IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *XTL Inc. v. FPS Food Process Solutions Corporation,* 2024 BCSC 1581

Date: 20240828
Docket: S197023
Registry: Vancouver

Between:

XTL Inc.

Plaintiff

And

FPS Food Process Solutions Corporation

Defendant

And

XTL Inc.

Defendant by Counterclaim

Before: The Honourable Mr. Justice Gibb-Carsley

Reasons for Judgment

Counsel for the Plaintiff and Defendant by Counterclaim:	J. Zeljkovich
Counsel for the Defendant:	J. Shewfelt
Place and Dates Trial:	New Westminster, B.C. December 11–15, 2023 February 1 and April 5, 2024
Place and Date of Judgment:	New Westminster, B.C. August 28, 2024

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I. Introduction

[1] In this trial, the plaintiff and defendant by counterclaim, XTL Inc. ("XTL") seeks return of the funds it paid to the defendant and plaintiff in the counterclaim, FPS Freezing Process Solutions Corporation ("FPS"), for a large variable retention multi-pass industrial freezer system (the "Freezer") that XTL contracted FPS to build (the "Freezer project" or "project"). The initial contract price for the Freezer was US$3,050,000. XTL paid US$762,500 to FPS as a down payment or partial payment and FPS commenced work on building the Freezer. XTL was unable to obtain financing to complete the project and the Freezer was never completed.

[2] The heart of XTL's claim is what amount, if any, FPS is entitled to set off against the US$762,500 owing to XTL. The parties disagree as to what amount FPS expended on building the Freezer before it was clear that the project was not going to complete.

[3] In respect of XTL's claim for a return of a portion of the amounts paid to FPS, the parties' positions are relatively simple. FPS contends that the amounts it incurred in commencing the manufacture of the Freezer are legitimate, reasonable and appropriate. As I will describe below, the vast majority of the expenses claimed by FPS relate to design and engineering work performed by a New Zealand company, Freezing Solutions Limited ("FSL"). FPS asserts that the expenses it (and FSL) incurred were necessary and appropriate given the requirements to complete the Freezer under the timelines of the project. Further, FPS argues that XTL repeatedly assured them that XTL would get financing to proceed with the project, even after payment deadlines were missed.

[4] XTL contends that once it was clear that XTL had missed payment deadlines and financing was in jeopardy, any additional work undertaken by FPS was done at its own peril. In other words, XTL asserts that FPS did not take sufficient steps to mitigate its losses to curtail the expenses once it was clear the Freezer project was halted. Further, XTL asserts that the costs of the work performed by FSL are inflated. Importantly, XTL asserts that many of the expenses were incurred by FPS

or FSL after FPS had alerted FSL that the Freezer project was suspended because XTL had missed payments. To reiterate, XTL's position is that any work conducted or expenses incurred by FSL (and claimed by FPS) after it was clear that the project would not continue was done at FPS's risk and it is unreasonable to set off those amounts against advances paid by XTL.

[5] In its counterclaim, FPS seeks damages for the amounts it would have earned had XTL not breached the contract. In support of the counterclaim for expectation damages, FPS tendered expert evidence at trial as to what it expected to earn as profit had the project completed. In response to the counterclaim, XTL contends that FPS cannot advance both a claim for reliance damages (a return of the amount it expended on the project) and for expectation damages (the amounts it would have earned had the project completed). In the alternative, XTL argues that the Court should disregard the measure of the expectation damages because the expert was not provided with accurate supporting information to make a proper assessment of the profit FPS would have earned.

[6] As a starting point, in respect of FPS's claim for both reliance and expectation damages, I accept XTL's argument that FPS is unable to advance these claims concurrently. I will describe the basis for this decision in more detail below. Further, I have sufficient concerns regarding the evidence provided by FPS in support for its claim for lost profit that I am not satisfied that the claim has been established with any certainty. As such, I have approached my analysis of this trial with a focus on reviewing FPS's set-off defence against the payments made to it by XTL.

[7] In my view, to assess the amount of FPS's set-off claim I must answer two core questions. First, when was it reasonable for FPS to stop work on the Freezer project? Second, what is the quantum of the expenses incurred by FPS before it should have reasonably stopped work on the Freezer project?

[8] In these reasons for judgment, I will first provide brief background facts for context and then turn to my analysis and determination.

II. Background Facts

[9] To better understand the scale of the Freezer and the Freezer project, I accept the evidence of Justin Lai about the general nature of “carton” freezers. Mr. Lai is currently and was in 2015, FPS’s Vice President – Sales and Marketing and one of its founders. Mr. Lai testified that carton style freezers are large industrial freezers which are essentially the size of a building. Mr. Lai testified that carton freezers were not the usual type of freezer manufactured by FPS. Indeed, FPS had only ever manufactured one carton-style freezer before taking on the Freezer project.

