

**CITATION:** Zenish Polyfilm LLP v. Alpha Marathon Film Extrusion Technologies Inc., 2023  
ONSC 1936

**COURT FILE NO.:** CV-19-00628396-0000

**DATE:** 20230324

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** ZENISH POLYFILM LLP and ZENISH RECLAMATION, Plaintiffs

**AND:**

ALPHA MARATHON FILM EXTRUSION TECHNOLOGIES INC., Defendant

**BEFORE:** VERMETTE J.

**COUNSEL:** *Lucas Lung and Spencer Jones*, for the Plaintiffs

*Charles Cooke*, for the Defendant

**HEARD:** September 6, 2022

**ENDORSEMENT**

[1] The Plaintiffs move for an order granting them summary judgment for damages in the amount of US\$693,750.00.

[2] I conclude that the motion should be granted. The Plaintiffs have discharged their evidentiary burden of establishing that there is no genuine issue requiring a trial, and the Defendant has failed to show that its defence has a real chance of success or that there is otherwise a genuine issue requiring a trial. The Defendant's response to this motion was an exercise in obfuscation. The Defendant failed to put its best foot forward.

[3] All excerpts from e-mails and documents reproduced in this Endorsement are quoted verbatim. For reasons of readability, I have not inserted "[sic]" when there were spelling or grammatical errors in the quoted text.

**A. FACTUAL BACKGROUND**

**1. The parties**

[4] The Plaintiff Zenish Reclamation is a partnership registered pursuant to the laws of India. The Plaintiff Zenish Polyfilm LLP is a limited liability partnership registered pursuant to the laws of India. Zenish Reclamation and Zenish Polyfilm LLP (collectively, "**Zenish**") are related entities that engage in the business of manufacturing polyfilm and other products in facilities located in

Morbi, Gujarat, India.<sup>1</sup> Mr. Dilip Patel, a partner of the Plaintiffs, provided affidavit evidence in support of the Plaintiffs' motion.

[5] The Defendant, Alpha Marathon Film Extrusion Technologies Inc. (“**Alpha**”), is an Ontario corporation that operates from facilities located in Woodbridge, Ontario. Its business includes, among other things, designing and building production solutions for polyfilm and other packaging products. Alpha's President is Domenic Marzano. He provided affidavit evidence in response to the motion.

## **2. Initial contractual relationship between the parties**

[6] In late 2015, Zenish was searching for a company to design and manufacture a turnkey blown film extrusion system for its manufacturing facilities in India. Zenish contacted a representative of Alpha in India and, in late 2016, Alpha provided Zenish with an initial quotation on the proposed system (quotation # 11400).

[7] On April 11, 2016, following a site visit, Alpha sent an updated design proposal and a revised manufacturing quote (quotation # 11400-R1) to Zenish.

[8] Representatives of Zenish travelled to Toronto in June 2016 to meet with Mr. Marzano and to discuss the system and confirm the final design and price. During this meeting, the parties came to an agreement on the design and project price. On July 20, 2016, Alpha issued quotation # 11400- R4 for a total contract price of US\$2,575,000.00 to supply “Blown film line for nano cross laminating film using nanotechnology – 2X – 27 layers nanodie”. The July 20, 2016 quotation was accepted by Zenish and signed by both parties (“**July 2016 Contract**”).

[9] On July 28, 2016, Zenish issued a purchase order to Alpha based on the July 20, 2016 quotation. On the same day, Alpha issued an invoice in the amount of US\$257,500.00 for the required 10% down payment.

[10] By September 23, 2016, Zenish had paid US\$263,300.00 to Alpha.

[11] In late September 2016, Zenish requested modifications to the system to be supplied under the July 2016 Contract. Following discussions, Alpha provided another quotation (# 11400-R8) dated October 27, 2016 to Zenish for a total contract price of US\$2,775,000.00 to supply “Blown film line for nano cross laminating film using nanotechnology – 2X – 91 layers nanodie”. The October 27, 2016 quotation was accepted by Zenish and signed by both parties (“**October 2016 Contract**”).

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<sup>1</sup> On this motion, the parties have referred to the Plaintiffs as a collective entity, without distinguishing between the two as to which particular entity did what or made which payments. I will do the same in this endorsement.

[12] Zenish made an additional payment in the amount of US\$14,200.00 on November 4, 2016 to comply with the required 10% down payment.

[13] In November 2016, India underwent a program of banknote demonetization. This negatively affected Zenish's ability to continue making payments and it requested that Alpha delay work under the contract until the situation stabilized.

[14] In April 2017, the situation had improved, and Zenish contacted Mr. Marzano and requested an updated completion date for manufacturing. Following a site visit to India by a representative of Alpha in June 2017 and approval of the system drawings provided by Alpha, Zenish made additional payments of US\$200,000.00 on July 10, 2017 and US\$216,250.00 on July 14, 2017.

[15] Thus, as of July 14, 2017, Zenish had paid a total of US\$693,750.00 to Alpha.

[16] In July 2017, disagreements arose with respect to a proposed modification to the system. The project was put on hold. Following numerous exchanges of e-mails, Mr. Marzano advised in October 2017 that the system would be ready for testing in March 2018.

### **3. March 2018 Contract**

[17] On December 30, 2017, Mr. Marzano sent the following e-mail to Mr. Patel:

Dear Dilip – Hope this E Mail finds you well

Happy new Year from Alpha Marathon Family

Like to assure you and Zenish Family that Alpha Marathon really like to move forward and build the order

As I understand there are many Crosslinked line been installed in India now as the protection has expired.

Dilip, lately We have seen a large demand of requested quote for 7 Layers lines from INDIA

Could this be of Interest to ZENISH?

