

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Valley Select Foods Inc. v. Lloyd's Underwriters*,  
2023 BCSC 1146

Date: 20230706  
Docket: S238204  
Registry: New Westminster

Between:

**Valley Select Foods Inc. and Cedar View Farms Ltd.**

Plaintiffs

And

**Lloyd's Underwriters**

Defendant

Before: The Honourable Justice Chan

## Reasons for Judgment

Counsel for the Plaintiffs:

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Place and Date of Trial:

Vancouver, B.C.  
June 2, 2023

Place and Date of Judgment:

New Westminster, B.C.  
July 6, 2023

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**Introduction**

[1] Valley Select Foods Inc. and Cedar View Farms Ltd. (“Valley Select”) bring an application for summary trial pursuant to Rule 9-7 of the *Supreme Court Civil Rules* (the “SCCR”). Valley Select seeks a declaration that Lloyd’s Underwriters (“Lloyd’s”) be ordered to indemnify the plaintiffs for their loss from damaged blueberries at their farm, pursuant to an insurance policy issued by Lloyd’s.

[2] Lloyd’s argues this matter is not suitable for summary trial. The main issue is what caused the damage to the blueberries, and Lloyd’s argues this requires the Court to weigh competing expert opinions, which is best done after a conventional trial.

**Factual Background**

[3] The parties have submitted several affidavits for consideration at the summary trial.

[4] I take the following facts from the affidavits. I note these are not findings of fact, but a summary of the evidence presented at this summary trial application.

[5] The core of the dispute is whether damage to Valley Select blueberries from August 1, 2019, when the frozen blueberries became thawed, is covered by an insurance policy issued by Lloyd’s. Valley Select takes the position the damage was caused by a failure of a freezer and covered by the insurance policy, while Lloyd’s takes the position the damage was caused by the processing methods used by Valley Select, and not covered by the insurance policy. Valley Select estimates the loss to be approximately \$1.87 million USD.

[6] Valley Select processes and converts field blueberries into frozen blueberries. On average, Valley Select converts over 20,000,000 lbs of field blueberries into frozen blueberries a year. In 2019, Valley Select leased 31867 Marshall Place, Abbotsford (the “Processing Facility”), as the harvest of blueberries was significantly above average that year.

[7] The lease includes a holding freezer (the "Freezer") at the Processing Facility. The Freezer contains three refrigeration units that are designed to keep the temperature in the Freezer between -18 degrees Celsius and -26 degrees Celsius. Each of the refrigeration units contains multiple compressors that pump refrigerant through the system.

[8] The lease also includes a piece of equipment called OctoFrost, which is a large freezing tunnel that freezes the produce fed through it, specifically blueberries. The freezing method used is called IQF, which stands for individual quick frozen. Valley Select hired two IQF Tunnel Operators familiar with the OctoFrost to continue operating it at the Processing Facility.

[9] These operators are trained to continuously monitor the OctoFrost to detect ice-build up on the refrigeration coils and conveyor belt. Inspection hatches allow visual inspection, and if ice-build up is detected, the employees are trained to remove the interlocking panels and clean them.

[10] After exiting the OctoFrost, the frozen blueberries are packaged and loaded onto skids. The skids are then transferred to the Freezer at the Processing Facility. The Freezer is designed to hold the temperature of the frozen blueberries until they are ready for sale.

[11] From July 14, 2019 to August 1, 2019, Valley Select processed 2,059,800 lbs of frozen blueberries.

[12] Valley Select employs a Fruit Temperature Recording Procedure at the Processing Facility. This requires employees to check the temperature of the blueberries exiting the OctoFrost every 10 to 15 minutes. Random samples are collected and a thermometer probe is inserted into the samples. Once a sample is collected, the Quality Assurance Technician must wait three to five minutes while the temperature is dropping until it reaches consistently the same value. Once the fluctuation of the temperature stops, the fruit sample is taken to the Quality Assurance Lab for grading the blueberry in size, defects and other quality attributes, and the fruit

temperatures are recorded in the Daily Production Score Sheet. From July 14, 2019 to August 1, 2019, the blueberries exiting the OctoFrost were sampled and recorded as averaging below -18 degrees Celsius each day.

[13] If the average temperature of the blueberries exiting the OctoFrost was too high, the Quality Assurance Technicians are trained to alert the IQF Tunnel Operators who would adjust the speed and direction of the conveyor system. Sergio Olano is the Head of Quality Assurance at Valley Select. Mr. Olano deposed that while he was in charge of Quality Assurance in 2019 and 2020, at no time was it detected that a significant number of blueberries were exiting the OctoFrost without being properly frozen.