[10] The parties provided an Agreed Statement of Facts which included the following facts:

a) XTL operates transportation, logistics and warehouse facilities throughout the east coast of the United States;

b) FPS is in the business of manufacturing industrial food processing equipment, including freezers;

c) On or about May 4, 2015, XTL entered into an agreement (the "Agreement") with FPS for the purchase of the Freezer;

d) The terms of the Agreement were set out in Order Confirmation No. 81080 issued by FPS and delivered to XTL, which included, *inter alia*, the following terms:

    i. A total sale price of US$3,050,000 for the supply of the Freezer, including equipment and installation services, but excluding taxes, licenses and all special code requirements or permits;

    ii. Payment terms requiring XTL to make the following payments at the following times:

        (1) An immediate down-payment of 15% of the purchase price;

(2) Progress payments of 10% of the purchase price due on the 1sl of each month, commencing June 1, 2015 through December 1, 2015, inclusive;

(3) A progress payment of 5% of the purchase price due January 1, 2016;

(4) Payment of the final 10% of the purchase price due 60 days after start up, but no later than 120 days after the Freezer was ready for shipment; and

iii. An estimate that the Freezer would be ready for shipment within 26 to 32 weeks after the receipt of the order, the down payment, and the approval of layout drawings, dependent on the final scope of the equipment to be supplied.

e) FPS normally designs and engineers its own freezers. However, the Freezer was designed and engineered by a FSL, which by agreement with FPS was responsible for providing all of the engineering drawings and some of the components and parts;

f) On or about May 18, 2015, XTL paid FPS a US$457,500 ($3,050,000 x 15%) down payment for the purchase of the Freezer as required by the Agreement;

g) XTL did not make progress payments of 10% of the purchase price due on the 1st of each month commencing June 1, 2015, through December 1, 2015, inclusive;

h) On or about December 23, 2015, XTL paid FPS US$305,000 for partial payment of the purchase price of the Freezer ($3,050,000 x 10%);

i) By the end of December 2015 at the latest, FPS completed the manufacture of the shelving units for the Freezer. No further physical

manufacturing of the Freezer by FPS occurred after the completion of the shelving units;

j) The total amount received by FPS from XTL under the Agreement was US$762,500;

k) In or about May 2016, XTL requested updated pricing information from FPS for the purpose of securing financing. On or about May 19, 2016, FPS provided XTL with an updated contract price of US$3,100,000;

l) XTL commenced the present action on June 19, 2019, seeking judgment against FPS in the amount of Canadian currency necessary to purchase US$762,500 at a chartered bank located in British Columbia;

m) On September 16, 2019, FPS filed a Response to Civil Claim and a Counterclaim in this action; and

n) The Response to Civil Claim pleads that, subject to the set-off pleaded therein and the damages pleaded in the Counterclaim, FPS admits XTL's claim.

[11] In summary, XTL and FPS entered into the Agreement dated May 4, 2015, for FPS to build the Freezer for XTL. Under the Agreement, XTL was to pay certain amounts at various times towards the final price of the Freezer. As set out in the contract, after making the initial 15% down payment, XTL was to make progress payments of 10% of the purchase price on the 1st of each month, commencing June 1, 2015, through December 1, 2015, inclusive.

[12] XTL paid US$762,500 towards the Freezer project, but its last payment to FPS was made on December 23, 2015. XTL never paid the full amount of the purchase price for the project.

[13] At trial, only FPS called witnesses. The purpose of the testimony provided by the witnesses was to establish the nature of the work done by FPS generally and more specifically how it performed the work, why it performed the work, and the cost

of work it conducted on the Freezer project. FPS also called Mark Peagram, the president of FSL, to testify about the work FSL completed on the Freezer project and why it continued to perform work on the project even after it appeared uncertain that the project would continue.

[14] In respect of the relationship between FPS and FSL, FSL is a distinct corporate entity from FPS. However, the two companies have a close relationship and described themselves in certain contexts as “partners”. As will be evident below, a complicating factor in the dispute between FPS and XTL is that FSL was tasked by FPS to complete most of the manufacturing and engineering of the construction of the Freezer. However, FSL was not a party to any contracts with XTL for the production of the Freezer. Only FPS had a business relationship with FSL. In other words, there is no direct relationship between XTL and FSL, despite FSL playing a significant role in the design and manufacture of the Freezer. Further, FSL was not brought in by way of counterclaim into this proceeding by FPS.

[15] Further, as I understand the evidence, there was no direct communication between XTL and FSL, thus FPS was the conduit for information between the two entities.

III. Discussion and Analysis

A. Credibility

[16] Before analyzing the expenses incurred by FPS on the Freezer, I will comment on XTL’s argument that the court should be cautious in accepting the testimony of the witnesses tendered by FPS.

[17] XTL attacked the credibility of the witnesses called by FPS. Specifically, Mr. Lai and Gladys Leung, a project manager at FPS. In support of its assertion that their evidence should be carefully scrutinized, XTL noted that on the eve of the initial trial set for this matter to commence in January 2023, FPS admitted that it had actually been able to repurpose the shelving units it had manufactured for the Freezer.

