy Documents buttresses the necessity of the application of the aforementioned principles. To accept the Receiver's position that bare invoices are proof of delivery without any supporting evidence or documentation would permit entities such as RBee to overstate the value of goods and services in those invoices and receive an undeserved windfall without consequence. This would result in unjust outcomes with no recourse for innocent entities overbilled by those willing to engage in questionable business practices.

81. Lastly, the Receiver relies on statements received from RBee's management at paragraph 23 of its Brief. There is nothing to substantiate the suggestion that RMC delayed payment of the Unpaid Invoices to gain leverage. This is irrelevant and does not aid in discharging the Receiver's burden in relation to the delivery of the aggregate and services under the Unpaid Invoices.

### D. RMC's Set-Off Defence More Than Offsets Any Amounts Owing

82. Only if the Court finds that the Receiver has met its primary burden in establishing that RMC is liable for the amounts claimed in the Unpaid Invoices must it determine whether RMC has established its set-off defence through its Final Verification.

#### 1. RMC Has Established Equitable Set-Off

83. RMC asserts a defence of equitable set-off against the Receiver's claim. The Court in *Chevron Canada Resources v Canada* affirmed the principles pertaining to equitable set-off, as stated by the SCC in *Telford v Holt*: (1) The party relying on a set off must show some equitable ground for being protected against his adversary's demands; (2) The equitable ground must go to the very root of the plaintiff's claim before a set off will be allowed; (3) A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to

[93] First Burak Affidavit, para 57.

[94] Receiver's Brief, para 17.

enforce payment without taking into consideration the cross-claim; (4) The plaintiff's claim and the cross-claim need not arise out of the same contract; and (5) Unliquidated claims are on the same footing as liquidated claims.[95]

84. The first requirement—an equitable ground for being protected against RBee's/the Receiver's claim—is clearly established here. It would be manifestly unfair to force RMC to satisfy the Unpaid Invoices when RBee breached the Supplier Agreement by substantially overcharging RMC over the course of the Project, including with respect to the periods to which the Unpaid Invoices pertain.

85. The second and third requirements of equitable set-off are also met. RMC's set-off clearly goes to the root of and is clearly connected with the Receiver's (RBee's) claim for payment of the Unpaid Invoices, given that the Unpaid Invoices pertain to the same work on the same Project for which RBee substantially overbilled RMC (and for which RMC has already paid). The first three principles above are the only requirements RMC must establish.

### 2. RMC's Evidence supporting its Set-Off Defence is Reliable

86. RMC's evidence as to the AFDE Survey, the density factors used to convert the quantity of aggregate from cubic meters in the AFDE Survey to tonnes, and RMC's Batch Records (collectively, "**RMC's Set-Off Evidence**") are accurate and reliable for the purposes of establishing RMC's set-off defence.

87. As a preliminary matter, it should be kept in mind that RMC's Product Reconciliation discloses that the amount *owed by RBee to RMC*, net of RBee's September and October Invoices, is over $3,100,000.[96] Yet RMC is not counterclaiming for this amount. It is merely asserting a defence of set-off. Thus, even a very large theoretical margin of error – up to the equivalent of over $3,100,000 worth of aggregate – would have no impact on the outcome of these proceedings. However, to be clear, RMC's Product Reconciliation is accurate and reliable, and does not have a margin of error even remotely approaching the amount required to result in a nil balance between the parties.

88. The Receiver argues that RMC's Set-Off Evidence should be discounted on the basis that it was created for some purpose other than RMC's aggregate verification or that it was not commissioned for the purposes of this dispute.[97] RMC does not agree with this proposition. RMC's Set-Off Evidence is almost entirely based on contemporaneous business records, which have an inherent indicia of reliability. For this reason, business records are excepted from the rule against hearsay

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[95] *Chevron Canada Resources v Canada*, 2019 ABQB 418 at para 178, citing *Telford v Holt*, [1987] 2 SCR 193 (SCC) at paras 27, 34.

[96] First Burak Affidavit, para 58; updated to reflect Second Burak Affidavit, para 13.

[97] For example, see the Receiver's Brief, paras 45-46, 48-49, 105, 116, among other paras.

evidence.[98] The only exception in this case is that density testing on the 40-20mm aggregate from the Project occurred on December 22, 2022, and was conducted for the purposes of RMC's reconciliation. But this evidence also is reliable—it represents independent laboratory testing conducted by a third party on material sourced from the Project in order to ensure that the conversion from volume to weight in RMC's reconciliation was accurate.

89. In any event, other than the fact that contemporaneous business records form almost all of RMC's Set-Off Evidence, RMC does not accept that the purpose for which its Set-Off Evidence was created is relevant. The issue is simply whether the Set-Off Evidence is accurate and reliable, which RMC establishes in the affirmative in the sections below. In contrast, the Receiver has adduced speculative second-hand evidence in an attempt to argue that RMC's analysis is unreliable. The Receiver's evidence in this regard should be afforded little weight and RMC's evidence from those directly involved in aggregate production contracts and on the Project itself should be preferred.

90. In the words of the British Columbia Supreme Court ("**BCSC**") in *Suzuki v Jackson*, "[a]ll we have is speculation and speculation carries little weight in balancing probabilities".[99] A "mere possibility" or speculation falls below the evidentiary standard required to prove a fact on a balance of probabilities.[100] The requisite standard is probable, not possible.[101]

91. The opinion evidence proffered by the Receiver's two "Construction Solutions" professionals[102] should be afforded little weight, on the basis that they purport to give advice of what, in their views, should have occurred on the Project, but there is no indication that they qualify as experts on aggregate production of the kind carried out on the Project. Their CVs are dominated by claims preparation work, with some management of general capital projects, and no claim is advanced that they possess the requisite expertise to opine on regular practice or procedure as it relates to aggregate production or measurement.[103]

92. The courts have become increasingly wary of the opinions of generalists in fields with complex sub-specialities. For instance, in *R v Scott*, the BCSC refused to allow a general psychiatrist to offer an opinion in the area of neuropsychiatry, quoting SCC precedent that "The evidence must be given

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98 *R v Christhurajah*, 2016 BCSC 2400 at para 44.

99 *Suzuki v Jackson*, 3 A.C.W.S. (2d) 244, 1980 CarswellBC 1590 at para 27 (A copy of this authority is added as Appendix "E" to this Brief, as an electronic version is not publicly available).

100 *Gilead Sciences, Inc. v Idenix Pharmaceuticals Inc*., 2015 FC 1156 ("***Gilead Sciences***") at para 254.

101 *Gilead Sciences* at para 254.

102 See Receiver's Supplemental Report, paras 23-24.

103 Receiver's Supplemental Report, Appendix "G".

by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify."[104]

93. The Receiver's in-house claims specialists' evidence is also problematic given that they had no involvement in the Project, and have never attended at the Project site. Certainly, the evidence of those who were actually involved on the Project should be preferred with respect to whether the stockpile site was flat, whether the appropriate density factors were applied, and whether there was wasted or lost product.

94. The evidence of those who actually have direct first-hand knowledge on these points supports the fact that RMC's Set-Off Evidence is reliable and accurate.

**(a) The Stockpile Area was Flat**

95. The Receiver attempts to cast doubt on the reliability of the AFDE survey evidence, which recorded the amount of aggregate in the Project Stockpile as of October 31, 2021 by speculating that the Stockpile may not have been on flat ground. The Receiver relies on its construction claims personnel for the proposition that stripping, clearing, and grubbing do not make an area flat, and that a visual inspection is not sufficient to determine whether the area was level.[105]

96. The problem with the Receiver's position is that it does not establish that the Stockpile area was not flat. It does not fundamentally contradict the evidence provided by RMC from individuals who were actually at the Project site, who testify that the area was indeed flat.

97. Before the commencement of AFDE's work on the Project, BC Hydro engaged a third party to prepare the site that would contain the Stockpile and RMC's Batch Plants.[106] Scott Marshall, AFDE's Project Director, is intimately familiar with the Project site and the day-to-day operations on the Project, where he has worked full-time on-site since Project inception.[107] He testified that AFDE ensured the Stockpile site was flat and levelled once the site preparations had been completed.[108] In accordance with standard industry practice and the practice employed by AFDE with respect to other areas of the Project, AFDE performed an inspection to ensure the site was level and then formally accepted the handover of the area from BC Hydro.[109]

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[104] *R v Scott,* 2018 BCSC 2562 at paras 43-44, 48.
[105] Receiver's Supplemental Report, para 24(a).
[106] Marshall Cross-Examination, 26:23 – 26:25.
[107] Marshall Cross-Examination, 11:14 – 11:20.
[108] Marshall Cross-Examination, 25:18 – 26:9.
[109] Marshall Cross-Examination, 25:7 – 25:17; 27:23 – 27:24.

98. In addition, the evidence of Mr. Burak is that RMC also performed an inspection of the Stockpile area prior to commencement of the work on the Project, also in accordance with standard industry practice.[110] This involved walking over and viewing the entirety of the area, which would have revealed any slopes or other irregularities, and none were revealed.[111] Like Mr. Marshall, Mr. Burak was personally present at the Stockpile site and has attested that the area was flat and without slopes, minor or otherwise.[112] In his Second Cross-Examination, Mr. Burak further confirmed that a visual inspection of the site by all those who had a commercial interest in the same was conducted and showed that the site was flat, that this visual inspection was standard practice, and that even if there was a slope at the Project site this would not be relevant to or account for the magnitude of material that was not delivered by RBee. He also confirmed that the map of the Project site confirmed the flatness of the site in area of the Stockpile used for concrete production.[113]

99. A level area was required for building the structures (the Batch Plants)[114] and stockpiling the aggregate.[115] Had this area not been flat or adequate "to go to work", RBee, RMC, or AFDE would have likely commenced a corresponding claim, given that stockpiling aggregate on a sloping area would have been operationally difficult, and would have led to problems with stockpiling on the Project and verifying how much aggregate was in the stockpiles.[116] No such problems arose on the Project, and none of the parties raised an objection in relation to any inadequacies pertaining to the Stockpile site at any time, further confirming that the Stockpile area was flat.[117]

100. The possibility that the Stockpile area may not have been flat is pure speculation on the part of the Receiver, who never personally visited the Project site. There is no evidence on record to suggest that the Stockpile area was not flat. To the contrary, Mr. Marshall testified that he was personally "out there at the [Stockpile] site" and able to determine that the Stockpile area was flat and adequate for the purposes for which it would be utilized.[118] The Receiver's claims to the contrary are speculative and are not supported by the evidence.

101. The evidence that AFDE and RMC were able to visually determine that the Stockpile area was flat, provided by Mr. Marshall, a seasoned Project Manager with real-world experience in managing

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[110] Second Burak Affidavit, para 7.

[111] Second Burak Affidavit, para 7.

[112] Second Burak Affidavit, para 9.

[113] Second Burak Cross-Examination, 10:12 – 10:25; 12:10 – 12:20, 12:27 – 13:25, 15:5 – 15:16, 18:24 – 18:26, 21:15 – 22:12.

[114] Marshall Cross-Examination, 25:18 – 26:9.

[115] Second Burak Affidavit, para 8.

[116] Marshall Cross-Examination, 25:18 – 26-9; Second Burak Affidavit, para 8.

[117] Second Burak Affidavit, para 8.

[118] Marshall Cross-Examination, 25:18 – 26:9, 27:8 – 28:4.

large public infrastructure projects,[119] and Mr. Burak, who has observed this method of inspection on multiple aggregate production projects,[120] should be preferred over the opinion of the Receiver's consultants, who have no proven expertise or experience in terms of aggregate production.[121]

### (b) There Was No Diversion of Aggregate

102. The possibility that aggregate may have been removed from the Stockpile by some party other than RMC or otherwise removed for use in something other than concrete production (and thus not accounted for in RMC's verification) is also pure speculation raised by the Receiver.

103. The Receiver has provided no evidence that this actually occurred. The Receiver has only stated in its latest report that "consideration of wasted or lost product" should be considered.[122] This falls far short of demonstrating that any such wastage or loss of aggregate actually arose.

104. Indeed, RMC's evidence is conclusive and to the contrary. Other than the 4,170 tonnes of winter abrasive material that were used to sand the roadways, the delivery and payment for which RMC does not dispute, the evidence is that no aggregate was used on the Project for any purpose other than concrete production.[123] The Receiver's Brief at paragraph 43 on this point is misleading, as the winter abrasive material is not and has never been included as part of any of the aggregate in dispute, and therefore is not evidence of diversion of aggregate.

105. In cross-examination, Mr. Marshall agreed with the Receiver's suggestion that aggregate "could" be used for purposes other than concrete production on a project site.[124] However, when asked whether aggregate was in fact used to build or maintain any roads on the Project site in particular, Mr. Marshall conclusively rejected that proposition.[125] As noted, Mr. Marshall was on the Project site full time. He further testified that:[126]

(a) The Project site is the most secure construction site he has ever worked on;

(b) No aggregate products delivered by RBee would have left the Project site;

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[119] Affidavit of Scott Marshall, sworn December 16, 2022 ("**Marshall Affidavit**"), para 2.
[120] Second Burak Affidavit, para 7.
[121] Receiver's Supplemental Report, Appendix "G".
[122] Receiver's Supplemental Report, para 24(d).
[123] Second Burak Affidavit, para 17.
[124] Marshall Cross-Examination, 20:13 – 20:15.
[125] Marshall Cross-Examination, 21:6 – 21:17.
[126] Marshall Cross-Examination, 21:6 – 22:24, 23:19 – 23:21, 28:5 – 28:26.

(c) The Project Stockpile was the only location to which RBee delivered aggregate for use in RMC's Batch Plants; and

(d) He was "very confident" that no aggregates were taken from the Stockpile but not used in RMC's Batch Plants – this would have been "highly unlikely".

106. Mr. Burak's evidence was to the same effect in cross-examination: no aggregate for concrete production was used on potholes, leveling, or to maintain roads.[127] The Receiver's reliance on Mr. Burak's evidence that drivers transferring aggregate from the Stockpile using a loader at paragraph 44 of the Receiver's Brief is taken out of context. Mr. Burak was simply stating that the aggregate was usually transferred from the Stockpile to the Batch Plants via a loader instead of a rock truck.[128] This is not evidence of any wastage, as all aggregate taken to the Batch Plants, whether by loader or truck, is accounted for in the Batch Plant records.

107. In addition, RMC staff had been constantly on-site during the Project. If anyone started removing aggregate from the Stockpile, for purposes other than concrete production, RMC's staff would have prevented such removal, given that RMC was paying for the aggregate for the purpose of concrete production.[129] This simply did not occur on the Project.[130] This, along with Mr. Marshall's testimony as a first-hand witness on the Project site, is directly contrary to the Receiver's mere speculation regarding diversion of aggregate.[131]

#### (c) The AFDE Survey Accurately Measured the Stockpile Volume

108. The evidence of Mr. Marshall is that the AFDE Survey conducted on October 31, 2021 recorded the quantities of aggregate in the Stockpile to a high degree of accuracy, with an error margin of only about +/- 3mm millimeters relative to aggregate piles that typically spanned heights of 10 meters or more.[132] Although AFDE obtained surveys for a number of purposes, including for the purposes of submitting advance billings to BC Hydro, Mr. Marshall confirmed his belief that the AFDE Survey data was accurate and reliable for the purposes of calculating the precise amount of each kind of aggregate that was located in the Project stockpiles as of October 31, 2021.[133] His evidence surrounding the accuracy of the AFDE Survey itself was not challenged in cross examination on his Affidavit.

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[127] First Burak Cross-Examination, 29:3 – 29:25.
[128] First Burak Cross-Examination, 33:9 – 33:20.
[129] Second Burak Affidavit, para 17.
[130] Second Burak Affidavit, para 17.
[131] Receiver's Brief, paras 41, 44.
[132] Marshall Affidavit, paras 10-12, 14.
[133] Marshall Affidavit, paras 7, 14.

### (d) RMC Relied on Accurate Density Factors

109. Because the AFDE Survey measured the Stockpile quantities of the various aggregate products in in volume (cubic meters), RMC was required to multiply these values by a density factor for each class of aggregate to obtain the quantities in weight (tonnes). A density factor represents an aggregate material's mass per unit volume (i.e. density).[134]

110. In RMC's original fall 2021 calculations, it utilized density factors obtained from AFDE. However, the reliability of the AFDE-provided density factors could not be confirmed and it was revealed in late December 2022 that AFDE had simply used an estimated average density factor of 1.6 for all classes of aggregates for the purposes of its interim billings to BC Hydro.[135] As a result, RMC then adjusted its calculations to rely on laboratory testing of the densities of the four relevant classes of aggregate supplied by RBee that it had commissioned, which Mr. Burak utilized in providing updated calculations in his Affidavit sworn December 23, 2022.[136]

111. Although three of the four classes of aggregates tested (the 20-14 mm product, 14-5 mm product and sand) were with respect to samples crushed during the 2021 season by RBee on the Vogel Pit Project near Drayton Valley, Alberta, they were nevertheless river deposit gravel, of the same kind and nature as the products sourced on the Project.[137] As stated by Arun Aggarwal, who has direct expertise and experience in aggregate quality testing, the densities were expected to be very similar to the density of the products sourced on the Project.[138]

112. After considering the Receiver's concerns surrounding the density factors obtained from testing the Vogel Pit samples, RMC undertook a search of its records and was able to locate laboratory testing results provided by Wood Environment & Infrastructure Solutions ("**Wood**") dating back to 2019 with respect to aggregate crushed by RBee on the Project site for the 20-10 mm and 14-5 mm products.[139] As anticipated, the Wood density factors are very similar to the density factors obtained from testing the Vogel Pit samples, with negligible differences.[140]

113. In any event, Mr. Burak proceeded to update his verification and reconciliation calculations using the Wood density factors for the 20-10 mm and 14-5 mm products. Using the Wood density factors obtained from testing aggregate sourced from the Project reduced the total of RBee's overbilling

[134] First Burak Affidavit, para 33.
[135] First Burak Cross-Examination, 65:18 – 66:8.
[136] First Burak Affidavit, para 34.
[137] Second Burak Affidavit, paras 10-11.
[138] Second Burak Affidavit, para 11.
[139] Second Burak Affidavit, para 12.
[140] Second Burak Affidavit, para 12.

on the Project slightly, down to the amount of **$7,106,857.50** before GST.[141] To be clear, and contrary to the Receiver's Brief at paragraphs 53 and 110, this calculation was based on density factors where three of the four types of aggregate tested for density originated from the Project site.

114. There are two categories of densities: compacted density and loose density. A compacted density for any given aggregate product will be higher than a loose density because there are fewer voids in a compacted mass of aggregate relative to aggregate that is in a loose state.[142] Despite the fact that a loose density is typically appropriate for application with respect to aggregates in a stockpile, to provide the most conservative and beneficial calculation to RBee, Mr. Burak has utilized the compacted densities for each class of aggregate disclosed through the laboratory testing, including the Wood density factors.[143] With the higher, compacted densities, the calculated weight of aggregate in the Stockpile as of October 31, 2021 is higher and more favourable to RBee than had Mr. Burak utilized the loose densities.

115. The Receiver provides submissions at paragraphs 50-54 of its Brief regarding the density factors that AFDE and BC Hydro agreed to use to convert the Stockpile quantities from cubic meters to tonnes. As stated above, RMC did not use the density factors selected by AFDE and BC Hydro in the preparation of its Product Reconciliation, and as such, these density factors are not relevant.

116. The Receiver also states in its Brief at paragraph 52 that Mr. Burak noted during his cross-examination that the laboratory density testing was intended to be "an estimate." This is a misstatement of Mr. Burak's evidence. Mr. Burak was not referring to the density testing itself as an estimate but rather RMC's overall internal planning process that considers stockpiles at various sites. Mr. Burak confirmed in his testimony that, when it comes to matters of payment or invoicing (as opposed to planning) – RMC uses "actuals", not estimates.[144]

117. The Receiver's suggestion that RMC's calculations of RBee's overbilling should be rejected because of uncertainty on density factors is again based on mere speculation that was ultimately contradicted by the actual evidence. The Receiver's claims personnel could only state that it should not be assumed without verification that aggregate from different locations have the same density factor.[145] RMC has provided evidence that the density factors for aggregate from the Vogel Pit and from the Project site were highly similar to one another. RMC also has presented contemporaneous

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[141] Second Burak Affidavit, para 13.

[142] First Burak Affidavit, Exhibit "F", as per Arun Aggarwal, Lab Supervisor with CRJ Civil Ltd.

[143] Second Burak Affidavit, para 13; First Burak Affidavit, paras 36-37 and Exhibit "F", as per Arun Aggarwal, Lab Supervisor with CRJ Civil Ltd.

[144] First Burak Cross-Examination, 66:13 – 66:26.

[145] Receiver's Supplemental Report, para 24(b).

evidence of density factors from the Project for the 40-20 mm, 20-10 mm and 14-5 mm aggregate products, which, when applied to the Stockpile, confirm RBee's significant overbilling on the Project.

118. In his Second Cross-Examination, Mr. Burak has confirmed that, subsequent to the Second Burak Affidavit being filed, updated density testing was done on the aggregate located at the Project site itself and "the difference in density factors was less than a percent of variation" and there are "very negligible differences between the properties".[146] This further confirms the accuracy of the density factors used in RMC's Product Reconciliation.