If yes will update the quote ad adjust the price accordingly

We can prose a 7 Extruders / 2500mm lay flat Blown Film Line using Alpha ADSS Die/ 7 Modules X 14 layers with or with out Barrier film.

Please discuss and advise.

[18] Mr. Patel responded to Mr. Marzano's e-mail and asked him to send a quotation. Mr. Marzano sent a quotation on January 4, 2018, which was followed by discussions and further quotations.

[19] On March 8, 2018, representatives of Zenish met with Mr. Marzano in Toronto to discuss the project.

[20] On March 9, 2018, Alpha provided a quotation (# 12128-R1) to Zenish. It contained a list of equipment to be supplied by Alpha ("**System**") for a total price of US\$475,000.00. It also stated the following:

**TEST AND APPROVAL TIME IN ALPHA PLANT (MANUFACTURING TIME)**

**24 to 28 weeks** from receipt of purchase order and down payment

\*\* The quoted delivery time is based on our current production schedule and may vary at the time the order is placed. Alpha Marathon will make every effort to meet your requirements.

**TERMS.**

**Prepaid in full**

[...]

**CHANGES IN THE SCOPE OF SUPPLY**

Should the customer request for any changes in the scope of supply at any stage of the project after issuing the PO, then it is customer's responsibility for any delays and absorbing extra charges related to the request.

Alpha Marathon will investigate customer's request to apply changes to best fulfil the new requirements. Alpha Marathon will then notify customer the modification charges and new delivery time.

Customer should send the written approval on the new delivery time and extra charges. Charges for the requested changes should be paid by the customer.

[21] The March 9, 2018 quotation also contained "Conditions of Quotations and Order Acceptance" (which were standard terms in Alpha's quotations), including the following:

**2. SHIPPING SCHEDULE**

Shipping schedule is quoted subject to prior sale and confirmation at time of our formal acknowledgment. Shipping schedule is approximate only, and calculated from date of receipt of written order, deposit and full credit information. Shipping

schedule is subject to circumstances beyond our control, including requirements imposed by any government authority. In the event purchaser is unable to accept delivery on the date the goods are ready for shipment and this date is the same or after the shipping date given on our formal acknowledgment, the goods will be invoiced to the purchaser and stored at a place he may designate or stored by us at his expense.

### 3. AGREEMENT

The terms set out in this quotation, if accepted, shall constitute the entire agreement between Alpha and the Buyer with respect to the equipment. There is no representation, warranty, collateral agreement or condition which affects the sale of the equipment other than as expressed herein

[...]

### 6. WARRANTY

[...]

This warranty is only effective with all the terms and conditions of this quote being met, and it is understood that time is of the essence in this agreement.

[...]

### 9. CANCELLATION

In the event of cancellation by purchaser:

a) Any items completed at time of receipt of written cancellation notice, will be shipped and invoiced at full price.

b) Work on balance of order will be stopped as promptly as reasonably possible, and ALPHA MARATHON Film Extrusion Technologies Inc. will be reimbursed for all actual expenditures, commitments, liabilities and costs, determined in accordance with good accounting practice, made or incurred in respect to such incomplete items, plus a reasonable profit on such costs[.] Any items which we can use economically to fill orders will be cancelled without charge.

[22] The following note appears at the end of the quotation:

**Note: in case the order is not deliver in 28 weeks Alpha will pay the credit note to Zenish Reclamation**

[23] The March 9, 2018 quotation indicated that the contract price (i.e., US\$475,000.00) was prepaid because it was going to be paid from the US\$693,750.00 that Zenish had already transferred

to Alpha. It was agreed that the remaining balance of US\$218,750.00 would be refunded to Zenish (“**Refund**”).

[24] Zenish accepted the quotation on March 9, 2018 and both parties signed it on that day (“**March 2018 Contract**”).

**4. April 26, 2018 Letter**

[25] On April 24, 2018, Alpha sent the following letter confirming the terms of the parties’ agreement:

Alpha Marathon Film Extrusion Technology Inc received advance of Zenish Reclamation is 277,500.00 USD & Zenish Poly Film is 416,250.00 USD.

For total amount of 693,750.00 USD

On March 9/2018 Q # 12128-R1 Zenish Reclamation place order for 475,000.00 USD

AMFET Inc. Will return the difference USD 218,750.00- at same time the Order for above quote is delivered.

[26] A number of e-mails were exchanged before this letter was sent. On April 24, 2018, Mr. Patel sent the following e-mail to Mr. Marzano and others:

We are just asking for payment confirmation for amount already paid to you.

Why are you not confirming this amount received by you?

Since our meeting in March, you are not giving us balance confirmation and every day you are giving us different excuses.

In our meeting at Alpha, we signed the agreement that you will make balance payment in week 28. We are aware of your nature of delaying project and payment return. Even if project is delayed you have to return payment in week 28 as you agreed. If you need the copy of agreement we signed I will send it to you.

Delivery date and Rheology data is has nothing to do with payment confirmation.

If you think this letters are not ok, please make payment receipt on your letter pad according to your liking words and send us with sign and stamp so we can submit it with our Banker.

Domenic – Its better you send us this payment receipts immediately or it will affect our business relationship because if it takes 2 months for balance confirmation then we don’t know how long it will take to make machinery and supply it. You will be

giving us excuses everyday like you are giving us right now for balance confirmation.

[27] After the letter set out in paragraph 25 above was received, Mr. Patel sent the following e-mail:

Please find the attached Quote #Q12128-R1 signed by us on our visit of 09-03-2018.

It clearly states that weather delivered or not balance payment will be done to Zenish Reclamation.