[18] Up to that point, FPS had claimed that part of its damages included considerable expense related to manufacturing shelving units for the Freezer that could not be repurposed. FPS provided evidence, under oath, in discovery and affidavits that it was unable to repurpose the shelves and suffered damages related to this expense. However, on the eve of trial, FPS acknowledged it was mistaken because the shelving units had been repurposed, thus mitigating its damages. XTL contends that the false claim relating to the damages incurred because of the shelving units is evidence that FPS's current claim about its losses should be treated with suspicion. XTL also argues that it demonstrates an inaccuracy in FPS's ability to account for expenses and its mitigation of damages.

[19] XTL also pointed to inconsistencies between the testimony of Mr. Lai and Ms. Leung on examinations for discovery and at trial. One example relates to a "costing sheet" prepared by FPS in respect of project costs. In the course of litigation, FPS relied on a costing sheet dated June 2015. However, during the trial it became apparent that there was an updated costing sheet dated August 2015, which was never disclosed in the litigation.

[20] Despite the assertions of XTL that the evidence of the FPS witnesses should be treated skeptically, my assessment of the reliability and credibility of the witnesses at this trial leaves me generally unconcerned as to their credibility. I found that the witnesses testified in a straightforward manner. Further, in my view, the case does not turn in any meaningful way on the credibility or reliability of the witnesses. Instead, the heart of this case is when FPS should have taken steps to mitigate its damages and the costs incurred before and after that time. As I will describe below, I have generally found that this evidence is contained in emails and accounting documents.

[21] While commenting on credibility and reliability of the witnesses presented by FPS, I note that I found Mr. Peagram to be a straightforward and credible witness. As I will describe in more detail, Mr. Peagram testified as to the expenses incurred by FSL on the project and how those expenses were accounted for in the

documentation prepared by FSL. I also acknowledge Mr. Peagram's candour regarding FSL's decision to continue work on the Freezer project despite the concern over XTL's ability to obtain financing. His evidence was that in his experience, and that of Raph Engle, his partner at FSL, was that the project was of such a scale that to stop it and restart it would mean it would be difficult to complete it on time. I accept Mr. Peagram's evidence that starting and halting an engineering project only to restart it later is not efficient nor cost effective. In other words, FSL determined the upside of continuing the project without secured financing outweighed stopping the project to wait for certainty.

[22] In many ways, FSL's decisions shape this litigation. My impression from the evidence at trial was that, perhaps like the start of most business deals, XTL, FPS and FSL all wanted the Freezer project to complete and were optimistic that it would. XTL believed it would secure financing to complete the project and FPS and FSL, for a time, accepted and hoped that XTL would secure financing. Indeed, XTL made representations—which were unsupported by payments—that it was going to secure its financing and move forward with the project. However, at some point, FPS determined that hope and words were not enough and so advised XTL that work would stop on the project until the money owed was paid.

[23] In my view, a determination of that moment in time is central to the resolution of this case.

B. Facts Regarding the Breakdown of the Project

[24] There is no doubt that XTL agreed to the terms of the Agreement and then failed to complete it. While there was no evidence from representatives of XTL before the Court, the available inferences from the documentary evidence and evidence from the witnesses from FPS and FSL is that XTL wanted to complete the project, but was unable to secure sufficient financing to do so. I make no findings as to what actually occurred at XTL as to why it could not go through with the project, but accept for the purposes of my analysis that it intended to have FPS build the Freezer, but was unable to follow through with completion. The evidence is

uncontroverted that after making the initial payment, XTL missed the first progress payment it was to make at June 1, 2015. At this point, FPS would have been aware that the project might be in jeopardy. However, given the practicalities and realities of business, it appears reasonable that although the first progress payment was missed, FPS would not immediately stop work on the project. However, by December 15, 2015, XTL had missed a number of required US$305,000 payments, each representing 10% of the purchase price. Mr. Lai's testimony establishes that by December 2015, there was a real concern at FPS regarding XTL's financing of the project:

> Q: Now, did XTL make the progress payments it was required to make under the contract?
>
> A: No, they did not.
>
> Q: What -- just in terms of the time period of -- from June until December of 2015, was there any consequence from FPS's perspective arising from the failure of XTL to make the progress payments?
>
> A: Not initially. But towards the end of the year when multiple progress payments were missed, that was when issues were brought to attention.
>
> Q: All right. And what was the consequence of that?
>
> A: The project was -- was stopped.
>
> Q: From -- from FPS's perspective?
>
> A: From -- from FPS's perspective.

