IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Coquihalla Motor Inn Ltd. v. Very Jazzroo Enterprises Incorporated (Hospitality Designs)*, 2023 BCSC 1982

Date: 20231114
Docket: S228552
Registry: Vancouver

Between:

Coquihalla Motor Inn Ltd.

Plaintiff

And

Very Jazzroo Enterprises Incorporated dba Hospitality Designs

Defendant

And

Anoop Sekhon

Third Party

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

Counsel for the Plaintiff and the Third Party:	J.M. Drayton
Counsel for the Defendant:	O.J. Kowarsky P.Y. Yeh
Place and Date of Summary Trial:	Vancouver, B.C. October 5, 2023
Place and Date of Judgment:	Vancouver, B.C. November 14, 2023

Table of Contents

I. Introduction

[1] This action arises from a dispute over a contract that called for the defendant, Very Jazzroo Enterprises Incorporated, doing business as “Hospitality Designs” (“VJEI”), to design, manufacture and deliver certain pieces of custom-made furniture, known as “case goods”, for a hotel located in Merritt, British Columbia, known as the “Ramada Limited Merritt” (the “Hotel”).

[2] The plaintiff, Coquihalla Motor Inn Ltd. (“CMIL”), claims damages from VJEI for breach of that contract, including what are alleged to be a series of overcharges and, in the end, a total failure to deliver the case goods as promised. It seeks an award of damages in the amount of $68,662.07, to compensate it for the consideration that it had previously paid for the case goods.

[3] VJEI denies that CMIL has standing to bring that claim, on the basis that, according to VJEI, CMIL was not privy to the contract. VJEI contends that the sole purchaser under the contract was CMIL’s principal, the third party, Mr. Sekhon. In its third party claim against him, VJEI seeks damages from him personally for amounts he is said to owe VJEI under the contract, a total of $854,216.84.

[4] Both CMIL and VJEI have applied under R. 9-7 of the *Supreme Court Civil Rules* [*SCCR*] for judgment in their favour by way of summary trial. For the reasons that follow, I have concluded that both claims lend themselves to summary disposition and that both should be summarily dismissed.

II. Background Facts

A. The Parties

[5] CMIL operates the Hotel, which is part of the Ramada Inn chain. Mr. Sekhon describes himself as the General Manager of CMIL.

[6] According to VJEI’s Vice President of Finance, Jung-Tsun Hong, VJEI designs and manufactures custom-built furniture for the hotel industry. It also procures furniture, fixtures and equipment such as chairs, carpets and drapes, from its third-party suppliers. Mr. Hong says that VJEI is one of the approved suppliers for

the Wyndham Hotels & Resorts group, of which the Hotel is a part. VJEI maintains an office at 11720 Horseshoe Way in Richmond, British Columbia.

B. The September 25, 2020 Case Goods Quote

[7] In September 2020, Mr. Sekhon approached VJEI seeking a quote to supply various items of furniture for the Hotel. To that end, on September 25, 2020, VJEI provided Mr. Sekhon with two quotes, as follows:

a) 2025-11732, offering to supply 28 dining chairs for an aggregate price of $4,390,09, with the associated cost of freight to follow; and

b) 2020-11736, offering to supply various other pieces of furniture (including 59 headboards, 33 desks, 24 media consoles, 10 television chests, 37 mirrors, 14 tables and 58 night-stands, which are described collectively as the “case goods”) for an aggregate price of $63,355.81.

[8] The second of these quotes (the “September 25, 2020 Case Goods Quote”) consists of two pages. Both pages state that the order was to be billed and shipped to “Ramada Limited Merritt” at 3751 Voght Street in Merritt.

[9] At the bottom of both pages, there appears a box under the heading “Payment Details”. The text in that box indicates that half of the purchase price ($31,677.91) was to be due “on Order” and the other half “Before Shipping.”

[10] In the lower right corner of both pages, the following pre-printed paragraph appears:

> DUE TO PENDING COUNTERVAILLING DUTIES AND TARRIFS BEING IMPOSED, HOSPITALITY DESIGNS RESERVES THE RIGHT TO CHARGE THESE COSTS AS PER ACTUAL.

[11] There follows below that paragraph, on both pages, a line where the Buyer is directed to place his or her initials, apparently to indicate acknowledgment of that particular term. Mr. Sekhon’s initials appear above that line on both pages.