[14] On August 1, 2019, Parmpaul Singh Sahota, the owner and President of Valley Select, was advised by the manager at the Processing Facility that several employees had noticed that skids of frozen blueberries in the Freezer had collapsed. Mr. Sahota asked that CIMCO Refrigeration be contacted.

[15] On August 1, 2019, Lee Mackenzie, a subcontractor for Valley Select in charge of all construction projects, attended the Processing Facility with Zach Giles of CIMCO Refrigeration to inspect the Freezer. Mr. Mackenzie witnessed Zach Giles open the refrigeration units and inspect the individual compressors. Mr. Mackenzie saw that the sight glass on one of the compressors was flashing, indicating that it is low on charge/refrigerant.

[16] Mr. Mackenzie deposed that “if a compressor is low on refrigerant, it means that the compressor may not have been working as intended to control the temperature in the [F]reezer”.

[17] Mr. Mackenzie deposed that “neither Zach Giles nor I was able to notice any cracks on the compressor that was low on refrigerant”.

[18] Mr. Mackenzie saw Zach Giles fill the compressor completely with refrigerant to test if it would hold the refrigerant and function as intended. Mr. Mackenzie saw

Zach Giles measure the box temperature and he advised Mr. Mackenzie that the box temperature was decreasing.

[19] On August 2, 2019, Mr. Mackenzie returned to the Processing Facility with Zach Giles. Mr. Mackenzie saw the sight glass on the same compressor was flashing again. Zach Giles advised Mr. Mackenzie that “he suspected there was a leak somewhere in the compressor and [they] performed a more detailed check”.

[20] During this more detailed inspection, Mr. Mackenzie noticed two large cracks in the copper tubing of the compressor, right in the middle of the coil. Mr. Mackenzie saw that the tubing had been crushed and damaged.

[21] Mr. Mackenzie saw Zach Giles turn off the system and expose the location where the cracks were located. Mr. Mackenzie approved and witnessed Zach Giles welding over the cracks to fix them.

[22] Mr. Mackenzie saw Zach Giles fill the compressor again with refrigerant. Mr. Mackenzie witnessed Zach Giles measure the box temperature and Zach Giles advised Mr. Mackenzie that “the box temperature was decreasing”.

[23] On August 3, 2019, Mr. Mackenzie and Zach Giles returned to the Processing Facility. On that date, Mr. Mackenzie saw there was no flashing on the sight glass. Mr. Mackenzie saw Zach Giles top off the compressor with a little bit more refrigerant and advised Mr. Mackenzie “that the box temperature was continuing to improve”.

[24] After the repairs, Mr. Mackenzie deposed that he was not aware of any further issues involving the compressor.

[25] Valley Select continued to use the OctoFrost until August 10, 2019, when the blueberry processing concluded for the season. During this time, Valley Select stored the majority of the frozen blueberries in a freezer at a separate facility. From August 2 to August 10, 2019, Valley Select continued to use the OctoFrost to process 931,950 lbs of frozen blueberries.

[26] In 2020, Valley Select used the OctoFrost to process 5,639,480 lbs of frozen blueberries, with no changes made to the procedures. The Freezer was able to hold the temperature of the frozen blueberries with no further issues.

[27] After this incident, a fourth refrigeration unit was added to the Freezer to serve as a backup unit, in case one of the other three refrigeration units fails.

[28] Valley Select filed a claim against Lloyds for the loss of the frozen blueberries from August 1, 2019. The amount of the claim is approximately \$1.87 million USD. The claim was denied by Lloyds, and Valley Select started this action in May 2021 to determine if the loss is covered. The quantum of the loss is to be determined by mandatory dispute resolution pursuant to the *Insurance Act*, RSBC 2012 c. 1.

### **Expert Reports**

#### **(a) Plaintiffs' Expert Report of Ben Desclouds**

[29] Mr. Desclouds is a licensed engineer, with a Bachelor of Engineering and Management, Materials Engineering degree. He is a senior associate in the Materials Failure Group at 30 Forensic Engineering.

[30] He has acted in more than 900 forensic investigations, and was the lead engineer in more than 600 of those investigations as of March 2023. Mr. Desclouds "specializes in analysis of the structure, properties, mechanics, and production of materials, as well as determining the causal factors in their failures". He has participated in a range of investigations including "product and glass failures, corrosion failures, weld and joint failures, failures from component deterioration, cases involving residential and commercial sprinkler and plumbing systems, and the characterization and/or identification of materials".