[25] Mr. Lai also testified that after December 2015, after the shelves were manufactured for the Freezer by FPS in Canada, there was no work performed by FPS on the project:

> Q: And I will -- would you agree with me that there was a decision made at FPS to halt this project if back payments were not received?
>
> A: Yes.
>
> Q: And by October of 2015, shelving components for the XTL freezer that FPS was manufacturing were soon going to be finished; right?
>
> A: Yes.
>
> Q: Okay. And the internal decision at FPS was to finish those shelving units and then wait and see about whether -- whether other payments were going to be made; right?
>
> A: Correct.

> Q: Okay. And those shelving units were completed by December of 2015; right?
>
> A: Correct.
>
> Q: And by the end of December 2015, no additional work was being done by FPS on the XTL project; right?
>
> A: Correct.

[26] A review of the emails between FPS and XTL in December 2015 corroborate Mr. Lai's evidence. The emails exchanged between Ms. Leung and Kenneth Garret of XTL demonstrate that FPS sought payment for the outstanding progress payments for the months of July to December 2015 (of US$305,000 each). The emails also demonstrate that XTL stated that it was working on getting its financing to make the payments. In short, the email exchanges indicate growing concern on the part of FPS that it would not be paid by XTL.

[27] However, in my view, FPS's position regarding the missed payments crystallizes in an email dated January 5, 2016, sent from Ms. Leung to Mr. Garrett. In that email, Ms. Leung writes, "[FPS] will not be able to resume production until we receive further payment".

[28] The language of the January email is unequivocal. FPS tells XTL that it will stop work—and thus stop incurring costs ultimately to be paid by XTL—on the Freezer project. The email sends a clear message that FPS will not continue work on the Freezer until XTL makes further payment. From XTL's perspective, given this communication, it appears reasonable that XTL would understand that FPS had stopped work on the project unless further payment was made. The corollary of this conclusion is that any work FPS continued to perform on the project after January 5, 2016, was undertaken contrary to the message it communicated to XTL. In other words, I conclude that the work and expenses incurred by FPS after January 5, 2016, on the project were expended at the risk that FPS would be unable to recover those costs from XTL.

[29] I acknowledge that XTL made a partial payment of US$305,000 on December 23, 2015. However, given the email of January 5, 2016, is after the December 2015

payment was made by XTL, there can be no confusion that unless XTL made all of the payments it owed FPS for the partial payments as agreed to under the Agreement—or at least one payment after January 5, 2016—FPS would not continue work on the Freezer. I also accept the characterization of XTL's December 23, 2015, payment as described by XTL's counsel as a "drop in the bucket", that could not reasonably be considered to alter FPS's position about the jeopardy of the completion of the project.

[30] Given the foregoing, I conclude that any additional costs incurred by FPS in respect of the project after January 5, 2016, was a business decision made by FPS to hedge against its belief and hope that XTL would ultimately obtain the funding and the project would complete. That business decision carried a risk. The risk, which ultimately materialized, was that XTL would not get financing, the project would not move forward and FPS would not get paid.

[31] In part, my conclusion rests on my finding that XTL, when presented with a definitive statement on January 5, 2016, that FPS would cease work on the Freezer unless payments were made had two options. It could pay the amounts owing as the partial payments, thus, inviting FPS to continue the work, or it could not pay, thus tacitly accepting that FPS had stopped work under the Agreement. In my view, this establishes that XTL accepted that there was some certainty that FPS would not proceed with the Freezer project after January 5, 2016 (thus ceasing incurring additional expenses on the project for which XTL might be responsible) unless and until XTL made further payment.

[32] I also accept that XTL's communications to FPS about the status of the financing can certainly be perceived as sending mixed messages about the state of the project. However, when XTL missed payments despite repeated requests to make the partial payments, FPS was left with a choice to continue with the project based on words and enticements in the hopes the project would go ahead or cease that work and not incur other expenses, thus mitigating a potential loss. Given FPS had indicated clearly to XTL by January 5, 2016, that it would not continue work on

the Freezer until payments were made, to the extent it relied on XTL's assurances that were not backed by payments, FPS did so at its own peril. Put another way, I find that after January 5, 2016, FPS failed to properly mitigate its damages related to the project in respect of any expenses it incurred after that date.

[33] In summary, I am satisfied that by January 5, 2016, any expenses incurred by FPS were incurred against the explicit message it had communicated to XTL that it would not continue work on the Freezer until it received payment. I will now turn to a calculation of the reasonable expenses incurred by FPS on the project up until January 5, 2016. As set out above, FPS's set-off claim consists entirely of amounts incurred by FSL. As such, my analysis necessarily includes an assessment of the reasonableness of FSL's expenses incurred on the project and whether FSL took reasonable steps to mitigate its losses after January 2016.