[12] On the first page, above the list of the items to be supplied, the following terms are stated (among others):

a) "Case Goods Coming Out From Asia Plant";

b) "Freight to Vancouver Port Only"; and

c) "PLEASE ALLOW 16-18 WEEKS AFTER CONFIRMATION OF PRODUCT DETAILS AND RECEIPT OF DEPOSIT CHEQUE FOR DELIVERY" [uppercase as in original].

[13] At the bottom of the second page there appears a box under the heading "Notes". In that box, the following pre-printed text appears:

> By [signing/initialling] this portion of the Quote the Buyer hereby
>
> 1) Accepts and agrees to pay the amount quoted, subject to the attached standard terms and conditions (the "Standard Terms and Conditions") copies of which are available for viewing on Hospitality Design's website at http://www.hospitalitydesigns.com/terms-and-conditions/
> 2) Confirms that it is the Buyer's responsibility to read the standard Terms and Conditions; and
> 3) Unless otherwise billed for specific items, Hospitality Designs does not collect or submit US taxes.
> 4) Acknowledges that informing the state in which the property conducts business and submitting any taxes are the hotels responsibility.

[14] Inside that same box, to the right of the block of text quoted above, there appears a signature line with Mr. Sekhon's name pre-printed below, indicating where he was supposed to sign. Mr. Sekhon's appears to have placed his signature above that line to indicate his acceptance of VJEI's offer on those terms.

[15] Neither VJEI's nor CMIL's names appear anywhere on either page of the September 25, 2020 Case Goods Quote. Rather, it is presented under the letterhead of "HOSPITALITY DESIGNS" and Mr. Sekhon has signed and initialed the document to indicate his acceptance of the proposed terms in his own name.

[16] In his first affidavit sworn November 7, 2022, Mr. Hong deposes that his understanding was that Hospitality Designs was contracting with Mr. Sekhon

personally and that Mr. Sekhon never mentioned CMIL's name to him. However, Mr. Hong does not identify which individuals at VJEI were dealing with Mr. Sekhon at the material time, nor does he state if he was one of them.

[17] Despite having sworn his second affidavit subsequently on February 28, 2023, Mr. Sekhon has not disputed those statements. I note as an aside, however, that both of Mr. Sekhon's two affidavits purport to incorporate by reference, and confirm as true, the statements of fact set out in CMIL's notices of application "executed concurrently", but neither of those accompanying documents were attached as exhibits, or even included in the record placed before me.

[18] In any event, on September 30, 2020, a cheque was issued by "Ramada Limited" payable to "Hospitality Designs" in the amount of $31,667.91, in payment of the first half of the purchase price as contemplated by the September 25, 2020 Case Goods Quote.

C. The January 15, 2021 Case Goods Quote

[19] The record is silent as to what occurred, if anything, between then and early January 2021. At that time, Mr. Sekhon was engaged in an exchange of emails with one of VJEI's Project Managers, Erina Lo, in which they were discussing the specifications of the case goods to be supplied under the contract. In an email sent on January 8, 2021, Ms. Lo advised Mr. Sekhon that the estimated lead time for delivery of the case goods was then April 2021.

[20] On January 12, 2021, Ms. Lo sent Mr. Sekhon line drawings of the case goods for his review. She told him that if he approved of the dimensions set out in those drawings, he was to send back a signed PDF copy, whereupon Ms. Lo could "get your case goods into production."

[21] Mr. Sekhon did not approve the drawings as presented, but asked instead to have certain changes made. In an email sent on January 14, 2021, Ms. Lo advised Mr. Sekhon that the changes he was seeking would add a further $3,628.80 to the cost of the order.

[22] In his response sent on January 15, 2021, Mr. Sekhon stated as follows:

> Erina,
>
> Go ahead and order the chairs, I will send payment out today for the amount of $4390.09 as per signed quote 2025-11732. If there is one more mention of a price increase the next letter will be from my lawyer requesting a return of our deposit. Also go ahead with the changes … as I specified on your line drawings. I agree on the extra charges totalling to $3628.80 for the changes. Please forward new line drawings for approval.

[23] Ms. Lo responded within an hour as follows:

> Hi Anoop,
>
> Noted and will let my team know that we can expect the cheque of $4390.09 and will place the order once received. They will not ship your product until the freight is collected at a later date.
>
> Advised my engineer on the add on changes, will get these updated line drawings to you shortly. Thank you.