#### (e) The Batch Records Reliably Recorded the Aggregate Removed from the Stockpile

119. Once RMC transferred the aggregate supplied by RBee from the Stockpile to its nearby Batch Plants, each aggregate product was weighed by RMC's automated scales, controlled by its batching software, to ensure that accurate quantities of each aggregate product were mixed into each batch of concrete produced.[147] RMC's batching system automatically recorded the quantities of each aggregate product consumed in each batch of concrete in its Batch Records.[148]

120. RMC created and maintained its Batch Records to provide assurance to AFDE that RMC was producing concrete in compliance with the material proportions and quantities specified in AFDE's concrete mix design. For example, if AFDE's mix design specified a target of 100 tonnes of sand per batch of concrete, RMC's Batch Records, which AFDE would review, would detail the actual amount of sand mixed into each batch of concrete and would thus disclose to AFDE whether there was any variance relative to the target.[149]

121. RMC's Batch Plants were independently audited and certified by Concrete BC, which required that RMC batch its aggregates to meet specified minimum tolerances, meaning that RMC's Batch Records would be accurate to within these minimum tolerances. Depending on the scale capacity, the minimum tolerances specified by Concrete BC for aggregates range from +/- 0.3% to +/- 3%.[150]

122. In addition to the two successful audits and inspections that Concrete BC completed on July 11, 2018 and September 15, 2021, its also required RMC to obtain more frequent periodic scale calibrations by qualified technical staff employed by a scale manufacturer or authorized scale company.[151] From the beginning of RMC's concrete production on the Project in about the summer

[146] Second Burak Cross-Examination, 28:2 – 28:23, 30:1 – 30:25.
[147] First Burak Cross-Examination, 30:6 – 30:14, 31:9 – 31:10, 32:7 – 33:3.
[148] First Burak Affidavit, para 42.
[149] First Burak Cross-Examination, 45:5 – 46:12.
[150] First Burak Affidavit, para 26.
[151] First Burak Affidavit, para 26.

of 2018 to the end of 2021, RMC obtained a total of 17 independent scale calibrations from Precision Scale, a firm that specializes in industrial scale inspection and calibration services.[152]

123. The Receiver raises the possibility that there may have been wasted or lost product to a such a degree that it should have been considered in RMC's quantity verification. Again, this is simply speculation.[153] There is no evidence to prove that aggregate was in fact wasted or lost. To the contrary, the evidence of Mr. Burak is that RMC did not observe any wastage and would not expect to have lost any more than a de minimis amount of aggregate.[154]

124. It was the practice of RMC to fill its trucks to a level such that no aggregate would be lost during transport from the Stockpile to the Batch Plants. Furthermore, the Batch Plants were immediately adjacent to the Stockpile area such that RMC was only required to transport the aggregate a distance of about 50 meters to 330 meters, depending on the location of the specific pile within the Stockpile area.[155] It is quite unlikely that RMC could have lost any material amount of aggregate considering its careful practices and the short transport distances. Further, RMC had a strong economic incentive to avoid any such wastage.[156]

125. The only aggregate delivered by RBee and removed by RMC from the Stockpile that may not have been accounted for in Mr. Burak's verification was the amount of aggregate products, if any, that were located in the Batch Plant bins on October 31, 2021, having been moved from the Stockpile but not yet weighed and recorded inside the Batch Plants.[157] However, the total capacity of these bins was confirmed to be only about a couple thousand tonnes—a "minuscule" capacity relative to the amount in the Stockpile.[158] By means of comparison, RBee claimed to deliver 1,761,480 tonnes of aggregate over the course of its performance on the Project.[159] To put that in perspective, the total capacity of the bins, assuming they are full, is only 0.11% of the total quantity of aggregate that RBee claimed to deliver over the course of its performance.

126. In sum, in contrast to the Receiver's reliance on mere invoices without proof of delivery to justify its claims, RMC has put forward a detailed Product Reconciliation based on contemporaneous Project records, all of which together provide an accurate calculation of the amount of aggregate delivered on the Project as of October 31, 2021. The Receiver's arguments that the Product Reconciliation

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[152] Nicholas Burak's First Responses to Undertakings, #6, Precision Scale Calibration Reports.
[153] Receiver's Supplemental Report, para 24(d); Receiver's Brief of Law at paras 44, 55.
[154] Second Burak Affidavit, para 16.
[155] Second Burak Affidavit, para 16.
[156] Second Burak Affidavit, para 16.
[157] First Burak Cross-Examination, 30:22 – 31:20.
[158] Marshall Cross-Examination, 31:21 – 32:4, 36:19 – 37:15.
[159] First Burak Affidavit, Exhibit "E".

is unreliable are based on speculation as to what *may* have occurred, and not what *is likely* to have occurred. RMC's set-off claim should be allowed given that it is based on evidence from witnesses who were on site and attest to what actually occurred.

**E. Miscellaneous Points: RMC's continuing Relationship with Mr. Reed and the Performance Bond**

127. RMC will conclude its submissions by addressing some miscellaneous points raised by the Receiver which do not appear to directly relate to the main issues before this Court.

128. The Receiver has repeatedly raised the fact that RBee's principal, Mr. Reed, also controls A-1 and Paragon, the corporations that subsequently purchased and operated RBee's aggregate processing equipment on the Project. The Receiver suggests that RMC should be seeking compensation or relief from A-1 or Paragon as a result, and that RMC should have been able to secure Mr. Reed's testimony in this matter.[160]

129. First, as per RMC's evidence described in paragraph 26 above, RMC had no practical option other than to deal with Mr. Reed's other companies due to the time constraints on the Project and to avoid the Liquidated Damages that would accrue at $25,000 if a new aggregate supplier were not urgently put in place.[161] Second, despite Mr. Reed's involvement in all companies, A-1 and Paragon are distinct corporations from that of RBee. RMC simply has no legal basis to assert a claim for which RBee is liable against these distinct corporate entities. Third, simply because RMC has contracted with A-1 and Paragon does not mean that Mr. Reed would willingly provide evidence to RMC regarding undersupply and overbilling by RBee. The burden was on the Receiver, and not RMC to prove that the claimed amounts of aggregate and hauling were provided. It is clear that the Receiver had full access to RBee's management, but has failed to adduce sufficient evidence on this point. Indeed, as described in paragraph 81 above, the Receiver had access to and received information from RBee's management in relation to the Unpaid Invoices, but failed to adduce any evidence validating the claimed deliveries set out in the Unpaid Invoices.

130. The Receiver also raises the fact that RMC never called on the performance bond issued with respect to RBee's scope of work, but makes no argument as to what it believes should flow from that. The reasons for RMC not calling on the bond are set out in detail in the evidence.[162] Most importantly, RMC was able to find a replacement contractor to provide it with aggregate at the exact

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[160] Receiver's Brief, paras 58-62, 113.

[161] First Burak Affidavit, paras 61-63.

[162] Second Burak Affidavit, para 20.

same pricing as provided under the Agreement.[163] Thus, RMC did not sustain a loss due to RBee's default and the insurer would have had a complete defence to any a claim under the bond.[164]

131. Ultimately, the Receiver's submissions on these points are a distraction from the key issues in these proceedings—whether the Receiver can meet its burden to prove that RMC is liable for the Unpaid Invoices, and whether RMC has established a set-off defence. As already set out above, the Receiver's claim fails on both of these issues.

## V. CONCLUSION

132. The evidence is clear in this case on the main issues before this Court. The proper interpretation of the Agreement allows RMC to dispute the Unpaid Invoices and to advance a defence of set-off regarding overbilling in relation to the Unpaid Invoices and the Project generally.

133. The Receiver has failed to meet its burden to establish that the work and aggregate claimed in the Unpaid Invoices was actually delivered by RBee. Its claim should be rejected for this reason alone. Even if the Receiver had been able to provide some evidence in support of its claim, it would fail due to RMC's valid defence of equitable set-off. RMC has adduced compelling evidence from witnesses who were actually on the Project site and on the basis of contemporaneous Project records that RBee overbilled RMC for more than $7,000,000 worth of aggregate. In contrast, the Receiver's arguments on this point fail for being speculative and ignoring the applicable law.

134. For the foregoing reasons, RMC respectfully requests that this Court reject the Receiver's application and order it to pay RMC's costs forthwith with respect to the within Application, the initial hearing of this Application by this Honourable Court, and the Appeal Decision.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of March, 2026.

**DENTONS CANADA LLP**

Per: ______________________________

**Chris Zelyas, Counsel for RMC Construction Materials Ltd.**

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[163] Nicholas Burak's First Responses to Undertakings, #9 and #11.

[164] The case law supports this interpretation and confirms that the surety will not pay more than the actual loss. See: *York (City) v Wellington Insurance Co*., 41 OR (3d) 750, [1998 CanLII 14704 (ON SC)] at paras 23(c), 24 (A highlighted copy of this authority is added as Appendix "F" to this Brief, as paragraph numbering is not available in the hyperlinked version).

## Table of Authorities and Documents Cited

### Legislation

1. *Alberta Rules of Court*, Alta Reg 124/2010
2. *Limitations Act*, RSA 2000, c L-12

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1. *Crown Capital Partner Funding LP v RBee Aggregate Consulting Ltd*, 2023 ABKB 724
2. *Crown Capital Partner Funding LP v RBee Aggregate Consulting Ltd*, 2025 ABCA 117
3. *1808882 Alberta Ltd v. Moderno Ventures Ltd*, 2018 ABQB 885
4. *Condominium Corporation No 022 6956 v Mercier*, 2023 ABKB 125
5. *Rigco North America LLC v ExxonMobil Canada Ltd.*, 2007 ABQB 311
6. *Beetown Honey Products Inc., Re*, 67 OR (3d) 511, 2003 CanLII 32918 (ON SC)
7. *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53
8. *Trico Developments Corporation v El Condor Developments Ltd*, 2020 ABCA 132
9. *Thunder Bay (City) v CN Rail*, 2017 ONSC 3560
10. *Dorval v Dorval*, 2006 SKCA 21
11. *Nexxtep Resources Ltd v Talisman Energy Inc*, 2013 ABCA 40
12. *IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing*, 2017 ABCA 157
13. *Ainsworth Lumber Co. v KMW Energy Inc.*, 2004 BCCA 415
14. *First City Development Corp. v Stevenson Construction Co.*, [1985] BCJ No. 2062, 1985 CarswellBC 762
15. *Swagger Construction Ltd. v U.B.C. et al.*, 2000 BCSC 1839
16. *Paradigm Holdings Ltd. v. Ngan & Siu Investments Co. Ltd.*, 2008 BCCA 172
17. *Arrow Transfer Co v Royal Bank*, [1972] SCR 845
18. *Royal Bank v Larry Creighton Pro. Corp.*, [1989] 3 WWR 561, 1989 ABCA 53 (CanLII)
19. *Cavell Dev. Ltd. v. Royal Bank*, 78 DLR (4th) 512, 1991 CanLII 749 (BC CA)
20. *Action Petroleum Services Ltd. v Prince Albert Credit Union Ltd.*, 1999 SKQB 133

21. *Envision Credit Union v Canada*, 2013 SCC 48

22. *Nor-Wes Building Supplies Limited v Arrowsmith*, 22 W.W.R. 185, 1957 CanLII 640 (BC CA)

23. *Amtim Capital Inc. v Appliance Recycling Centers of America*, 2022 ONSC 6877

24. *Amtim Capital Inc. v. Appliance Recycling Centers of America*, 2024 ONCA 225

25. *Mera Software v Intelligent Mechatronic Systems*, 2018 ONSC 5208

26. *Chevron Canada Resources v Canada*, 2019 ABQB 418

27. *Telford v Holt*, [1987] 2 SCR 193 (SCC)

28. *R v Christhurajah*, 2016 BCSC 2400

29. *Suzuki v Jackson*, 3 A.C.W.S. (2d) 244, 1980 CarswellBC 1590

30. *Gilead Sciences, Inc. v Idenix Pharmaceuticals Inc*., 2015 FC 1156

31. *R v Scott,* 2018 BCSC 2562

32. *York (City) v Wellington Insurance Co*., 41 OR (3d) 750, 1998 CanLII 14704 (ON SC)

# APPENDIX “A”

**KeyCite treatment**
**Most Negative Treatment:** Distinguished
**Most Recent Distinguished:** Technicore Underground Inc. v. Toronto (City) | 2011 ONSC 7205, 2011 CarswellOnt 14960, 94 M.P.L.R. (4th) 115, 11 C.L.R. (4th) 268, 211 A.C.W.S. (3d) 535, [2011] O.J. No. 5667 | (Ont. S.C.J., Dec 5, 2011)

1985 CarswellBC 762
British Columbia Court of Appeal

First City Development Corp. v. Stevenson Construction Co.

1985 CarswellBC 762, [1985] B.C.W.L.D. 3095, [1985] B.C.J. No. 2062, 14 C.L.R. 250, 33 A.C.W.S. (2d) 79

# FIRST CITY DEVELOPMENT CORP. LTD. et al. v. STEVENSON CONSTRUCTION CO. LTD. *

Taggart, Aikins and Hutcheon JJ.A.

Judgment: August 23, 1985
Docket: Vancouver No. CA002528

Counsel: *B.W.F. McLoughlin, Q.C.*, and *D. Tuck*, for appellant.
*H.S. Silber* and *E.A. Dolden*, for respondents.

Subject: Contracts
**Related Abridgment Classifications**
**Construction law**
II Contracts
II.6 Breach of terms of contract
II.6.f Exclusion of liability
**Contracts**
VII Construction and interpretation
VII.5 Disclaimer clauses
**Headnote**
**Construction Law --- Breach of terms of contract — Exclusion of liability**
Building contracts — Damages for delay — Clause providing that claim for damages to be made within reasonable time and not later than time of final certificate — Final certificate never issued — Plaintiff commencing action one year after completion — Clause not barring action — Plaintiff's claim allowed.
The plaintiffs entered into a standard building contract with the defendant, whereby the latter agreed to complete construction of a building by January 31, 1982. Article 36 of the construction contract provided that the claim for damages was to be made in writing "within a reasonable time after the first observance of such damages and not later than the time of final certificate". Substantial completion was certified by the architect on May 25, 1982, but no final certificate of completion was ever issued. In March 1983, the plaintiffs brought the present action claiming damages for delay.
At trial it was held that art. 36 applied to claims for pure economic loss arising from a breach of contract but this article did not provide a bar to proceedings in the absence of a final certificate of completion. The defendant appealed.
**Held:**
The appeal was dismissed.
The only limitation in art. 36 is by the words "not later than the time of final certificate". There was responsibility placed upon each party by art. 36 to give notice of the claim in writing within a reasonable time but the failure to do so did not create a bar to the making of a claim.

**Table of Authorities**

**Cases considered:**

Hancock v. B.W. Brazier (Anerley) Ltd., [1966] 2 All E.R. 901, [1966] 1 W.L.R. 1330 (C.A.) — *followed*

Simpsons Ltd. v. Pigott Construction Co. (1973), 1 O.R. (2d) 257, 40 D.L.R. (3d) 47 (Ont. C.A.) — *followed*

APPEAL from a decision, reported (1984), 8 C.L.R. 125 (B.C. S.C.), allowing a claim for damages.

**The judgment of the Court was delivered by *Hutcheon J.A.*:**

1 The defendant, Stevenson Construction Co. Ltd., was committed by its contract with the appellants, First City Development Corp. Ltd., Continental Pacific Development Corporation and I. & B. Management Ltd., to complete the construction of a building by January 31, 1982. Substantial completion was not certified by the architect until May 25, 1982. In March 1983 the plaintiffs brought the present action claiming damages for delay. By an agreement dated January 27, 1984, the parties posed to the Court three preliminary questions for answer:

(i) Does art. 36 (of the contract between the parties) apply to claims for pure economic loss arising from breach of contract by the contractor;

(ii) If the Court decides the first question in the affirmative, has the plaintiff complied with art. 36 given that no final certificate had been issued at any material time prior to the commencement of this action;

(iii) If the Court decides the first question in the affirmative, and furthermore decides that the plaintiff has not complied with art. 36, is the plaintiff then barred from recovering any damage which it may have incurred, assuming the defendant delayed the performance of the contract (or was guilty of delay in the performance of the contract) and assuming the delay constituted a breach of contract.

2 In his reasons for judgment [reported (1984), 8 C.L.R. 125], Mr. Justice Meredith answered question (ii) in the affirmative. He does not appear to have dealt with question (i) in his reasons. However, the formal order under appeal contains a paragraph adjudging that question (i) be answered in the affirmative.

3 Mr. Justice Meredith's findings have been challenged on this appeal but I do not consider that it is necessary to deal with that challenge. I agree with Mr. Silber, counsel for the plaintiffs, that art. 36 does not provide a bar to proceedings in the absence of a final certificate of completion. In this case, no final certificate of completion was ever issued by the architect.

4 The articles to be considered, arts. 27 and 36, are found in the general conditions of many standard building contracts.

5 A convenient arrangement is to set out first the relevant part of art. 36 and then of art. 27:

**Article 36. Damage and Mutual Responsibility**

If either party to this Contract should suffer damage in any manner because of any wrongful act or neglect of the other party or of anyone employed by him, then he shall be reimbursed by the other party for such damage. Claims under this paragraph shall be made in writing to the party liable within a reasonable time after the first observance of such damage and not later than the time of final certificate, except as expressly stipulated otherwise in the case of faulty work or materials, and may be adjusted by agreement or in the manner set out in Article 41, and the party reimbursing the other party as aforesaid shall thereupon be subrogated to the rights of the other party in respect of such wrongful act or neglect if it be that of a third party.

**Article 27. Certificates and Payments**

. . . . .

No payment made to the Contractor and no partial or entire use or occupancy of the work by the Owner shall be construed as an acceptance of any work or material not in accordance with this Contract. *The issuance of the final certificate shall constitute a waiver of all claims by the Owner otherwise than under Article 17 of these Conditions and the acceptance of such final certificate by the Contractor shall constitute a waiver by him of all claims except those previously made and* *still unsettled if any*. Should the Owner fail to pay the sum named in any certificate of the Architect or in any award by arbitration, upon demand when due, the Contractor shall receive, in addition to the sum named in the certificate or award, interest thereon at the rate of two per cent (2)% per month or fraction thereof.

(My underlining) The claims under art. 17 excluded from art. 27 are those arising from defects discovered within one year of substantial completion.

6 I approach the construction of art. 36 with the proposition established by the decided cases in mind: if a party to a building contract is to be deprived of a cause of action, this is only to be done by clear words. Two citations are sufficient. In Hancock v. B.W. Brazier (Anerley) Ltd., [1966] 2 All E.R. 901, [1966] 1 W.L.R. 1330 (C.A.), the English Court of Appeal held that an article such as art. 17 was not clear enough in meaning to take away from the owner the right to sue in respect of structural defects which were not discoverable within six months.

7 The Ontario Court of Appeal, in Simpsons Ltd. v. Pigott Construction Co. (1973), 1 O.R. (2d) 257, 40 D.L.R. (3d) 47 (C.A.), held that neither art. 17 nor art. 32 were sufficiently clear to excuse the builder from liability in an action brought within the statutory limitation period. Article 17 provided for corrections after final payment and art. 32 resembled art. 36 in the present case except that claims were to be made not later than the time of final payment.

8 The only limitation clearly stated in art. 36 is that by the words "not later than the time of final certificate". I then turn to art. 27 for the meaning of "the time of final certificate". For the owner the time is the issue of the final certificate; for the contractor the time is the acceptance of the final certificate. When that time has passed, all known claims are barred save those excluded by art. 27. There is a responsibility placed upon each party by art. 36 to give notice of a claim in writing within a reasonable time but, in my opinion, the failure to do so does not create a bar to the making of a claim. The clear words that are required to create that bar are not present in art. 36.

9 The injunction to the parties in art. 36 is of a kind similar to that to the contractor in art. A-6: "The Contractor shall ... make such investigations as to the supply of materials ... as may be reasonably required ... and shall make such estimates as may be reasonably required. ..."

10 The respondents filed a cross-appeal from the paragraph of the formal order appealed from adjudging that art. 36 applies to claims for pure economic loss arising from breach of contract by the contractor. Since I consider that art. 36 by itself, and in so far as it requires written notice to be given within a reasonable time, is not a clause of time limitation for the bringing of an action, I do not find it necessary to examine the merits of the cross-appeal.

11 I would dismiss both the appeal and cross-appeal with costs of the appeal to the respondents in any event of the cause. There will be no costs of the cross-appeal.

*Appeal dismissed.*

Footnotes

* Leave to appeal to the Supreme Court of Canada was refused on October 29, 1985.

# APPENDIX “B”

**KeyCite treatment**
**Most Negative Treatment:** Distinguished
**Most Recent Distinguished:** SNS Industrial Products Ltd. v. Bank of Montreal | 2009 CarswellOnt 628, 174 A.C.W.S. (3d) 1188 | (Ont. S.C.J., Feb 6, 2009)

1972 CarswellBC 103
Supreme Court of Canada

Arrow Transfer Co. v. Royal Bank

1972 CarswellBC 103, 1972 CarswellBC 314, [1972] 4 W.W.R. 70, [1972] S.C.R. 845, [1972] S.C.J. No. 64, 27 D.L.R. (3d) 81

# Arrow Transfer Company Ltd. v. Royal Bank of Canada, Bank of Montreal, Canadian Imperial Bank of Commerce and Seear

Abbott, Martland, Ritchie, Spence and Laskin JJ.