Project can be delayed intentionally so you can delay payment of Zenish Reclamation.

It was clearly discussed during our visit so please change that line in your letter and resend.

[28] Mr. Patel's e-mail attached the last page of the March 2018 Contract with the following note highlighted: "in case the order is not deliver in 28 weeks Alpha will pay the credit note to Zenish Reclamation".

[29] On April 26, 2018, Alpha sent a revised letter to Zenish (still dated April 24, 2018) which read as follows ("**April 26, 2018 Letter**"):

Alpha Marathon Film Extrusion Technology Inc received advance of Zenish Reclamation is 277,500.00 USD & Zenish Poly Film is 416,250.00 USD.

For total amount of 693,750.00 USD

On March 9/2018 Q # 12128-R1 Zenish Reclamation place order for 475,000.00 USD

AMFET Inc. Will return the difference USD 218,750.00- at same time the Order for above quote is delivered in **28 weeks started from 25<sup>th</sup> April 2018** [Emphasis in the original.]

##### **5. Communications between the parties in 2018**

[30] In July 2018, an issue arose with respect to the fixing arrangement for a component known as an Intermediate Bulk Container ("**IBC**"). The parties disagree as to who is to blame for this issue. Ultimately, Alpha agreed to include the IBC fixing arrangement requested by Zenish at no additional cost. However, Mr. Marzano advised on August 6, 2018, that there would be a 6-8-week delay to obtain the necessary components. Mr. Marzano later advised that the delay would be 12 weeks.

[31] On October 30, 2018, Mr. Patel sent the following e-mail to Mr. Marzano:

As per our earlier contract delivery was supposed be in October end or first week of November.

After die modification you informed us it will be delayed by 8 weeks. Now in your last mail you are saying that it will take 12 weeks.

Please give us the exact date of delivery, we do not want time of delay. So we can decide what we need to do about this matter.

Please revert immediately with exact date of delivery.

[32] On Wednesday, October 31, 2018, Mr. Marzano responded that he would inform Mr. Patel later that week. On Friday, November 2, 2018, Mr. Marzano advised that there would be a production meeting the following day and that he would report back. Throughout the month of November 2018, Zenish sent a number of follow-up e-mails and Mr. Marzano responded with various promises of updates. He ultimately addressed the question of the delivery date in an e-mail dated November 23, 2018. He stated as follows:

Everything got delayed when you asked to design the IBC as part od the Die

We are receiving the NEW Die material next Week.

Barrels, Gearbox on order, will arrive end Of January.

With the Holidays, delivery expected in March - April

[33] I note that Mr. Marzano's statement that the barrels and gearbox were "on order" was false. Alpha's records show that the gearboxes were not ordered until December 3 2018 and the barrels were not ordered until December 10, 2018.

[34] Mr. Patel sent the following e-mail in response on November 23, 2018:

As per our contract dt.09<sup>th</sup> March, your delivery date was supposed to be in 22<sup>nd</sup> Sept 2018 (24 to 28 weeks).

Please give us clear answer for following points:

1. We have paid you 100% advance payment.
2. We have not changed anything in Gearbox and screw barrel and earlier our delivery was in 22<sup>nd</sup> Sept the why haven't you received Gearbox and Screw Barrel still now?



3. Our representative Mr. Satish met you last week and you told him that Screw Barrel is at port and it will be cleared from customs on Thursday which mean you provided wrong information to him.
4. When we discussed IBC provision in Die you told us it will take 12 extra weeks and we agreed and requested you to minimize this extra time as much as possible.
5. Even after calculating your 12 extra week delivery date should be around 15th December. Is it as per your schedule or not?
6. Also why haven't you refunded excess money to us as per your commitment?

We can accept delivery by 15<sup>th</sup> January but not even a one extra day on that. Please confirm If it is possible for you or not?

If your expected delivery time is in March/April then you are forcing us to cancel this order as you are not delivering as per your commitment.

Please confirm if you can deliver this machine by 15<sup>th</sup> Jan or you wish to cancel this order?

[35] A few days earlier, on November 20, 2018, Mr. Patel and Mr. Marzano exchanged e-mails regarding the Refund. Mr. Patel wrote as follows:

Please find the attached Letter of Alpha marathon about balance conformation and refund of balance payment.

As per your commitment in letter dt. 24<sup>th</sup> April 2018 (week no. 17) that payment will be done within 28 weeks so we should have received refund of balance payment by week no. 45 but we still haven't received the balance payment. It is already week no. 47.

You have been using our money for a long time now so please make this balance payment as per your commitment or we will charge you 24% interest from the date of your letter.

Also as per your last mail please confirm the delivery date today.

[36] Mr. Marzano responded on the same day that “[w]e are working to start returning the funds.”

[37] On November 29, 2018, Mr. Marzano sent an e-mail advising that the order was moving forward, and that Alpha was “looking to deliver end of February”. He did not address the six points set out in Mr. Patel’s e-mail dated November 23, 2018.

[38] On December 7, 2018, Mr. Patel sent an e-mail to Mr. Marzano asking him to confirm whether he could deliver the machine on January 15, 2019. He indicated that a clear delivery date, not week, was needed and asked for an immediate reply “so we can decide our further actions accordingly.” Mr. Marzano responded on the same day that Alpha had placed priority on this project and that the shop was aware of the urgency. Mr. Patel reiterated that he needed a clear delivery date. On December 10, 2018, Mr. Marzano repeated that the projected delivery was end of February 2019. A number of e-mails followed in which Mr. Patel asked for delivery by January 15, 2019 and Mr. Marzano reiterated that the delivery of the order would be at the end of February 2019.

[39] Zenish also sent follow-up e-mails in December 2018 regarding the Refund.