[24] Later that same day, VJEI issued a second case goods quote, numbered 2015-14470 (the "January 15, 2021 Case Goods Quote"), which was essentially identical to the September 25, 2020 Case Goods Quote, except that with the changed specifications, the price had increased to $67,420.66. Mr. Sekhon signed the January 15, 2021 Case Goods Quote but did not initial the paragraphs on each page where directed to do so, as he had when he signed the September 25, 2020 Case Goods Quote.

D. Invoices and "Final Payment"

[25] On February 1, 2021, VJEI issued invoice 21-4767 in the amount of $4,390.09 for the 28 chairs. That invoice was paid by way of a wire transfer from CMIL to VJEI on that same day.

[26] On February 5, 2021, VJEI issued invoice 21-4794 seeking payment of the full $69,690.19 for the case goods. Following further discussions between the parties, VJEI subsequently issued a credit note (21-4818) in the amount of $2,270.11 against that balance. On March 17, 2021, VJEI issued invoice 21-4911 in the amount of $1,331.68 seeking payment of the freight for the chairs.

[27] On March 4, 2021, Ms. Lo sent Mr. Sekhon an email to advise of the delivery schedule for his two orders, stating as follows:

a) the chairs would be ready for shipment by the end of April or early May; and

b) the case goods would be ready for shipping by early April and scheduled to load in the second week of April, with the expectation that the vessel will take about a month from then to arrive in Vancouver.

[28] Ms. Lo concluded the email by asking Mr. Sekhon to confirm that he will be ready to accept delivery of the order from the middle to the end of May, so that she could proceed to schedule the shipment. Mr. Sekhon responded later that same day to confirm that her proposed timing was acceptable to him.

[29] In emails sent March 17-19, 2021, Ms. Lo requested “final payment on the account” for the case goods in the amount of $37,083.85. Having received no response, Ms. Lo reiterated the request on March 31, 2021. Having still received no response as of April 12, 2021, Ms. Lo advised Mr. Sekhon that the loading date for the case goods would now have to be pushed back. She reminded him that VJEI required final payment in full, in order to book passage on the vessel.

[30] Having still received no reply from Mr. Sekhon, Ms. Lo sent Mr. Sekhon another reminder on May 10, 2021, reiterating that VJEI wanted to ship his order as soon as possible but could not do so without receipt of final payment. On May 17, 2021, Ms. Lo notified Mr. Sekhon that VJEI was imposing a “back charge” of $3,000 because the case goods had been ready to be shipped for over a month. Monthly storage charges of $3,000 would, she said, now continue to accrue until final payment was received.

[31] This finally provoked a response from Mr. Sekhon, which came two days later, on May 19, 2021. His interpretation of the contract was that “before shipping” meant after shipping from Asia to Vancouver, but before shipping from Vancouver to Merritt. Relying on that interpretation, he refused to make any further payments “until

the shipment is in Vancouver and we have a definitive date of arrival at our site in Merritt". He threatened legal proceedings if VJEI did not arrange the shipment forthwith on that basis.

[32] On the same day, May 19, 2021, Steve Yeung, VJEI's President, responded to Mr. Sekhon and asked that all future communications go to him. He asserted that payment of the second half of the price for the case goods, or $31,677.91, was due under the contract *before shipping from Asia*. He reiterated that a $3,000 monthly storage charge would continue to be imposed until he made that final payment. The then current balance owing was stated to be $34,677.91. Once that was paid, he said, the shipment would be arranged.

[33] One week later, on May 26, 2021, CMIL wired the sum of $31,677.91 to VJEI.

[34] On May 31, 2021, Mr. Yeung emailed Mr. Sekhon with the subject line "Re: CID 7406 – Request for Final Payment". The email stated as follows:

> Hi Anoop,
>
> To ensure 100% accuracy, we completed a full review of your account and attached your most up to date account statement.
>
> The final amount owning [sic] is **$5,306.25** and is due immediately.
>
> This is the FINAL payment owning [sic] for your casegoods, freight and dining chairs. The dining chairs will be arriving at the vendor's warehouse today and we will require this payment prior to shipping.
>
> Since I have received no response since your payment last week, I would like to remind you of the storage charges that you will incur for both the casegoods and dining chairs if you fail to comply.
>
> Please advise ASAP.
>
> [Emphasis in original.]

[35] It appears to be common ground that the sum of $5,306.25 was indeed paid at that time and acknowledged as received by VJEI on June 8, 2021.