[31] Mr. Desclouds spoke with Valley Select staff, reviewed materials and conducted a site visit on August 18, 2020. He prepared an initial report on February 26, 2021 and a final report on March 15, 2023. His conclusions are summarized at page one of his final report:

- Cracks in the copper lines of the refrigeration unit (Unit 2), allowed all the refrigerant to escape. Without the refrigerant, the evaporator in the freezer was unable to perform any cooling, significantly reducing the cooling capacity of the freezer. As a result, the temperature of the freezer rose significantly, allowing the frozen blueberries to thaw.
- At the time of the loss, the only significant change in the system from normal operating conditions was the significant reduction in the cooling capacity of the holding freezer. Therefore, the sudden failure of the refrigeration unit in the holding freezer was the cause of the loss of cooling and the product spoilage.
- The subject facility produced a significant amount of blueberries after the refrigeration unit was repaired in 2019 and an even larger amount in 2020. Given that this increased production occurred without any changes to the system other than the refrigeration unit repair, it is our opinion that the incident loss would not have occurred if the refrigeration unit had not failed.
- In our opinion, the production data does not suggest there is an inherent flaw in the way that Valley Select was producing the individually quick frozen (IQF) blueberries.

We disagree with the majority of the Maxwell Claims Services Inc. ("Maxwell") letter and the report by Mr. John Topliss of Refrigeration Components Canada Ltd. (the "Topliss report"):

- Neither report adequately investigated the cause of the refrigeration equipment malfunction, and both dismissed its role in the overall loss.
- Neither report substantiated their claims with calculations or data surrounding the holding freezer and its suspected lack of capacity. The production data shows that the holding freezer did have the capacity to hold the IQF blueberries at the correct temperature.
- Both reports exhibited a lack of understanding and neither acknowledged how parameters of the OctoFrost (the IQF freezer on the production line) could be altered to compensate for changes in the product and equipment's condition throughout the day. As such, both reports made incorrect claims about whether the OctoFrost could produce IQF blueberries at various points in a day.

## **(b) Defendant's Draft Expert Report of John Topliss**

### ***Admissibility of the Expert Report of John Topliss***

[32] The defendant's expert report of John Topliss (the "Topliss Report") is in draft form, and does not meet the mandatory requirements under Rule 11-6(1) of the *SCCR*. This draft report is not signed, does not contain the mandatory certification in Rule 11-2(2) of the *SCCR*, and does not contain instructions provided to the expert.



[33] However, pursuant to Rule 9-7(5)(e)(ii) of the *SCCR*, the Court may order an expert report to be admissible at a summary trial even if it does not conform with Rule 11-6(1) of the *SCCR*.

[34] In my view, the interests of justice require the Topliss Report to be admitted. I find there is no prejudice to the plaintiffs, as they have had the Topliss Report for some time. The plaintiffs' expert was asked to comment on portions of the Topliss Report. I note that much of the Topliss Report has been reproduced in the plaintiffs' expert report in any event.

[35] Due to a serious health issue, Mr. Topliss could not put his draft report into proper court form. The expert reports in this case provide the critical evidence with respect to causation, and the Court requires the assistance of the expert reports from both parties. I find the Topliss Report admissible at this summary trial application.

***Content of the Topliss Report***

[36] The Topliss Report is a four-page report dated December 13, 2019.

[37] Mr. Topliss is the president of Refrigeration Components (RCC) Canada Ltd., with 50 years of experience in industrial refrigeration, including "hundreds of Blast and IQF Freezing Systems".

[38] Mr. Topliss reviewed 14 items relating to production and service records, and conducted two site visits.

[39] Mr. Topliss describes the production process as follows:

The Production Line is designed with a U-Shape Component Layout that provides a continuous flow of blueberries to the IQF Tunnel. Products enter the system and travel through cleaning and wash sections and then are cross-fed by a series of conveyor belts to the entrance to the IQF Tunnel. After the berries have been washed a series of three fans operate to remove accumulated water and moisture prior to entering the freezing section. The blueberries enter the IQF Freezer, travel through the tunnel and leave in a frozen state and then drop into cardboard bins, which when full, are taken by forklift to the holding freezer.

