SUPREME COURT OF NOVA SCOTIA

Citation: *Cherubini Metal Works Ltd. v. M & J Total Transport & Rigging Inc.*, 2024 NSSC 227

Date: 20240808
Docket: 508901
Registry: Halifax

Between:

Cherubini Metal Works Ltd

Applicant

v.

M & J Total Transport and Rigging Inc.

Respondent

DECISION

Judge:	The Honourable Justice John Bodurtha
Heard:	June 27, 28 & 29, 2023, in Halifax, Nova Scotia
Final Written Submissions:	July 28, 2023
Counsel:	Robert Mroz and Noah Entwisle, for the Applicant Barry Mason, KC, and Laura Neilan, for the Respondent

By the Court:

Background

[1] The Applicant in this matter is Cherubini Metal Works Ltd ("Cherubini"). The Respondent is M & J Total Transport and Rigging ("TTR"). Together they will be referred to as the Parties. Cherubini is a metal and steel fabricator based in Dartmouth, Nova Scotia. TTR provides transport and heavy-lift services throughout Nova Scotia. The Parties have a longstanding history of contracting to work on different construction projects together. These contracts were often informal in nature and not reduced to writing.

[2] In 2019, Cherubini was awarded a contract to build four steel bridges in the City of Toronto (the "Bridges Project"). This project involved constructing heavy bridges in Dartmouth and shipping them by barge to Toronto. In order to build and ship the bridges, Cherubini required approximately 20 heavy lifts of the bridges (the "moves") at various points during the construction process. The moves would occur between 2020 and 2021.

[3] When they submitted a bid for the project, Cherubini asked TTR to provide a quote for their services. When Cherubini was awarded the Bridges Project contract, it contacted TTR and asked them to perform the moves. The Parties disagree about the legal effect of their conversations and agreement. Cherubini argues that the parties entered into a contract for TTR to perform all of the moves for the Bridges Project. TTR says they entered into an agreement to perform the first move, but that all the subsequent moves were subject to TTR's availability.

[4] On July 29, 2019, after communication between the Parties on the rate for TTR's services, Cherubini sent TTR a Purchase Order setting out the equipment that would be required to perform the moves. The listed equipment consisted of self-propelled modular transports ("SPMTs"), which required a differing number of axles or lines for each move, and portable power units ("PPUs"). The Purchase Order did not specify the timeframe that the equipment would be required for, or the amount of equipment that would be necessary for each move, but it provided the rates that would be charged for the equipment and the operating personnel. The rates included a set price for the SPMTs and PPUs and a rate for the number of axles used on the SPMTs.

[5] There are a number of people who were involved in the planning and execution of the moves. Blair Nakatsu and Stuart Herlt were the project coordinators for Cherubini. Jason Jenkins and Jeff Mills coordinated the project for TTR. David McLaughlin was an engineer who worked for TTR and communicated with Cherubini, and related third parties, to plan the moves.

[6] These individuals had conversations between July 2019 and February 2020, discussing the required equipment and the timelines for the moves. TTR arranged to have the necessary equipment shipped to Cherubini's yard from a supplier in Germany, Fahrenholz Industrue Services ("Fahrenholz"). Cherubini made representations to TTR that the moves would begin in early 2020 and would continue until spring 2021. There were numerous alterations to this timeline which created difficulty scheduling the first move.

[7] On August 16, 2020, TTR performed the first move. The next day, TTR contacted Cherubini to confirm dates for the subsequent moves, and asked Cherubini if they would like to reserve the equipment at reduced rates to ensure it would be available when required. TTR advised that it would like to decide about maintaining the equipment by the next day at the latest. Cherubini replied with a tentative schedule for the next few moves but did not comment on reserving the equipment.

[8] On September 4, 2020, TTR shipped the equipment back to its third-party supplier in Germany.

[9] In early September, Renee Gasparetto, an owner of Cherubini, spoke to Jeff Mills, an owner of TTR, about a personnel issue that arose between the parties when an employee left Cherubini to work at TTR. During the conversation Gasparetto made representations that Mills interpreted as a severance of the business relationship between the parties.

[10] On September 29, 2020, Cherubini contacted TTR to confirm dates for the next move. TTR informed them that they had returned the equipment needed to perform that move and had not arranged a replacement because they thought that Cherubini no longer wanted to work with them. Cherubini says it treated this conduct as a repudiation of the contract, which it accepted.

[11] TTR offered to contact other equipment suppliers in the area to determine if they had equipment that could be used to perform the moves. TTR contacted Irving

and determined that they had equipment available to perform the next move and could provide it to TTR at the rates set out in the Purchase Order.

[12] Cherubini chose not to utilize TTR for the second move but contracted with Fagioli Canada Ltd. ("Fagioli") for the second and subsequent moves. Cherubini claims that it cost them significantly more to complete the moves with Fagioli. It claims damages of $248,047.72, which represents the difference between the anticipated cost to complete the moves with TTR based on the Purchase Order rates, and the cost to complete the moves with Fagioli.

Issues

[13]

(a) Were the parties in a contract for TTR to provide heavy lifting services for all of the moves? If so, what were the terms of the contract?

(b) Did TTR breach the contract?

(c) If TTR breached the contract, what damages did Cherubini suffer?

(d) Did Cherubini fail to mitigate their damages?

Evidence

[14] The parties have provided ample submissions in support of their respective positions.

[15] On behalf of Cherubini the Court has received the following:

- Affidavit of Stuart Herlt dated January 14, 2022
- Affidavit of Stuart Herlt dated July 7, 2022
- Affidavit of Mattia Melezi dated January 13, 2022
- Affidavit of Blair Nakatsu dated January 13, 2022

- Reply affidavit of Blair Nakatsu dated February 17, 2022

[16] On behalf of TTR the Court has received the following:

- Affidavit of David McLaughlin court stamped February 4, 2022
- Affidavit of Jeff Mills dated February 3, 2022
- Affidavit of Jason Jenkins court stamped February 3, 2022

[17] The witnesses were cross-examined on their affidavits.

Analysis

Issue (a) - Were the parties in a contract for TTR to provide heavy lifting services for all of the moves? If so, what were the terms?

Positions of the parties

Cherubini

[18] Cherubini argues that there was a contractual relationship and that the circumstances surrounding its formation make clear that the Parties intended TTR to perform all of the moves for the Bridges Project. In support of this position Cherubini relies on emails from Jenkin's to Nakatsu on June 21, 2019, where Jenkins indicates that they will "ramp up" their equipment "as production requires" to move the larger items.