**6. Communications between the parties in 2019**

[40] On January 9, 2019, Mr. Patel asked for a clear delivery date and for the Refund to be paid that week. Mr. Marzano sent the following response on January 12, 2019:

Plant is working on the order.

Will start sending payment shortly

Thank you for your understanding and support

[41] On January 24, 2019, Mr. Patel sent a follow-up e-mail to Mr. Marzano:

We have not received funds yet. Its already been 12 days since your last mail. Please arrange to make this payment immediately.

Please send the photos of work done on project.

Awaiting your reply.

[42] Mr. Marzano responded as follows on January 26, 2019:

Thank you for your patience and support

Please rest assure of Alpha commitment to return the funds and complete the Project

[43] On February 25, 2019, a representative of Zenish sent the following e-mail to Mr. Marzano:

Last week we had phone call discussion on final status of our plant to be supplied by end of February-19.

Despite of our repeated reminder on mail and phone call, you are keeping [quiet] on the subject. We don't know what is wrong with the Alfa.

Please treat this mail as most urgent and your prompt action awaited on plant delivery as well our refund of excess amount with you.

Matter Urgent.

[44] Alpha did not deliver anything in February. On March 4, 2019, Mr. Patel sent the following e-mail:

You committed us delivery of machines in February end but we still haven't received any machines.

Also you didn't reply to mail of Ashok Joshi regarding delivery of machines. Explain why didn't you reply?

You always give us your commitment that excess funds will be paid soon but we haven't received any funds yet.

Please do not test our patience in this matter.

What do you wish to do? Because you give us new dates every time we ask about project and excess funds.

If you wish that we should sought out this matter legally then we can proceed accordingly.

We need clear dates for return of our complete funds which was paid to alpha and alpha also committed us return.

Give me your last delivery date of machines, if you fail to deliver on this date you will be required to return our complete funds with interest.

Please give me your reply immediately.

[45] Mr. Marzano responded as follows on March 6, 2019:

We are working on the project, please rest assure of Alpha commitment to deliver

The order and the money owed as soon as possible

[46] Mr. Patel asked for an exact date for payment. On March 7, 2019, Mr. Marzano indicated that Alpha would start returning funds in April 2019. Mr. Patel asked again for a date for the return of the complete amount of the Refund. On March 14, 2019, Mr. Marzano stated that Alpha would pay the Refund by making four monthly payments starting in April. Mr. Patel sent the following e-mail in response on March 14, 2019:

We do not agree to this payment method.

As per your commitment, we should have received money in November and we have already given you 5 extra months.

Either complete all payment by the end of April or we will be forced to take legal action.

We will claim our amount with interest and penalty.

So let us know if you agree to make payment by the end of April or not?

Reply with your decision today.

[47] On March 17, 2019, Mr. Marzano informed Zenish that a part required for the System would only be ready in 14 weeks. Also on March 17, 2019, Mr. Marzano asked again Mr. Patel to agree to his proposal to make four equal monthly payments starting in April. On March 18, 2019, Mr. Patel advised that the proposal was not acceptable, and he made a counter-proposal which required the Refund to be paid by the end of May 2019. Mr. Patel sent follow-up e-mails on March 25 and 26, 2019. On March 26, 2019, Mr. Marzano again asked Mr. Patel to accept his original proposal. The following day, Mr. Patel reiterated that Zenish did not accept his proposal. On March 28, 2019, Mr. Marzano stated that he needed three months, with payments on April 15, May 15 and June 15.

[48] On April 9, 2019, Mr. Patel sent the following e-mail:

As per your commitment, please make payment of 72917 USD on 15th April.

Also send us signed and stamped agreement letter we sent you in last mail. Its been one week and you have't sent us yet.

[49] Mr. Marzano responded on April 10, 2019 that they would "issue payment this month". However, he never signed the agreement referred to in Mr. Patel's e-mail and Alpha did not make any payment in April 2019.

[50] On May 5, 2019, Mr. Marzano sent the following e-mail to Mr. Patel:

Thank you for your patience and understanding

– We have received the new ring and We are working to complete the order –

6 Module X 12 layers – 4 Extruder and Air Ring Project.

Alpha estimate new deliver time middle of August

I am also confident to complete payment for

What Alpha owe Zenish by this time.

[51] There was no delivery and no repayment in or before August 2019.

**7. Termination by Zenish**

[52] On September 19, 2019, Zenish's lawyer wrote to Alpha advising that Zenish was no longer willing to take delivery of the System and asking for a complete refund (i.e., US\$693,750.00).

[53] On the same day, Mr. Marzano sent an e-mail to Zenish's lawyer stating that the order was 90% ready and that they were welcome to come and see it.

[54] On September 21, 2019, Mr. Marzano sent the following e-mail to Mr. Patel:

Order will be ready to pick up middle of November

Attached pictures of 4 extruders been assembled, 6 module X 12 layers Die –

needs to send out for Nickel and assembled

and complete Air Ring.

For your information Cost of Material 412,000.00 USD.

We really

[55] On September 23, 2019, Zenish's lawyer sent the following response:

The email below was forwarded to me by my client. Please direct any future correspondence regarding this matter to me and not to my client.

Alpha Marathon was contractually obligated to deliver the equipment by October 2018. It has failed to do so. My client has no obligation to accept delivery of the equipment in November 2019, some 13 months after the deadline for delivery.

However, my client is willing to consider accepting delivery of the equipment if a bank draft in the amount of US\$218,750 is delivered to my office by 5pm on Thursday. Regardless of whether my client accepts delivery of the equipment, there is no reason for refusing to refund the US\$218,750 immediately. If a bank draft in that amount is not received by my office by Thursday, we will know that this is nothing more than a delaying tactic and that Alpha Marathon has no intention of returning my client's money.