Judgment: March 30, 1972

Counsel: *B. W. F. McLoughlin*, for appellant.
*C. C. I. Merritt, Q. C.* and *H. A. McCandless*, for Royal Bank of Canada.
*R. J. Harvey, F. R. Read* and *J. S. Clyne*, for Bank of Montreal.

Subject: Corporate and Commercial
**Related Abridgment Classifications**
**Bills of exchange and negotiable instruments**
III Cheques
III.11 Forged or unauthorized cheques
III.11.a Forged cheques
III.11.a.ii Duty of customer to notify bank
III.11.a.ii.B Verification agreements
**Headnote**
**Banking and Banks --- Cheques — Forged or unauthorized cheques — Forged cheques — Duty of customer to notify bank**
Banks and banking — Fraud by customer's employee — Name of drawer of cheque forged — Effect of verification agreement between bank and customer — Liability of bank.
Appeal from the judgment of the British Columbia Court of Appeal, [1971] 3 W.W.R. 241, 19 D.L.R. (3d) 420, dismissing an appeal from the judgment of Seaton J., 72 W.W.R. 19, 9 D.L.R. (3d) 693. Appeal dismissed.
One S., an accountant employed by appellant, having access to appellant's cheque forms, forged cheques drawn on the respondent Royal Bank which totalled over the years $165,109.03. Some of the cheques were taken directly to the Royal Bank while others were deposited to the credit of accounts, or negotiated for cash, at other banks, including the respondent Bank of Montreal. Appellant claimed against the Royal Bank for debiting its account without authority, alternatively for conversion or negligence, and against the Bank of Montreal for conversion, for negligence or for money had and received. Between appellant and the Royal Bank there was at all material times a written "verification agreement" which placed on appellant the responsibility of protesting the correctness of statements furnished by the bank to its customer within a stated period of time following its receipt, failing which their correctness was to be conclusively presumed.
*Held* that the appeal must be dismissed; the verification agreement provided the Royal Bank with a complete defence to appellant's action; that agreement was a contract defining the terms on which the bank continued appellant's account; the debits entered in appellant's account paid by the banks were "debits wrongly made" within the terms of the agreement and appellant's

  

failure (with one exception) to give notice freed the bank from any claim in respect of them. For the reasons given below, and by Laskin J. in this Court, the claims against the respondent Bank of Montreal must also be dismissed.

***Martland J.*** **(Abbott, Ritchie and Spence JJ. concurring):**

1 This is an appeal from the unanimous judgment of the Court of Appeal for British Columbia, [1971] 3 W.W.R. 241, 19 D.L.R. (3d) 420, which dismissed the appellant's appeal from the trial judgment, 72 W.W.R. 19, 9 D.L.R. (3d) 693.

2 The appellant's claim was made in respect of 73 forged cheques which, over a period of 5 years, had been paid out by the respondent, the Royal Bank of Canada, hereinafter referred to as "Royal", and which had been debited to the appellant's account with that bank. The total amount of these cheques was $165,109.03. Of these cheques, the forger, Seear, an employee of the appellant, had deposited with the respondent, Bank of Montreal, hereinafter referred to as "Montreal", cheques in the total amount of $128,418.23, on which Montreal had collected that amount from Royal.

3 Seear, in 1963, had become chief accountant and office manager of the appellant. His practice was to use the appellant's printed blank cheque forms, by filling in the name of a payee, or cash, and an amount. He would forge the signatures of the appellant's officers authorized to sign its cheques. He cashed the cheques made payable to cash at the Royal. Some of the others were deposited with Montreal to the credit of certain trade names adopted by Seear. From time to time he withdrew the moneys in these accounts. It was not until May 1968 that an audit revealed that the seventy-third of the cheques above mentioned, in the amount of $9,077.14, was a forgery, and notice was then given to Royal.

4 In 1962 the appellant had entered into an agreement with Royal in the following terms:

> In consideration of THE ROYAL BANK OF CANADA (hereinafter called the 'Bank') opening or continuing an account with the undersigned, the undersigned hereby agrees with the Bank in respect of each account with the undersigned now or hereafter kept by the Bank at any of its branches or agencies to verify the correctness of each statement of account received from the Bank and if a statement of account and relative vouchers are not received by the 10th day after the end of each month or, if statements are not to be prepared monthly, by the 10th day after the end of the term agreed on for their preparation to obtain them from the Bank and within 30 days after the time when they should have been received to notify the Bank in writing at the branch or agency where the account is kept of any alleged omissions from or debits wrongly made to or inaccurate entries in the account as so stated and that at the end of the said 30 days the account as kept by the Bank shall be conclusive evidence without any further proof that except as to any alleged errors so notified and any payments made on forged or unauthorized endorsements the account contains all credits that should be contained therein and no debits that should not be contained therein and all the entries therein are correct and subject to the above exception the Bank shall be free from all claims in respect of the account.
>
> Dated at Vancouver, this 6th day of August, 1962.
>
> ARROW TRANSFER CO. LTD. General A/C
>
> [Sgd.] J. W. Charles
>
> [Sgd.] G. T. Campbell

5 The primary claim of the appellant against Royal was that it had paid out the total amount in question without authority from the appellant. Royal's defence to this claim was based upon the agreement set out above, hereinafter referred to as the "verification agreement". No notice to Royal had been given by the appellant within the time prescribed in the agreement in respect of any of the forged cheques, except only the last one. The appellant recovered judgment in the amount of that cheque, i.e., $9,077.14, but its action in respect of the remainder of its claim, i.e., $156,031.89, was dismissed.

6 The claim of the appellant against Montreal was for $128,418.23 as money had and received by it to the use of the appellant, or, alternatively, as damages for conversion of that amount. This claim was dismissed.

 

7 I agree with the opinions expressed in the Court of Appeal that the verification agreement provided Royal with a complete defence to the action. That agreement is a contract, defining the terms upon which the bank continued the account of the appellant. The appellant agreed to verify each statement of account which it received from the bank, and, within the period specified, to notify the bank of any debits wrongly made in the account. At the end of the stipulated period the account as kept by the bank became conclusive evidence that it contained no debits that should not be contained in it, subject only to two exceptions: 1. errors of which timely notice had been given to the bank; 2. payments made on forged or unauthorized endorsements.

8 The debits entered in the appellant's account in respect of the forged cheques paid by Royal were "debits wrongly made". The payment was not made on a forged endorsement. Except as to the last of the 73 cheques, the appellant failed to give the required notice as to debits wrongly made. As to the first 72 cheques, the account became conclusive evidence that it contained no debits that it should not have contained, and Royal was freed from any claim in respect of them.

9 I do not agree with the contention that the words "debits wrongly made" do not apply in respect of a forged cheque. The obligation of the customer to give notice to the bank within the prescribed period relates to any debit wrongly made, and it is clear that it is wrong for a bank to debit a customer's account in respect of the payment of a forged cheque. In the absence of the verification agreement, a bank which debited a customer's account in respect of a forged cheque would be liable to him. The agreement furnishes some protection to the bank in that the customer must check the account and the relevant vouchers and give prompt notice if he is to enforce that liability against the bank. I see no reason to limit the meaning of the words "debits wrongly made". They apply to any debit to the account which the bank was wrong in making.

10 There is the further fact that the verification agreement does refer to forgery, in relation to payments made on forged endorsements. Such payments are within one of the two exceptions to the conclusive nature of the account. The fact that a specific exception was created in respect of a forgery of that kind indicates that the agreement is applicable in respect of a debit wrongly made in relation to a cheque on which the signature of the drawer is forged.

11 I do not regard the decision of this Court in *Stewart v. Royal Bank of Canada et al.*, [1930] S.C.R. 544, [1930] 4 D.L.R. 694, as being contrary to my interpretation of the verification agreement in this case. That was a case in which a local bank manager of the defendant bank had taken, without authority, sums from a customer's bank account. The main defence raised by the bank in an action to recover these sums was that they had been repaid. The bank did raise, as an additional defence, a document, signed by the customer, in the following form:

> RECEIVED from THE ROYAL BANK OF CANADA, Middle Musquodoboit, N.S., statement of my/our account as at the close of business on April 29, 1922, showing a balance of $6,684.05 in my favour, together with vouchers for all amounts charged to the said account up to and including the said date.
>
> For valuable consideration I/we agree to examine forthwith into the accuracy of the said statement and the regularity and validity of the said vouchers, and I/we further agree that at the expiration of ten days from the date hereof, the said statement shall be conclusive evidence of the correctness of the balance therein shown, and the bank shall be and is released from all claims by me/us in respect of any and every item shown in the said statement, save such as shall have been questioned or objected to in writing within the said ten days.
>
> (Sgd.) T. E. STEWART.

12 It was held on the facts of this case that the bank was not protected from liability by this document. Duff J. as he then was, delivering the reasons of the majority of the Court, said [p. 549]:

> It is first necessary to observe that the document is a receipt for vouchers, for vouchers for all amounts charged to the 'said account' up to and including the 'said date.' Now this is a receipt produced to the customer by the bank for signature, and there can be no possible doubt as to the meaning of the word voucher used in it; it is something in the nature of authority or some evidence or record of authority to the bank to dispose of the sums charged. Admittedly, there never was any such voucher in respect of these sums of $3,500 and $1,500; as to the sum of $3,500, there is a vague suggestion, but as evidence

> it is negligible. And here it must be insisted on, because it is vital, that the case has proceeded from the beginning to the end on the basis that neither the bank nor Fraser had authority to abstract these sums. Fraser's story from the beginning was that he took the money and with it made personal loans to the Creamy Company. It is perfectly plain, therefore, that this document is founded upon a fundamental error and as against the deceased Stewart can have no evidentiary weight as to the state of the account. It is to be observed that the document as drawn by the bank, and presented by the bank to its customer, is one of those documents which, being in ambiguous form, can be no protection. Read without extraordinary care by a customer, relying not only on the honesty, but upon the reasonable care of his banker, he might very well receive from it the idea: here are vouchers for all the sums charged, examine them and see whether or not they are genuine and if we do not hear from you within ten days, we are to be at liberty to assume that the balance is correct. That, I think, in the circumstances, is the meaning a customer would probably attach to this piece of paper; and the customer's signature is of no value whatever as evidence in favour of the bank or anyone else.

13 The verification agreement in question in the present case is not ambiguous. It is a contract under which the customer undertakes a duty to the bank to disclose within a limited period, among other things, debits wrongly made. In the present case, the appellant received the statements and the relevant vouchers. Having failed to perform his contractual duty, the agreement made the statements conclusive evidence against him.

14 In *Rutherford v. Royal Bank of Canada*, [1932] S.C.R. 131, 13 C.B.R. 372, [1932] 2 D.L.R. 332, in which Duff J. sat, a cheque had been honoured, which was signed by only one officer of a company, whereas the banking resolution required the signatures of two officers. Smith J., who delivered the judgment of the Court, said [p. 133]:

> No objection to the payment by the bank of this cheque was ever made by the company. The vice-president and trea surer Gregg had full authority to sign the release on behalf of the company, and *prima facie* that document is binding on the company. No evidence was offered to displace the *prima facie* defence thus established, and it is therefore unnecessary to discuss here under what state of facts or circumstances a customer of the bank might be relieved from the ordinary effect of such a release.

15 There has been one case in this Court dealing with the liability of a bank which had charged its customer's account with the amounts of forged cheques, i.e., *Bank of Montreal v. The King et al.* (1906), 38 S.C.R. 258, 27 C.L.T. 226. The cheques had been forged by a clerk employed by the Government of Canada. Periodically, the cheques, after payment, were received by the Government and a receipt was given to the bank therefor, together with an acknowledgment of the correctness of the balance as shown by the bank's statement. While the bank was held liable in that case, it does not, in my opinion, have any bearing in the present appeal. The essential distinction is that there was no contract on the part of the customer in that case to verify the statement of account, and to accept it as conclusive unless any errors were notified to the bank within a stipulated period. The bank relied on the signed acknowledgments, not on the basis of contract, but as creating an estoppel. The majority of the Court based their decision on the proposition that estoppel could not be invoked against the Crown.

16 Verification agreements have been held to apply in respect of debits made in respect of forged cheques in *Columbia Graphophone Co. v. Union Bank of Canada* (1916), 38 O.L.R. 326, 34 D.L.R. 743; *Mackenzie v. Imperial Bank*, [1938] O.W.N. 166; *B. & G. Construction Ltd. v. Bank of Montreal*, 10 W.W.R. (N.S.) 553, [1954] 2 D.L.R. 753 (Alta.); and *Syndicat des Camionneurs Artisans du Québec Métropolitan v. Banque Provinciale du Canada*, [1970] Que. C.A. 425, 11 D.L.R. (3d) 610.

17 In my opinion the claim against Royal in respect of the first 72 cheques is completely answered by the verification agreement.

18 With respect to the claim against Montreal, I am in agreement with the reasons of Robertson J.A., in the Court of Appeal, and with the reasons of my brother Laskin in this Court. Insofar as the claim is for moneys had and received, the moneys received by Montreal in respect of the forged cheques were not those of the appellant, but were paid to Montreal by Royal. Royal was not entitled to charge those moneys to the appellant's account, and would have had to assume responsibility for their payment, save for the protection afforded to it by the verification agreement.

  

19 The claim for conversion has to be based upon the conversion of a valuable instrument of the appellant: *Morison v. London County & Westminster Bank Ltd.*, [1914] 3 K.B. 356 at 365; *Lloyds Bank v. Chartered Bank of India, Australia and China*, [1929] 1 K.B. 40 at 55. In this case, however, there was no conversion of the appellant's cheques. There was a conversion by Seear of the blank cheque forms of the appellant, but the signature of the drawer was a forgery, and the cheques were not payable to the appellant. Montreal did not convert cheques of the appellant.

20 For the same reasons the alternative claim in conversion against Royal also fails.

21 For these reasons, as well as for the reasons delivered in the Court of Appeal, I would dismiss this appeal with costs.

***Laskin J.*:**

22 In the five-year period between April 1963 and April 1968, the appellant's chief accountant (who was also its office manager) defrauded his employer of $165,109.03. He forged the signatures of the appellant's signing officers to 73 cheques drawn on its account at a certain branch of the Royal Bank of Canada. Some of the cheques were made out to cash, some to fictitious payees, and some (totalling $128,418.23) were made out in the names of two accounts which the forger opened at a branch of the Bank of Montreal. The forger, who made off with the money, was able to conceal his fraudulent activities despite regular semi-annual audits of his employer's books of account; and it was not until the audit of May 1968 that his chicanery was uncovered. He was convicted of forgery and sentenced to imprisonment.

23 The question before this Court, as before the Courts of British Columbia where the proceedings herein originated, is whether the appellant or the two banks should bear the loss, of which $156,031.89 is claimed from the Royal Bank (which admitted liability for the seventy-third cheque in the amount of $9,077.14) and $128,418.23 of which is claimed from the Bank of Montreal. Whatever issues there may be between the banks inter se, if they are liable, have been postponed pending determination of the appellant's claims against them.

24 The appellant put forward three grounds of recovery in respect of its claim against the Royal Bank and three also in respect of its claim against the Bank of Montreal. Two grounds, for money had and received and for conversion, were common. The third ground of recovery from the Royal Bank, the one argued first and at greatest length, was an alleged breach of contract in honouring the forged cheques without authority. The third ground taken against the Bank of Montreal was its alleged participation in a breach of fiduciary duty between the appellant and its faithless employee. I say at once that I can find no basis on which this third submission against the Bank of Montreal can be maintained.

25 Leaving for the time being the two common grounds urged against the respondent banks and turning to the first submission against the Royal Bank, I note that the judgments below [72 W.W.R. 19, 9 D.L.R. (3d) 693, affirmed [1971] 3 W.W.R. 241, 19 D.L.R. (3d) 420] proceeded on the footing that the chief obstacle to success by the appellant on its claim was a verification agreement which it entered into with the Royal Bank. Counsel who appeared for that bank in this Court also relied on that agreement as the main defence to the appellant's contention that the bank must answer for the breach of contractual obligation to its customer in debiting its account without its authority.

26 The verification agreement, which was executed before the forgeries began, reads as follows:

> In consideration of THE ROYAL BANK OF CANADA (hereinafter called the 'Bank') opening or continuing an account with the undersigned, the undersigned hereby agrees with the Bank in respect of each account with the undersigned now or hereafter kept by the Bank at any of its branches or agencies to verify the correctness of each statement of account received from the Bank and if a statement of account and relative vouchers are not received by the 10th day after the end of each month or, if statements are not to be prepared monthly, by the 10th day after the end of the term agreed on for their preparation to obtain them from the Bank and within 30 days after the time when they should have been received to notify the Bank in writing at the branch or agency where the account is kept of any alleged omissions from or debits wrongly made to or inaccurate entries in the account as so stated and that at the end of the said 30 days the account as kept by the Bank shall be conclusive evidence without any further proof that except as to any alleged errors so notified and any

 

payments made on forged or unauthorized endorsements the account contains all credits that should be contained therein and no debits that should not be contained therein and all the entries therein are correct and subject to the above exception the Bank shall be free from all claims in respect of the account.

27 What the customer agreed to was: (1) to verify the correctness of each statement of account received from the bank; (2) if a statement of account and related vouchers were not received from the bank by the tenth day after the end of each month or by the tenth day after the end of any longer term for their preparation as agreed upon, the customer was to obtain them from the bank; (3) within 30 days after the time when they should have been received, he must notify the bank in writing of "any alleged omissions from or debits wrongly made to or inaccurate entries in the account as so stated"; and (4) except as to alleged errors so notified and as to payments made on forged or unauthorized endorsements, the customer's account as kept by the bank was to be conclusive, at the end of the prescribed 30-day period, as to its correctness, and the bank was to be free from all claims in respect thereof.

28 This agreement replaced an earlier practice under which the appellant signed a verification form only after it had picked up or had delivered to it a statement of account and related cheques or vouchers. This form also provided for a 30-day period within which the bank was to be notified of errors, omissions or irregularities on pain, save as to forged or unauthorized endorsements, of the appellant being conclusively bound by the statement thereafter. I do not find much profit in disputation on whether the verification agreement in issue here was simply part of the contractual arrangement between the parties thereto or whether it was an exemption provision in their contractual relations. What is plain is that the verification agreement does not embrace the whole of the contractual relationship of the parties; it focuses on a part of it, albeit an important part, and in so doing it modifies the liabilities of the bank to its customer that would otherwise arise out of the fact of their relationship. That relationship is itself, of course, founded upon agreement but there was no suggestion before this Court that, apart from the verification document, the agreement was anything more than the manifested willingness of the one party to open an account for the other at the latter's request.

29 The issue, therefore, which the verification agreement raises is the extent to which it has modified liabilities of the bank which would have existed without it; and, particularly, whether it relieves the bank of liability to answer for the consequences of successfully executed forgeries of a customer's signature as drawer of cheques against its account which the bank honours, where the customer does not give notice of such forgeries to the bank within the prescribed 30-day period. It is, of course, part of the bank's case that if the verification agreement includes in its scope forgeries of the customer's signature as drawer, there is no alleviation in the fact that the forgeries were not discovered nor reasonably discoverable within the said 30-day period.

30 The Royal Bank invokes in its favour a line of cases beginning with *Columbia Graphophone Co. v. Union Bank of Canada* (1916), 38 O.L.R. 326, 34 D.L.R. 743, where Middleton J. held that forgery of the drawer's signature was within the coverage of a verification form which was given to the bank customer with each statement of his account and was to be signed and returned. That form, which replaced an earlier one that was simply an acknowledgment of the correctness of the account, was similar to the document involved here but if contained no exclusions (not even of forged endorsements) and was by its terms conclusive against the customer, except as to "improper charges or errors" pointed out in writing, within a prescribed ten-day period. There is the further distinction that the form in the *Columbia Graphophone* case did not purport to have continuing force, as does the verification agreement in the present case, but had to have the signed acknowledgment of the customer on a periodic basis as statements of account were submitted.

31 Middleton J. dealt with the effect of this periodic form in emphatic brevity; he said this at p. 332:

I can see no reason why these acknowledgments and agreements should not bind the customer. They were intended to be real agreements and to define the relation between the parties and, I think, relieve the bank from all liability down to [the last date on which such a form was signed].

32 This pronouncement spawned progeny which, although not all arising out of similar situations, gave at least the cover of continuity, with but one exception, to its validity and to its apparently unlimited scope. I shall refer first to cases which did not involve forgery and then to those that did.

  

33 *Union Bank of Canada v. Wood*, [1920] 3 W.W.R. 173 (Alta.), was a different case from the one which came before Middleton J. The issue was whether the bank had failed to credit the customer's account with various cheques, as alleged by the customer, or whether the customer had received cash for the cheques, as alleged by the bank. It was held that the monthly verification forms signed by the customer effect ively disposed of the issue. There was no question of forgery involved.

34 *Rutherford v. Royal Bank of Canada*, [1932] S.C.R. 131, 13 C.B.R. 372, [1932] 2 D.L.R. 332, was a case where a cheque signed by an authorized signing officer of the company payable to himself or order was cashed by the bank which was unaware of a company resolution requiring two signing officers. A verification slip, covering the period in which the cheque was cashed, and amounting to a settlement statement and release, was signed by an authorized officer of the company. The reasons of the Supreme Court, delivered by Smith J., refusing relief to the trustee in bankruptcy of the company, concluded with this statement: "No evidence was offered to displace the *prima facie* defence thus established, and it is therefore unnecessary to discuss here under what state of facts or circumstances a customer of the bank might be relieved from the ordinary effect of such a release."