[36] Mr. Hong has attached as exhibits to his affidavit bills of lading showing that the chairs left Richmond on their way to Merritt on June 15, 2021, and that the case goods began their ocean journey from Asia on their way to Vancouver on June 24, 2021. Mr. Sekhon confirmed receipt of the chairs in Merritt on June 28, 2021.

E. The Asia Freight and Storage Disputes

[37] On July 2, 2021, Ms. Lo sent Mr. Sekhon an email to advise that the case goods were expected to arrive in Vancouver on July 16, 2021. On July 26, 2021, she provided an update indicating that the estimated date of arrival was now July 27, 2021.

[38] Mr. Sekhon responded that same day, July 26, 2021, advising Ms. Lo that that he would not be able to accept delivery until the end of August. Ms. Lo responded later that same day advising that VJEI could not control the time of delivery and would not have a container available for him in Vancouver, so he will have to arrange for one himself.

[39] Ms. Sekhon responded by reiterating his refusal to take delivery before the end of August, explaining that the Hotel was fully occupied by wildfire evacuees and all of the storage containers in Merritt were full.

[40] On August 24, 2021, Ms. Lo sent Mr. Sekhon an email to advise that the case goods had arrived in Vancouver and that VJEI had arranged for them to be offloaded and transferred to a storage facility. She attached two new invoices: 21-5319, dated July 21, 2021, in the amount of $11,032 (for additional freight costs said to have been incurred in shipping the case goods from Asia to Vancouver, the so-called “Asia Freight”) and 21-5369, dated August 13, 2021, in the amount of $7,319.20, for the costs incurred by VJEI in moving and storing the case goods after Mr. Sekhon refused to take delivery himself.

[41] Mr. Sekhon refused to pay either invoice. He insisted that the case goods be released to him once he was ready to accept them at the end of August, and that the only amount owing from his end was the cost to ship them from Vancouver to Merritt. VJEI refused to release the case goods without payment of both invoices.

[42] With no payment forthcoming from Mr. Sekhon, Mr. Yeung once again took over communications himself. In an email sent on September 2, 2021, he again sought payment from Mr. Sekhon of the two outstanding invoices in the aggregate

amount of $18,450.89. He reiterated the same demand on September 13, 2021, noting that the “charges are increasing by the week.” By January 3, 2022, VJEI was claiming an outstanding debt of $31,170.70.

III. Litigation History

[43] CMIL commenced this action on June 10, 2022. The notice of civil claim (“NOCC”) originally sought a declaration that CMIL had already paid what it was required to pay to have the case goods delivered to Vancouver, or alternatively, an accounting.

[44] In its response filed July 7, 2022, VJEI asserted, among other things, that CMIL was not a party to the contract and therefore had no standing to bring this action. On August 2, 2022, it filed a counterclaim and third-party claim against Mr. Sekhon personally, seeking damages as follows:

a) Asia Freight in the amount of $11,032; and

b) storage costs of $2,600 plus GST for the period from July 30, 2021 to August 3, 2021.

[45] On October 27, 2022, CMIL filed an interlocutory application seeking an order to allow it to inspect the case goods and to compel VJEI to release them upon CMIL paying $20,000 into court and providing an undertaking as to damages. VJEI opposed the application, asserting that no interlocutory order should be made.

[46] The application came on for hearing before Tammen J. on November 14, 2022. He granted CMIL that order on the terms sought. His oral reasons for judgment begin with the following observations:

> This case in general and this application in particular cries out for some pragmatism. None is evident in the positions taken by [VJEI], nor is any sense of proportionality.

[47] In the end, CMIL did not pay the money into court and did not take delivery as contemplated by that order. Instead, in late November 2022, CMIL and Mr. Sekhon

sold their interest in the Hotel to a third party, leaving them without any need for the case goods. On December 1, 2022, their counsel wrote to VJEI to advise that CMIL would no longer be seeking delivery. Instead, it was electing to treat the contract as repudiated and would be seeking damages for nondelivery under ss. 31 and 54 of the *Sale of Goods Act*, R.S.B.C. 1996, c 410 [*SGA*]. On December 9, 2022, CMIL filed an amended NOCC that, among other things, added a new claim to the prayer for relief, seeking damages in the form of a refund of the sums previously paid by CMIL on account of the case goods.

[48] On April 19, 2023, VJEI sold the case goods to a third party for $40,320. As of October 5, 2023, it was demanding payment of $37,442.70, which was said to reflect the amount outstanding, not including interest, administration and insurance fees, after crediting Mr. Sekhon with the $40,320 received for the case goods.