[56] Mr. Marzano responded as follows on September 26, 2019:

Received your e mail

I cannot pay US\$218,750 at this time

I am expecting funds, will remit as soon I receive

Thanks for Understanding

[57] The Refund was never paid.

[58] Alpha's Responding Motion Record includes a list of purchase orders for parts allegedly bought by Alpha to build the System ordered by Zenish. A review of this list reveals that the great majority of the parts were not ordered until late 2018 or 2019. A number of parts were not even ordered until October 2019, after the agreement was terminated by Zenish. When asked why Alpha waited until late 2018 or even 2019 to order parts, Mr. Marzano was unable to provide a rational answer.

[59] In his affidavit, Mr. Marzano states that the System is complete and ready for delivery to Zenish as ordered. He does not indicate when the System was allegedly completed. Attached to his affidavit are pictures of the completed System that were taken on February 14, 2022. It is clear from Alpha's Statement of Defence that the System had not been completed by the time the Statement of Defence was served on October 30, 2019.<sup>2</sup>

## **8. The action**

[60] This action was commenced on October 2, 2019. Zenish seeks damages in an amount of Canadian currency sufficient to buy US\$693,750.00 for breach of contract and/or unjust enrichment.

[61] Alpha served a Statement of Defence dated October 30, 2019. In it, Alpha denies that it breached the contract between the parties or that it agreed to refund the funds paid by Zenish toward the contract. Alpha has not counterclaimed against Zenish.

## **B. POSITIONS OF THE PARTIES**

### **1. Position of the Plaintiffs**

[62] Zenish's position is that the documentary evidence in this case is sufficient to establish that Alpha breached the March 2018 Contract and that Zenish is entitled to the repayment of all funds that have been paid to Alpha.

[63] Zenish submits that the only contract in issue is the March 2018 Contract, which superseded the two prior contracts that were entered into in 2016. Zenish points out that the March 2018 Contract contemplated a completely different scope of supply and price.

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<sup>2</sup> The Statement of Defence states that the System was "near completion and soon ready to be delivered."

[64] Zenish argues that Alpha's failure to deliver the System within 24-28 weeks, or within a reasonable period of time thereafter, was a fundamental breach of the March 2018 Contract. It points out that the correspondence that Zenish sent to Alpha shows that time of delivery was an important factor. Zenish's position is that, as a result of Alpha's fundamental breach, it is entitled to terminate the contract and have the US\$693,750.00 that it paid to Alpha returned.

[65] According to Zenish, it did not materially contribute to the delay in the delivery of the System. Zenish states that the only delay that Alpha has attributed to Zenish with respect to the March 2018 Contract involved the IBC issue, and that this issue only contributed to an 8-12-week delay. Zenish submits that this is the only delay that Zenish arguably consented to, and that this should still have resulted in the delivery of the System by no later than December 2018. Zenish notes that Alpha has not provided any evidence as to why it repeatedly delayed the project, and that there is no evidence of delay from obtaining parts from third parties. Zenish argues that Alpha has failed to put its best foot forward to explain the delays.

[66] Zenish submits that Alpha's position that it was not required to pay the Refund until and unless the System was delivered is directly contrary to the repeated promises made by Mr. Marzano in many e-mails that the Refund would be paid, in whole or in part, on various days. Zenish states that at no time until the delivery of its Statement of Defence in this action did Alpha ever take the position that it was not required to pay the Refund. Zenish argues that Alpha's failure to pay the Refund also constitutes a fundamental breach of the March 2018 Contract.

[67] Zenish's position is that there are no issues of credibility that need to be decided at trial. Zenish notes that Mr. Marzano repeatedly confirmed during his cross-examination that he had no independent recollection of the events that occurred.

## **2. Position of the Defendant**

[68] Alpha's position is that this is not an appropriate case for summary judgment as there are issues of credibility, many material facts and genuine issues in dispute, as well as contradictory evidence.

[69] Alpha argues that the March 2018 Contract is not a stand-alone contract but, rather, "the last agreement in a series of amending agreements in the context of a single period of time from 2016 to 2019 and a single business relationship." It also argues that there is an issue as to whether Mr. Marzano actually signed the March 2018 Contract. However, Alpha has failed to produce its version of the March 2018 Contract.

[70] Alpha submits that Zenish, by its actions, acquiesced that the final delivery date was subject to change and was "floating". Alpha relies on the "Shipping Schedule" clause in the contracts, as well as the statement that "[t]he quoted delivery time is based on our current production schedule and may vary at the time the order is placed." Alpha states that the delivery date in the agreement could vary and was subject to circumstances beyond its control.

[71] According to Alpha, Zenish was, for the most part, the party responsible for the delay as a result of numerous requests for changes. Alpha points out that the manufacture of certain components is contracted out to third parties over which Alpha does not have control.

[72] Alpha argues that it has suffered damages in the amount of \$737,802.26, which is greater than the amount of Zenish's claim. Alpha relies on the Cancellation clause in the contracts which states that upon cancellation, Alpha is to be reimbursed for its expenditures and costs.

[73] With respect to the Refund issue, Alpha submits that the final refund date is unclear and ambiguous. Its position is that the Refund was due at the same time than, and conditional upon, the delivery of the final product.

[74] Alpha states that, as a result of the standard provisions in the contracts, the delays and the failure to provide the Refund cannot be characterized as breaches of contract, let alone fundamental breaches.