[19] Cherubini says the Purchase Order referred to the project as the "Portland Bridges" project and indicated that TTR would charge rates based on the number of lines required for "each move", implying that TTR was aware that there would be more than one move. It also stated that the terms would be "as usual", suggesting that the parties would rely on their longstanding business relationship to continue to work together for the duration of the project. Cherubini says that the Parties had a history of contracting with each other using "handshake deals", where the terms of their contracts were not expressly set out in writing and were routinely modified when circumstances changed during a project.

[20] Finally, Cherubini argues that TTR's conduct in planning for the moves after the Purchase Order was issued, including inquiring about the equipment required for each bridge, and numerous requests for a schedule of all the moves, showed that TTR accepted and intended to be bound by the Purchase Order, and intended to perform all of the moves.

TTR

[21] TTR views the Purchase Order very differently. It claims that the Purchase Order only represented an agreement as to the price of equipment and services if Cherubini decided to use TTR for the moves. Cherubini was free to choose a different supplier at any time, and TTR was free to refuse work based on their availability. TTR understood that Cherubini required flexibility on the dates of each move. As a result, TTR might not be able to perform specific moves.

[22] The nature of the Parties' relationship was causal, and arrangements for projects with Cherubini typically did not result in formal contracts. However, the basis of this agreement, TTR argues, was that it was understood that the Parties would work together so long as it was mutually beneficial, and either party was free to end the arrangement.

[23] TTR submits that the Purchase Order was not a contract, but only an agreement to agree. The Parties intended to work together on the Bridges Project, but essential terms, like the dates of performance, and the equipment required, would need to be worked out as the project developed.

[24] The Purchase Order, TTR claims, does not set out all of the necessary information to establish a contract for all the moves. It does not reference the equipment required to perform the larger moves, only that required for the smaller moves. The move that TTR performed in August 2020 used larger equipment that was not mentioned in the Purchase Order. Furthermore, the Purchase Order did not provide a timeframe for performing the services, including the notice that would be required to procure the equipment and services. Finally, it did not reference payment terms.

[25] TTR claims that there is no reasonable interpretation of the Purchase Order as a contract, because doing so would bind TTR to performance of services and equipment on demand for an indefinite timeframe, which defies any logical assessment of the Parties' intentions.

Applicable legal principles

Contract formation and terms

[26] In *BC Rail Partnership v Standard Car Truck Co*, 2009 NSSC 240, the Court reviewed the principles of contract formation:

> [20] While the theory of contract creation is sometimes debated, the principles are not complicated. A contract consists of a promise or promises given by a person in exchange for the promise or promises made by the other person. Its existence is a voluntary legally-recognized bargain that gives rise to express and implied enforceable obligations. There must exist, on an objective analysis, a meeting of the minds or consensus *ad item*.

[27] Further explanation of what creates a binding agreement comes from Warner J. in *Alva Construction Ltd v DW Matheson & Sons Contracting Ltd*, 2013 NSSC 352:

> [61] The process of interpretation focuses almost exclusively on what a reasonable person in the position of the offeree would understand by what the offeror said, even though that understanding might be quite different from what the offeror actually meant.
>
> [62] Said differently, words mean what a reasonable person would take them to mean, and the parties' subjective intentions are not considered.
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> …
>
> [65] The fifth of Geoff R. Hall's nine precepts for the interpretation of contracts is particularly relevant to this dispute. Commercial contracts must be interpreted in accordance with sound commercial principles and good business sense. Hall calls it the principle of commercial efficacy. The principle is grounded in the intentions of the parties. It is not determined from the prospective [*sic*] of only one contracting party. It is applied with reference to the entire context - the language of the contract as a whole and the factual matrix.
>
> [66] Hall's sixth precept recognizes that substantive contract law holds that if an agreement's essential terms lack sufficient certainty, because they are too vague or incomplete, there is no binding contract. He observes that the application of this principle can sometimes defeat the intention of the parties and therefore requires the application of the interpretative principle that directs courts to make every effort to find a meaning for a contract, and to avoid, if possible, finding a contract to be void for uncertainty.

Agreement to agree

[28] Cherubini relies on *Mitsui & Co (Point Aconi) Ltd v Jones Power Co*, 2000 NSCA 95, where Cromwell JA (as he then was), writing for the court, discussed the distinction between contracts and agreements to agree:

> [67] An agreement is not incomplete simply because it calls for some further agreement between the parties … or because it provides for the execution of a further formal document… The question is whether the further agreement or documentation is a condition of the bargain, or whether it is simply an indication of the manner in which the contract already made will be implemented. This is a matter of the proper construction of the agreement…

[29] The court in *Mitsui* held that when interpreting an agreement, a judge must "take account of the document as a whole as well as of the 'genesis and aim of the transaction" (para. 67). In doing so, the court considered the history of the parties' relationship to help interpret the provisions of a contract. When determining if the words of the agreement were sufficiently certain and complete to establish an agreement. Cromwell JA reiterated the following principles:

> [81] Where parties reach agreement, courts are reluctant to find that it cannot be given meaning. From early times, the common law has accepted the principle that, where possible, words should be understood so as to give effect to the agreement rather than to destroy it: *verba ita sunt intelligenda ut res magis valeat quam pereat*. This principle was stated by Lord Wright in *Scammell v. Ouston, supra* at 268:
>
> > ... the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation.
>
> [82] The question of certainty does not relate to the correct meaning of the words, but rather to whether the words are capable of being given a reasonably certain meaning by the court…

[30] In *Capital Market Technologies Inc v Prince Edward Island*, 2019 PESC 40, the court provided an overview of other relevant principles on agreements to agree:

> [165] In *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.*, 1991 CanLII 2734, at p.13, the Ontario Court of Appeal held:
>
> > **However, when the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract**; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations

> are to be deferred until a formal contract has been approved and executed, **the original or preliminary agreement can not constitute an enforceable contract. In other words, in such circumstances the "contract to make a contract" is not a contract at all**. The execution of the contemplated formal document is not intended only as a solemn record or memorial of an already complete and binding contract but is essential to the formation of the contract itself.
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> [Emphasis added in original]

[166] After commenting on the *Bawitko* decision, Hall, in his text *Canadian Contractual Interpretation Law*, 3rd ed. (Markham, Ont.: LexisNexis. 2016) noted at p. 207:

> **In other words, there are three separate sub-propositions contained within the basic notion that an agreement to agree is unenforceable. First**, there is no enforceable contract where essential terms have not been agreed but instead have been left by the parties for future agreement. **Second**, there is no enforceable contract where the provisions of what has been agreed are insufficiently certain. **Third**, there is no enforceable contract where the parties intend that a preliminary agreement is not to create binding contractual relations until a subsequent formal document is executed.
>
> [Emphasis added in original]

[31] The court in *Capital Market Technologies Inc.* went on to cite *Georgian Windpower Corp. v. Stelco Inc.*, 2012 ONSC 3759, where that court considered the degree of certainty required to create an enforceable agreement:

> [172] With respect to the contested issues, the court in *Georgian Windpower* concluded, commencing at para. 121, that:
>
> (2) Agreements to agree or negotiate
>
> [121] It has long been held that agreements to agree or negotiate are not enforceable… "The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks necessary certainty."
>
> (3) Essential terms
>
> [122] In order for there to be a binding contract, the parties must agree on all of the essential terms of the agreement…The rationale is similar to that in respect of agreements to agree or negotiate. An agreement which lacks the essential terms is too uncertain to be enforceable.
>
> [123] Where the essential terms have not been settled or agreed upon or where the contract is too general or uncertain to be valid, the agreement is not valid. Similarly, where the understanding or intention of the parties,

> even where there is no uncertainty as to the terms of the agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the initial agreement is not binding…
>
> [124] What constitutes the "essential terms" depends on the subject matter of the contract and what transpired at the time of the alleged agreement…

[32] In *Logikor Inc v Bessey Tools Inc (cob Bessey Tools North America)*, 2013 ONSC 5052, the court held that in commercial contracts the essential terms that require agreement are the "parties, the period, and the price" (para. 29).

[33] To determine if there was sufficient certainty of terms, I must turn to the principles of contractual interpretation.

[34] *Reddick Brothers Masonry Ltd v Hage Investments Ltd*, 2022 NSSC 89, discussed the enforceability of a purchase order. Reddick was employed to do construction work for Hage. The parties signed a purchase order specifying the number of bricks required. During construction Reddick needed to use more bricks, and they charged Hage additional fees that Hage disputed. Justice Coughlan in *Reddick Brothers Masonry Ltd*. reviewed the principles of contract interpretation as set out in *Sattva Capital Corp. v. Creston Molly Corp.*, 2014 SCC 53:

> [24] The approach to be followed when a court is involved in the interpretation of a contract was set out in *Sattva*…, where, in giving the Court's judgment, Rothstein, J. stated at paras. 47-48:
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> > 47 Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, per LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, per Cromwell J.). To do so, a decision-maker must read the 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. …
> >
> > 48 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…
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> [25] Justice Rothstein went on to say contractual interpretation is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix (para. 50).

> [26] The use of surrounding circumstances and the nature of the surrounding circumstances was described by Rothstein, J. at paras. 57-58:
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> > 57 While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and *Hall*, at p. 30)… While 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 (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).
> >
> > 58 The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting…
> >
> > [Emphasis added]

[35] Justice Coughlan determined that the objective intention of the parties was to pay for the number of bricks used, not the number stated in the purchase order. In this case, the Purchase Order sets out the rates at which the equipment is billed but does not specify what equipment would be used for each move.

[36] Justice Coady set out a useful framework for courts addressing interpretation issues in *Pothier v Parkland Fuel Corp*, 2021 NSSC 41 (affirmed at 2022 NSCA 9). After reviewing the law on contractual interpretation, he set out the following roadmap for judges to follow:

> [10]… There are three approaches to contractual interpretation. The first is to decide the dispute on the basis of the language in the contract. If ambiguity remains, resort may be had to the "factual matrix". If ambiguity persists, the Court can then resort to the *contra proferentem rule*.

Analysis

[37] In this case, the Purchase Order forms the basis of the agreement between the parties. Alone, the Purchase Order provides little detail regarding the rights and obligations of the parties. Some terms are vague, such as the agreement being subject to the “as usual” terms. Because of the ambiguity in the Purchase Order, this Court must consider the surrounding circumstances, such as the parties’ communications before the Purchase Order was issued.

[38] There is clear evidence of an intention to contract. However, TTR claims that the essential terms of the contract were not sufficiently certain to establish a legally binding relationship. Following the approach in *Logikor*, I will consider whether there is sufficient certainty regarding the essential terms of the parties, the period, and the price.

The parties

[39] The communications between the Parties prior to the issuance of the Purchase Order establish that they understood Cherubini was going to require a company to perform several moves to complete the Bridges Project.

[40] Cherubini wanted TTR to perform those moves. It is also clear that TTR wanted to perform those moves for Cherubini. While being cross-examined on their affidavits both Jenkins and Nakatsu confirmed these mutual intentions.

[41] During cross-examination the parties demonstrated that although they both preferred TTR to perform all of the moves, Cherubini did not require exclusivity in the relationship. There was nothing in the communications prior to the Purchase Order that suggested the contract required exclusivity. Nakatsu testified that during the planning for the Bridges Project, in June 2020, Cherubini reached out to Fagioli to determine if they were available to perform one of the moves. Nakatsu explained that Cherubini had contemplated using Fagioli for this move because Cherubini was concerned that TTR did not have adequate equipment to perform that move.

[42] I am satisfied that due to the flexible nature of the project there was a mutual intention for TTR to perform all of the moves for Cherubini, subject to limitations on equipment and availability.

The time period

[43] The Parties' communication before the Purchase Order demonstrates that there was a degree of flexibility required regarding when the moves would take place. The affidavits of Herlt and Nakatsu establish that they communicated to TTR that the moves would be conducted throughout 2020 and 2021, but the dates of the moves were subject to change.

[44] The nature of the project required the bridges to be designed and built in coordination with multiple third parties. The moves were to be performed on a

staggered basis as one bridge (or piece of a bridge) was completed. These circumstances make a project like this difficult to plan with precision. I accept that at the time that the Purchase Order was issued, which was before construction of the bridges began, it would not be possible to establish a set time for each of the moves.

[45] The casual relationship between the Parties based on their past practices demonstrates that they were used to modifying performance requirements to accommodate unforeseen circumstances such as delays.

[46] I reject TTR's position that the Purchase Order bound it for a period of indefinite duration. The contract would not apply in perpetuity but would end when all of the moves were performed. Though there was some uncertainty regarding the exact number of moves that were required, there was an understanding that there would be approximately 20 moves.