[49] On March 3, 2023, VJEI amended its counterclaim and third-party notice. Among other things, it added a new claim for payment of interest at 36% per annum, a $75 administration fee and a penalty of $500 per day charge for the first five days of storage and $1,000 per day thereafter, yielding a revised total amount claimed to be owing of $854,216.84.

IV. Discussion

A. Suitability for Summary Trial

[50] The test to be applied in determining whether an action lends itself to summary adjudication under R. 9-7 of the *SCCR* was summarised conveniently in *Gichuru v. Pallai*, 2013 BCCA 60, where D. Smith J.A. writing for the Court, stated as follows:

> [30] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), the court confirmed that the court under this rule "tries the issues raised by the pleadings on affidavits", that "a triable issue or arguable defence will not always defeat a summary trial application", and that "cases will be decided summarily if the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law" provided that the judge does not find "it is unjust to do so" (p. 211). In determining the latter issue (whether it would be unjust to

proceed summarily), the Chief Justice identified a number of relevant factors to consider (at p. 215):

> In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, *inter alia*, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

[31] To this list has been added other factors including the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices: *Dahl v. Royal Bank of Canada et al.,* 2005 BCSC 1263 at para. 12, upheld on appeal at 2006 BCCA 369.

[32] All parties to an action must come to a summary trial hearing prepared to prove their claim, or defence, as judgment may be granted in favour of any party, regardless of which party has brought the application, unless the judge concludes that he or she is unable to find the facts necessary to decide the issues or is of the view that it would be unjust to decide the issues in this manner. This requirement was underscored by Madam Justice Newbury in *Everest Canadian Properties Ltd. v. Mallmann,* 2008 BCCA 275:

> [34] It is trite law that where an application for summary determination under Rule 18A is set down, the parties are obliged to take every reasonable step to put themselves in the best position possible. As this court noted in *Anglo Canadian Shipping Co. v. Pulp, Paper & Woodworkers of Canada, Local 8* (1988) 27 B.C.L.R. (2d) 378 (B.C.C.A.) at 382, a party cannot, by failing to take such steps, frustrate the benefits of the summary trial process. Where the application is brought by a plaintiff, the defendant may not simply insist on a full trial in hopes that with the benefit of *viva voce* evidence, 'something might turn up': see *Hamilton v. Sutherland* (1992), 68 B.C.L.R. (2d) 115, [1992] 5 W.W.R. 151 (B.C.C.A.) at paras. 66-7. The same is true of a plaintiff where the defence has brought the R. 18A motion.

[Emphasis added by D. Smith J.A.]

[51] In this case, all parties seek to have the entire action resolved by way of summary trial. I agree that the requisite findings of fact can be made on the record before me, and that it would not be unjust to grant final judgment now.

B. CMIL's Claim

[52] CMIL claims damages in the amount of $68,662.07 for nondelivery pursuant to ss. 31 and 54 of the *SGA*. Those provisions state as follows:

> Duties of seller and buyer
>
> 31 It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.
>
> …
>
> Damages for nondelivery
>
> 54 (1) If the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for nondelivery.
>
> (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.
>
> (3) If there is an available market for the goods in question, the measure of damages is to be ascertained, unless there is evidence to the contrary, by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was set, then at the time of the refusal to deliver.

[53] In order to obtain judgment on that claim, CMIL must first demonstrate that it has standing to seek that relief as the "buyer" under the contract.

[54] In arguing that CMIL lacks such standing, VJEI relies on the "Standard Terms and Conditions" (the "STCs") that were incorporated by reference into both the September 25, 2020 Case Goods Quote and the January 15, 2021 Case Goods Quote. CMIL does not dispute that the STCs form part of the contract. Indeed, both it and Mr. Sekhon have expressly relied on them in pleading and arguing their own case.

[55] In Section 1 (General) of the STCs, the term "Buyer" is defined in s. 1.3 to mean "the party placing the Order and to whom Goods (as defined below) are sold by the Seller". Section 1.4 states that "[t]he Buyer is identified by that party's full legal name and signature in the box marked 'Buyer' in the Order". Section 1.5 states as follows:

> If the Buyer is a corporation or partnership, the signatory must identify themselves as an authorized signatory of same, and list their job title and the full legal name of the Buyer with the box marked "Buyer" in the Order; otherwise, the signatory is the Buyer and is personally liable to the Seller for full payment.