[75] Alpha argues that the credibility of Mr. Patel for the Plaintiffs and Mr. Marzano for the Defendant must be determined in order to resolve a number of material facts and genuine issues in dispute, including the following:

- a. the governing contract between the parties and the characterization of the various amendments to the initial agreement;
- b. the terms of the contract regarding the completion and final delivery date of the completed System and the conditions of the Refund to Zenish, and whether Mr. Marzano signed the version of the March 2018 Contract put forward by Zenish;
- c. the responsibility for the delays and extensions and their impact on the final completion and delivery date;
- d. detrimental reliance by Alpha; and
- e. the quantum of damages to Alpha.

## C. **DISCUSSION**

### 1. **General principles applicable on a motion for summary judgment**

[76] On a motion for summary judgment, the court must first determine if there is a genuine issue requiring a trial based only on the evidence in the motion record, without using the fact-finding powers set out in Rules 20.04(2.1) and (2.2) of the *Rules of Civil Procedure*. There will be no genuine issue requiring a trial if the summary judgment process provides the court with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure. See *Hryniak v. Mauldin*, 2014 SCC 7 at para. 66.



[77] A party moving for summary judgment has the evidentiary burden of showing that there is no genuine issue requiring a trial with respect to a claim or defence: Rule 20.04(2)(a). The burden shifts to the responding party to prove that its claim or defence has a real chance of success only after the moving party has discharged its evidentiary burden of establishing that there is no genuine issue requiring a trial. See *Sanzone v. Schechter*, 2016 ONCA 566 at para. 30 and *Kinectrics Inc. v. FCL Fisker Customs & Logistics Inc.*, 2020 ONSC 6748 at para. 35.

[78] Each party must put its best foot forward to establish whether or not there is a genuine issue requiring a trial: see *Ramdial v. Davis*, 2015 ONCA 726 at para. 27 (“*Ramdial*”). The court is entitled to assume that the record contains all the evidence that the parties would present at trial: see *Toronto-Dominion Bank v. Hylton*, 2012 ONCA 614 at para. 5 and *Broadgrain Commodities Inc. v. Continental Casualty Company*, 2018 ONCA 438 at para. 7. Thus, if the moving party meets the evidentiary burden of producing evidence on which the court could conclude that there is no genuine issue of material fact requiring a trial, the responding party must either refute or counter the moving party’s evidence or risk a summary judgment: see *Soliman v. Bordman*, 2021 ONSC 7023 at para. 133. A responding party has an obligation to “lead trump or risk losing” and cannot rely on allegations or denials in the pleadings; it must present evidence of specific facts demonstrating that there is a genuine issue requiring a trial: see *Ramdial* at paras. 28 and 30, and *Sylvite v. Parkes*, 2020 ONSC 5569 at para. 16. A self-serving affidavit is not sufficient in itself to create a triable issue in the absence of detailed facts and supporting evidence: see *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 432 at para. 31.

## **2. General principles of contractual interpretation**

[79] The Supreme Court of Canada set out the current approach to contractual interpretation in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 (“*Sattva*”). In a nutshell, courts are to read a contract as a whole, 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. While the meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement, the surrounding circumstances must never be allowed to overwhelm the words of that agreement. Thus, even though the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement. Relevant surrounding circumstances consist only of objective evidence of the background facts at the time of the execution of the contract, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. See *Sattva* at paras. 47-48, 57-58 and *Corner Brook (City) v. Bailey*, 2021 SCC 29 at para. 20.

[80] Where an agreement is ambiguous, evidence of subsequent conduct may be admitted to determine the intent of the parties: see *Montreal Trust Co. of Canada v. Birmingham Lodge Ltd.*, 1995 CanLII 438 (Ont. C.A.) and *Simpson v. Canada (Attorney General)*, 2011 ONSC 5637 at para. 68.

[81] Absent a term making time of the essence, the law will imply a reasonable time for performance: see *Illidge v. Sona Resources Corporation*, 2018 BCCA 368 at para. 81.

### **3. General principles regarding fundamental breach of contract**

[82] A fundamental breach of contract by one party gives the right to the other party to treat the contract as at an end. A fundamental breach is one that deprived the innocent party of substantially the whole benefit of the contract. See *Spirent Communications of Ottawa Limited v. Quake Technologies (Canada) Inc.*, 2008 ONCA 92 at para. 35 (“*Spirent*”).

[83] There are five factors to be considered when determining whether a fundamental breach has occurred, i.e., whether conduct has deprived the innocent party of substantially the whole benefit of the contract (see *Spirent* at para. 36):

- a. the ratio of the party’s obligations not performed to that party’s obligations as a whole;
- b. the seriousness of the breach to the innocent party;
- c. the likelihood of repetition of such breach;
- d. the seriousness of the consequences of the breach; and
- e. the relationship of the part of the obligation performed to the whole obligation.

### **4. Application to this case**

#### ***a. Whether this is an appropriate case for summary judgment***

[84] I find that this is an appropriate case for summary judgment. The documentary evidence, including the e-mails exchanged by the parties, is objective and reliable and, in large part, establishes what happened. I conclude that there is sufficient evidence before the court to fairly and justly adjudicate the dispute between the parties, and that it is appropriate to make dispositive findings on this motion. Providing a timely, affordable and proportionate procedure to the parties is also an important consideration in this case.