[40] His conclusions are set out on the last page of the report:

### Conclusion to Report

The blueberry IQF product deterioration can be attributed to three main factors:

The incomplete freezing of the blueberries within the OctoFrost tunnel after 8 hours of production run caused the lower grade product outcome. This means when the production run exceeds 8 hours, the core of the individual berries remains unfrozen. Water and moisture on the product prior to entering the freezer tunnel caused the refrigeration coils to prematurely ice up after only 8 hours of run time.

The lack of refrigeration capacity in the Holding Freezer leads to frozen and crust-frozen berries to lose their retained temperature, both IQF berries and Semi-Frozen product had to sacrifice their internal temperature and formed clumps of product where re-freezing occurred.

The overall deterioration started with the 120lb/min cleaning and washing system, after the product left this system it travelled to the drying portion of the conveyor system. The Drying time of 30-40 seconds was insufficient for removing the excess water and moisture which caused water carry-over. The moisture carry-over resulted in moisture residue on the product. This excess moisture led the refrigeration coils, within the OctoFrost Unit, to ice over. The ice build up on these coils reduced the overall freezing capacity within the Tunnel.

Mechanical Failure within the Equipment in the Holding Freezer also contributed to the product deterioration; however, the optimal storage room temperature of the IQF Frozen Berries was never achieved in the Holding Storage Freezer.

### **(c) Response of Desclouds to the Topliss Report**

[41] Mr. Desclouds notes that when Mr. Topliss visited the Processing Facility, it was not in operation.

[42] In response to the Topliss Report, Mr. Desclouds wrote at para. 5.4.4. the following:

The Topliss report made claims about the OctoFrost that were not correct (i.e. that it required a camera), ignored systems that were included to help with snow/ice removal (i.e. snow removal system, extra bedplates), and discounted how many other parameters (i.e., retention time, bed depth) could be altered to accommodate higher than optimal moisture content to ensure IQF blueberries were produced.

The Topliss report equated less production with non-IQF blueberries being formed. However, there was no evidence presented that confirmed this occurred. The quality assurance records pre-loss and reported production post-loss show that the OctoFrost was operating within specification and outputting blueberries that met the desired -18 C temperature. Therefore,

based on the available information, our conclusion is that Valley Select was producing IQF blueberries.

**The Insurance Policy**

[43] The Insurance Policy contains the following clauses with respect to coverage:

“Against all risks of physical loss of or damage to the subject-matter insured from any external cause”.

Special Conditions:

Spoilage Clause

It is noted and agreed that this Policy is specifically extended to include loss and/or damage and/or spoilage and/or deterioration caused by or resulting from breakdown and/or derangement and/or stoppage of refrigerating and/or temperature controlling machinery, including improper maintenance of temperature beyond the control of the Insured.

Process Clause

This insurance remains in full force whilst the subject-matter insured is under any process but in no case shall extend to cover loss or damage thereto solely caused by such process.

**Analysis of Suitability for Summary Trial**

[44] Rule 9-7 of the *SCCR* enables the Court to grant judgment in favour of any party upon hearing a summary trial application.

[45] Under this rule, the Court tries the issue raised by the pleadings on affidavits. A triable issue or arguable defence will not always defeat a summary trial application. The Court will decide the case on a summary trial if the Court is able to find the necessary facts, even though there may be disputed issues, provided it is not unjust to do so. Relevant factors as to whether it is unjust to do so include: the amount of the claim, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case to a conventional trial in relation to the amount involved, the course of the proceedings, the cost of the litigation, the time of the summary trial, whether credibility is a critical factor, whether the summary trial will create unnecessary complexity in the resolution of the dispute, whether the application will result in litigation in slices, and any other matters: *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 30–35.

[46] The onus lies with the party opposing a summary trial application to demonstrate that the matter is not suitable: *Saran v. Cartonio Inc.*, 2020 BCSC 556 at para. 32, aff'd 2020 BCCA 252.

**(a) Can the Court Find the Necessary Facts?**

[47] In order to decide this matter on the merits, the Court needs to be able to find the facts that go to the issue of whether the damage to the blueberries is covered under the insurance policy.

[48] The insurance policy covers against all types of risks from any external cause, as long as it was fortuitous. The plaintiff does not have to prove the exact cause of the loss: *Corp of Dawson Creek (City) v. Zurich Insurance Co.*, 2000 BCCA 158 at paras. 13, 15.

[49] However, the defendant relies on the process clause as an exclusion. The defendant argues coverage is not extended to loss or damage solely caused by the processing methods used by the plaintiffs.