[56] VJEI also relies on the decision of this court in *Very Jazzroo Enterprises Incorporated v. Patel*, 2022 BCSC 2131. There, Stephens J. held the defendant, Mr. Patel, liable personally as buyer under his contract with VJEI, despite Mr. Patel's contention that he was contracting on behalf of a corporation, for the following reasons:

a) the company was not referred to in his dealings with VJEI nor in any of the correspondence that passed between the parties; and

b) Mr. Patel signed the contract in his own name without referring to the corporate name.

[57] CMIL has not provided sufficient reason for this court to reach a different conclusion in this case. CMIL argues that, unlike Mr. Patel, it was indeed involved in the dealings between Mr. Sekhon and VJEI because it made at least two of the wire payments called for under the contract. I am not persuaded that that fact alone is sufficient to overcome the clear wording of the STCs so as to make CMIL the buyer, rather than or in addition to Mr. Sekhon.

[58] CMIL also argues that this is a "non-issue" because both it and Mr. Sekhon have acknowledged that they are jointly and severally liable to VJEI for any breach of contract as buyer. In my view, that submission misses the point. It is simply not open to a stranger to a contract, like CMIL, to sue on it, in the absence of an exception to the privity rule, such as trust or agency: *Holmes v. United Furniture Warehouse GP*, 2012 BCCA 227. No such exception is pleaded, argued or attested in the evidence here.

[59] In any event, regardless of whether the buyer is Mr. Sekhon or CMIL, CMIL's claim also fails because it has not established that VJEI wrongfully neglected or

refused to deliver the case goods at any time when the buyer was willing and prepared to take them in accordance with the terms of the contract.

[60] CMIL argues that the contract required VJEI to deliver in Vancouver in mid-to-late May 2021, as the parties had agreed in the exchange of emails between Ms. Lo and Mr. Sekhon on March 4, 2021. However, I agree with VJEI that the delay in delivery between then and late July was attributable essentially to Mr. Sekhon's refusal to effect payment in full prior to shipment, as required by the contract.

[61] Section 11 of the STCs states as follows:

> 11. TERMS OF PAYMENT
>
> 1.Unless otherwise specified within the Order or agreed to by the Seller in writing, full payment (in excess of the Deposit) for all Goods, together with freight and/or shipping and any other related expenses and charges, shall be made Ten (10) business days prior to the shipment of the Goods to the Buyer. No goods will be released by the Seller for shipment to the Buyer unless and until payment in full for all Goods, together with freight and/or shipping costs and other potential related charges, is received by the Seller, unless otherwise agreed to in writing by the Seller. For any type of freight delivery or shipping, from anywhere to anywhere in the world the following terms will apply over and above any other terms specific to the order: In the event that shipping rates increase after A) The seller quoted them to the buyer, or B) After the buyer has paid for shipping based on the previously quoted rate, the buyer is required to pay either the increased shipping rate [or] the differential (if payment of the previous rate has been effected), prior to shipping. The seller is not liable and buyer indemnifies seller from any claims in respect of damages flowing from delayed shipping as the result of any increase in shipping costs in respect to the order.
>
> …
>
> 11. Asian Shipments: Seller will invoice Buyer of the full amount due and owing Fifteen (15) Business Days prior to loading at the designated port in Asia. Seller must subsequently receive payment in full, inclusive of all freight, duties, tariffs, penalties and taxes, Ten (10) Business Days prior to the Goods being loaded. If the Buyer fails to make full payment prior to the deadline, the shipping date will be lost and it may take up to Fifteen (15) Business Days before the Seller can reschedule a date for delivery. All Goods placed into storage as the result of Buyer delay will be placed in as many Forty (40) Foot High-Cube containers as Seller, at its sole discretion, may require, and storage charges will be passed on to the Buyer, plus a Seventy Five ($75.00) Dollar Administration Fee, and added to the amount that the Buyer must pay prior to delivery. In the event that Buyer thereafter requests additional storage time or modifications to the delivery of some or all of the Goods, any additional charges, plus a Seventy Five ($75.00) Dollar Administration Fee per change, must be paid by the Buyer to the Seller prior to shipment. Seller

> accepts no responsibility for any damage or loss to the Buyer resulting from the storage of the Goods, including foreseeable damages from any delay. The Buyer is responsible for insuring the Goods while they are in storage.
>
> [Emphasis added.]