[85] I disagree with Alpha that the points set out in paragraph 75 above raise credibility issues. As set out in *Sattva*, contractual interpretation is an exercise based on objective, not subjective, evidence. Further, unsupported and self-serving allegations are insufficient to raise a genuine credibility issue or a genuine issue requiring a trial as parties have an obligation to put their best foot forward. Thus:

- a. Mr. Marzano’s unsupported allegation that the version of the March 2018 Contract in Alpha’s files is different from the one attached to Mr. Patel’s affidavit (with respect to the note at the end of the contract and, possibly, Mr. Marzano’s signature) does not raise a genuine issue requiring a trial given the failure of Alpha to produce

such alleged different version. Further, I note that Mr. Patel sent the last page (which is the page that is alleged to be different) of the March 2018 Contract to Mr. Marzano by e-mail on April 25, 2018 and made specific reference to the note in issue in his e-mail. There is no evidence that, in response to Mr. Patel's e-mail or at any time before the litigation, Mr. Marzano or anyone at Alpha ever disputed that the note at the end of the March 2018 Contract had been agreed upon by the parties or that the March 2018 Contract had been signed by Mr. Marzano.

- b. Mr. Marzano's suggestion during his cross-examination that he may not have signed the April 26, 2018 Letter and that his assistant may have "pasted" his signature from another document also does not raise a genuine issue requiring a trial. This allegation is completely unsupported, speculative and self-serving.

[86] I now turn to the contractual issues raised in this case.

***b. The governing contract and its terms***

[87] In my view, the question of whether the March 2018 Contract is an amendment or a separate contract is a red herring. Based on the evidence before me, there is no doubt that the parties were operating under the March 2018 Contract and that Alpha understood that it was to supply the System described in that contract and not the systems that were set out in the July 2016 Contract and/or the October 2016 Contract. Whether the March 2018 Contract was a new contract or an amendment, its terms applied going forward, including the delivery time, the payment term (i.e., prepaid in full) and the note regarding the payment of the "credit note" to Zenish.

[88] ***Delivery time.*** The March 2018 Contract provides for a delivery time of 24 to 28 weeks. It also provides under the Warranty clause that "time is of the essence in this agreement". Even if the "time is of the essence" mention was only meant to apply to the warranty clause, it is appropriate to imply a reasonable time for performance in the March 2018 Contract: *Illidge v. Sona Resources Corporation*, 2018 BCCA 368 at para. 81.

[89] Given that the March 2018 Contract specifically addresses the issue of delivery time, I reject the suggestion that the delivery time set out in the contract had no meaning and that there was, in effect, no time constraints on Alpha. Alpha's position in this regard is not consistent with the text of the March 2018 Contract read as a whole. The conclusion that the delivery time included in the contract had meaning and was relied upon by the parties is supported by the text included in the March 2018 Contract right after the delivery time. The following statement appears immediately after the statement that the quoted delivery time is based on Alpha's current production schedule and may vary at the time the order is placed: "Alpha Marathon will make every effort to meet your requirements." Thus, it was understood and agreed that Alpha would make every effort to meet the delivery time.

[90] The conclusion that the delivery time quoted in the March 2018 Contract was not meaningless and was relied upon by the parties is also supported by the clause "Changes in the Scope of Supply". This clause provides that Zenish would be responsible for any delays related to a request for any changes in the scope of supply, but it also provides that Alpha would

investigate any request for changes and “then notify the customer [of] the modification charges and the new delivery time.” The fact that a new fixed delivery date had to be provided by Alpha contradicts the suggestion that the March 2018 Contract contained no delivery date or only a “floating” one.

[91] If there is any ambiguity on this issue, the correspondence between the parties following the execution of the March 2018 Contract shows that the time of delivery was an important factor.

[92] I do not accept Alpha’s arguments that the delays in issue were caused by requests for changes made by Zenish. Almost all of the requests for changes relied upon by Alpha relate to the July 2016 Contract and the October 2016 Contract. In my view, the changes that were requested under the July 2016 Contract and the October 2016 Contract are irrelevant. They pertained to a different system, and they had no impact on the agreed-upon delivery date for the new System that is set out in the March 2018 Contract. The only request for change that has been established after March 9, 2018<sup>3</sup> pertains to the IBC issue. As provided in the “Changes in the Scope of Supply” clause in the March 2018 Contract, Alpha notified Zenish of the new delivery time as a result of this change, which initially was an addition of 6-8 weeks to the original delivery time, and later became an addition of 12 weeks.

[93] The addition of 12 weeks to the original delivery time of 24 to 28 weeks results in a delivery time of 36 to 40 weeks. Using forty weeks from the execution of the March 2018 Contract on March 9, 2018, the outside delivery date was December 14, 2018. Zenish terminated the March 2018 Contract approximately forty weeks later, on September 19, 2019.

[94] Aside from the IBC issue, no other justification has been established for extending the delivery date under the March 2018 Contract. Among other things:

- a. The qualification in the March 2018 Contract that “[t]he quoted delivery time is based on our current production schedule and may vary at the time the order is placed” has no application in this case. The order was prepaid and the contract was signed by the parties on the same date than the quotation was made, i.e., on March 9, 2018. The April 26, 2018 Letter confirms that Zenish placed its order on March 9, 2018. Thus, there was no change in Alpha’s production schedule between the time the quotation was made and the time it was accepted and the order was placed.
- b. The “Shipping Schedule” clause provides that the shipping schedule is approximate only and is subject to circumstances beyond Alpha’s control. Alpha has adduced no evidence of any circumstances beyond its control. In fact, Alpha has not adduced any specific evidence explaining the delays under the March 2018 Contract. The fact that the shipping schedule was approximate is consistent with

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<sup>3</sup> I note that Zenish denies that it is responsible for the change regarding the IBC, but, for the purpose of this motion, I will assume that it was, without finding that it was.

an implied term that provides for a reasonable time for performance past the quoted delivery time. However, it cannot justify, without anything else, a delivery time that is forty weeks longer than the quoted delivery time. By definition, something that is approximate has to be close to the actual.