C. Quantification of FPS's Claim for Reliance Damages

[34] FPS asserts that it has a right to set-off its unmitigated expenses incurred in attempting to complete its obligations under the Agreement. As set out in its final submissions, FPS contends it incurred unmitigated expenses in the amount of CA$479,302.29 (NZ$547,825.25) that it ought to be able to set-off against repayment to XTL of the partial payment of the contract:

(a)	Payments to FSL:		
	June 15, 2015	NZ$237,133.50	CA$200,894.45
	October 29, 2015	NZ$47,426.50	CA$40,184.55
	February 15, 2016	NZ$266,633.25	CA$233,010.85
	Minus shelf drawings	(NZ$3,368.00)	(CA$2,943.30)
	FSL Total:	NZ$547,825.25	CA$471,146.50
(b)	Travel and Expenses:		CA$5,344.21
(c)	Installation Contractor:	(US$2,122.27)	CA$2,811.58
Total Set-Off			CA$479,302.29

[35] I note that FPS has set out its claim based on payments it made to FSL for partial payments of the expected total costs to be incurred by FSL on the Freezer.

As I will discuss below, I have taken a different approach in my attempt to fairly quantify FPS's loss.

[36] I accept that FPS has a duty to take all reasonable steps to mitigate damages and cannot claim damages resulting from a failure to take such steps. A claimant's right to recover damages for losses suffered is subject to the qualification that a defendant cannot be called upon to pay for losses which could have been avoided by the claimant acting reasonably: *Red Deer College v. Michaels* (1975), [1976] 2 S.C.R. 324, 1975 CanLII 15. What is reasonable is a question of fact and depends on the circumstances of each case.

[37] As set out above, I find it is legitimate for FPS to offset expenses it incurred on the project up until January 5, 2016. However, I have difficulty with the methodology adopted by FPS in calculating the amount of the set-off. FPS has based its set-off claim on amounts it paid to FSL based on the percentage of the contract price FPS had with FSL. In my view, these amounts themselves would encompass contemplated work as well as work completed and not actual expenses incurred by FSL. In that respect, I find them not particularly useful for the purposes of calculating the expenses incurred by FSL (and thus FPS) to calculate its set-off damages.

[38] Fortunately however, much of the evidence at trial concerned the expenses actually incurred by FSL. Mr. Peagram provided detailed evidence and reference to accounting documentation setting out FSL's expenses on the project. In my view, using the actual amounts expended by FSL on the project provides a more accurate assessment of the appropriate expenses incurred by FPS (through expenses incurred by FSL) on the project than relying upon payments made by FPS to FSL for partial payments of expected contract prices.

[39] I acknowledge that this was not the methodology provided to me explicitly by either party. However, in my view, it achieves a more accurate assessment of the appropriate amounts that FPS is entitled to set off against the deposits paid by XTL and is based on the evidence presented at trial.

[40] I now turn to that assessment.

[41] I have carefully reviewed the spreadsheet of expenses incurred by FSL to the project ("FSL Expense Spreadsheet") contained at Exhibit 3, Tab 164 and the testimony of Mr. Peagram explaining this document. Mr. Peagram testified that this document showed the summary of costs that were committed and expended on the Freezer project in New Zealand dollars. The source of the information was the accounting software used by FSL. Data regarding the invoices and expenses is inputted into the accounting software and is reproduced in the summary format. The column titled "Committed" is the expected amount to be incurred by FSL and the column titled "Actual" is the actual cost expended by FSL. More specifically, the FSL Expense Spreadsheet sets out various expenses with the following headings:

a) IP license;

b) Draughting;

c) Project management;

d) Structural design;

e) Electrical design and programming;

f) Office overheads;

g) Evaporators incl. design;

h) Manufacture; and

i) Storage costs (estimated only).

[42] The total of the "Actual" expenses incurred by FSL with a date range of May 31, 2015 to August 31, 2017, without any deductions is NZ$631,608. I have reviewed these expenses and accept that they were legitimately incurred by FSL on the project. However, for the reasons set out above, I conclude that any expense incurred after January 5, 2016, should be disallowed as part of FPS's set-off claim.

Based on the foregoing, by eliminating the expenses incurred after January 2016, I reduce the expenses claimed by FSL (and claimed as set off by FPS) by the following amounts:

a) Draughting – NZ$37,700;

b) Project management – NZ$24,222;

c) Evaporators incl. design – NZ$24,000; and

d) Manufacture – NZ$78,535.

[43] On the FSL Expense Spreadsheet, FSL has claimed Office Overheads in the amount of NZ$135,179. I accept that based on its accounting practices, FSL apportions the general office expenses to projects upon which it is working. In respect of this expense Mr. Peagram testified:

> A: Yes. So we -- the way that -- the way the number was calculated was to look at the projects that we had going through the office at the time, the length of time that they were carried out, the quantity of the projects, and then we allocated the costs accordingly by project.

[44] However, the duration of the project based on dates of the expenses on the spreadsheet is from May 2015 to the end of August 2017. Given my conclusion that FSL should have stopped work on the project in January 2016, I find it appropriate to apportion the Office Overheads based on the actual length of time FSL should have been engaged in the project being May 2015 to the end of January 2016. I have extended the date to the end of the month of January 2016 to allow FSL some time to remove items from storage and to account for a share of office expenses related to ceasing work on the project. In my view, this is a fair way to account for those expenses given the reality that “downing tools” on a significant project would not occur instantaneously.