[47] The lack of explicit reference to the dates of the moves in the Purchase Order does not mean there was uncertainty regarding the essential terms. Cherubini requested TTR to perform numerous heavy lifts for the Bridges Project, and TTR agreed to do so knowing that they would take place over a prolonged period of time as Cherubini constructed the bridges.

[48] There was sufficient certainty regarding the time period over which this contract would apply.

The price

[49] In *Logikor*, the court held that in commercial contexts, price is of particular importance. The court noted:

> [34]… when reading a commercial contract, the reader must be able to ascertain what is going to be charged; that is the price must be ascertained or ascertainable. There must be a specific price or a specific pricing formula. …

[50] In this case, the exact price was not ascertained, but was ascertainable, because the parties agreed to a pricing scheme that could be used for the duration of the project. The values set out in the Purchase Order delineate the price per line and per PPUs, allowing the parties to apply this rate to all of the moves regardless of the number of lines or PPUs used to perform the moves.

[51] Though TTR claims that the Purchase Order did not include the equipment used to perform the heavier lifts, this argument is not persuasive for two reasons. Firstly, the Purchase Order contemplated a pricing scheme based on the number of axles/lines used to perform the lifts. Whether the parties used a six-line model or a four-line model SPMT, or a combination thereof, is not of consequential difference.

[52] Secondly, the email from Jenkins on June 21, 2019, proposes the rates to be used for the equipment. The email says that the "equipment bases" will be two six-line models with two PPUs. I take that to mean that this represents the minimum equipment that will be used for each move, but that more equipment could be used. This is supported by Jenkins' statement earlier in the same email indicating a willingness to ramp up equipment use for the move of the larger bridge pieces.

[53] The pricing scheme that was set out in the Purchase Order was sufficient to establish the price of TTR's services.

Implied terms

[54] If the Court is to find that the Purchase Order was a contract, there are three terms that must be implied to give effect to the parties' intentions and provide commercial efficacy to the contract. These terms can be implied based on the parties' communications and conduct:

> A. Cherubini was required to provide TTR with sufficient notice regarding the anticipated dates for the moves in order for TTR to make itself and its equipment available to perform the moves at the rates quoted in the Purchase Order;
>
> B. TTR would make reasonable efforts to secure equipment and have it available to perform moves on the scheduled move dates; and
>
> C. If TTR was not available to perform a move, it would provide Cherubini with sufficient notice for it to find another supplier.

[55] Due to the flexible nature of the project and the parties' informal business relationship there must be an implied term that Cherubini would provide TTR with reasonable notice of the move dates for it to secure the necessary equipment to perform the moves. In Cherubini's correspondence with TTR, Cherubini consistently inquired about TTR's availability on proposed move dates. For example, in Herlt's September 29, 2020, email to Jenkins, Cherubini advises of the tentative dates required for the next two moves, and ends the email by asking TTR "What is your availability looking like?" (Exhibit P of the Herlt January 2022

affidavit). This question suggests that Cherubini was aware that TTR's availability to perform the moves was subject to the availability of the equipment.

[56] Cherubini's conversations with Fagioli in June 2020, demonstrate that the contract did not require TTR to perform a move if they did not have access to the necessary equipment to perform that move. These conversations demonstrate that both TTR and Cherubini were aware of the flexibility required for this project, and the common understanding that it might not be possible for TTR to perform every move.

[57] There was also evidence before the court regarding timeframes during which the bridges could be shipped to their final destination in Toronto having regard to shipping lane closures and Cherubini's production area which required one bridge to be moved before construction could begin on another bridge. Given these constraints, it also must be an implied term that if TTR was unable to perform a move, they would provide Cherubini with sufficient notice to secure services from another provider without causing a delay that would impact Cherubini's ability to perform its contractual obligations.

[58] The implied terms set out above are required to make commercial sense of the contract and to give effect to the intentions of the parties.

[59] There is nothing in the Purchase Order or email correspondence that specifies what equipment supplier TTR was to use. TTR was contracted to perform the work, but this did not limit their ability to contract with third-party suppliers to obtain equipment in order to perform their duties under the contract. For greater certainty, I find there is no implied term limiting the suppliers that TTR could use to perform the work.

Did TTR accept the Purchase Order through its conduct?

[60] TTR argues that the Purchase Order cannot be a contract because they did not sign it. Cherubini argues that TTR's conduct demonstrates that it accepted that the Purchase Order created a legal relationship. The comments of the court in *Timberwolf Log Trading Ltd v Columbia National Investments Ltd*, 2011 BCSC 864, are useful here:

> [63] In *Remington Energy Ltd. v. British Columbia Hydro and Power Authority*, 2005 BCCA 191 at para. 31, the Court of Appeal affirmed the trial judge's summary of the law as follows:

> (a) In order to bring a contract into existence, there must be a communication of the parties' intention by outward expression. The test is objective - have the parties indicated to the objective reasonable bystander, their intention to contract and the terms of such contract? G.H.L. Fridman, *The Law of Contract in Canada 4th ed.*, (Toronto, Carswell, 1999) at 16 & 17;
>
> (b) The parties must have evinced clear agreement on the essential terms of the intended contract: Fridman, *supra*, at 20;
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> (c) The conduct of a party may be considered to determine the existence of a binding contract: see *J.K. Campbell & Associates Ltd. v. Lahr Construction Ltd. et al* (1987), 27 C.L.R. 220 (B.C.S.C.) at 224, Cohen J.
>
> (d) Acceptance of an offer may be implied from conduct, the test being objective: see *Saint John Tug Boat Co. Ltd. v. Irving Refinery Ltd.* (1964), 46 D.L.R. (2d) 1 at 7, [1964] S.C.R. 614 (SCC), Ritchie, J. speaking for the court.

[64] In Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto: Carswell, 2006) at p. 15, the author articulated the test for agreement as follows:

> ... the test of agreement for legal purposes is whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract. The law is concerned not with the parties' intentions but with their manifested intentions. It is not what an individual party believed or understood was the meaning of what the other party said or did that is the criterion of agreement; it is whether a reasonable man in the situation of that party would have believed and understood that the other party was consenting to the identical terms. ...
>
> [Emphasis added]

[61] The objective element of this test is a useful measure of dealing with the Purchase Order and whether it meets the criteria for establishing a contract. The actions of the parties after the Purchase Order was issued demonstrates an objective intention to contract. The Parties planned what equipment would be needed for each move, including engaging with third parties to determine equipment requirements. The Parties discussed scheduling and determined a rough plan for equipment storage in the short term and for later in the project. They contacted each other numerous times to plan for the first move, which TTR completed. All these actions suggest that a reasonable person in Cherubini's or TTR's situation would have believed that they had contracted with each other to complete the moves for the Bridges Project. I am satisfied that TTR's conduct constituted acceptance of the contract.