- c. The e-mail correspondence between the parties shows that the delivery time was an important factor and that Zenish did not agree to additional delays in the delivery of the System after December 2018.

[95] In light of the foregoing, and based on the facts of this case, I find that Alpha had the obligation under the March 2018 Contract to deliver the System by December 14, 2018 or within a reasonable time thereafter.

[96] **Refund.** In my view, the note at the end of the March 2018 Contract clearly required Alpha to pay the Refund within 28 weeks of March 9, 2018 in the event the System was not delivered within 28 weeks. If there was any ambiguity, the April 26, 2018 Letter and the correspondence leading to it supports this interpretation.<sup>4</sup>

[97] Alpha's position that the payment of the Refund could be delayed until, and was conditional upon, the delivery of the System is wholly contradicted by the correspondence between the parties and Mr. Marzano's numerous promises to pay the Refund before the delivery of the System. Alpha's position also makes no commercial sense whatsoever. The logical consequence of Alpha's position is that it did not have to ever pay the Refund and could keep an extra US\$218,750.00 in the event it failed to fulfil its contractual obligations and never delivered the System. This is a completely unreasonable interpretation of the parties' obligations under the March 2018 Contract. There would have been no reason for Zenish to agree to let Alpha use more than US\$200,000.00 of its money interest-free for any period of time that was longer than necessary when such an amount was not required to pay for the System under the March 2018 Contract.

[98] The e-mail correspondence between the parties shows that Zenish did not agree to additional delays with respect to the payment of the Refund.

**c. Fundamental breach of the March 2018 Contract**

[99] In light of the foregoing, I find that Alpha's failure to deliver the System on December 14, 2018 or within a reasonable time thereafter and its failure to pay the Refund within 28 weeks of March 9, 2018 were breaches of the March 2018 Contract. A 40-week delay (i.e., the delay between December 14, 2018 and Zenish's termination letter sent in September 2019) is not a

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<sup>4</sup> However, the April 25, 2018 date in the April 26, 2018 Letter is wrong and should have been the date of the March 2018 Contract instead of the date the letter was prepared.

reasonable time when one considers that the delivery was to take place within 40 weeks after the parties entered into the contract (taking the IBC issue into account).

[100] I agree with Zenish that these breaches constitute a fundamental breach of the March 2018 Contract. The factors set out in *Spirent* support this conclusion:

- a. ***The ratio of the party's obligations not performed to that party's obligations as a whole.*** Alpha did not perform any of its obligations under the March 2018 Contract. It did not deliver the System and it did not pay the Refund.
- b. ***The seriousness of the breach to the innocent party.*** The breach was serious to Zenish. Zenish was deprived of any benefit that it contracted for due to significant delays. At the time of termination, the delays doubled the delivery time set out in the March 2018 Contract and more than doubled the payment time for the Refund. The seriousness of the breach to Zenish is also reflected in the fact that after it became clear that Alpha would not deliver the System in the originally contemplated time frame, Zenish repeatedly sought updates from Alpha as to the status of the System and the payment of the Refund, constantly requested that Alpha provide firm dates for delivery of the System and for payment, and indicated that the matter was urgent.
- c. ***The likelihood of repetition of such breach.*** This factor is not applicable in this case.
- d. ***The seriousness of the consequences of the breach.*** The consequences of the breach were serious. As stated above, Zenish was deprived of any benefit that it contracted for due to significant delays. The failure to repay the Refund deprived Zenish of a substantial amount of money (i.e., almost half of the value of the March 2018 Contract) for an extended period of time. Further, even though Zenish had prepaid the System in full, it did not receive anything from Alpha.
- e. ***The relationship of the part of the obligation performed to the whole obligation.*** Alpha did not perform any of its obligations under the March 2018 Contract.

[101] I also note that, between November 2018 and the termination of the contract in September 2019, Zenish warned Alpha numerous times that it intended to “cancel” the contract due to the repeated delays. Alpha was aware that delivery time was important for Zenish and Mr. Marzano acknowledged that Alpha was aware of the urgency in an e-mail he sent in December 2018. Despite this, significant delays ensued for which no explanation has been provided.

[102] Given Alpha's fundamental breach of contract, Zenish was entitled to terminate the March 2018 Contract.

[103] I reject Alpha's allegation that the March 2018 Contract was “cancelled” and that, as a result, Alpha is entitled to compensation/reimbursement under the Cancellation clause of the March 2018 Contract. In my view, based on the text of this clause, it was not intended to apply in

circumstances where the contract was terminated as a result of a fundamental breach on the part of Alpha. This case is not a situation where Zenish decided to cancel the contract for reasons unrelated to Alpha's conduct.

[104] Zenish paid US\$693,750.00 to Alpha and did not receive anything in return. As a result of Alpha's fundamental breach of the March 2018 Contract, Zenish is entitled to damages in that amount.

**D. CONCLUSION**

[105] The Plaintiffs' motion for summary judgment is granted. The Defendant is ordered to pay to the Plaintiffs an amount of Canadian currency sufficient to buy US\$693,750.00 plus prejudgment interest at a rate of 2% commencing December 14, 2018.<sup>5</sup>

[106] If costs cannot be agreed upon, the Plaintiffs shall deliver submissions of not more than three pages (double-spaced), excluding the costs outline, by April 6, 2023. The Defendant shall deliver its responding submissions (with the same page limit) by April 20, 2023. The submissions of all parties shall also be sent to my assistant by e-mail and uploaded onto CaseLines.

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**Vermette J.**

**Date:** March 24, 2023

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<sup>5</sup> This date is based on forty weeks from the date of the March 2018 Contract (i.e., 28 weeks as stated in the March 2018 Contract + 12 weeks for the delay relating to the IBC issue).