[62] When VJEI tried to effect delivery in late July upon arrival of the case goods in Vancouver, Mr. Sekhon refused to accept them. He may have had very good reasons for doing so, having regard to the unforeseen impacts of the wildfires that were then ravaging the interior of the province, but that does not mean that he had the right, by refusing to take delivery immediately, to simply transfer to VJEI the cost of taking delivery later.

[63] In late August or early September 2021, Mr. Sekhon was communicating his willingness to take delivery at that time. However, by then, VJEI had incurred handling and storage costs for which it was entitled under the contract to be reimbursed.

[64] Section 13 of the STCs states as follows:

> 1. "Shipping and Handling Costs" means all costs, as determined by the Seller at its sole discretion, to be paid or reimbursed by the Buyer in relation to the transportation and handling of the Goods which also includes, without limitation, fork lifts, lift gates, demurrage charges, crating and/or boxing fees, storage charges, as well as other costs incurred if the Buyer does not take immediate possession of the Goods when they arrive at their destination and fees for expedited service.
>
> 2. Shipping terms on Goods shall furthermore be fulfilled on the terms as set out below, which are subject to change by the Seller at its sole discretion without the requirement of notice to the Buyer:
>
> | Good type | Delivery Location | Shipping terms |
> |---|---|---|
> | Case goods – Asia | Mainland USA | DDP – Delivered Duty Paid |
> | Canada, Hawaii, Alaska | DDU-Delivered Duty Unpaid (to port, not property) | |
>
> …
>
> 6. <u>After an Estimated Shipping Date is provided to the Buyer, all Goods not accepted by the Buyer on delivery, or not paid for in full by the Buyer prior to shipment, so that in either event delivery is unable to be fulfilled, will be re-routed at the Buyer's expense and will be subject to storage and or demurrage charges, or both, at the Buyer's expense, as calculated and charged by the Seller at its sole discretion</u>. If the Seller is required to pay any

> storage or demerge charges after the Goods have reached North America as the result of any failure or delay by the Buyer, a fee of Five Hundred ($500) Dollars per day for the first Five (5) Days and One Thousand ($1,000.00) Dollars per day thereafter will apply. All expenses, costs and charges incurred by the Seller as the result of any Goods demurred by the Buyer will require payment to the Seller before the Goods are released to the Buyer.
>
> [Emphasis added.]

[65] By refusing to reimburse VJEI for any part of those costs, the buyer was in breach of the contract and therefore in no position to demand release of the case goods without first effecting payment and thereby bringing itself into compliance. I am therefore not persuaded that VJEI ever wrongfully neglected or refused to deliver in accordance with the terms of the contract when called upon to do so, so as to render it liable to the buyer under the *SGA*.

[66] I appreciate that the effect of my conclusion is that the buyer is left having paid the entire purchase price for the case goods, while receiving nothing in return. Conversely, VJEI will have effectively been paid twice for the same case goods: once by the buyer prior to shipment (in the amount of $68,662.07) and again when VJEI sold them after the buyer communicated its election to repudiate the contract (in the amount of $40,320).

[67] Nevertheless, it does not follow that the buyer is entitled by virtue of those facts to a refund of the purchase price. CMIL has not advanced a claim in restitution, but rather for damages flowing from a failure to deliver pursuant to the *SGA*. In support of that claim, CMIL cites G.H.L. Fridman, *Sale of Goods in Canada* (6th ed), where the following is stated at p. 353, under the heading “Recovery of Money”:

> Sometimes the buyer has paid money to the seller in advance of delivery of the goods. This may consist of the entire purchase price or a smaller amount. Where the whole purchase price has been prepaid the failure of the seller to deliver any goods … will also entitle the buyer to claim the return of such payment …

[68] I have omitted the footnotes added to that extract. The one appearing at the end of that last quoted sentence cites *Gunner Industries Ltd. v. HyPower Systems Inc.* (1994), 127 Sask. R. 194 (Q.B.), as authority for that proposition, but then adds

this: “The buyer can not recover the purchase price if he has not repudiated the contract”, citing *Grand Falls Steel Building Ltd. v. Victor Bernard & Sons Ltd*. (1990), 110 N.B.R. (2d) 424 (C.A.).