[45] As such, I have taken the proportional difference of nine months (May 1, 2015 to the end of January 2016) against the time period on FSL’s spread sheet 17 months (May 2015 to the end of August 2017). The result is 52.9% (9 months /17

months). The resulting calculation of Office Overheads that are properly apportioned to the Freezer project is NZ$71,644.87 (NZ$135,179 x 53%). As such, FSL (and thereby FPS) may deduct and additional NZ$71,644.87 as set off. The corollary of this is that from the FSL Expense Spreadsheet total of NZ$631,608, NZ$63,534.13 (NZ$135,179 x 47%) must be deducted as not being a reasonable expense.

[46] In respect of the “Storage costs (estimated only)”, Mr. Peagram testified that the expense related to the floor space committed to the project “over the period of time”. Accordingly, for the same reasons I apportioned the “Office overheads” expense, I find that the NZ$54,000 for “Storage costs” should be reduced to reflect the time for which it was appropriate that FSL continued work on the project. The result is that FSL is entitled to set off NZ$28,620 for storage costs (NZ$54,000 x 53%). The corollary of this is that from the FSL Expense Spreadsheet total of NZ$631,608, NZ$25,380 (NZ$54,000 x 47%), should be deducted as not being a reasonable expense.

[47] Based on the foregoing, I conclude that the reasonable expenses incurred by FSL on the project, that FPS may set off against the amounts claimed by XTL for return of its deposit is NZ$378,236.87. I have calculated this amount by deducting the amounts listed above from the NZ$631,608 amount of actual expenditures FSL incurred on the Freezer project. To reiterate, those amounts are as follows:

a) Draughting NZ$37,700;

b) Project management – NZ$24,222;

c) Evaporators incl. design – NZ$24,000;

d) Manufacture – NZ$78,535;

e) Office overheads – NZ$63,534.13; and

f) Storage costs – NZ$25,380.

[48] My calculation of this amount is NZ$253,371.13. After deducting this amount from the total claimed by FSL on the FSL Expense Spreadsheet, the remaining amount that I determine is the reasonable expenses incurred by FSL on the project from May 2015 to December 2015 is NZ$378,236.87 (NZ$631,608 – NZ$253,371.13).

[49] To reiterate, I am satisfied based on Mr. Peagram's testimony that the items listed on the FSL Spreadsheet were incurred for the project. I base my conclusion on my acceptance of Mr. Peagram's testimony that the FSL Spreadsheet Expense Report was generated based on projected and actual amounts incurred for the Freezer project. Further, as I referenced above, I found that Mr. Peagram was candid regarding whether or not expenses were incurred by FSL on the project. For example, he testified that the NZ$186,652 committed for Electric Design and programming was never actually incurred because "[FSL] never actually started that process with [New Zealand Controls] due to the delays. So you can see our ---our actual costs there is zero". Likewise, in respect of the amounts for "Manufacture", Mr. Peagram testified that while $295,017 was committed as a budget item, only $78,000 of that work was completed. I found Mr. Peagram to be a straightforward and reliable witness who explained the work performed by FSL on the project.

[50] I wish to be clear that while I consider certain expenses incurred by FSL as unreasonable and thus not properly an offset to XTL's partial payment, I make that finding because those expenses were incurred after the date I found that FPS and FSL should have stopped work on the project to mitigate its losses. In other words, my conclusions are not on the basis that FSL did not legitimately undertake the work. Instead, I have concluded that FSL made a business decision to keep working on the Freezer even when it was, or should have been, clear that the project was in jeopardy of not moving forward. Put bluntly, FSL gambled that the project would complete and did not want to be behind if it went forward. Unfortunately, FSL lost that bet.

[51] In cross-examination, Mr. Peagram acknowledged that FSL made a decision to continue work on the Freezer even when it appeared that there were potential problems with XTL's financing because it was difficult to stop and then restart an engineering project. I also accept that the principal of FSL at that time, Raph Engle, who has since passed away, believed it was important to continue work on the project despite the potential it would not go ahead. Further, in emails, Mr. Engle revealed insight into his belief that XTL would ultimately be able to obtain financing. In this regard, Mr. Engle set out in an email dated February 10, 2016, "we are fine with your comments should the unlikely cancellation of the contract occur" (emphasis added).

[52] In summary, I conclude that by January 5, 2016, FPS clearly expressed it would not continue work on the project until XTL had made further payments for the project. Whether it could or should have directed FSL to stop incurring expenses is an issue between FPS and FSL, which does not specifically engage XTL. Put another way, FPS is responsible for any expenses incurred on the project after January 5, 2016. I have found that the expenses incurred by FSL on the Freezer to that point were reasonable, however, after that point, they did so of their own volition and at their own risk. That risk after January 5, 2016, should not be XTL's responsibility.