Issue (b) - Did TTR breach the contract?

Positions of the parties

Cherubini

[62] Cherubini says the Bridges Project involved consultation and coordination with several companies, which made specifying move dates impossible to do with precision.

[63] When TTR asked for an updated schedule on August 17, 2020, Cherubini provided a tentative timeline for the moves. TTR, Cherubini says, never raised an issue with the proposed schedule or indicated that it would not be available to perform the moves, despite making arrangements to have the equipment shipped back to Germany around this time. Indeed, Cherubini says that TTR did not inform them that the equipment was no longer available until September 29, 2020, when Cherubini reached out to confirm move dates.

[64] Cherubini denies that Mills's phone conversation with Gasparetto impacted the Bridges Project because neither of these individuals were involved in the day-to-day oversight of the project. Cherubini claims that this conversation was extraneous to the bridge projects and argues that the conversation did not result in Gasparetto terminating the parties' business relationship.

[65] TTR shipped their equipment back to Germany and did not obtain replacement equipment to perform the subsequent moves. This, Cherubini claims, was an anticipatory breach of the contract, amounting to a repudiation, because the root of the contract (and its sole purpose) was that TTR would obtain equipment that would be used to move the bridges.

[66] Cherubini also says that if this court does not find that sending the equipment overseas was an anticipatory breach, TTR nevertheless committed two other breaches: 1) failing to make new equipment available in time for the second move, and 2) requiring Cherubini to lease the equipment. Cherubini claims that TTR refused to perform its obligations by requiring Cherubini to meet conditions that were not in the contract. TTR performed the first move without insisting that Cherubini lease the equipment, evincing that this was not a term of the contract.

[67] In order to fulfill their obligations to other parties and complete the project, Cherubini says it had to act quickly to find replacement equipment to perform the moves.

[68] There were initial conversations where TTR sought to obtain replacement equipment for the moves. Cherubini says it also sought to obtain replacement equipment, and both parties were in contact with Fagioli as an equipment provider. Cherubini claims that TTR told them it would be more cost effective for Cherubini to engage with Fagioli directly rather than continue to work with TTR who would charge a markup for the same equipment.

TTR

[69] TTR submits that if there was a binding contract, any services to be provided in relation to the moves were subject to TTR's availability.

[70] There were numerous delays on scheduling the first move. It had originally been scheduled for February 2020 but did not happen until August 2020. TTR claims that Cherubini failed to provide reasonable and timely notice of the changes in move dates.

[71] TTR submits that during the planning for the moves, Cherubini always inquired whether TTR would be available during the timeframe discussed. TTR attempted to discuss scheduling with Cherubini several times prior to October 2020 and informed them that they would need to reserve the equipment if there were going to be extensive delays between moves.

[72] On July 20, 2020, Jason Jenkins sent an email to Stuart Herlt advising Cherubini that they were "in a position that we must address immediately" because the delays were costing TTR "missed money and opportunities" that they could not afford. The email states that TTR would like to perform the moves, but also states "we need to relook at how we are to preform [sic] and book the lines for you. We need a schedule set forth as soon as possible so we can review and determine cross overs or constraints that you may need to know about".

[73] This email ends by saying "we need you to firm up dates or you need to commit to the equipment ready dates and we can put on lease to you so we can perform to your ready dates". This email, TTR argues, establishes that performance of the moves was contingent on TTR either being told of the move

dates (and reserving the equipment) or Cherubini reserving the equipment so that it could be ready on move dates.

[74] On August 6, 2020, Cherubini wrote to TTR to ask them if they were available to perform the first move. On August 16, TTR performed the move. On August 17, Jenkins sent Cherubini an email asking them for a timeline for the following moves, and asked again about leasing the equipment, because TTR was unable to hold onto it indefinitely. Cherubini did not respond to the inquiry about leasing the equipment. TTR submits that Cherubini's failure to respond indicates that the parties did not have a binding contract that required TTR to provide services on demand, otherwise Cherubini would have indicated that the contract required TTR to perform the moves.

[75] TTR's third-party supplier, Fahrenholz, requested to have their equipment returned by September if it was not being used by TTR. At this time, Cherubini had represented to TTR that the next move would not be performed until mid-October at the earliest. TTR says that having not heard back from Cherubini about leasing the equipment, they decided to return it to Fahrenholz and determined that if they were to perform the next move, they would have the equipment shipped back or source it from a local supplier. TTR say they would have been able to procure alternate equipment from a local company so long as Cherubini gave them adequate notice of the move dates.

[76] In early September 2020, Mr. Mills, received a phone call from Gasparetto. TTR claims that during the phone call, Gasparetto made comments that Mills interpreted as severing the Parties' business relationship. As a result of this conversation, TTR says that it did not expect to receive a request from Cherubini to perform the moves and therefore did not make arrangements with equipment suppliers. TTR did not follow up to see if Cherubini was on schedule for the next projected moves because it assumed that Cherubini would be retaining a different supplier.

[77] McLaughlin, TTR's engineer was told about the conversation with Gasparetto, but hoped that the parties would be able to resolve their issues and continued to coordinate with Cherubini prior to the October move.

[78] After receiving an email from Herlt on September 29, 2020, regarding scheduling the second move, TTR informed Cherubini that it had not made arrangements to obtain equipment, because of the phone call with Gasparetto terminating the Parties' relationship. TTR claims that when Jenkins spoke to

Nakatsu about this issue, Nakatsu did not deny that Gasparetto had terminated the parties' working relationship but said that Cherubini still endeavoured to continue working together on the Bridges Project.

[79] Jenkins offered to make some calls to local suppliers to procure equipment. Nakatsu indicated that they still wanted TTR to perform the moves, but TTR denies that Nakatsu indicated that Cherubini felt that TTR was bound by contract to complete the moves.

[80] TTR says it contacted suppliers and was able to find alternative equipment that would have kept the project on schedule and within budget. TTR was willing and able to perform the next moves. Jenkins contacted Cherubini around October 2, 2020, to advise them of this, but was told that Cherubini had decided to use Fagioli, another heavy lifting company, to perform the moves. Mills deposed that he believes that Cherubini decided to use Fagioli to complete the moves because Gasparetto did not want TTR to work with Cherubini.