[69] In this case, the buyer did not elect to treat the contract as repudiated until December 1, 2022, some 16 months after delivery was supposed to have occurred. In the meantime, VJEI was, as the buyer knew, continuing to incur significant additional sunk costs of its own to store the case goods, making the buyer’s delay an inherently unreasonable one. An aggrieved party’s election to treat the contract as at an end must be timely if it is to be considered effective (*Anthem Crestpoint Tillicum Holdings Ltd. v. Hudson’s Bay Company ULC Compagnie de la Baie D’Hudson SRI*, 2022 BCCA 166; *Kaur v. Bajwa*, 2020 BCCA 310) and this one was not.

[70] For all those reasons, I have concluded that CMIL’s claim must be dismissed.

C. VJEI’s Counterclaim and Third-Party Claim

[71] CMIL and Mr. Sekhon acknowledge they are jointly and severally liable for any liability that either of them may have to VJEI as buyer under the contract.

[72] VJEI claims damages against them under ss. 41, 52 and 53 of *SGA*, in the amount of $854,216.84. Those provisions state as follows:

> **Liability of buyer for neglecting or refusing to take delivery of goods**
>
> **41** (1) When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after the request take delivery of the goods, the buyer is liable to the seller for
>
> (a) any loss occasioned by the buyer's neglect or refusal to take delivery, and
>
> (b) a reasonable charge for the care and custody of the goods.
>
> (2) Nothing in this section affects the rights of the seller if the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.
>
> …
>
> **Action for price**
>
> 52 (1) If, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods

> according to the terms of the contract, the seller may maintain an action against the buyer for the price of the goods.
>
> (2) If, under a contract of sale, the price is payable on a day certain, irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.
>
> **Damages for nonacceptance**
>
> 53 (1) If the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against the buyer for damages for nonacceptance.
>
> (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.
>
> (3) If there is an available market for the goods in question, the measure of damages is to be ascertained, unless there is evidence to the contrary, by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or if no time was set for acceptance, then at the time of the refusal to accept.

[73] The fatal flaw in VJEI's claim is that it has not demonstrated that it had the right under the contract to refuse to release or deliver the case goods to the buyer without prior payment of the Asia Freight.

[74] Section 11.1 of the STCs (cited in full above) includes the following terms:

> For any type of freight delivery or shipping, from anywhere to anywhere in the world the following terms will apply over and above any other terms specific to the order: In the event that shipping rates increase after A) The seller quoted them to the buyer, or B) After the buyer has paid for shipping based on the previously quoted rate, the buyer is required to pay either the increased shipping rate [or] the differential (if payment of the previous rate has been effected), prior to shipping.

[75] Although VJEI separately quoted and invoiced a discrete shipping cost for the chairs, it did neither for the case goods. The "freight" payable to deliver the case goods to Vancouver was never quantified in isolation. Instead, VJEI offered, and the buyer ultimately accepted, an all-inclusive price for the case goods that expressly included freight, at least to Vancouver. In these circumstances, the clause cited above has no application because the seller never quoted a discrete "shipping rate" to the buyer.

[76] Moreover, in demanding that the full price for the case goods be paid before they were shipped from Asia, VJEI repeatedly assured the buyer that the price payable at that time as a condition for shipping would be the “final” one.

[77] VJEI therefore had no right under that provision or otherwise to charge any additional amount, beyond what the buyer had already paid, to ship the case goods to Vancouver. Even if it had such a right, VJEI has adduced no evidence to show that it actually incurred any additional shipping costs beyond those assumed or budgeted in its earlier quotes and invoices, or if so, in what amount.

[78] Having failed to demonstrate that it had the right to charge any amount for Asia Freight, VJEI was in no position to demand that an additional $11,032 be paid for that purpose before it would be willing to release or deliver the case goods to the buyer. It follows that the buyer was, due to VJEI’s own breach of contract, never given a proper opportunity to take delivery in accordance with the contract, so as to render the buyer liable to VJEI under the *SGA* or otherwise.

[79] In the absence of any basis for a finding of liability in favour of VJEI, it is unnecessary to decide whether and to what degree VJEI’s heavily inflated damages claim consists of an unenforceable penalty.

[80] In summary, I have concluded that VJEI’s counterclaim and third-party claim must also be dismissed.

V. Summary and Disposition

[81] All of the claims advanced in this action are dismissed.

[82] Because none of the parties have succeeded in their respective claims, I am inclined to order they will all bear their own costs. If any of the parties wish to have a different order made as to costs on the basis of information of which I have not yet

been made aware, they may file an online requisition within the next 30 days to set down another hearing before for me for that purpose.

"Milman J."