35 About a year and a half earlier, the Supreme Court, in *Stewart v. Royal Bank of Canada et al.*, [1930] S.C.R. 544, [1930] 4 D.L.R. 694, dealt with a case in which a bank sought protection through a verification agreement against the wrongful act of one of its branch managers who, without authority, took money out of a customer's account. There was an issue raised of restitution by the branch manager which was ultimately decided against the bank. The verification documents relied on by the bank referred to the statement of the customer's account as of a specified date showing a stated balance "together with vouchers for all amounts charged to the said account up to and including the said date." There were no vouchers for the sums wrongfully appropriated. In speaking for the Court majority (there was one dissent) on the significance of the verification documents, Duff J., as he then was, said this at p. 549:

> It is to be observed that the document as drawn by the bank, and presented by the bank to its customer, is one of those documents which, being in ambiguous form, can be no protection. Read without extraordinary care by a customer, relying not only on the honesty but upon the reasonable care of his banker, he might very well receive from it the idea: here are vouchers for all sums charged, examine them and see whether or not they are genuine, and if we do not hear from you within ten days, we are to be at liberty to assume that the balance is correct. That, I think, in the circumstances, is the meaning a customer would probably attach to this piece of paper; and the customer's signature is of no value whatever as evidence in favour of the bank or anyone else.

36 There are three forgery cases which followed upon the *Columbia Graphophone* case, none of which reached this Court. *Mackenzie v. Imperial Bank of Canada*, [1938] O.W.N. 166, [1938] 2 D.L.R. 764, involved payment by a bank on a forged endorsement, and it successfully resisted a claim by the drawer on the basis of a verification document and on the supporting pronouncement in the *Columbia Graphophone* case. There was no reference in the short account of the case to s. 49(3) of the Bills of Exchange Act, R.S.C. 1952, c. 15, as amended, now R.S.C. 1970, c. B-5, which ex facie gives the drawer one year from the time he acquired notice of the forgery within which to claim against the drawee bank. I am aware of the doubt that exists whether s. 49(3) does more than fix an outside limit of time, and hence the contention that within that limit a "contracting out" or other preclusive conduct of the customer may be set up: see Falconbridge, Banking and Bills of Exchange, 7th ed., 1969, p. 567. Section 49(3) does not apply to forged signatures of drawers, and hence I need not pass on its effect in this case; but I do point out that the verification agreement in issue here contains an express exclusion of forged endorsements from its asserted conclusive effect.

37 *B. & G. Construction Co. Ltd. v. Bank of Montreal*, 10 W.W.R. (N.S.) 553, [1954] 2 D.L.R. 753 (Alta.), was a case like the present one where the drawer's signature was forged by an employee. Three cheques were involved, drawn over a period of 1 1/2 months. Verification receipts covering this period were signed by the drawer-customer and the defendant bank relied on the "conclusively settled" clause of the documents which precluded the customer from challenging the statement of account if it did not point out in writing "improper charges or errors" within a stipulated 15-day period. Here too there was no express reference to forgery or fraud (and, indeed, no exclusions), but in the absence of the prescribed notice the vouchers as to debit items were to be taken as "genuine and properly chargeable" against the customer. Although the Court, a single judge, considered a defence of

  

estoppel which appeared to him to be a good one, he founded himself on the *Columbia Graphophone* case and on the principle that the verification receipts were signed as part of the relationship of banker and customer.

38 The Quebec Court of Appeal in *Syndicat des Camionneurs Artisans du Québec Métropolitain v. Banque Provinciale du Canada*, [1970] Que. C.A. 425, 11 D.L.R. (3d) 610 , came to a similar conclusion, reversing the trial Judge, in a similar situation of forgery of the customer's signature to 13 cheques by an employee, where the verification agreement (which expressly excluded payments made on counterfeit or unauthorized endorsements) referred to "errors, irregularities or omissions". The Court relied on the *Rutherford* case in which (to use the words of Montgomery J.A. of the Quebec Court of Appeal) "The validity of a similar contract ... was upheld".

39 In none of the cases that I have mentioned was there any discussion of the scope of the verification document, apart from its validity, save that in the Quebec case last mentioned there was the following observation at p. 612:

> Respondent further suggests that the contract does not apply in the case of a cheque bearing a forged signature. I find nothing in the language of the contract so to limit its operation. I note that in the case of *Rutherford v. Royal Bank* [supra], one of the required signatures was completely omitted, and I see no reason to distinguish the case where a signature is forged rather than omitted.

40 I shall return to this issue later in these reasons, because I wish to consider at this point a judgment of this Court which was not mentioned in *Columbia Graphophone v. Union Bank of Canada* (1916), 38 O.L.R. 326, 34 D.L.R. 743, nor in any of the other cases cited, save the *B. & G. Construction Co.* case where it was stated that the judgment in question went off on its particular facts, involving as it did a claim by the Crown in right of Canada.

41 *Bank of Montreal v. The King et al.* (1907), 38 S.C.R. 258, 27 C.L.T. 226, dealt with a claim by the Crown in right of Canada, a customer of the appellant bank, to recover from the bank the amounts of cheques on which the drawer's signature was forged by a departmental employee of the Government who was able, for a time, to conceal his forgeries. The account operated by the Government was a letter of credit account under which the bank made advances to the specified limit and submitted monthly statements according to which it received Government cheques by way of reimbursement. Nothing, in my opinion, turns on the form of the account. There is the relevant fact that the monthly statements were accompanied by a receipt form which when signed, as it was by a responsible Government official, acknowledged the correctness thereof. The fact that the forger was the person who reported on the correctness of the statement to the signing official would not, of course, militate against the bank.

42 The effect of these statements as "settled accounts" was differently treated in the Courts that were seized of the case. Anglin J. at trial took the position on this point that because the Audit Act, R.S.C. 1886, c. 29, provided only for reimbursement of the bank "for advances under credits to cover the expenditures made and authorized", this statutory method of settling accounts governed: see 10 O.L.R. 117 at 130. In the Ontario Court of Appeal, Maclaren J.A. dealt with the "settled account" argument, based on a contractual relation arising out of the signed receipts, as follows (see 11 O.L.R. 595 at 607):

> Notwithstanding the ingenious argument of the defendant's counsel on this point, I am utterly unable to see how, under the facts and circumstances of this case, the receipts given by the accountant can operate to prevent the plaintiff from correcting the mistakes that were made in them, or avail as a defence to this action, unless they are sufficient, in connection with the other facts to create an estoppel. To my mind it is either a question of estoppel or no valid defence at all. If the plaintiff is precluded from going behind the receipts, and shewing the real facts it must be only because he is estopped from doing so by the conduct of his officers and servants.

43 In this Court, Girouard J., with whom Maclennan J. agreed, disposed of the drawee bank's appeal on the basis of what is now s. 49(1) of the Bills of Exchange Act, namely, that a forged signature is wholly inoperative, unless the drawer whose signature is forged is precluded from so asserting; and examining this latter point, not in relation to any privileged position of the Crown, but as between mercantile men, he concluded that there was no estoppel and that the bank could not rely on the settlement receipts for this purpose.

44 Davies J. pointed out that the settlement receipts were first urged to establish an estoppel, which the Courts below held could not be raised against the Crown; but then it was urged by the bank that a contractual relation arose so as to bind the Crown as by a settled account. As to this Davies J. said the following at p. 274:

> Why the signature as to the correctness of these pass-book sheets should have a different effect from the signature of settlement to any ordinary account so as to prevent it being re-opened in case of the discovery of a mistake, I am at a loss to understand. The officer signing the account as correct was deceived into doing so by a clever forger. The same forger deceived the bank by the forged signatures. If the circumstances under which the accounts were acknowledged to the bank could be held to be an estoppel well and good. But the doctrine cannot be applied as against the Crown and outside of it I cannot find any contract settling the accounts as between the government and the bank and prohibiting their being re-opened in case of mistake.
>
> The bank became the plaintiff's debtor for the money had and received and, outside of estoppel, nothing but payment, accord and satisfaction or a release under seal would be an answer to plaintiff's demand.

45 Idington J. likewise took the view that there was no contractual bar to the Crown seeking rectification of "such a clear mistake or series of mistakes as occurred in one or more of its subordinate officers assenting to a stated account and incidentally thereto, in some instances, assenting erroneously to the number of cheques alleged in the statement as correctly representing the number chargeable" (at p. 279); only estoppel could be considered as a defence if the action was between private persons.

46 Duff J. agreed with Moss C.J.O. in the Ontario Court of Appeal, and that Judge, on the point under discussion, rejected the notion that there was any obligation resting upon a customer, arising out of the relationship of banker and customer, to examine the pass-book and returned cheques and vouchers and to make timely objection if it would contest the state of accounts as indicated by the bank; the preclusion of the customer was a matter of estoppel by conduct, and this could not be urged against the Crown. I am bound to say that Moss C.J.O. made no express reference to the signed receipts acknowledging the correctness of the account unless it be in his assertion that "a customer [is not precluded] from disputing debits which have appeared in the book both when delivered to him and returned by him without objection, or from denying the genuineness of his signature to cheques which represent such debits and have been returned paid with the book and retained by the customer without comment": see 11 O.L.R. 595 at 599.

47 One distinction that emerges from the run of cases is that between a mere signed acknowledgment of the correctness of the account as a periodic settlement and a specific undertaking by the customer to examine the statement and vouchers and to make timely objection; it is the distinction between the form in *Bank of Montreal v. The King*, supra (and see also the earlier case of *Agricultural Savings & Loan Assn. v. Federal Bank* (1880), 45 U.C.Q.B. 214, affirmed 6 O.A.R. 192), and that in the *Columbia Graphophone* case. I have no doubt of the significance of the distinction; it depended, however, on a strict view of the acknowledgment form. In the *Agricultural Savings* case, Burton J.A. referred to the form therein as "at the most a mere acknowledgment of the correctness of the balance on the assumption that the cheques issued by the plaintiffs had been paid to the proper parties": 6 O.A.R. 192 at 200. The question here is whether that very fact does not make it evident that if the bank is to rely on a verification contract it must be able to point to words in the contract that leave no doubt of the scope of the protection which it claims.

48 That this is the proper answer to the question finds some support in s. 49(1) of the Bills of Exchange Act. That subsection provides that a forged signature on a bill is wholly inoperative, and no right to enforce payment of the bill can be acquired through such a signature unless the party against whom it is sought to enforce payment is precluded from setting up the forgery. It is not that s. 49(1) is of that class of statutes from whose terms there can be no contractual departure. Rather, its express reference to a forged signature appears to me to oblige those who would contract out to make it quite clear that forgery of a drawer's signature on a cheque is within the scope of the protection that a drawee bank has obtained under its self-protecting contractual arrangements with its depositors.

 

49 Apart from any verification agreement, a bank would be answerable for depletion of a customer's account by reason of any unauthorized dealing, including forgery, unless the drawer was precluded from setting up the want of authority, and the bank would be protected to the degree to which any such preclusion extended. Similarly, apart from a verification agreement, the bank would be answerable for forgery or unauthorized milking of a customer's account by an employee of the bank; and in this latter respect, the matter would not necessarily depend on principles of vicarious liability but rather would stem from the bank's obligation to maintain the integrity of a customer's account against unauthorized withdrawals.

50 The Royal Bank's position on the verification agreement is such that it would place upon a customer the duty to detect within the prescribed 30-day period not only forgeries of the customer's signature by the latter's employees or by third parties, but also by employees of the Royal Bank. There is the further hurdle, if literalness is to prevail, that it is the account as kept by the bank that has the conclusive effect, regardless of what may have been delivered or not delivered to the customer by way of statements or vouchers.

51 Forgery and unauthorized debits to a customer's account owing to the forgery or fraud of third persons or of employees do not exhaust a bank's liability. There is the quite ordinary case of arithmetic error, of failure to credit sums to an account, of wrongful, albeit, innocent attribution of debits to an account. These are possible, even if infrequent; perhaps as infrequent as forgery and fraud. These instances of breach of obligation to a customer relate directly to what the bank has sought to achieve through the verification agreement. In my opinion, the principal question is not whether the bank has sought to protect itself against its breach of a fundamental term of its relationship with its customer, but rather what is the scope of protection which it has achieved under a document which is more a contract of adhesion than a bargained arrangement.

52 Neither forgery nor fraud are expressed as risks of the customer. The key words are "verify the correctness" of statements of account received from the bank; "notify the Bank in writing ... of any alleged omissions from or debits wrongly made to or inaccurate entries in the account". It is in respect of these, unless there is timely notice, that "the account as kept by the Bank shall be conclusive evidence" that it is correct, and that, subject to what is excepted (this includes "payments made on forged or unauthorized endorsements"), the bank is to be free "from all claims in respect of the account".

53 I find it strange that a bank which seeks by contract to throw the risk of all forged drawer signatures upon its customer should be so reticent about referring expressly to such an eventuality. It is not as if its verification form lacks subject matter without it. The verification form, as a matter of words, encompasses the situation which arose in *Union Bank of Canada v. Wood*, [1920] 3 W.W.R. 173 (Alta.). Beyond this or related situations, it surely is, to say the least, "ambiguous" (to use the term applied by Duff J. in the *Stewart* case) in any suggested application to forgery or fraud. There is every reason to construe it contra proferentem, and I would therefore conclude that its words do not provide protection against the forgery of the drawer's signature.

54 The construction that I would put on the verification agreement is consistent with the approach to contractual limitations of liability in other kinds of relationships, such as bailee and bailor, carrier and consignor, retailer and purchaser. Risks that are by contract to be passed by a party, upon whom they would otherwise rest, to the other party to the relationship must be brought home expressly if they are to be effective; at least this is so when the limitation would still have subject matter if unexpressed risks be found to be outside its general language.

55 There remains on this phase of the case the question whether the bank is in any event entitled to rest on the principle of an account stated or a settled account or whether, if the relations between the parties do involve a stated or settled account, the appellant is entitled to reopen it to show unauthorized debits. The trial Judge dealt with this issue by declaring [pp. 23-4] that "[the verification] contract does much more than create settled accounts ... If this case involved a mere settled account I would not think the injustice necessary to open such an account has been displayed". The key to this conclusion appears to be in the trial Judge's finding [p. 24] that "There was no step the bank could have taken to guard against this loss and there were many steps the plaintiff could have taken, any one of which would have discovered the earlier losses and prevented the later large losses". The basis of this finding is not spelled out until a later part of his reasons where the trial Judge dealt with a claim in negligence

 

against the Bank of Montreal (a claim not pursued on appeal), and indicated that he would have found (were it necessary to do so) that the appellant's negligence was the primary cause of its loss. I shall return to this point later in these reasons.

56 In the course of his reasons for judgment in the House of Lords' decision in *Camillo Tank SS. Co. Ltd. v. Alexandria Engineering Works* (1921), 38 T.L.R. 134 at 143, Lord Cave classified three types of accounts stated. His third class was one "where a claim has been made by one party, and the other party has for valuable consideration agreed to accept it as correct ... This is a real agreed account, and ... cannot be reopened except for fraud or on some other ground which would enable a party to an agreement to have it set aside". Lord Wright, speaking for the Judicial Committee in *Firm Bishun Chand v. Seth Girdhari Lal* (1934), 50 T.L.R. 465 at 468-9, was more pointed in asserting that, "It has not been doubted that in law there can be a settled or stated account between banker and customer". He went on to say that "what has been questioned is whether the acceptance by the customer without protest of a balance struck in the passbook constitutes a settled account, but the question has had reference merely to the issue whether such a settlement can be inferred as a matter of fact from the passing backward and forward of the pass-book. The legal competence of such a settlement, if made, is not questioned".

57 In the present case, the reliance on the verification agreement as establishing a settled account which is unchallengeable must fail because, on the construction I have put on the agreement, there was no settlement made that covered forgery of the drawer's signature. The settlement could go no farther than the document under which it was asserted.

58 Is then the Royal Bank's only defense to the claim of the appellant that the latter is (to refer to what is stated in s. 49(1) of the Bills of Exchange Act) precluded from setting up any or all of the forgeries? In examining the scope of this defense and in bringing the facts of this case into relation thereto, I begin by saying here what I might have said as conveniently much earlier in these reasons, that the adoption of verification receipts and verification agreements in this country appeared to be a response to judicial reluctance to impose upon a depositor a duty to examine bank statements and to report any discrepancies within a reasonable period.

59 Such a duty was imposed in the United States, the leading authority being *Leather Manufacturers' National Bank v. Morgan* (1885), 117 U.S. 96, 6 S. Ct. 657, 29 L. Ed. 811. It goes beyond the holding of a customer to answer for a forgery of which he had knowledge and failed to inform the bank. The Uniform Commercial Code, of almost universal application in the United States, has spelled out this duty in some detail in s. 4-406 as follows:

> (1) When a bank sends to its customer a statement of account accompanied by items paid in good faith in support of the debit entries or holds the statement and items pursuant to a request or instructions of its customer or otherwise in a reasonable manner makes the statement and items available to the customer, the customer must exercise reasonable care and promptness to examine the statement and items to discover his unauthorized signature or any alteration on an item and must notify the bank promptly after discovery thereof.
>
> (2) If the bank establishes that the customer failed with respect to an item to comply with the duties imposed on the customer by sub-section (1) the customer is precluded from asserting against the bank
>
>> (a) his unauthorized signature or any alteration on the item if the bank also establishes that it suffered a loss by reason of such failure; and
>>
>> (b) an unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank after the first item and statement was available to the customer for a reasonable period not exceeding fourteen calendar days and before the bank receives notification from the customer of any such unauthorized signature or alteration.
>
> (3) The preclusion under sub-section (2) does not apply if the customer establishes lack of ordinary care on the part of the bank in paying the item(s).
>
> (4) Without regard to the care or lack of care of either the customer or the bank a customer who does not within one year from the time the statement and items are made available to the customer (sub-section (1)) discover and report his unauthorized signature or any alteration on the face or back of the item or does not within three years from that time

 

discover and report any unauthorized indorsement is precluded from asserting against the bank such unauthorized signature or indorsement or such alteration.

(5) If under this section a payor bank has a valid defense against a claim of a customer upon or resulting from payment of an item and waives or fails upon request to assert the defense the bank may not assert against any collecting bank or other prior party presenting or transferring the item a claim based upon the unauthorized signature or alteration giving rise to the customer's claim.

60 2 Hals. (3d) 210 states that the authorities in England are conflicting on "whether there is or is not a duty on the part of the customer to examine the pass-book and paid cheques, if returned with it, and to communicate to the banker within reasonable time all debits which he does not admit". *Kepitigalla Rubber Estates Ltd. v. National Bank of India Ltd.*, [1909] 2 K.B. 1010, is cited as supporting the view that there is no such duty, unless it is imposed by express stipulation. It was a case where a company, a customer of defendant bank, recovered the amounts of a number of cheques on which the drawer signatures were forged by the company's secretary and which had been debited to the company. The significance of the *Kepitigalla* case for Canada is that it was referred to with approval by Middleton J. in the *Columbia Graphophone* case. There Middleton J. noted that a duty to the bank may arise after a customer has knowledge of a forgery. *Ewing v. Dominion Bank* (1904), 35 S.C.R. 133, 24 C.L.T. 285 , leave to appeal refused [1904] A.C. 806, goes far in this respect in its holding, by a bare majority, that a person may come under a duty to a bank where he is informed that a note of his, which was in fact forged, and which the bank had discounted, was coming due; and he may incur liability if he does not respond and in the result the proceeds thereof are withdrawn. I point out that the case was dealt with in terms of estoppel which involved turning the so-called duty into a representation by silence.

61 I do not think it is too late to fasten upon bank customers in this country a duty to examine bank statements with reasonable care and to report account discrepancies within a reasonable time. The Supreme Court of California in *Pacific Coast Cheese Inc. v. Security First National Bank of Los Angeles* (1955), 286 P. 2d 353, has stated the applicable principle as follows at p. 355:

The general rule is that a bank may not charge its depositor's account with payments made on altered or forged checks unless some conduct of the depositor falling under the principles of negligence or estoppel contributed to the loss and the bank was itself free from negligence ... This rule has been applied where as here the alteration or forgery was committed by an employee of the depositor ... When it appears that a bank has made payment on the basis of an altered or forged check, the burden is on the bank to justify the charge by establishing, as an affirmative defence, both that it was free from negligence and that the depositor was negligent or was estopped to deny the correctness of the payments.

62 This principle would be consistent with the duty of which I speak, a duty that would not, however, be as draconian as that which the bank has sought to fasten upon the appellant under the verification agreement.

63 The Uniform Commercial Code recognizes contractual limitations upon the duty referred to in s. 4-406, quoted above. It provides in s. 4-103, in its relevant parts, as follows:

(1) The effect of the provisions of this Article may be varied by agreement except that no agreement can disclaim a bank's responsibility for its own lack of good faith or failure to exercise ordinary care or can limit the measure of damages for such lack or failure; but the parties may by agreement determine the standards by which such responsibility is to be measured if such standards are not manifestly unreasonable.

(2) Federal Reserve regulations and operating letters, clearing house rules, and the like, have the effect of agreements under subsection (1), whether or not specifically assented to by all parties interested in items handled.