[81] TTR argues that Cherubini did not indicate that it wanted TTR to perform any of the subsequent moves. Cherubini did not indicate to TTR that using Fagioli to complete the moves would be more expensive.

[82] TTR says it was willing to continue the parties' working relationship with Cherubini and to perform the moves for the bridges project. TTR argues that it was Cherubini who ended the relationship.

Applicable legal principles

Repudiation

[83] In *Potter v New Brunswick Legal Aid Services Commission*, 2015 SCC 10, Chief Justice McLachlin, writing in dissent but not on this point, made the following comments about repudiation of contracts:

> [139]… Repudiation may also consist of conduct which, when viewed in light of all of the circumstances, shows that, in the mind of a reasonable person viewing the matter objectively, the employer did not intend to be bound in the future by the terms of the contract….
>
> …
>
> [144] The term repudiation refers to the situation in which a breach of contract by one party gives rise to the right of the other party to terminate the contract and

> pursue the available remedies for the breach: J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 676-78. This occurs when one party actually breaches the contract in some very important respect and is said to thereby repudiate the contract. If the other party "accepts" the repudiation, the contract is over. If the other party does not accept the repudiation, the contract continues (subject to various other doctrines). In either case, the non-breaching party can pursue the available remedies which may vary depending on whether that party has accepted the repudiation or affirmed the contract.
>
> [145] There is a wealth of learning about the types of breach that constitute repudiation. Without getting into the details, we may say in brief that a breach is a repudiation of the contract if it is a breach of a contractual condition or of some other sufficiently important term of the contract so that there is a substantial failure of performance: S. M. Waddams, *The Law of Contracts* (6th ed. 2010), at para. 590; McCamus, at pp. 676-77.
>
> …
>
> [149]… An anticipatory breach "occurs when one party manifests, through words or conduct, an intention not to perform or not to be bound by provisions of the agreement that require performance in the future": McCamus, at p. 689; see also A. Swan, with the assistance of J. Adamski, *Canadian Contract Law* (2nd ed. 2009), at § 7.89. When the anticipated future non-observance relates to important terms of the contract or shows an intention not to be bound in the future, the anticipatory breach gives rise to anticipatory repudiation. The focus in such cases is on what the party's words and/or conduct say about future performance of the contract. For example, there will be an anticipatory repudiation if the words and conduct evince an intention to breach a term of the contract which, if actually breached, would constitute repudiation of the contract.

[84] Often the phrase that will be used to describe the type of breach that will give rise to the right of repudiation, is a “fundamental breach”. The starting point to understanding what constitutes a fundamental breach comes from *Hunter Engineering Co v Syncrude Canada Ltd,* [1989] S.C.J. No. 23, [1989] 1 SCR 426, where Wilson J, writing for the majority on this point, held:

> [147] Fundamental breach has been the subject of many judicial definitions. It has been described as "a breach going to the root of the contract" …
>
> [148] The formulation that I prefer is that given by Lord Diplock in *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827 (H.L.), at p. 849. A fundamental breach occurs "Where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract" This is a restrictive definition and rightly so, I believe. As Lord Diplock points out, the usual remedy for breach of a "primary"

> contractual obligation (the thing bargained for) is a concomitant "secondary" obligation to pay damages. The other primary obligations of both parties yet unperformed remain in place. Fundamental breach represents an exception to this rule for it gives to the innocent party an additional remedy, an election to "put an end to all primary obligations of both parties remaining unperformed" (p. 849). It seems to me that this exceptional remedy should be available only in circumstances where the foundation of the contract has been undermined, where the very thing bargained for has not been provided.
>
> [Emphasis added]

[85] Further explanation of what conduct amounts to repudiation is discussed in *New Light Construction Ltd v Smith*, 2020 NSSC 42, where Justice Robertson adopted the definition by G.H.L. Fridman, in *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011):

> [85] Fridman, describes anticipatory breach at 585 and 586:
>
> > Anticipatory breach occurs when a party, by express language or conduct, or as a matter of implication from what he has said or done, repudiates his contractual obligations before they fall due . . .
> >
> > The authorities reveal that, for this type of breach to occur the following must be established: (1) conduct which amounts to a total rejection of the obligations of the contract; (2) lack of justification for such conduct. If, to these, is added the acceptance by the innocent party of the repudiation, then the effect will be to terminate the contract. This does not mean that the repudiating party may be freed from his obligations. It simply means that the innocent party may be freed from his obligations, and may pursue such remedies as would be available to him if the breach had taken place at the time when performance was due.
> >
> > [Emphasis added]

[86] It should be noted that the justification Fridman refers to above, is a legal justification, not moral one. In *Doucette v Giannoulis*, 2006 NSSC 166, there was a dispute about the purchase of a condominium unit. The defendants refused to close the transaction after the plaintiff assaulted them and threatened to burn down the property and kill them. The defendants claimed that this was a such an egregious breach of the plaintiff's good faith obligations that it amounted to a "fundamental breach" allowing them to repudiate the contract. In determining where the fault lay for the contract termination Justice Boudreau held:

> [33] Therefore, the remaining question is whether the actions of Mr. Doucette on March 29, 2005 constituted a fundamental breach of contract so as to provide legal

> justification for the immediate repudiation of the contract by the defendants. When I look at the formulation of the criteria for fundamental breach provided by Wilson J. In *Syncrude et al. v. Hunter et al.*, *supra*, as quoted from Lord Diplock, I am not satisfied that the event in question had "the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract". As Wilson J. stated, "... this exceptional remedy should be available only in circumstances where the foundation of the contract has been undermined, where the very thing bargained for has not been provided."
>
> [34] In the present case the selling party is the corporate defendant and not the Giannoulis brothers personally, although they are in effect the corporate entity. The assault on Stavros Giannoulis, while reprehensible, can be addressed in litigation separately, as it has been in the present counter-claim. The corporate defendant would have received the benefit to which it was entitled upon closing of the sale, namely the purchase price. The result is that while the Giannoulis brothers may have been personally, morally and ethically able to justify refusing to deal further with Mr. Doucette, the corporate defendants were not in the same position, and for the reasons stated, they were not legally entitled to repudiate the Agreement of Purchase and Sale with Mr. Doucette. Therefore, the repudiation also constituted a breach of contract, this one by the defendants. What remedy should flow from this breach by the defendants?
>
> [Emphasis added]

Analysis

[87] The cases above discuss repudiation that arises out of a breach of the fundamental/essential terms of the contract such that the breach deprives the party of substantially the whole benefit of the contract. In this case the benefit the parties contracted for was the movement of bridge pieces. An essential element of that contract was that TTR would perform the moves as required. To do so, TTR needed the appropriate equipment. Having access to the necessary equipment in time for the scheduled move was an essential term of the contract. However, there was no term that required TTR to continuously maintain access to the necessary equipment.