[53] Before concluding my analysis of the quantification of the amount of set-off FPS may make against XTL's claim, I will address the travel expenses for the meetings related to the project organized by XTL in Council Bluffs, Iowa, in August 2016. It strikes me as unfair that XTL could entice FPS and the installation contractor to a meeting in the United States under the guise of re-starting the project and then deny the cost of attendance as a legitimate expense. XTL was the sole cause of the delay and failure of the project from moving forward. I find that FPS should be entitled to set off the expenses related to those meetings as part of its set-off claim.

[54] An email of August 9, 2016, sent by Ken Hawkes, the Director of Automation Engineering for XTL, relating to the meeting to "re-start" the project sets out the optimism on moving forward with the project:

> Team,
>
> We are finally at the point that we can move forward with the project. Over the past 2 months we have been working to engage a new General Contractor and one that could oversee the entire project as desired by the Bank.
>
> …
>
> Ken Garrett and Dougherty Funding are finalizing the details for financing and will be setting a closing date in the next few days. In an effort to get the project rolling and ensure that all team members are on the same page, we would like to have all supplier/vendors in Omaha to meet next Thursday August 18th. I would suggest travelling in Wednesday and flying out Friday.

[55] Unfortunately, the optimism was not backed with financing and the project failed. It seems unfair to have FPS incur additional expenses related to this meeting when they were essentially lured there under the auspices of moving forward with the project. While expenses of this sort might normally be considered a reasonable "cost of doing business" in the nature of client management, given XTL was unable to complete the project, in my view, FPS should be compensated for the expenses it incurred related to the attendance at the meetings in Iowa.

[56] I acknowledge that during closing submissions, counsel for XTL submitted that given the amounts related to the travel expenses are relatively minor, XTL was no longer objecting to their inclusion in FPS's set-off claim. I accept that concession, but note that, even without that concession, given the circumstances in which those expenses arose, I would have allowed FPS to set off the amounts against XTL's claim for the reasons I have just articulated.

D. FPS's Claim for Both Reliance and Expectation Damages

[57] As I referenced in the introduction, in the counterclaim, FPS claims damages for loss of profit on the basis of what it claims it would have earned had the project completed. In its opening statement, FPS described its counterclaim as being for contractual damage (lost profits), and states that "the issue on the counterclaim is

the quantum of loss profit to which FPS is entitled for XTL's repudiation of the Agreement". FPS claims that the amount of "gross profit" it would have earned had the project completed would have been US$469,540, or CA$636,365.

[58] XTL argues that FPS is not entitled to recovery of both costs incurred (reliance damages), and lost profits (expectation damages) because such a claim amounts to double recovery. In short, XTL contends that FPS is required to elect one course of recovery or the other, not both. In support of its position, XTL relies upon *Sunshine Vacation Villas Ltd. v. Governor and Co. of Adventures of England Trading into Hudson's Bay* (1984), 58 B.C.L.R. 33, 1984 CanLII 336 (C.A.), in which the British Columbia Court of Appeal held that a party must seek expectation damages and reliance damages as alternatives, not concurrently. Our Court of Appeal explained the differences between the two approaches and held they must be pursued as alternative paths to recovery:

> [22] The alternative submission is right. One method of assessment, the return of expenses or loss of capital, approaches the matter by considering what Sunshine Vacation's position would have been had it not entered into the contract. The other, loss of profit, approaches it by considering what the position would have been had the Bay carried out its bargain. The two approaches must be alternatives. McGregor on Damages, 14th ed. (1980), p. 21, para, 24, states that the "normal measure of damages in contract" is:
>
> > If one party makes default in performing his side of the contract, then the basic loss to the other party is the market value of the benefit of which he has been deprived through the breach. Put shortly, the plaintiff is entitled to compensation for the loss of his bargain. That is what may best be called the normal measure of damages in contract.
>
> [23] At p. 25 (para. 31) the author says:
>
> It is important to notice in all the above cases that not only must the defendant be credited with the amount that the plaintiff has saved by no longer having to perform his side of the bargain, but the plaintiff cannot also recover, in addition to the basic loss which is intended to represent the loss of his bargain, any expenses he has incurred in preparation or in part performance. Such expenses represent part of the price that the plaintiff has to incur to secure his bargain. If he recovers for the loss of his bargain, it would be inconsistent that he should in addition recover for expenses which were necessarily laid out by him for its attainment.
>
> [24] At pp. 32-33 (para. 42) he says:
>
> Just as expenses rendered futile by the breach may generally be claimed as an alternative to the normal measure of damages, so they may also be claimed as an alternative to recovering for gains prevented by the breach. Again, it is important to realize that such expenses form an alternative and not an additional head of

> damage, since they represent part of the price that the plaintiff was to incur in order to secure the gain. Sometimes this may have been lost sight of, and a double recovery involving an inconsistency of compensation allowed.