64 This specific reference to contractual exculpation in relation to s. 4 of the Code (which deals with bank deposits and collections) reinforces the general provision in s. 1-102, applicable to the Code as a whole, which provides in para. 3 that:

the effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement

> but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

65 The foregoing provisions say nothing about the reach or construction of exculpatory agreements which do not offend its limitations on a bank's right to contract out of liabilities. That is left to what I may call the general law; and I have already indicated my approach to it in respect of the verification agreement put forward in this case. I need only add here that, even apart from my view of its scope, that agreement could not have its full literal force if the limitations of ss. 1-102 and 4-103 were applied to it.

66 The facts found in the present case go, however, beyond any failure to meet the duty that I have suggested, and hence make it unnecessary for me to determine how many of the forgeries would have to be borne by the bank by reason of a breach of duty which arose only in relation to the submission of statements of account to the appellant. The trial Judge absolved the bank of any negligence in relation to the forgeries, which were skilfully executed, and dealing with the appellant's conduct of its business, he made the following findings [p. 33]:

> The plaintiff employed a person they knew had been found to be untrustworthy in the past and placed him in a position of complete trust where no one checked upon his work adequately. The procedures followed by the plaintiff and its auditors were inadequate to discover the fraud and to discover that its books had not balanced for a number of years. Cheques remain today in which the duplicate shows one payee and the original another. The accounts payable had not balanced for years. In each of the months in which there was a forged cheque Mr. Seear was permitted to extract the cheque and complete the balancing. He was a very personable fellow, well trained in accounting. If the plaintiff had employed proper procedures it seems reasonable to expect that it would have discovered some of the forgeries, that its bank's returns did not balance in many months, that its accounts payable did not balance, or that its cheques were not in accordance with the duplicate register. One would have expected that in an organization handling money in the amounts that this plaintiff handled, no person would be so wholly entrusted with responsibility that no other person's duties would involve a check upon him. In this case the plaintiff knew that the person in that position had been discharged from his former employment because it was found that he could not be trusted.

67 On these findings, relating as they do to the particular facts of this case, I am of the opinion that the appellant is precluded from claiming against the Royal Bank on any of the 72 cheques which are the subject of its action.

68 This conclusion is enough to dispose of the alternative claims against this bank for money had and received and for conversion. I do not pause to examine the appropriateness of these causes of action to a claim made by a customer against its bank. What is obvious is that the appellant cannot be in any better position on his alternative causes of action than he is on his main allegation. It would require mounting fiction upon fiction by way of ignoring the findings of fact to conclude that the bank has improperly retained money (or improperly debited the account) of the appellant, or has made a wrongful appropriation of assets of the appellant so as to be guilty of tortious conduct.

69 The claim of the appellant against the Bank of Montreal, the collecting bank, for conversion, or, alternatively, for money had and received, was rejected by the trial Judge on the ground that the principle of *Price v. Neal* (1762), 3 Burr. 1354, 97 E.R. 871, 1 Wm. Bl. 390, 96 E.R. 221, applied to bar a drawer, who must be taken to know his own signature, from throwing upon an innocent third party the loss resulting to him from the payment out of his account of the amounts of the forged cheques. He distinguished the present case from one where the drawer's signature was genuine but the amount of the cheque was wrongly raised. In his view [p. 31]:

> The drawer's cause of action against his own bank gives him adequate protection. If he chooses to bargain that cause of action away or allow it to lapse, the loss should not be imposed on an innocent third party.

70 This last statement referred, of course, to the trial Judge's appreciation of the effect of the verification agreement.

71 In the Court of Appeal, Robertson J.A., with whom Taggart J.A. agreed, said in summation [p. 258] (after exploring the theory upon which conversion lies for the value represented by a bill of exchange) that, "In order to succeed on a claim

 

of this kind, the plaintiff must be the true owner of the piece of paper qua cheque and not simply the owner of the piece of paper qua piece of paper". Nemetz J.A. in concurring reasons rejected the claim for conversion because the so-called cheques were admittedly not bills of exchange, as defined in the Bills of Exchange Act; and hence the collecting bank could not be guilty of conversion so as to be answerable for the face value of the forged cheques for which it had received payment from the drawee bank.

72 The technical result of the forgeries in destroying the "bills of exchange" character of the documents in this case does not make it any less true that the value of the appellant's chose in action against the Royal Bank had been considerably diminished by the action of the collecting bank. But this is so in the present case only because the drawer's bank was, on the facts, not liable to make good to the drawer the amounts of the forgeries. The collecting bank was merely carrying out its duty to its customer; and the fact that he was the forger would not, on that ground alone, affect its position unless it knew or could reasonably be fixed with knowledge of the forgeries, and only to the extent of such knowledge or attribution thereof. The overriding question here is whether, despite want of knowledge or want of any basis of attribution thereof, a collecting bank is at the peril of a successful claim by the drawer whose signature has been forged because that bank has received money on the presentation of worthless documents and thus has reduced the credit position of the drawer with its own bank. The issue arises only because the collecting bank had both surrendered the documents and had in turn paid out to its fraudulent customer what it collected before having any knowledge of his criminal actions; and, above all, it arises because the drawer finds himself without recourse against the paying bank.

73 There is in this case no tenable claim for money had and received if there is no recovery for conversion. Although the former is not tied to conversion — it may, for example, arise where there has been a failure of consideration — the basis of the claim here for money had and received is the allegedly tortious conduct of the collecting bank, and the claim would arise upon a waiver of the tort. What, then, is the tort, with ensuing damage, which the collecting bank has committed against the appellant? It has not deprived the appellant of the fruits of bills of exchange to which the appellant was entitled. It has not knowingly assisted in perpetrating a fraud through which the appellant suffered a loss. It was not fixed with notice of the forgeries, or any of them, at a time when the forger's accounts with it were still on the credit side, so as to support a claim to follow the money.

74 I do not find it necessary to consider the Bank of Montreal's position as a holder for value. Certainly, in such a case, the doctrine of *Price v. Neal*, supra, would protect it against a claim by the drawee; and equally, it seems to me, against a claim by the drawer who would be expected to have recourse against the drawee. I look upon the present case as one where, as between the appellant and the collecting bank, the loss suffered as a result of the forgeries must lie where it has fallen.

75 I would dismiss the appeal against both banks with costs.

# APPENDIX “C”

**KeyCite treatment**
**Most Negative Treatment:** Not followed
**Most Recent Not followed:** Boltrun Investments Inc. v. Bank of Montreal | 1998 CarswellOnt 5117, 84 A.C.W.S. (3d) 1172, 86 O.T.C. 211, [1998] O.J. No. 5526 | (Ont. Gen. Div., Dec 30, 1998)

1991 CarswellBC 32
British Columbia Court of Appeal

Cavell Dev. Ltd. v. Royal Bank

1991 CarswellBC 32, [1991] 4 W.W.R. 266, [1991] B.C.W.L.D. 972, [1991] B.C.J. No. 614, 25 A.C.W.S. (3d) 1189, 54 B.C.L.R. (2d) 1, 78 D.L.R. (4th) 512

# CAVELL DEVELOPMENTS LTD. v. THE ROYAL BANK OF CANADA

Lambert, Macdonald and Cumming JJ.A.

Heard: November 30, 1990
Judgment: March 18, 1991
Docket: Vancouver Doc. CA012022

Counsel: *R.J. Kearns* and *C.L. Spratt*, for appellant.
*W.B. McKinnon*, for respondent.

Subject: Corporate and Commercial; Torts
**Related Abridgment Classifications**
**Financial institutions**
XIII Tortious liability of banks
XIII.1 Nature of bank's duty to customer
XIII.1.b Duty of care
**Headnote**
**Banking and Banks --- Tortious liability of banks — Negligence of bank — Miscellaneous negligent acts of banks**
Banking — Relationship between bank and customer — Duties and liability of bank — Payment of cheques and drafts — Standard account verification agreement not releasing bank from consequences of its own negligence in honouring cheque drawn on corporate customer's account without proper authority.
Banking — Relationship between bank and customer — Duties and liability of customer — Verification of statement of account — Standard account verification agreement not releasing bank from consequences of its own negligence in honouring cheque drawn on corporate customer's account without proper authority.
The corporate plaintiff signed an account verification agreement with the defendant bank. The agreement gave the plaintiff 30 days within which to notify the bank of inaccurate entries, otherwise the bank was to be free of claims in respect of the account. The bank negligently accepted a certification of an invalid directors' resolution specifying a single signing officer, signed by that officer in the presence of a bank employee, and negligently accepted a cheque drawn by the plaintiff on the signature of that single signing officer. As a result, that officer was able to convert $36,000 of the plaintiff's funds to his own use. The plaintiff's November, 1988, bank statement included the debit of $36,000, but the plaintiff did not notify the bank that that cheque was improperly drawn until February, 1989. The bank claimed that the account verification agreement released it from the consequences of its own negligence. In the plaintiff's action the trial judge held that the account verification agreement provided no defence to negligence, and awarded damages of $36,000. The bank appealed.
**Held:**
Appeal dismissed.
There is nothing fundamental in the banking relationship that would require a mistaken debit to the customer's account to be rectified within 30 days or not at all. A bank could be led into wrong banking decisions by a mistaken credit to the account,

 

but there is nothing in a standard verification agreement that prevents a bank from rectifying such an error at any time. It is only if the error favours the bank and is detrimental to the customer that the verification agreement precludes rectification. If the error favours the bank, then credit decisions are not affected by it. Here, there was nothing in the contractual matrix of the banker-customer relationship that required that the standard verification agreement be interpreted to release the bank from the consequences of its own negligence. The verification agreement was accordingly to be given a strict interpretation. There were clearly situations in which the release in the agreement would come into play to protect the bank, so it could not be argued that the verification agreement had nothing on which to operate if it did not constitute a release of liability for the bank's own negligence.

**Table of Authorities**

**Cases considered:**

*Alderslade v. Hendon Laundry Ltd.*, [1945] K.B. 189, [1945] 1 All E.R. 244 (C.A.) — *applied*

*Arrow Transfer Co. v. Royal Bank*, [1972] S.C.R. 845, [1972] 4 W.W.R. 70, 27 D.L.R. (3d) 81 [B.C.] — *applied*

*Blanchard v. Bank of Montreal*, [1990] 1 W.W.R. 682, 81 Sask. R. 49 (Q.B.) — *referred to*

*C.I.B.C. v. Haley* (1979), 100 D.L.R. (3d) 470, 25 N.B.R. (2d) 304, 51 A.P.R. 304 (C.A.) — *considered*

*C.P. Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711, 41 C.C.L.T. 1, 40 D.L.R. (4th) 385, 21 O.A.C. 321, 77 N.R. 161 — *considered*

*Can. SS. Lines Ltd. v. R.*, [1952] A.C. 192, 5 W.W.R. (N.S.) 609, [1952] 2 D.L.R. 786, [1952] 1 All E.R. 305 (P.C.) [Exch.] — *referred to*

*Cercle Universitaire d'Ottawa v. Nat. Bank of Can.* (1987), 61 O.R. (2d) 456, 43 D.L.R. (4th) 147 (H.C.) — *considered*

*ITO-Int. Terminal Operators Ltd. v. Miida Electronics Inc.; Miida Electronics Inc. v. Mitsui O.S.K. Lines Ltd.*, [1986] 1 S.C.R. 752, 34 B.L.R. 251, 28 D.L.R. (4th) 641, 68 N.R. 241 [Fed.] — *referred to*

*Kelly Funeral Homes Ltd. v. C.I.B.C.* (1990), 72 D.L.R. (4th) 276 (Ont. H.C.) — *considered*

*Royal Bank v. Larry Creighton Pro. Corp.*, [1989] 3 W.W.R. 561, 65 Alta. L.R. (2d) 178, 45 B.L.R. 217, 95 A.R. 40 (C.A.) — *applied*

*Rutherford v. Royal Bank*, [1923] S.C.R. 131, 13 C.B.R. 372, [1932] 2 D.L.R. 332 [Que.] — *considered*

*Shields (Resort Village) v. T.D. Bank*, [1988] 3 W.W.R. 268, 64 Sask. R. 253, reversed [1989] 2 W.W.R. 163, 69 Sask. R. 131 (C.A.) — *considered*

**Statutes considered:**

Uniform Commercial Code

s. 4-103

s. 4-406

Appeal from R. 18A judgment of Owen-Flood Co. Ct. J., [1990] B.C.W.L.D. 694, [1990] C.L.D. 362, 48 B.L.R. 80, finding against bank for negligence.

**The judgment of the court was delivered by *Lambert J.A.*:**

1 Cavell Developments Ltd. ("Cavell") signed an account verification agreement with the Royal Bank of Canada ("the bank"). The agreement specified a 30-day period within which Cavell had to notify the bank about inaccurate entries, otherwise the bank was to be free from claims in respect of the account. The bank was negligent in the way it obtained a certification of a new directors' resolution specifying a single signing officer, and in accepting a cheque drawn by Cavell on the signature of that single signing officer. The question in this appeal [from [1990] B.C.W.L.D. 694, [1990] C.L.D. 362, 48 B.L.R. 80] is whether the account verification agreement released the bank from the consequences of its own negligence.

**I**

2 Cavell was established for the purpose of carrying out a real estate development. In March, 1988, it opened a current account at the Douglas Street branch of the bank in Victoria. It arranged for the execution and filing with the bank of two standard form bank documents: a "Companies Resolution of Directors Regarding Banking and Security" (Form 221-(5/87)); and an "Operation and Verification of Account Agreement" (Form 459(5-66)).

 

3 The directors' resolution form authorized the president, together with any one of the secretary, the vice-president and the treasurer, to draw cheques and execute other banking documents. It contained this provision:

> ... and that this resolution shall remain in force and be binding upon the Company until a copy, certified by a director, or officer of the Company, or by the solicitor for the Company, of a resolution passed by the Directors of the Company repealing or replacing this resolution shall have been received by the manager of each such branch or agency of the Bank and duly acknowledged in writing, and that the said list with any changes notified and acknowledged as aforesaid and the said designations shall respectively remain in force and be binding upon the Company until written notice to the contrary shall have been received and acknowledged as aforesaid.

The certificate relating to the resolution was printed at the end of Form 221 and contemplated that it was to be signed by both the president and the secretary. On March 14, 1988, it was signed by them.

4 The verification agreement contained this clause:

> (9) That where a statement of account and relative vouchers are to be rendered by the Bank;
>
> (a) the undersigned will verify the correctness of each statement of account received from the Bank;
>
> (b) If a statement of account and relative vouchers are not received on or before the 10th day after the end of the cycle agreed on for their preparation, the undersigned will notify the Bank not later than 5 days thereafter;
>
> (c) *The undersigned will within 30 days* and not thereafter following the end of the cycle agreed on for the statement of account preparation, *notify the Bank in writing* at the branch or agency where the account is kept, *of any alleged omissions from or inaccurate entries in the account* as so stated;
>
> (d) *that at the end of the said 30 days the account as kept by the Bank shall be conclusive evidence* without any further proof *that* except as to any alleged errors of which the Bank has been so notified and any payments made on forged or unauthorized endorsements *the account contains* all credits that should be contained therein and *no debits that should not be contained therein* and all the entries therein are correct *and* subject to the above exception *the Bank shall be free from all claims in respect of the account*. [emphasis added]

5 The president of Cavell was Ian Bloomfield. On October 19, 1988, he wrote to the bank to say that from October 15, 1988, "only ONE signature is required on the ... account" (Mr. Bloomfield's emphasis). Mr. Bloomfield also said that any one of the three signing officers of the company could sign any bank document. But Mr. Bloomfield was the only one involved in the day-to-day dealings with the bank.

6 On October 21 Mr. Bloomfield went to the bank. He was told that a new directors' resolution was required in order to implement the change from two signing officers to a single signing officer. Mr. Bloomfield immediately sat down, there and then, in the bank and filled in a new resolution in Form 221 naming the president (i.e., himself) as the only person entitled to draw cheques or sign other banking documents. Mr. Bloomfield also filled in the bank's certificate form at the end of the resolution. That form required the signature of the company president and company secretary. However, Mr. Bloomfield was the only person who signed it, and he did so as president alone, contrary to the text of the form. Mr. Bloomfield then handed over the signed form to the bank officer from whom he had just received it in blank.

7 Between October 19, 1988, and early November Mr. Bloomfield drew company cheques as president. They were honoured by the bank. One of them was a cheque for $36,000 for the purchase of a BMW automobile. The cheque was payable to J. Ladd, a BMW dealer. Very soon after taking delivery of the car, Mr. Bloomfield sold it. He left the country shortly after that. Cavell has since obtained a judgment against him for $239,900, but that judgment remains unsatisfied.

8 The statement of account prepared by the bank some time early in November bearing the statement date of November 4, 1988, included the debit of $36,000. On December 9, 1988, two officers of Cavell went to the bank and said that they thought

 

Mr. Bloomfield had been acting improperly with respect to the company's banking. They did not single out the $36,000 entry as being incorrect, but they said that they were going to examine the company's financial records and try to straighten out the company's account. The new president of the company wrote to the bank in February, 1989, indicating specifically that the $36,000 cheque was improperly drawn and should not have been debited to the account.

9 No resolution authorizing the president alone to draw cheques or sign banking documents was ever passed by the board of directors of Cavell.

**II**

10 Counsel for the appellant bank put the issue in this way:

> The learned Chambers Judge erred in law in finding that the Verification Agreement was not a complete defence to [Cavell's] claim against the [bank].

Several other issues were argued on Cavell's motion for judgment under R. 18A. But the chambers judge did not accept any of the bank's defences. He found that the bank was negligent towards its customer, Cavell, and he found that the bank was in breach of the contract that governed its relations with Cavell. The chambers judge assessed damages at $36,000, the amount of the cheque that had been wrongly debited to the plaintiff's account with the bank.

11 The bank pleaded contributory negligence on the part of Cavell. The chambers judge made no finding of contributory negligence. The bank did not appeal with respect to contributory negligence or with respect to any of the other defences, such as the "indoor management" rule or ostensible authority. The bank confined its appeal to the verification agreement.

12 The only issue in this appeal, therefore, is whether the verification agreement provides the bank with a defence in this case, where the bank has been found to have been negligent in acting on a directors' resolution that was handed to Mr. Bloomfield in the bank by a bank employee and was immediately filled in, dated to indicate that the resolution had been passed on that very day, signed and delivered back to the employee, without any opportunity for the directors to have met or to have signed a consent resolution in the intervening period, and without the secretary's signature on the certificate as contemplated by the bank's own form.

**III**

13 For the purposes of this appeal I am prepared to assume, without deciding, that Cavell's claim is a "claim in respect of the account" as those words are used in cl. 9 of the verification agreement. So I put aside the argument that the claim in negligence for breach of duty in accepting and acting on an obviously invalid directors' resolution should not be regarded as a "claim in respect of the account." I also put aside the argument that the verification agreement relates only to claims for breach of contract and does not extend at all to claims that are framed in tort. I do not think that such an argument would be correct in law. I hasten to add that neither of the arguments I have put aside was made by counsel for Cavell.

14 Counsel for Cavell did argue that the verification agreement did not cover "debits wrongly made" under cl. 9(c). But, having regard to the words "and no debits that should not be contained therein" in cl. 9(d), I do not think that cl. 9(c) can be limited in the way counsel for Cavell suggested.

15 So that brings me to the principal argument made by counsel for Cavell, and to the central issue in this appeal. Does cl. 9 release the bank from claims for its own negligence if they are not made within 30 days after the end of a cycle for the preparation of a statement showing an entry that resulted from the negligence?

***The guidelines in Alderslade v. Hendon Laundry***

16 In *Alderslade v. Hendon Laundry Ltd.*, [1945] K.B. 189, [1945] 1 All E.R. 244 (C.A.), Lord Greene M.R. said this at p. 245:

  

> The effect of those authorities can I think be stated as follows: where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because if it were not so construed it would lack subject-matter. Where, on the other hand, the head of damage may be based on some ground other than that of negligence, the general principle is that the clause must be confined to loss occurring through that other cause to the exclusion of loss arising through negligence. The reason for that is that if a contracting party wishes in such a case to limit his liability in respect of negligence, he must do so in clear terms, and in the absence of such clear terms the clause is to be construed as relating to a different kind of liability and not to liability based on negligence.

17 Those guidelines were endorsed for Canada by the Judicial Committee of the Privy Council in *Can. SS. Lines Ltd. v. R.*, [1952] A.C. 192 at 207-208, 5 W.W.R. (N.S.) 609, [1952] 2 D.L.R. 786, [1952] 1 All E.R. 305 [Exch.]. They were also commented on by Mr. Justice McIntyre, for the majority of the Supreme Court of Canada, in *ITO - Int. Terminal Operators Ltd. v. Miida Electronics Inc.; Miida Electronics Inc. v. Mitsui O.S.K. Lines Ltd.*, [1986] 1 S.C.R. 752 at 794-98, 34 B.L.R. 251, 28 D.L.R. (4th) 641, 68 N.R. 241 [Fed.], and their designation as guidelines rather than tests was approved. In short, they are aids to construction. They tend to reveal the intent of the parties, but the intent of the parties must govern.

18 Throughout the cases that deal with limitations on liability or exclusions of liability, there runs the concern that a party who signs a contract of adhesion should not be considered to have released any claims against the party who prepared the contract based on that party's own negligence unless the party who adhered to the contract could have clearly seen, by reading the contract, that the party who drew the contract was absolving himself or herself from any duty of care or was limiting in some way the consequences of any breach of his or her duty of care.