Did TTR breach the contract when it returned the equipment to Fahrenholz?

[88] Cherubini claims that the failure to maintain access to the equipment required to perform the moves amounted to an anticipatory breach of the contract. In *Christopher v United Gulf Developments Ltd*, 2009 NSSC 41, Coady J, noted that:

> [63] A breach of the essential terms of a contract gives rise to the doctrine of repudiation. A party who has reasons to believe that the other party will not perform its obligation does not have to wait until performance is due in order to consider the contract rescinded…

[89] The evidence is that between September and October 2020, TTR did not have the necessary equipment to perform the contract, but that once it was put on notice by Cherubini that it wanted to have TTR perform the next move, TTR secured access to alternative equipment. As noted above, it was not a term of the contract to maintain equipment to perform the moves at all times, only to secure equipment in time to perform the moves on the scheduled dates. In these circumstances, TTR did not breach the contract by sending their equipment back to Fahrenholz. When the equipment was sent back to Germany in early September, it was not required. The evidence of Jenkins establishes that TTR intended to have the equipment shipped back to Nova Scotia when it would be required, or to secure equipment from local suppliers.

What was the impact of the phone call between Gasparetto and Mills?

[90] Mills and Gasparetto both produced affidavits regarding what was said during their phone conversation in September 2020. Both were cross-examined on their affidavits. They presented conflicting evidence about the substance of the conversation.

[91] Where the evidence contradicts, I prefer the evidence of Mills. Mills was calm and collected during his cross-examination and testified in a testified in a clear, candid, and straightforward manner. Mills was not evasive, strategic, hesitant, or biased in her testimony. He recalled the words that Gasparetto said to him, and explained why he took them to mean that Gasparetto was severing ties with TTR, by describing the circumstances leading up to the phone call. Mills also explained that he had had numerous conversations with Gasparetto prior to this phone call, and the tone and substance of this conversation differed significantly from previous conversations. Though Mills gave contradictory testimony about who hung up the phone, I find this does not impeach his credibility regarding the substance of the call.

[92] Conversely, Gasparetto had a challenging time answering questions on cross-examination. He repeated himself numerous times, explaining the background to the dispute, rather than directly answering the questions put to him. He gave contradictory evidence as to how the phone call was arranged and who he

spoke to about the situation prior to, and after, the call. The inconsistencies in Gasparetto's evidence and his inability to recall with accuracy the circumstances surrounding the phone call cause me to doubt his ability to accurately recall the substance of the call.

[93] Given these credibility findings and the reliability of Gasparetto's evidence I find as fact that Gasparetto called Mills a liar during their call and said "your company is out of control. We're done."

[94] The next issue to address is what effect those words had, and whether it was reasonable for Mills to interpret the words as an end to the parties' business relationship. Gasparetto's statements, though they may have offended Mills, are not breaches of the contract.

[95] The evidence indicates that Gasparetto did not intend for the conversation to affect the Bridges Project. I am satisfied that Gasparetto had the authority as the owner of the company to prohibit Cherubini from working with TTR. Though the evidence demonstrates that Gasparetto did prohibit some interactions with TTR, such as by not lending them equipment as had been previously agreed upon, he did not prohibit Herlt or Nakatsu from continuing to work with TTR on the Bridges Project. This is proven from Herlt's and Nakatsu's emails with McLaughlin throughout September 2020, and Herlt's email to Jenkins on September 29, 2020, to confirm dates for the next move. The continued communication between Herlt, Nakatsu, and McLaughlin demonstrate that Cherubini still had intention to work with TTR to perform the moves. The phone call did not sever business relationship between the parties.

[96] However, this phone call does inform the reasonableness of TTR's failure to reserve equipment in advance of the October move. The evidence of Mills and Jenkins is that they thought their business relationship with Cherubini was at an end because of this conversation. Because they thought that Cherubini no longer wanted to work with them, TTR did not take steps to have the equipment available for mid-October, which was the date for the next move that Herlt provided in August.

[97] I note that although McLaughlin responded to Cherubini, he did not have the authority to make arrangements regarding equipment procurement. Nor was he fully informed of the situation between the parties during the time that he had email correspondence with Cherubini.

Did TTR breach the contract by failing to make arrangements to secure equipment for the October moves?

[98] As explained above, I find that it was a term of the contract for Cherubini to provide TTR with reasonable notice of the move dates in order for them to secure equipment. The schedule provided by Herlt in August 2020, provided speculative dates for the anticipated moves, noting that the next move would be in "mid-October" at the earliest. Without confirmation of the move dates, (and with respect to the history of the many delays in scheduling the first move) TTR did not have the necessary information from this email to secure equipment on the dates that it would be required.

[99] Cherubini, not TTR, knew how the project was going and if the moves would occur on the dates set out in the schedule. Therefore, the burden rested upon them to provide TTR with adequate notice of the move dates. That is why Herlt needed to follow up on September 28, 2020, to provide further details about the anticipated move dates in order for TTR to have information to secure equipment at the necessary times.

[100] Because TTR was not provided with notice of the exact move dates until September 29, 2020, it was not a breach for them to have failed to secure equipment at that time.

Was Herlt's email on September 29, 2020, appropriate notice to prepare for the second move?

[101] One of the implied terms of the contract was that Cherubini would provide TTR with reasonable notice of the upcoming moves so that it could secure the necessary equipment to perform the move.

[102] The date for the previous move in August was firmed up with approximately two weeks of notice. TTR had the equipment available and was able to perform the move. There was no indication from either party, in correspondence at the time, or in testimony during the application, that this was insufficient notice. This indicates that two weeks of notice was reasonable under those circumstances.

[103] The email from Herlt on September 29, 2020, stated that one bridge will be done painting on October 16, but might need to be cured for several days, and that the barge to be loaded would arrive on October 26, but would not be ready for loading immediately. This establishes that the next move date would be sometime

after October 16, 2020. By providing notice on September 29, 2020, Cherubini provided more than two weeks of notice. When determining whether this was a reasonable amount of notice this Court must consider the evidence it has before it.