[50] The plaintiffs' expert is of the opinion that the loss was caused by the leak in the tubing of the compressor in one of the refrigeration units in the Freezer, allowing refrigerant to escape. This affected the cooling capacity of the Freezer, and led to the blueberries thawing.

[51] The plaintiffs argue their claim will succeed as long as they prove the loss was due to an external event that was fortuitous. They argue that has been made out by the evidence of the leak in the tubing in the compressor in the Freezer; that was surely an external event that was unintended.

[52] However, the defendant's expert is of the opinion that the loss was caused by improper use of the OctoFrost, including the lack of drying power in the machine, and not enough capacity in the Freezer for the amount of frozen blueberries being stored. The defendant's expert did acknowledge mechanical failure within the equipment in the Freezer contributing to the loss; however, the expert qualifies this by his opinion

that optimal storage room temperature of the blueberries was never achieved in the Freezer.

[53] For the plaintiff's claim to succeed, the Court needs to determine if the loss was caused by an external event that was unintended, or fortuitous: *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33 at para. 47. An intended but ill-advised processing procedure that was the sole cause of the loss would exclude the claim from coverage: *Cooke Aquaculture Inc. v. Continental Casualty Company*, 2020 ONSC 7588 at paras. 11–30.

[54] On the basis of the evidence submitted, the Court cannot determine this issue. While the plaintiffs argue the defendant's expert agreed that mechanical failure in the equipment in the Freezer contributed to the loss, that is qualified by the expert's opinion that even without the mechanical failure, the Freezer was not of optimal temperature to store the frozen blueberries. If the defendant's expert is correct, then it can be argued the sole cause of the loss was due to the processing procedure used by the plaintiffs.

[55] With respect to the problems with ice buildup or other issues in the OctoFrost, the plaintiffs argue that is covered by the spoilage clause. However, if the malfunctioning of the OctoFrost was as a result of the employees using the machine incorrectly - by for example inputting too many blueberries in a short period of time - that can be argued to not fall within the spoilage clause, which covers improper maintenance of temperature beyond the control of the insured. Alternatively, it can be argued to fall under the exclusion of the process clause.

[56] The only evidence on causation are the two expert reports, which offer different opinions on causation. The plaintiffs argue Mr. Topliss is not qualified to provide his opinion, as Mr. Topliss did not inspect the OctoFrost during production. The plaintiffs argue Mr. Topliss has no background in engineering and no formal training that would qualify him to provide an opinion on the cause of the loss. However, I note that Mr. Topliss has expertise in industrial refrigeration, including IQF freezing systems. The plaintiffs' expert has not listed any expertise in refrigeration.

[57] The plaintiffs argue that even if Mr. Topliss' expertise is accepted, the conclusions reached by him are based on incorrect information on how the OctoFrost worked and do not account for the quality assurance steps undertaken by Valley Select to check the temperatures of frozen blueberries exiting the OctoFrost. However, the Court is not in a position to decide if after eight hours of production, the cores of the blueberries were exiting the OctoFrost properly frozen. There is no evidence of whether the temperatures recorded by the quality assurance technicians were temperatures from the outside of the blueberries, or from the core. While the evidence was the blueberries exiting the OctoFrost after the date of the incident and the next season were not damaged, that does not necessarily mean there were no issues on the day of the incident, in light of the evidence of Mr. Topliss.

[58] On the basis of the evidence submitted, the Court is not in a position to choose one opinion over another. Conflicts in expert evidence weigh against suitability for summary trial, particularly where the conflicts leave the Court unable to conclude on an issue in dispute: *Mortifee v. Harvey*, 2022 BCSC 275 at para. 71. In my view, the Court is not in a position at a summary trial to determine these complex questions of causation on the basis of the affidavits. It is also not just for the Court to decide the issue of causation in this manner.

**(b) Other Factors**

[59] With respect to other factors to decide if it will be just to proceed with a summary trial, I note the plaintiffs are claiming a loss of approximately \$1.87 million USD. While the Court will not have to determine quantum as it will be decided pursuant to the mandatory dispute resolution, this is a significant claim. The cost of taking this matter to a five to 10-day trial is not out of proportion to the amount involved. There is no potential prejudice to the plaintiffs from delay that cannot be remedied by payment of interest if their claim is successful. I have not been referred to any urgency concerns which demand this matter be heard by summary trial. This is a complex matter.

**Conclusion**

[60] The plaintiffs' application for summary trial is dismissed. This matter will proceed to a conventional trial.

[61] The costs of this application will be determined by the trial judge.

"Chan J."