19 An illustration of the application of that approach to the relations between a bank and its customer is to be found in the decision of Chief Justice Hughes, for the New Brunswick Appeal Division, in *C.I.B.C. v. Haley* (1979), 100 D.L.R. (3d) 470, 25 N.B.R. (2d) 304, 51 A.P.R. 304. In that case, the release was said to apply "whether [the loss was] occasioned through the fault of the Bank or otherwise" [quoted at p. 476]. It was decided that even those words were not sufficiently specific to release the bank from claims against the bank based on negligence, though they covered other kinds of fault on the part of the bank.

20 Before leaving the matter of the proper approach to the construction of a verification agreement between a bank and its customer, it is worth noting that, under the Uniform Commercial Code in the United States (particularly ss. 4-103 and 4-406), a bank cannot obtain by contract a release from its duty of care to its customer or a release from any of the consequences of a breach of that duty and cannot require the customer to assert its claim in less than 12 months.

***The Canadian cases on verification agreements***

21 Counsel for the bank referred the court to three decisions of the Supreme Court of Canada. In none of those three cases was there an issue about whether a verification agreement applied when the bank was found to have been negligent.

22 The first was *Rutherford v. Royal Bank*, [1932] S.C.R. 131, 13 C.B.R. 372, [1932] 2 D.L.R. 332 [Que.]. The bank accepted a cheque signed by only one officer of the company when the company's banking resolution indicated that a cheque must be signed by two officers. The issue in the case was whether a verification slip released the bank. It was decided that it did. Smith J. delivered the judgment of the court. No evidence had been offered by the company to displace the prima facie defence of the bank based on the verification slip. In those circumstances Mr. Justice Smith said that it was not necessary to discuss under what state of facts or circumstances a customer of the bank might be relieved from the ordinary effects of such a release. Negligence was not specifically mentioned.

23 The second case was *Arrow Transfer Co. v. Royal Bank*, [1972] S.C.R. 845, [1972] 4 W.W.R. 70, 27 D.L.R. (3d) 81 [B.C.]. An employee of the plaintiff company systematically forged company cheques over a period of five years and diverted the proceeds to his own use. The trial judge found that the company had many more ways of preventing the losses than the bank did. Mr. Justice Laskin, in concurring reasons in the Supreme Court of Canada, said at p. 875: "The trial judge absolved the

  

bank of any negligence in relation to the forgeries..." Again there was no issue about whether a verification agreement protected the bank against its own negligence.

24 The third case was *C.P. Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711, 41 C.C.L.T. 1, 40 D.L.R. (4th) 385, 21 O.A.C. 321, 77 N.R. 161. In that case there was no verification agreement. But the daily bank statement said unilaterally that, except for errors reported within 30 days, the statement would be considered correct. The Supreme Court of Canada decided unanimously that, in the absence of an express agreement by the customer, there was no duty on the part of the customer to verify the daily bank statements. Again there was no issue about negligence on the part of the bank.

25 No decision of any provincial Court of Appeal was referred to by counsel for the bank.

26 The remaining cases relied upon by the bank were two trial judgments in Ontario, namely, *Cercle Universitaire d'Ottawa v. Nat. Bank of Can.* (1987), 61 O.R. (2d) 456, 43 D.L.R. (4th) 147 (H.C.) (Steele J.), and *Kelly Funeral Homes Ltd. v. C.I.B.C.*, April 9, 1990, No. 4046/86, Walsh J., H.C. [now reported 72 D.L.R. (4th) 276], and one trial judgment in Saskatchewan, namely, *Shields (Resort Village) v. T.D. Bank*, [1988] 3 W.W.R. 268, 64 Sask. R. 253, reversed [1989] 2 W.W.R. 163, 69 Sask. R. 131 (C.A.) (Hrabinsky J.). The judgment of the Saskatchewan Court of Appeal in the *Shields* case was not referred to by counsel for the bank.

27 In the *Cercle Universitaire* case the bank was found to have been negligent in permitting an employee of the plaintiff to deposit cheques payable to the plaintiff in the employee's own account. Mr. Justice Steele decided that the verification agreement applied and that the bank was not liable for its own negligence. Mr. Justice Steele said this, at p. 459:

> The agreement is wide and, by expressly excluding forgeries or unauthorized endorsements, can only have any substantial meaning by interpreting it to cover all aspects of negligence by the bank. It is hard to visualize what else it could apply to.

28 The account verification agreement in issue in that case excepted "payments made on forged or unauthorized endorsements": see p. 458. So when Mr. Justice Steele said that the agreement expressly excluded "forgeries or unauthorized endorsements" Mr. Justice Steele got the agreement wrong. And of course forgery of an endorsement is not the same thing as forgery of the signature of a drawer. An endorsement is what is done by a payee when he signs the back of a cheque or bill and transfers it by negotiation. There are many cases where a bank has been held liable for honouring a cheque or bill drawn on the bank where there was a forged signature of the drawer. And frequently the bank has not been considered negligent for failing to detect the forgery. But nonetheless the bank would be liable unless the liability were released by the customer. Indeed, see the *Arrow Transfer* case, supra, itself. And there are many other ways in which a bank could be liable without negligence on its part, including a reasonable and honest mistake in breach of its contract with its customer. So I think that Mr. Justice Steele based his reasons on a misapprehension of the account verification agreement, and I would not regard the *Cercle Universitaire* case as persuasive.

29 In the *Kelly Funeral Homes* case, supra, Mr. Justice Walsh considered that the verification agreement provided a defence to the bank. He made no finding that the bank was negligent, though he did say that it was not without fault. But, in deciding that the verification agreement should apply, he seems to have weighed the fact that it was much easier for the plaintiff company to have discovered the fraud of their employee than it would have been for the bank to do so. I do not regard the *Kelly Funeral Homes* case as an authority on the effect of a verification agreement when the reason for the error in the statement is the negligence of the bank.

30 The final case relied on by counsel for the bank was *Shields v. T.D. Bank*, supra. The court was asked to answer three questions of law. One of them was whether the verification agreement conclusively denied the plaintiff a cause of action based on the bank's negligence. Mr. Justice Hrabinsky decided that it did. He did not consider whether the bank's own negligence was a matter that merited separate consideration from the case of a forgery or alteration where the bank was not negligent. An appeal was taken from Mr. Justice Hrabinsky's decision on the ground that a bank could not contract out of liability for its own negligence unless it did so in specific terms. That appeal was allowed on the ground that the issues should not have been

 

dealt with as issues of law alone. There was no decision by the Saskatchewan Court of Appeal on the merits. But Mr. Justice Hrabinsky's decision was not upheld: see [1989] 2 W.W.R. 163.

31 During the course of the argument in this appeal, counsel for the bank was asked whether there were any cases where a verification agreement had been considered not to provide a defence. He referred to cases where the bank's officer was guilty of wrongdoing, and he drew the court's attention to a number of cases where the verification agreement had been held not to apply in circumstances where the bank was considered to have contracted for a fixed interest rate but it had debited the customer's account with a higher interest rate, calculated with reference to a floating prime rate. The most significant of those decisions is the decision of the Alberta Court of Appeal in *Royal Bank v. Larry Creighton Pro. Corp.*, [1989] 3 W.W.R. 561, 65 Alta. L.R. (2d) 178, 45 B.L.R. 217, 95 A.R. 40. In that case Mr. Justice Stratton, for the court, said this, at p. 565:

> In *Arrow Transfer Co. v. Royal Bank*, [1972] S.C.R. 845, [1972] 4 W.W.R. 70, 27 D.L.R. (3d) 81 [B.C.], Laskin, J. (as he then was), at p. 98, said:
>
> > The construction that I would put on the verification agreement is consistent with the approach to contractual limitations of liability in other kinds of relationships, such as bailee and bailor, carrier and consignor, retailer and purchaser. Risks that are by contract to be passed by a party, upon whom they would otherwise rest, to the other party to the relationship must be brought home expressly if they are to be effective; at least this is so when the limitation would still have subject-matter if unexpressed risks be found to be outside its general language.
>
> I agree that verification agreements should be strictly construed. In the present case the verification agreement, by the express words of the document itself, related to the customer's current account. Although the appellant, by his failure to object in the manner and within the time called for in the agreement, may well have accepted that the interest charges on his loans were to be debited to his current account, he did not thereby acknowledge that those loans had been properly handled in terms of the interest rate or rates applied to them.

So in that case the verification agreement was considered not to apply to increased interest debits to the account notwithstanding that its express terms were "debits wrongly made to or inaccurate entries in the account" [quoted at p. 564]. Clearly a very strict construction was given to the verification agreement.

32 The decision of the Alberta Court of Appeal in *Royal Bank v. Larry Creighton* was followed by Madam Justice Batten of the Saskatchewan Court of Queen's Bench in *Blanchard v. Bank of Montreal*, [1990] 1 W.W.R. 682, 81 Sask. R. 49, where the facts were very similar.

***Conclusion***

33 There is nothing fundamental in the banking relationship that would require a mistaken debit to the customer's account to be rectified within 30 days or not at all. One can see that a bank could be led into wrong banking decisions by a mistaken credit to the account, but there is nothing in a standard verification agreement that prevents a bank from rectifying such an error at any time. It is only if the error favours the bank and is detrimental to the customer that the verification agreement precludes rectification. If the error favours the bank, then credit decisions are not affected by it.

34 Having regard to those considerations, there does not seem to have been anything in the contractual matrix of the bank-customer relationship in this case that requires an interpretation to be given to the standard verification agreement that would result in releasing the bank from the consequences of its own negligence.

35 Since there is nothing in the factual matrix to indicate otherwise, I would give the verification agreement the strict construction that was contemplated by Mr. Justice Laskin in the *Arrow Transfer* case, supra, and adopted by the Alberta Court of Appeal in the *Larry Creighton* case, supra. I would follow the guidelines enunciated in *Alderslade v. Hendon Laundry*, supra, as applied and referred to in *Can. SS. Lines v. R.*, supra, and *ITO Ltd. v. Miida Electronics Inc.*, supra.

36 In the banker-customer relationship there is ample scope for the release contained in the verification agreement to apply in such cases as failure to detect forged signatures of the drawers of cheques and other honest and non-negligent breaches of the banking agreement by the bank. So there is no ground for considering that the verification agreement would have nothing to operate on unless it constituted a release of the liability of the bank for loss arising from the bank's own negligence in carelessly breaching its duty of care to its customer.

37 In my opinion the issue raised by the bank in this appeal, namely, whether, where its liability is based on its own negligence, it is entitled to rely on the verification agreement as a defence, should be answered, on the facts of this case at least, "No."

**(IV)**

38 There was only one issue raised in this appeal. For understandable reasons, the bank did not cross-appeal with respect to contributory negligence, nor did it persist with any of the other defences which were raised by it at trial.

39 I would dismiss the appeal.

*Appeal dismissed.*

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# APPENDIX “D”

**KeyCite treatment**
**Most Negative Treatment:** Distinguished
**Most Recent Distinguished:** Fruiticana Produce Ltd. v. 575760 B.C. Ltd. | 2008 BCSC 1588, 2008 CarswellBC 2505, 173 A.C.W.S. (3d) 120, [2009] B.C.W.L.D. 350, [2009] B.C.W.L.D. 421, [2009] B.C.W.L.D. 431, [2009] B.C.W.L.D. 510 | (B.C. S.C., Nov 20, 2008)

1957 CarswellBC 74
British Columbia Court of Appeal

Nor-Wes Building Supplies Ltd. v. Arrowsmith

1957 CarswellBC 74, 22 W.W.R. 185

# Nor-Wes Building Supplies Limited (Plaintiff) Appellant v. Arrowsmith (Defendant) Respondent

Sidney Smith, Bird and Davey, JJ.A.

Judgment: April 5, 1957

Counsel: *R. Edwards*, for plaintiff, appellant.
*P. E. Hogan*, for defendant, respondent.

Subject: Property; Contracts; Civil Practice and Procedure
**Related Abridgment Classifications**
**Commercial law**
V Sale of goods
V.8 Seller's remedies
V.8.a Action for purchase price
V.8.a.iv Miscellaneous
**Headnote**
**Sale of Goods --- Seller's remedies — Action for purchase price**
Sale of Goods — Action for Price — Insufficient Evidence of Delivery.
On appeal from the dismissal, (1956) 19 W.W.R. 565, of an action for the balance of the price of goods (building supplies) sold and delivered, *held*, dismissing the appeal, that the trial judge's finding that delivery of the goods to the defendant had not been proved was correct (per Sidney Smith and Bird, JJ.A.).
**Per Davey, J.A.:**
If the action had turned upon proof of delivery alone the plaintiff might have succeeded on the ground that there was evidence on which there might have been found an admission of the correctness of the amount of the account; but the plaintiff (appellant) fails because the other ingredients of its claim were not established; the evidence, so far from proving that the plaintiff sold and delivered goods to the defendant, proves that it did neither. The appeal must be disposed of on the pleadings as they stand, and therefore it fails.

Appeal by plaintiff and cross-appeal from the judgment of Lord, J., (1956) 19 W.W.R. 565. Appeal and cross-appeal dismissed.

***Sidney Smith, J.A.*:**

1 Here the plaintiff sued for the value of goods sold and delivered. The action was dismissed by Lord, J. The learned judge opened his reasons by stating that:

> This case must rest for its decision on whether there has been proper and sufficient evidence of the delivery of the supplies to the defendant's premises.

  

2 I agree respectfully with this view of the case and also of his subsequent finding that on the facts there was not sufficient proof of the delivery and receipt of the goods.

3 In my opinion the appeal fails.

***Bird, J.A.*:**

4 The appellant brought action to recover from the respondent $1,356.77, being the balance payable for building supplies alleged to have been sold and delivered by the appellant to the respondent, at his request, between February 9 and June 24, 1954. The learned trial judge dismissed the action for lack of sufficient proof of the "ordering and delivery" of the goods. He held further, as I understand the reasons for judgment, that the respondent was estopped from denying the authority of his building contractor to order materials from the appellant for delivery to the said job upon the grounds expressed in the reasons.

5 The appellant now appeals from the said judgment and a cross-appeal is taken by the respondent on the ground of error in the finding of estoppel.

6 In my judgment no sufficient evidence was adduced below to prove delivery by the appellant to the respondent at his request of the materials the subject of the claim.

7 It clearly appears from the evidence adduced by the plaintiff that all the said materials were supplied by it on orders placed by the respondent's building contractor, Giampa, and that the same were invoiced to him in his trade name of Arrow Construction. There was no evidence of delivery to the respondent or to his property of the said materials. The only evidence adduced in respect thereof is that of the plaintiff's bookkeeper who testified to the fact that she made entries in the plaintiff's ledger account, carried in the name of Arrow Construction, which purport to show that the said materials were delivered to the address of the respondent's premises. This witness had no personal knowledge of the alleged deliveries, no invoices were produced in respect thereof, nor were receipts produced therefor.

8 In the foregoing circumstances I respectfully agree with the conclusion reached by the learned trial judge that there was no sufficient proof of delivery.

9 In the result it becomes unnecessary to consider the question raised by way of cross-appeal. I would dismiss the appeal.

***Davey, J.A.*:**

10 In the opinion of the learned trial judge the appellant failed to prove delivery of the material for which it sued upon a common count for the price of goods sold and delivered, and he dismissed its claim. Had the action turned on that alone I would have been disposed to allow the appeal for though there was, as the learned judge held, no proof of actual delivery of material to the value claimed, there was, I think, evidence upon which he might have found an admission of the correctness of the amount of the account. That would have served to prove the quantum if the other ingredients of appellant's claim had been established. It is on that point that I think the appellant fails. The evidence, so far from showing that the appellant sold and delivered goods to the respondent, proves that it did neither; consequently it must fail upon its claim as pleaded.

11 The respondent entered into a building contract with one Giampa to finish the construction of respondent's house on Chancellor Boulevard. Giampa, who carried on that and other work under the name of Arrow Construction, was to supply everything required for a lump sum of $13,600.

12 Among other clauses, the contract provided that Messrs. Hogan, Steeves and Webber, who were respondent's solicitors, should pay the contractor's accounts out of the contract-price which the respondent was to pay to the solicitors in trust for that purpose. It also provided that such provision for payment was for the convenience of the parties and the protection of the respondent and that nothing should impose any liability upon the respondent for such accounts. That contract is not binding on the appellants, but it is evidence of the relationship between the respondent and Giampa.

  

13 It is clear that the contractor ordered the material on his own account for the appellant charged it to Arrow Construction, and it is likewise clear that while it was taken to the respondent's house it was delivered not to him but to the contractor.

14 The learned trial judge held that the respondent was precluded by his conduct and his conversations with one Gladstone of the appellant company from denying liability for the material so supplied for his house. It is not clear whether the learned judge in so holding was giving effect to agency or an estoppel or was proceeding upon some special contract by the respondent to assume liability for the account.

15 But neither agency nor estoppel had been pleaded and a special contract was not open to the appellant on the common count on which he had sued. Respondent's counsel raised this point at least three times during the trial but appellant's counsel refused to amend. Thereupon respondent's counsel properly stated, in effect, that he was proceeding with his defence on the plaintiff's case as pleaded. Since it is possible that the trial might have proceeded differently if the appellant had pleaded agency or estoppel or a special contract between itself and the respondent, it cannot be said that the respondent would suffer no prejudice if an amendment were allowed at this stage. The appeal must be disposed of on the pleadings as they stand, and therefore the appellant must fail.

16 I would dismiss the appeal.

# APPENDIX “E”

1980 CarswellBC 1590
British Columbia Supreme Court

Suzuki v. Jackson

1980 CarswellBC 1590, 3 A.C.W.S. (2d) 244

# BETWEEN: TAKASHI SUZUKI, UTAKO SUZUKI, CHIYOTA ISHIKAWA, and MICHIKO ISHIKAWA, suing on their own behalf under the Families Compensation Act, R.S.B.C. 1960, Chapter 138 and amendments thereto and HITOMI KAWAMURA, PLAINTIFFS AND: GORDON DAVID JACKSON, DEFENDANT

McKenzie, J

Judgment: March 26, 1980
Docket: None given.

Counsel: John N. Laxton for the Plaintiffs;
J.J. Camp for the Defendant;

Subject: Civil Practice and Procedure; Torts

***THE HONOURABLE MR. JUSTICE MCKENZIE*:**

1 Liability is admitted for the injuries suffered on 16 July 1978 by Hitomi Kawamura and for the death of Akiko Iwamura both of whom were in a stopped passenger car when it was struck from the rear by the defendant's car and bunted over an embankment into a river resulting in triple drownings and injuries to the two remaining passengers. This unfortunate group of Japanese were sightseeing in Eastern British Columbia and the two with whom we are presently concerned were enrolled at the University of British Columbia learning English. They had just embarked on their studies.

**CLAIM OF HITOMI KAWAMURA**

2 This is most of the report of the doctor who first attended Hitomi Kawamura. He had the benefit of an interpreter:

> "On arrival in the outpatient department she was conscious, coherent, collected, and soaking wet. Fortunately I was attending a Japanese lawyer from Seattle at the time and was able to communicate verbally with her. Her main complaints at the time consisted of headache, some pain related to the cervical area, and mid dorsal spine. In addition she complained of pain in the right ribs and some discomfort in the legs.
>
> Examination revealed superficial contusions to the head, some limitation of range of motion ir, the cervical spine and discomfort on palpation over the dorsal spine and right ribs. She also had Superficial abrasions and contusions of both legs. Vital and neurological signs are normal. X-ray of the skull, cervical spine, and thoracic spine showed no bony injury. She was detained for three days on account of the neck pain and stiffness and was finally discharged on July 19th.
>
> The prognosis for recovery of these injuries; is good."

3 She describes her condition at that time as follows:

> My neck became very stiff. I was very, very dizzy. I could not walk. My nose was bleeding. My whole body was very numb I could not open my mouth so could not eat anything. I could not lie down or get up by myself. Whenever I stood up I had severe headache, a lot of dizziness and nausea.

 

She travelled from Jasper to Vancouver in a friend's car and was sick during the journey and had to call an ambulance. At her apartment in Vancouver she "stayed in bed all the time" for two months before returning to Japan.

4 A Vancouver orthopedist saw her on the fifth day after the accident and she complained of severe pain in the back of the neck and back of the head mainly on the right side. She was feeling dizzy upon changing positions of her body. She had some pain over the lower ribs and was taking muscle relaxants. His conclusion then was that she sustained a fairly severe sprain of the neck spine and he advised continued use of a neck collar.

5 He saw her again on the 19th day when she said she was feeling better but she still had pain in the back of the neck and over the ribs. Her neck was stiff and there was pair, between the shoulder blades and back of the right shoulder. All movements attempted before the doctor were painful. He recommended wearing the neck collar three more weeks and aspirin. This was his conclusion:

> "This young woman sustained a sprain of the neck spine in the above-mentioned accident. She is slowly recovering from the injury and I think that she will completely recover, though it may take her six months or more before she is relatively free of symptoms. I don't expect any permanent loss of function as a result of this accident."

6 A Japanese doctor examined her about three months after the 1)1) accident and about six months after when her chief complaints were headache and some pain related to the cervical area especially when she was tired. He said "Her prognosis for recovery of these injuries is good. I advised her to continue wearing the neck collar and to take massage."