[104] Firstly, Cherubini was under the impression that the equipment required to perform the moves was in the possession of TTR. They did not know that the equipment had been shipped back. Secondly, the evidence of Jason Jenkins was that it would take two-to-three weeks to have the equipment shipped back from Germany, with no guarantee that the equipment would arrive within two weeks. Thirdly, TTR had access to equipment from local suppliers that could be used to perform the move.

[105] As of September 29, 2020, Cherubini was not told that TTR had sent back their equipment. Given that they were unaware that TTR no longer had the equipment in its possession, it was reasonable for them to assume that two weeks of notice for the October move would be sufficient, as it had been in August. The email from Jenkins on August 17, 2020, does not alter Cherubini's notice obligations. This email asks if Cherubini would like to put the equipment on reserve but does not indicate that TTR intended to return the equipment if it was not reserved.

[106] Notice of the upcoming second move on September 29, 2020, was reasonable considering the circumstances.

Did TTR demonstrate an intention not to perform the moves after September 29, 2020?

[107] In *Potter*, McLachlin CJ noted that a reviewing court must consider the words and conduct of the party to determine if they demonstrated an intention not to perform their contractual obligations. If so, this is an anticipatory breach.

[108] In this case, TTR's words and conduct once they were put on notice of the October move date demonstrated an intention to perform their contractual obligations. TTR told Cherubini that they did not have access to Fahrenholz's equipment but would contact local suppliers to secure alternate equipment. They contacted Irving and confirmed that they had equipment that matched the project's specifications and was available. TTR communicated this to Cherubini. These words and actions demonstrated a desire to perform the second move for Cherubini and an intention to honour their agreement.

[109] Furthermore, Nakatsu's correspondence with TTR via email on September 29, 2020, demonstrates that Cherubini did not treat TTR as having breached the contract by sending their equipment back, nor did they interpret this action as a refusal to perform the second move. It was clear that Cherubini still wanted to make the moves happen with TTR. Nakatsu said so in the email, and said they appreciated TTR's willingness to "get the situation resolved" by sourcing alterative equipment.

Did TTR source adequate alternative equipment?

[110] When put on notice of Cherubini's desire to have them perform the second move, TTR sought to obtain replacement equipment. The evidence of Nakatsu differs from the evidence of Jenkins with respect to the financial implications of sourcing alternative equipment, and TTR's willingness to provide equipment. Both testified, and each had some inconsistencies in their recollection.

[111] Nakatsu said Jenkins told him it would be more cost effective for Cherubini to engage with Fagioli to perform the moves rather than continue to work with TTR, who would charge a markup for the equipment. Jenkins stated that he told Nakatsu that they had obtained alternative equipment from Irving and that it could be sourced at the same rates as provided in the Purchase Order.

[112] Jenkins was cross-examined on the conversations with Nakatsu about sourcing alternative equipment between September 29 and October 3, 2020. He was adamant and unshaken on cross-examination that he did not suggest to Nakatsu that Cherubini should use Fagioli to perform the moves rather than TTR. Jenkins's evidence did not include any reference to Fagioli whatsoever. His evidence was that he spoke to Nakatsu about using Irving's equipment and told him that Irving was able to provide the equipment within the same rates outlined in the Purchase Order.

[113] Though Jenkins said in discovery that he did not know the exact financial implications of using Irving's equipment, he clarified on cross-examination that during his initial conversation with Nakatsu on September 29, 2020, when TTR first realized that Cherubini still wanted to work with them, he did not know the financial implications of using a different equipment provider. However, by October 2, 2020, when Jenkins spoke to Nakatsu a second time, he knew "one hundred percent" that the cost to rent from Irving was going to be in accordance with the terms set out in the Purchase Order.

[114] Jenkins's evidence was corroborated by McLaughlin's testimony that he had spoken with Irving about sourcing the equipment. He recalled that Irving had equipment available, that he told Irving about the rates that TTR was charging Cherubini for the equipment, and that Irving confirmed that they could provide equipment inside those rates.

[115] Nakatsu's evidence was inconsistent on several issues, including his description of his interactions and conversations with TTR. In response to several questions Nakatsu was evasive in his answers and attempted to frame responses in a way that would be beneficial to Cherubini's position. For example, Nakatsu was cross-examined on a paragraph in his affidavit where he said that he had told TTR over email that Cherubini was relying on TTR to perform the moves subject to their contract. The email in question did not reference a contract and did not say that Cherubini was relying on TTR. It simply thanked TTR for their willingness to help find alternate equipment suppliers. When the email was presented to Nakatsu, he did not readily agree that the description of the email in his affidavit was different than the substance of the email.

[116] In contrast, Jenkins answered questions straightforwardly despite the possibility that the answers would not be beneficial for TTR. For example, when he readily agreed that TTR stored the equipment in Cherubini's yard for free prior to the first move because it was advantageous to TTR to have the equipment available for other projects that TTR was performing.

[117] For these reasons, where the evidence of Jenkins and Nakatsu differs, I prefer the evidence of Jenkins. I find that as of October 2, 2020, TTR had secured replacement equipment that could be sourced at the rates set out in the Purchase Order and was prepared to perform the second move.

[118] Jenkins readily admitted that they had not determined if TTR was going to be charging Cherubini a markup for Irving's equipment. That issue was not determined by the time that Cherubini decided to use Fagioli to perform the moves, rather than TTR. Cherubini did not provide TTR with an opportunity to make this determination before Cherubini decided not to use their services.

[119] It was Cherubini who decided not to use TTR to perform the moves. TTR demonstrated that they were still willing and able to perform the second move when Cherubini decided to contract with Fagioli. TTR did not breach the contract by securing replacement equipment from Irving.

[120] I have found that TTR did not breach the contract, therefore there is no need for me to consider issues (c) and (d); what damages Cherubini suffered, and whether Cherubini's actions were reasonable mitigation efforts.

Conclusion

[121] I find that TTR did not breach their contractual obligations by failing to maintain access to equipment throughout the Bridges Project. By sourcing replacement equipment from Irving, TTR demonstrated that they were willing and able to perform their contractual duties. Cherubini ended the contractual relationship, not TTR, by choosing to use Fagioli for the remainder of the moves. Cherubini terminated the agreement and is not entitled to damages. Cherubini's claim against TTR is dismissed with costs.

[122] If the parties are unable to reach an agreement on costs, I will receive written submissions within 30 days of the date of this decision.

[123] I would ask counsel for the Respondent to prepare the order.

Bodurtha, J.