7 Thirteen months after the accident the Japanese doctor wrote: "Now there is little cervical pain, her chief complaint when she is tired. It will not be long before she recovers completely. I advised her to play tennis and swim in the summertime and may begin to work in September" (i.e. the next month). She tried both the tennis and work but could not manage either. She returned to her clerical work in a bout:.que in October 1979.

8 This doctor's final report of 3 March 1980 described her present condition as "clinically and radiologically good" and said that "her prognosis is good."

9 The Japanese doctor's reports are rather laconic and based on only two examinations near the end of 1978 with some subsequent "visits" by the patient, which she claimed were ever,i two weeks. It is obvious that he was not deeply impressed by the severity of her injuries. He nowhere mentions acupuncture or hot springs treatment, but she said she took both on his recommendation -acupuncture every two weeks for a year and hot springs once a month for several months.

10 As to her present condition, she says her neck gets very stiff in rainy weather and she claims quite limited ability to turn her head to the left. She suffers headaches, particularly at work upon sitting or bending. She believes that it will be another year before she can work full time. She presently works an hour short of full time but loses about five days a month when she feels unable to work. She continues to take therapeutic massages. She last saw her doctor in September 1979 and has no current appointment. In my opinion the truth lies somewhere between the doctor's assessment and her own.

11 For non-monetary general damages to include pain and suffering and loss of enjoyment of life both past and prospective and for the loss of the benefit which completion of her course at U.B.C. would have given her I award $10,000.00.

12 For loss of earnings up to trial I would reckon the time from the beginning of 1979,when she presumably would be in the job market again after completion of her course,up to October 1979 when she actually returned to work, which means that she lost $775.00 per month for nine months or $6975.00 and since 1 October her earnings have been reduced by some amount each Month because she works short hours. She was earning $775.00 per month when she left her job to come to Canada in the spring of 1978 and she was given $550.00 per month upon her return with the reduction being justified, according to her employer, because she works one hour short of a full day. Were she to work full time the employer would consider her worth $900.00 per month. That reason must be specious because a reduction of $350.00 per month, or 29%, cannot be justified for a

 

one hour daily shortfall. For want of a precise solution I will consider her loss at $250.00 per month for seven months which is to the end of the current month, a total of $1750.00. In addition there will be for future loss of earnings the sum of $1000.00.

13 Special damages are troublesome because many items are not only unsupported by invoices but they are implausibly high. Some were for acupuncture treatments and hot baths, which were :cot recommended by her doctor, or, at least, he does not mention them and in any event were paid by her parents with no indemnity agreement.

14 I am driven to select only those items which are either conceded by the defence, or which appear reasonable or to the extent that they appear reasonable and on this basis the following are allowed:

| | |
|---|---|
| Items lost in accident, converted to Canadian dollars at the conversion rate of 200 yen to the dollar which will be employed throughout these reasons | $ 462.00 |
| Enrolment at U.B.C. | 100.00 |
| Long Distance calls to and from Japan | 250.00 |
| Costs of attending funerals in Osaka and Tokyo of deceased companions | 200.00 |
| Portion of account of Michiko Sugita | 500.00 |
| Translation services | 250.00 |
| Taxis for treatments | 500.00 |
| Train journeys | 200.00 |
| Miscellaneous | 150.00 |
| Total: | $2,612.00 |

In summary, for the Hitomi Kawamura claim:

| | |
|---|---|
| General damages apart from future loss of earnings | $10,000.00 |
| Loss of earnings | 8,725.00 |
| Future Loss | 1,000.00 |
| Special damages | 2,612.00 |
| Total: | $22,337.00 |

15 Prejudgment interest at 11% will apply to all elements of the award except the $1000.00 awarded for loss of future earnings.

**CLAIM OF PARENTS**

16 The parents' claim arising from the death of Akiko Iwamura gives me a lot of trouble because many of the facts of her life are so obscure. The evidence about her came from her mother, her brother-in-law and certain bank records.

17 She left no estate when she died aged 33. Her marriage of 14 years ago produced a daughter now 12. Six years ago she separated from her husband because he was an inveterate gambler and the child went to live with his parents. She was afraid of her husband because (as it came to me from her mother through a skilled interpreter) he was "not normal, sort of like a hooligan". Her mother had heard that he had done such violence as throwing a kettle of boiling water at his wife. Upon the

 

separation the wife had gone to Tokyo. The mother testified that she did not know exactly what her daughter was doing in Tokyo but she was "taking piano", and also had a full time job which she thought was in a men's clothing store. When I later inquired about the kind of piano she was taking her mother said that she thought she was giving piano lessons in the classical piano of the European tradition. She had studied the instrument from kindergarten days and had studied for two years in Manilla. There was no hard evidence that she was actually teaching.

18 Since the daughter's departure for Tokyo the mother had seen her only once and that was immediately before her departure for Canada. There was some uncertain evidence which suggested that the daughter might have had a premonition of death in Canada but the mother said that this was not the meaning intended by her evidence. I could not fathom what meaning she intended.

19 The daughter's way of life, place of living and means of earning her livelihood were concealed even from her mother and the justification offered for this secrecy was the daughter's fear that her estranged husband would discover her whereabouts and do her violence.

20 After her separation the daughter started to make remittances under a partly assumed name to four bank accounts in the mother's village — two held in her father's name and the others in a brother-in-law's name. She used her christian name and an assumed surname. The bank books were entered in evidence and the brotherin-law also was a plaintiff's witness. He and the mother swore that upon being advised by the bank of the fact of a remittance their practice was to remove the amount of the remittance from the account. The brother-in-law would give the money to the parents but he did not suggest that he transferred it to their bank account. The mother said that as money was deposited to her husband's account by the daughter it was taken out straight away to purchase such needs as an air conditioning unit (which cost 150,000 yen) for her asthmatic husband, to meet the cost of their daily needs and so that the parents could be comfortable in later life. An examination of the nine bank books (relating to the four bank accounts) does not support this contention of immediate removal. While a great many of the transfers were promptly removed from the account, a number were not including the largest one of 700,000 yen ($3500.00) deposited on 23 February 1977. The explanation offered for the daughter distributing her transfers among four banks was that she was afraid her husband might know that she was sending money to her parents, or somehow he might learn her whereabouts. This is an explanation which does not explain much.

21 Although the mother only saw her daughter once since about 1974 she was able to say,in answer to a question as to how long her daughter intended to carry on making payments, that the daughter had said that she would be looking after the parents while they lived.

22 The parents have a 42 year old son, a 40 year old daughter and a 38 year old son. The mother testified that she and her husband take nothing whatsoever from their wine shop monthly profits of 150,000 yen because all of it goes to repay a 10 million yen debt of the business which will take 10 years to pay off. They each get an old age pension amounting to 20,000 yen ($100.00). The husband earns another 20,000 yen making pre-nuptial gifts for their son-inlaw's business. Since the daughter's death the mother has been forced to babysit in the wine shop which brings in 30,000 yen a month ($150.00). The parents are desperate but despite this they receive no help at all from their three surviving children. The mother believed that even while the daughter was at U.B.C. she would continue to sent money constantly. The payments did stop around the time she left for Canada and she soon after met her death so nothing can be inferred from a lack of remittance while she was in Canada.

23 The son-in-law has an income of 200,000 yen a month ($1000.00). He last saw the deceased seven or eight years ago but he was able to swear that he thought she would send money as long as her parents lived and he gave his opinion that despite his father-in-law being pretty well housebound because of asthma that there was no danger of him dying any earlier because of his condition.

24 Plaintiffs' counsel urges me to take a "rational rather than an intuitive approach" to the assessment of general damages — that is to follow wherever the statistics lead even though it produces higher damages than might have been traditionally awarded before the landmark decisions of the Supreme Court of Canada were handed down in 1968 of which *Andrews v. Grand Toy Alberta Ltd.* (1978) 1 WWR 577 was one.

 

25 The difficulty I have with the plaintiffs' case arises from the inherent implausibility of the narrative given in support of it and the inexplicable gaps in the narrative. In saying this I am mindful of the difficulties in proving facts which have to be discovered in another country and culture and relayed through an interpreter. After allowing for these difficulties I am not satisfied that evidence could not have been turned up which would have revealed something tangible about the deceased's occupation and earnings. Considering the size of her remittances she must have had an obligation to pay income tax but there is no evidence whatsoever which reveals her earnings or occupation. There is evidence of remittances received in the bank accounts of the mother and brother-in-law but no evidence from the deceased's bank. It is clear that the deceased came by enough money to remit. 4 deposits of 4,400,000 yen ($22,200.00) between December 1974 and June 1978. On February 23, 1977 she sent 700,000 yen ($3500) to her. father and on February 24, 1977 the same amount to her brother-in-law. if the order of payment had been reversed there would have been room for the possibility that the brother-in-law had received it and immediately transferred it to the parents. The fact is that the money was not transferred away at all with any immediacy from the brother-in-law's account and not in any amounts bearing any relationship to 700,000 yen. On May 30, 1978 she sent 550.00 yen ($2750.00) to each of them and followed up to each of them on June 6, 1978 with another 200,000 yen ($1000). There is no discernable pattern either in the time or the amount of the remittances. They run as low as 10,000 yen ($50.00) and sometimes more than one transfer would be credited on the same day and then there would be intervals of two months. There is no detectable pattern of distribution between the parents and the brother-in-law's accounts. This surely does not indicate a steady flow of earnings but an erratic one. One could speculate without profit as to whether or not the earnings were lawful.

26 The plaintiffs have produced actuarial evidence to support a present value of $97.070.00 for the deceased's contributions to her parents using an agreed discount rate of 2 1/2%. This does not take cognizance of a management fee and includes payments for the life expectancy of the last survivor as between the 68 year old father and the 65 year old mother.

27 Consideration must be given here to the contingency problem. What chance is there of a continued flow of bounty? From this odd assortment of jigsaw pieces with so many pieces missing it is impossible to construct a picture which clearly portrays an amply and steady stream. The chance of a reduced flow or a complete drying up is large indeed when the source of the flow is so obscure. No one ll knows where the money was coming from or what talents were being exercised to make it come. No one knows whether these earnings were in any way related to her youthful age or whether or not they were windfall profits of some kind. All we have is speculation and speculation carries little weight in balancing probabilities. The prospect of remarriage cannot be overlooked. One unhappy venture does not remove the possibility of another try. Consideration must also be given to the fact that she had come to Canada to improve her English with the apparent hope of becoming an interpreter. There was no evidence of the quality of her achievement in English when she began the course or of how near or distant a prospect for her was the attainment of the high skills required for an interpreter. Even assuming that all of her remittances were going to her parents it does not seem reasonable to assume that she would, continue payments to the last survivor on the same generous scare. The father is a partial invaLid. The mother and brother-in-law consider that he is in excellent health apart from his asthma but there is no disinterested evidence which supports this and it is asking a lot to assume that his life span will reach the statistical average.

28 Taking all these factors together they justify in my mind a reduction for contingencies of one-third of the actuarial calculation.

29 Quite apart from this element there remains the troublesome question as to whether or not all of the money that arrived in the bank accounts was destined for the parents. The mother and brotherin-law both give their word to this but they are substantially joined in interest and without some outside confirmation I cannot find the scales to be tilted by the whole amount of the remittances.

30 Prominent in my consideration is the possibility that this woman feared having immediate access to her savings because her husband might somehow persuade or force it from her so that the dispersal of the money put it out of her immediate reach but did not deny it to her absolutely. Further it is unlikElY in my view that this daughter would behave so exceptionally as compared to her sister and two brothers who contributed nothing to the struggling parents and it is hard to understand how her mysterious earnings could have been so high, compared to the earnings of others as given in the evidence, so as to allow

  

such generosity. The award must be reduced to recognize the uncertainty of ultimate destination of the remittances and that reduction is fixed at an additional one-third.

31 Since the actuarial's calculations did not take all remittances into consideration I will work from a round number of ? $100,000.00 and award $53,334.00 for the parents' lost expectancy of future support after deducting a 33 1/3% contingency and 33 1/3% for uncertainty of destination.

32 On this relatively small amount I do not thing any management fee is justified.

33 The special damages create problems too particularly with those which seem excessive. in the Statement of Claim dated may 1979 there is a claim for long distance tolls to Japan of 171,130 yen ($856.00) which seems large enough when one considers that the standard charge seems to be $3.00 per minute. At the trial this item was raised to 500,000 yen ($2500.00). This appears to be outrageous. The original amount is allowed of

| | | |
|---|---|---|
| | | $856.00 |
| Notary Public in Japan 6000 yen | | 30.00 |
| Items lost in vehicle | | 55.00 |
| Account of Kaiko Hiroi. She rendered service with respect to one of the deceased and to Hitomi Kawamura. One-third of her account is allowed | | 500.00 |
| Temple expenses | | 250.00 |
| Travel and hotel in connection with funeral | | 500.00 |
| Funeral expense | | 750.00 |
| | Total: | $2,941.00 |

34 To summarize, there will be payment as follows:

| | | |
|---|---|---|
| General damages for loss of future support | | $33,334.00 |
| Special damages | | 2,941.00 |
| | Total: | $36,275.00 |

and costs.

35 Prejudgment interest at 11% will apply to $7,500.00 of the general damages and to the special damages.

# APPENDIX “F”

1998 CarswellOnt 3641
Ontario Court of Justice (General Division)

York (City) v. Wellington Insurance Co.

1998 CarswellOnt 3641, 41 O.R. (3d) 750, 75 O.T.C. 33, 82 A.C.W.S. (3d) 678

# The Corporation of the City of York and B.G. Schickedanz Central Inc., Applicants and Wellington Insurance Company and London Guarantee Insurance Company, 667038 Ontario Limited and Deloitte and Touche Inc., Trustee of the Estate of 667038 Ontario Limited, Respondents

Wellington Insurance Company and London Guarantee Insurance Company, Applicants by Counter-Application and The Corporation of the City of York and B.G. Schickedanz Central Inc., and Bank of Montreal, Respondents by Counter-Application

Cullity J.

Heard: August 26, 1998
Heard: August 27, 1998
Judgment: September 15, 1998
Docket: 97-CV-138524

Counsel: *Jarvis K. Postnikoff*, for the Applicants.
*Patricia M. Conway*, for Wellington Insurance Company and London Guarantee Insurance Company.
*Patricia M. Conway*, for the Applicants by Counter-Application.
*Jarvis K. Postnikoff*, for The Corporation of the City of York and B.G. Schickedanz Central Inc.
*Barbara L. Grossman*, for Bank of Montreal.

Subject: Public; Corporate and Commercial; Property; Contracts; Insurance

**Related Abridgment Classifications**

**Construction law**

III Bonds and sureties

III.1 Bonds

III.1.f Miscellaneous

**Insurance**

VI Contract of indemnity

VI.1 Subrogation

VI.1.e Defences to subrogated action

VI.1.e.i Waiver of subrogation rights

**Headnote**

**Construction law --- Bonds and sureties — Performance bonds**

Developer did not complete subdivision pursuant to subdivision agreement with city — Developer subject to receiving order in bankruptcy — City and purchaser who bought part of lands from bank under power of sale brought application against developer, trustee of developer, and insurer to enforce performance bond — Insurer brought counter-application for declaration that bond no longer valid and to be delivered up for cancellation — Application and counter-application to be converted to trial of issue or reference as deemed appropriate — Bond was surety bond which guaranteed developer's performance of obligation under subdivision agreement — Purpose of bond to compensate city for loss or damage incurred due to developer's default up to amount of bond — Insurer not obliged to remedy developer's default by completing work — Unless city proved loss or damage suffered that city was unable to reasonably mitigate city was not entitled to order requiring payment under bond —

  

Issue of mitigation of damages by means of amending agreement city entered into with purchaser to be dealt with on trial of issue or reference as to loss or damages suffered by city.

**Insurance --- Contract of indemnity — Subrogation — Defences to subrogated action — Waiver of subrogation rights**

Developer did not complete subdivision pursuant to subdivision agreement between developer, city and mortgagees — Developer subject to receiving order in bankruptcy — Subdivision agreement contained clause which obliged bank to require as condition precedent to sale of lands that purchaser covenant to perform developer's obligations — Bank sold lands but did not require purchaser to enter into covenant — Purchaser entered into similar agreement with city anyway — City and purchaser who bought part of lands from bank under power of sale brought application against developer, trustee of developer and insurer to enforce performance bond — Insurer brought counter-application and claimed against bank for indemnification for any liability insurer had under bond due to developer's defaults — Counter-application dismissed in part — Insurer not entitled to be subrogated to rights of city against bank and no other basis existed for indemnification claim — Bank did not require performance of condition precedent but city waived right to complain of breach of clause when it entered into amending agreement with purchaser.

**Table of Authorities**

**Cases considered by *Cullity J.*:**

*Addco Drywall Ltd. v. White Rock Manor Joint Venture* (1991), 46 C.L.R. 255 (B.C. S.C.) — referred to

*Addco Drywall Ltd. v. White Rock Manor Joint Venture* (1993), 11 C.L.R. (2d) 79 (B.C. C.A.) — referred to

*Thomas Fuller Construction Co. (1958) v. Continental Insurance Co.* (1970), [1973] 3 O.R. 202, 36 D.L.R. (3d) 336 (Ont. H.C.) — referred to

*Trade Indemnity Co. v. Workington Harbour & Dock Board* (1936), [1937] A.C. 1, [1936] 1 All E.R. 454, 105 L.J.K.B. 183, 154 L.T. 507 (U.K. H.L.) — referred to

*Trafalgar House Construction (Regions) Ltd. v. General Surety & Guarantee Co. Ltd.* (1995), [1996] A.C. 199 (U.K. H.L.) — considered

APPLICATION by city and purchaser of lands to enforce performance bond after developer's default under subdivision agreement; COUNTER-APPLICATION by insurer against city and purchaser for declaration that bond no longer valid and against bank which sold lands under power of sale for indemnification.

***Cullity J.*:**

1 This application arose out of the failure of the Respondent 6670378 Ontario Ltd. ("667") to complete the development of a subdivision on lands (the "Lands") located at 1400 Weston Road, Toronto, pursuant to a Subdivision Agreement dated February 15, 1990, between it, The Corporation of the City of York ("the City") and mortgagees, including Bank of Montreal. The Applicants are the City and B.G. Schickedanz Central Inc. ("Schickedanz") who purchased part of the Lands on June 26, 1997, from Bank of Montreal acting under a power of sale.

2 The application concerns the rights of the City to enforce a bond (the "Bond") issued by the respondent Wellington Insurance Company ("Wellington") on May 10, 1990, to secure the performance of 667's obligations under the Subdivision Agreement. The other Respondent, London Guarantee Insurance Company, has assumed--in some manner not fully explained at the hearing--the obligations of Wellington under the Bond. It is conceded that this assumption had no affect on the rights of the City. In view of this concession, and as no issues have been raised, or submissions made, with respect to the effect of the assumption, I will deal with the application and the counter applications as if Wellington continued to be the obligor under the Bond. This, of course, is without prejudice to the rights of Wellington and London Guarantee Insurance Company *inter se* and, on the understanding that, if London Guarantee Insurance Company has, as a matter of law, replaced Wellington as the obligation under the Bond for all purposes, any findings I may make with respect to Wellington's rights, obligations or liability will be applicable to London.

3 Schickedanz is named as an Applicant as its obligations under an Amending Subdivision Agreement dated October 29, 1997, will be affected by the resolution of the issues raised on the application and, in that agreement, it undertook to bring the proceedings.

 

**A. The Facts**

4 On April 4, 1990, when the Subdivision Agreement was registered on title, 667 was the owner of the Lands and Bank of Montreal was one of two mortgagees. The Bank's mortgage, securing payment of a principal amount of $60,000,000, had been registered against title on February 22, 1990. The Subdivision Agreement postponed the rights of mortgagees to those of the City under the agreement.

5 The Subdivision Agreement was entered into pursuant to a condition contained in a draft approval of a plan of subdivision (the "Plan") granted to 667 by the Municipality of Metropolitan Toronto on the recommendation of the City. Among other things, the Subdivision Agreement required that 667 perform certain works and provide for certain services at its cost within specified time frames. Article XXVI required 667 to deposit with the City "as a performance and maintenance guarantee" financial securities in an amount equal to 100% of the cost of all of the works and services it was required to complete. The securities were to be in a form satisfactory to the City Solicitor acting reasonably. The City agreed that, as 667's obligation were performed, it would reduce the amount of the securities it held in a manner set out in a schedule to the agreement.

6 The financial securities deposited with the City pursuant to Article XXVI of the Subdivision Agreement included the Bond. This was executed on behalf of 667 and Wellington and was dated May 10, 1990. Its material parts read as follows:

> BOND NO. CCC2224764
>
> AMOUNT: $1,859,775
>
> KNOW ALL MEN BY THESE PRESENTS, that we, 667038 ONTARIO LIMITED, a company incorporated under the laws of the Province of Ontario, hereinafter called "the Principal", as Principal and WELLINGTON INSURANCE COMPANY, a company incorporated under the laws of Canada and duly authorized to transact the business of Suretyship in Canada, hereinafter called "the Surety", as Surety are held and firmly bound unto THE CORPORATION OF THE CITY OF YORK, hereinafter called the OBLIGEE, in the penal sum of ONE MILLION, EIGHT HUNDRED AND FIFTY-NINE THOUSAND, SEVEN HUNDRED AND SEVENTY-FIVE DOLLARS----xx/100 ($1,859,775.00) good and lawful money of Canada, for the payment of which well and truly to be made, we bind ourselves, our heirs, administrators, executors, successors and assigns, jointly and severally, firmly by these presents.
>
> WHEREAS the above bounden Principal has entered into a certain written Agreement with the above named Obligee in respect to certain items which are attached to this Bond as Schedule "A", said Agreement being dated the 15th day of February, 1990 and by reference made by part hereof:
>
>> NOW, THEREFORE, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that if that above bounder (sic) PRINCIPAL shall well and truly keep, do and perform, each and every, all and singular, the matters and things in said agreement set forth and specified to be by the said Principal, kept, done and performed at the time and in the manner in said Agreement specified, and shall pay over, make good and reimburse to the above Obligee all loss and damage which said Obligee may sustain by reason of failure or default on the part of said Principal, then this obligation shall be void; otherwise to be and remain in full force and effect.
>>
>> NO SUIT or other proceedings to enforce the liability of seif (sic) on this Bond shall be brought unless the Principal and Surety are joined therein by the due service of Process upon the Principal and the Surety.
>>
>> PROVIDED, however, this Bond is executed by the Surety upon the express condition that no right of action shall accrue upon or by reason whereof, to or for the use of benefit of any one other than the Obligee named herein; and the obligation of the Surety is and shall be construed strictly as one of suretyship only.
>>
>> SEALED with our seals and dated this 10th day of May, 1990.

  

The agreement referred to in the first recital to the Bond was the Subdivision Agreement.

7 The Plan was registered on June 6, 1990. As a consequence, and pursuant to the Subdivision Agreement, certain parts of the Lands were conveyed to, or otherwise acquired by, the City for roads, park land and other municipal purposes. On February 28, 1991, a transfer of a further part of the Lands was made to the Roman Catholic Episcopal Corporation for the Diocese of Toronto for nonprofit housing. Bank of Montreal's mortgage was partially discharged as a result of each of these acquisitions.

8 667 defaulted in its obligations and a receiving order in bankruptcy was made against it on August 4, 1995. As a result of the work done prior to the defaults, the penal sum of the Bond had been reduced to $1,471,694.00. I was informed that this amount represents and estimate of the cost of works and services that 667 was required to, but did not, complete pursuant to the Subdivision Agreement. The greater part of this work was to be undertaken on the portions of the Lands acquired by the City after June 6, 1990.

9 Following discussions between representatives of the City and Wellington, the Director of Finance of the City wrote to Wellington on August 31, 1995, referring to the "City's claim pursuant to the Bond" and giving formal notice of a declaration of default by 667 under the Subdivision Agreement. Wellington resisted the claims of the City and the parties have been unable to reach agreement.

10 On January 7, 1997, Bank of Montreal, under its power of sale, agreed to sell the part of the Lands remaining in the ownership of 667 to Schickedanz for a price of $7,300,000.00. Sections 22 and 23 of the agreement of purchase and sale were as follows:

> 22. The Purchaser acknowledges having been advised that the security (the "Security") currently posted under the agreements with the municipal authorities and utilities and others which pertain to the property and its development and servicing may not be valid, and the purchase price set out in this agreement is predicated upon the basis that the Purchaser will be unable to use or benefit from the Security and will be required to negotiate amendments or replacement agreements with the municipal authorities, utilities and others and undertake the completion of the works and services described in the said agreements as amended or replaced and to deliver security therefor. The Vendor warrants and represents that it has not entered into any agreement with the issuers of the Security or the City to settle the issue of the enforce ability of the Security and will not unilaterally enter into any such agreement while this agreement is in force and effect. The Purchaser convenants and agrees not to enter into an agreement with the issuers of the Security or the City in respect of the Security prior to closing without first obtaining the prior written consent to such agreement from the Vendor.
>
> 23. The Purchaser covenants to use its best efforts to agree with the Corporation of the City of York and Municipality of Metropolitan Toronto to perform and undertake all of the terms of the [Subdivision Agreement] as if it had been an original signatory thereto on or before closing.

11 The sale to Schickedanz was completed by a transfer registered on title on June 26, 1997. Prior to the closing of the sale on that date, Schickedanz had negotiated the Amending Subdivision Agreement with the City. Bank of Montreal was not a party to these negotiations or to the agreement. The final draft of the agreement was forwarded to Schickedanz on June 11, 1997, and executed by the City and Schickedanz after the closing of the sale of the Lands to the latter. Schickedanz was not required by Bank of Montreal to execute prior to the closing any covenants or agreements with the City with respect to its obligations under the Subdivision Agreement. The relevance of this omission will be explained below in the context of a claim by Wellington to be indemnified by Bank of Montreal for any liability Wellington may have under the Bond as a consequence of 667's defaults.

12 The Amending Subdivision Agreement refers to the part of the Lands purchased by Schickedanz from Bank of Montreal as the "Schickedanz Land". The principal purposes of the agreement were to defer payment of a particular levy by Schickedanz to the City until building permits were issued and to defer the issuance of building permits until the rights of the City under the Bond were clarified in legal proceedings. Paragraphs 5 and 7 of the Amending Subdivision Agreement read as follows:

5. The Owner agrees that neither it nor any contractor or other person claiming through it shall request the issuance of or be entitled to receive any building permit for a building or buildings to be constructed on [specified parts of the Schickedanz Land] ... until

(a) a final and binding Court Order has been obtained pursuant to litigation by the Owner, whereby the Court:

(i) confirms the obligations of the Wellington Insurance Company (hereinafter referred to as "Wellington") under the Bond and the Subdivision Agreement; and

(ii) orders Wellington to complete the works and services under the Bond or, in the alternative, the Court orders Wellington to pay to the City the amount required to complete the works and services: or

(b) the Owner deposits with the City as financial security for the completion of the works and services required under the Subdivision Agreement, an Irrevocable Letter of Credit in a form satisfactory to the City Solicitor. The Letter of Credit shall be in the amount of $1,471,694.00, or such lesser amount as determined in the sole discretion of the City. The Letter of Credit shall be in favour of the City from any chartered bank in Canada in the amount set out. The Letter of Credit shall be in such terms that the bank shall pay to the Senior Director of Finance and Treasurer for the City upon demand such sums as may be required from time to time to the maximum amount of credit without recourse. The Letter of Credit shall be subject to automatic extension unless thirty (30) days prior to expiration written notice is given to the City that the Letter of Credit will not be extended. The Letter of Credit shall be in such form that it cannot be revoked unless authorized by the Senior Director of Finance and Treasurer for the City and cannot be transferred to any other account...

7. The Subdivision Agreement shall be amended to the extent required to give effect to the provisions of this Agreement, and the Subdivision Agreement as so amended shall remain in full force and effect.

13 In my judgment it is sufficiently clear from these provisions and the cross-examination of the representatives of the City and of Schickedanz on their affidavits filed for the purposes of this application that, in the event that the Order of the Court referred to in paragraph 5(a) of the Amending Subdivision Agreement is not obtained,

(a) Schickedanz has an obligation to complete the work under the Subdivision Agreement on which 667 defaulted; and

(b) to do so whether or not such work relates to the parts of the lands owned by Schickedanz.

While the City was evidently prepared to assist Schickedanz in obtaining such an Order, it was insistent that Schickedanz, or any other purchaser from the Bank of Montreal, should complete the work and post security in the form of a letter of credit if the Order was not obtained. Schickedanz executed the Amending Subdivision Agreement on that basis.

14 By letter dated August 5, 1997, Mr. Postnikoff, acting as solicitor for both the City and Schickedanz, informed Wellington that, unless it gave a written commitment to honour its obligations under the Bond or paid the amount of $1,471,694.00 to his clients within five days, legal proceedings would be commenced by them without further notice.

**B. Relief Sought**

15 The Applicants have requested the following substantive relief:

(a) a declaration that the Bond is valid and subsisting;

(b) a declaration that the City's demands that Wellington complete the work were valid and proper;

(c) a declaration that Wellington has failed to honour its commitments and perform its obligations under the Bond;

(d) a declaration and an order that Wellington perform the work required pursuant to the Bond as demanded by the City;

 

(e) in the alternative, an order that Wellington pay the sum of $1,471,694 plus accrued interest to the City.

If granted, the Orders requested would relieve Schickedanz of an obligation to complete the work on which 667 defaulted at its own expense pursuant to the provisions of the Amending Subdivision Agreement.

16 In its counter-application Wellington seeks a declaration that the Bond is no longer valid and should be delivered up for cancellation. In the alternative it seeks a trial on the issue of its responsibility to pay the City under the Bond and an indemnity from the Bank of Montreal.

17 In its cross-claim, Bank of Montreal requests declarations and orders designed to establish that Schickedanz has all the obligations of 667 under the Subdivision Agreement and an indemnity from Schickedanz for any amounts Bank of Montreal is liable to pay to Wellington.

**C. Analysis**

***1) Liability of Wellington***

18 Counsel for the Applicants and counsel for Wellington made widely divergent submissions on the nature and extent of the obligations assumed by Wellington under the Bond. In Mr. Postnikoff's submission the effect of 667's default was that Wellington became liable to do the work that 667 had failed to do or, in the alternative, to pay the amount of $1,471,694 remaining under the Bond. He submitted further that the City was entitled to demand that the first of these alternatives be adopted. Ms. Conway's submission was, in effect, that the City had misconceived the nature of the Bond. In her submission it was essentially a guarantee under which Wellington agreed to compensate the City for any loss or damage it incurred as a result of defaults of 667. Such damage had to be proved and, even then, Wellington was entitled to rely on any defence that would have been available to 667 in an action brought by the City, including a duty to mitigate damages. Accordingly, in her submission, there could be no question of the City having a right to demand that Wellington complete the work on which 667 was in default or an absolute right to demand payment of the amount of $1,471,694.00 that represented an estimate of the cost of such work under the schedule to the Subdivision Agreement.

19 Ms. Conway also submitted that any liability of Wellington under the Bond was discharged or terminated by the amendment to the Subdivision Agreement that, in effect, replaced 667 with Schickedanz. For this purpose, she relied on authorities that establish that a material change in the underlying contract between a creditor and the principal will discharge a surety for the latter's performance.

20 While the substitution of Schickedanz for 667 might be described as a sufficient material change to discharge Wellington from any liability under the Bond with respect to defaults by Schickedanz in the future, I believe it would be more accurate to say simply that Wellington has not assumed any obligation with respect to the defaults of anyone other than 667. Whether or not the stipulation that the obligation under the Bond binds the assigns of 667 has any greater significance than the meaningless statement that the Bond binds 667's heirs and executors, the stipulation does not mean that Wellington has undertaken to act as surety for the performance of obligations under the Subdivision Agreement by anyone to whom 667 may assign part of the Lands. The obligations under the Bond must be distinguished from the obligations under the Subdivision Agreement even though the agreement is incorporated into the Bond and regardless of whether Schickedanz can properly be regarded as an "assign" of 667 with respect to the part of the Lands Schickedanz acquired. The Bond creates obligations that are separate and distinct from, although collateral to, the obligations under the agreement. However, I fail to see how the substitution of Schickedanz can negate all liability that Wellington may have as a consequence of the earlier defaults of 667. In this sense and to this extent I find that the Bond remains valid and subsisting. Whether the substitution of Schickedanz affects the determination of any damage or loss suffered by the City is a different question.

21 While I do not accept Mrs. Conway's submission that the substitution of Schickedanz as owner of part of the Lands has the effect of discharging Wellington's obligations under the Bond with respect to the defaults of 667, I believe her first, and more fundamental, submission with respect to Wellington's obligations under the Bond is correct. The structure of the Bond

  

and the language in which its terms are expressed are traditional features of surety bonds that have attracted judicial criticism: *Trafalgar House Construction (Regions) Ltd. v. General Surety & Guarantee Co. Ltd.* (1995), [1996] A.C. 199 (U.K. H.L.) at pp. 208-9; *Trade Indemnity Co. v. Workington Harbour & Dock Board* (1936), [1937] A.C. 1 (U.K. H.L.) at p. 17. While judges have insisted that the nature and extent of the rights and obligations created by such instruments are fundamentally to be determined as questions of interpretation, one might be forgiven for thinking that the retention of the traditional features is intended to make the task as difficult as possible. Read literally, the Bond does not purport to define the conditions on which Wellington would be liable. Nor does it expressly contemplate the possibility of liability in an amount less than the penal sum reduced in accordance with the provisions of the Subdivision Agreement that are incorporated into the Bond. Further, the terms of the Bond do not indicate with clarity whether the only manner in which Wellington's liability can be discharged is by payment of an amount to the City.

22 The archaic structure of the Bond is explicable only in terms of the long history of instruments of this kind. This is summarized helpfully in *Scott and Reynolds on Surety Bonds* (Carswell, 1994) at s. 2.1(b). The difficulty of interpretation created by adherence to the traditional from -- at least for those who have the task thrust upon them for the first time -- is compensated to some extent by the accumulation of judicial precedents that has developed over the years in England and in this country. General aspects of the relevant law are dealt with in *Scott and Reynolds*, above, chapters 2 and 10, and McGuinness, *The Law of Guarantee* (Carswell, 2nd ed., 1996), at s. 12.9 and 12.10.

23 I am satisfied that Ms. Conway was correct in her submission that the Bond is a surety bond of the traditional kind to which I have referred. In particular, I accept her submissions that:

(a) the Bond constitutes a guarantee by Wellington of 667's performance of its obligations under the Subdivision Agreement. This is indicated by the use of the traditional language and structure of a surety bond as analysed in cases such as *Trafalgar House Construction (Regions) Ltd. v. General Surety & Guarantee Co. Ltd.* and also by the description of Wellington as the "Surety" and the stipulation that "the obligation of the Surety is and shall be construed strictly as one of suretyship only";

(b) Wellington's obligation under the Bond is to compensate the City for any loss or damage it may incur as a consequence of 667's default under the provisions of the Subdivision Agreement. Neither the terms of the Bond nor the jurisprudence supports the existence of an obligation of Wellington to remedy 667's default by completing the work left undone. Surety bonds that are intended to guarantee performance of construction activities often give the surety an option to do the work in lieu of payment to the obligee. Unlike the bond in *Trafalgar House Construction (Regions) Ltd. v. General Surety & Guarantee Co. Ltd.*, there is no such express provision in the Bond. Even if such a provision is to be inferred from the stipulation that the obligation under the Bond would be void if 667 were to "make good" all loss and damage suffered by the City, this would not impose any obligation on Wellington to choose this option;

(c) although the measure of the damages for which Wellington can be liable under the Bond is limited by the amount of the penal sum reduced in accordance with the Subdivision Agreement, Wellington is not required to pay more than the actual damage or loss suffered by the City. Such damage or loss must be proven: *Trafalgar House Construction (Regions) Ltd. v. General Surety & Guarantee Co. Ltd.*) *Scott and Reynolds on Surety Bonds*, at p. 2-4. The provisions of the Subdivision Agreement, which are incorporated as part of the Bond, do not override this general rule of the law of guarantees by deeming the damage to be the cost, or the estimated cost, of the work on which 667 defaulted. The position of the Applicants on this question is similar to that accepted by the Court of Appeal, and rejected in the House of Lords, in *Trafalgar House Construction (Regions) Ltd. v. General Surety & Guarantee Co. Ltd.* It appears to confuse a surety bond--an "on default" obligation--with a performance guarantee or stand-by letter of credit--an "on demand" obligation. The distinction is discussed in McGuinness, above, at ss. 12-9 and 12.89. I note that paragraph 5 of the Amending Subdivision Agreement requires Schickedanz to obtain a letter of credit in the event that it does not obtain the Orders it has requested;

(d) Wellington is entitled to any defences that 667 would have against the City including the City's duty to mitigate its damages: *Addco Drywall Ltd. v. White Rock Manor Joint Venture* (1991), 46 C.L.R. 255 (B.C. S.C.), at pp. 276-278; aff'd in part (1993), 11 C.L.R. (2d) 79 (B.C. C.A.), at p.87; and

 

(e) neither notice to Wellington nor a demand for payment was a precondition of liability under the Bond. Liability arose on, and by virtue of, 667's defaults: *Thomas Fuller Construction Co. (1958) v. Continental Insurance Co.* (1970), [1973] 3 O.R. 202 (Ont. H.C.), at pp. 218-9.

24 It follows, in my judgment, that unless and until the City proves that, as a consequence of the defaults of 667, it has suffered a loss or damage that it could not reasonably have mitigated, the City is not entitled to an order requiring payment under the Bond. The question whether the City has mitigated its damages by entering into the Amending Subdivision Agreement with Schickedanz must be left to be dealt with on a trial of the issue of loss or damage suffered by the City.

***2) Wellington's Entitlement to an Indemnity Against Bank of Montreal***

25 Wellington's application to be indemnified by Bank of Montreal is based on the principle of subrogation. Ms. Conway's submissions on this issue can, I believe, be summarized briefly as follows:

a) in paragraph 1(b) of Article XLII of the Subdivision Agreement, Bank of Montreal undertook to require, as a condition precedent to the closing of any sale of the lands it might make, that the purchaser would have covenanted with the City to perform all the obligations of 667 under the Subdivision Agreement;

b) as Bank of Montreal did not require performance of the condition precedent, the City had a right of action against Bank of Montreal for any loss incurred by the City as a consequence of Bank of Montreal's breach of its obligation under paragraph 1(b); and

c) Wellington is entitled to be subrogated to the City's rights against Bank of Montreal.

26 Ms. Grossman challenged the validity of this argument on a number of grounds including the interpretation of paragraph 1(b) of Article XLII and the entitlement of Wellington to be subrogated to any rights of the City to damages for Bank of Montreal's breach of its covenant under that provision. She also argued, and sought a declaration, that the effect of the Amending Subdivision Agreement was to impose on Schickedanz an obligation to perform all of the terms of the Subdivision Agreement in the same manner as if it, rather than 667, had executed the Subdivision Agreement in the capacity of the owner of the land. On that basis, she submitted that, whether or not Bank of Montreal had failed to comply with the requirements of paragraph 1(b), no loss could flow from that breach as Schickedanz had covenanted with the City to the effect required by paragraph 1(b).

27 Ms. Grossman argued, in the further alternative, that, if Bank of Montreal was in breach of paragraph 1(b) of Article XLII, the City had waived the breach by entering into the Amending Subdivision Agreement. On that basis, the City would now have no right of action against Bank of Montreal and, in Ms. Grossman's submission, there is no right to which Wellington could be subrogated.

28 Paragraph 1(b) of Article XLII reads as follows:

> (b) in the event of a sale or the conveyance of the Mortgagee's entire freehold interest in the Lands, the Mortgagee shall require as a condition precedent to the closing of any such sale or conveyance, that the new owner (the purchaser) will have covenanted with the City and Metro to perform and undertake all of the terms of this agreement in the same manner as if the purchaser had executed this agreement in the capacity of the Owner.

29 The paragraph raises a number of difficult questions of interpretation of which the most basic arises from the reference to the "Mortgagee's entire freehold interest in the lands" as a sale or conveyance of such an interest is required before Bank of Montreal would acquire any obligation under paragraph 1(b). Another difficulty is that, read literally, the paragraph appears to require the purchaser to agree that no amendments of any kind would be made to the provisions of the Subdivision Agreement that defined the obligations of 667. This seems strange and impracticable in a case like this where the original owner has defaulted prior to the purchase from the mortgagee. This may explain why section 23 of the purchase agreement between Bank of Montreal and Schickedanz did not strictly conform to the requirements of paragraph 1(b) and required Schickedanz only to

 

use "its best efforts" to agree with the City to perform and undertake all of the terms of the Subdivision Agreement as if it had been an original signatory thereto, on or before closing.

30 Paragraph 1(b) was inserted to protect the City. It would bind Bank of Montreal but would not affect the power of the City to negotiate amendments to the Subdivision Agreement with a purchaser. This, of course, is what was done. The covenant required by the paragraph as a condition precedent to closing was one to which the City would be a party. It is, in my judgment, implicit in the provisions of the paragraph that any amendments agreed to by the City would constitute a waiver of its right to insist on performance of the condition.

31 The final draft of the Amending Subdivision Agreement was delivered to Schickedanz prior to the closing of its purchase from Bank of Montreal, and the City made no attempt to enforce the Bank's obligation pursuant to paragraph 1(b) of Article XLII by enjoining the sale or otherwise. In consequence -- and irrespective of the other questions of interpretation that arise under paragraph 1(b) -- the City has waived its right to complain of any breach by Bank of Montreal of its obligation under the paragraph and there is no right against Bank of Montreal to which Wellington can be subrogated. Any issue with respect to the City's duty to mitigate damages that may arise from the terms of the Amending Subdivision Agreement must be deferred until such damages have been proven. It is possible that the other problems of interpretation that arise under paragraph 1(b) of Article XLII may then have to be considered.

32 In view of my finding on the question of subrogation, Wellington has no right of indemnification against Bank of Montreal on this, the only, basis on which such a right is alleged to exist. Accordingly, it is not necessary to deal with the issues raised in the cross-claim of Bank of Montreal and I decline to do so.

33 At the hearing it was suggested by Ms. Conway that a reference rather than a trial of issues, might be a more appropriate method of dealing with the quantum of any liability of Wellington to compensate the City pursuant to the Bond. I will hear further submissions on this issue and the terms of my judgment and I would appreciate it if counsel would make an appointment for these purposes.

*Order accordingly.*

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