[59] XTL further relies upon *900567 Ontario Ltd. (c.o.b.) MGW & Associates) v. Welsby & Associates Taxation Inc.*, [2003] OJ No. 591, 2003 CarswellOnt 738 (Ont. Sup. Ct.). In that case, the Court provided the following explanation of how a plaintiff asserting a breach of contract may seek damages either as reliance damages or expectation damages, but not both:

> [75] Contract law holds that expectation damages are the usual measure of damages for a breach of contract. Expectation damages put the plaintiff in the position it would have been in had the contract been properly performed on both sides. As an alternative, reliance damages may be awarded to put the plaintiff in the position that it would have been in had it not wasted any resources under the contract.
>
> [76] The innocent plaintiff is generally entitled to recover either expectation damages or reliance damages, but not both. Expectation damages represent the benefit that the plaintiff expected to receive under the contract whereas reliance damages represent the costs it reasonably incurred. If the plaintiff wants to recover for the benefits it expected, it must be willing to pay the associated costs. This principle was helpfully described by Lord Denning in Anglia Television Ltd. v. Reed, [1971] 3 All E.R. 690 at 692:
>
> > It seems to me that a plaintiff in such a case as this had an election: he can either claim for his loss of profits; or for his wasted expenditures. But he must elect between them. He cannot claim both. <u>If he has not suffered any loss of profits – or if he cannot prove what his profits would have been – he can claim in the alternative the expenditure which had been thrown away, that is, wasted, by reason of the breach.</u>
>
> [77] The reason what the plaintiff must usually elect between the two measures of relief is avoid double recovery. As was explained by Arnup J.A. in R.G. McLean v. Canadian Vickers Ltd., [1971] 1 O.R. 207 at 214 – 15 (C.A.):
>
> If the contract had been performed, and profits earned by the use of the machine, the plaintiff would have had to pay the purchase price. In any calculation of damages, on a basis as if the contract had been performed, the purchase price must stand as a debit against the plaintiff; any damages awarded in its favour can be used to extinguish the purchase price, but only the excess can then be allowed to the plaintiff by way of further damages…[T]o give a purchaser both a refund of the purchase price and expenditures made would be double compensation.
>
> [Emphasis added.]

[60] I accept that a plaintiff cannot receive recompense pursuing both expectation and reliance damages concurrently. As such, FPS must determine which avenue of recovery to pursue its loss. As I referenced early in these reasons, I have determined that I will not accept FPS's claim for expectation damages because I do not have sufficient confidence in the evidence supporting FPS's expectation damages. In other words, I am not satisfied that based on the evidence before me, on balance, FPS has proven its claim for expectation damages.

[61] My concern with the evidence supporting FPS's claim for expectation damages arises from a number of factors. In support of its case, FPS tendered Robert Mackay to provide his opinion as to the FPS's lost profit. I qualified Mr. Mackay to provide an opinion answering the following question:

> What amount of profit in Canadian dollars would FPS have likely received if the contract for the manufacture and installation of the freezer had been performed at the modified price quoted on May 19th, 2016?

[62] Mr. Mackay's qualifications were not challenged by XTL. I found Mr. Mackay to be a forthright and balanced witness clearly skilled in setting out information that would properly assist the court in determining what FPS's lost profit might have been had the project completed. I want to be clear that my concern lies not with the accuracy of the output produced by Mr. Mackay in his opinion, but instead with the accuracy of the information he was provided to complete his opinion.

[63] One concern is that Mr. Mackay was not told that FPS had previously manufactured a carton freezer prior to the Freezer project. As such, Mr. Mackay based his opinion on the premise that the Freezer project was the first time that FPS had manufactured a carton freezer. Further, the previous carton freezer produced by FPS was not profitable for the company. Mr. Mackay was not provided with this information from FPS. In my view, it is an important and relevant omission. Indeed, in cross-examination, Mr. Mackay testified that whether FPS had previously worked on a carton freezer would have been a relevant consideration for his opinion.

[64] Mr. Mackay's reliance on the "fact" that FPS had never completed a project involving a carton style freezer and its influence on his assessment of the potential lost profit is clear from his report:

> In order to assess the reasonableness of the gross profit of 15.1% implied by the Contract I requested information from management regarding the historical gross profits earned on products similar to the Freezer sold by FPS during 2015 and 2016 (two years around the time of the Contract). No such information was available due to the unique nature of the Freezer. In the absence of individual product gross profit information, I reviewed the overall gross profit earned by FPS in 2015 and 2016, as set out in FPS's annual financial statements. It should be noted that the overall gross profit represents the results from a sale of a wide range of products.
>
> [Emphasis added.]

[65] Further, the relevance of having a comparator project to his opinion was put to Mr. Mackay in cross-examination:

> Q: Okay. Now, the request for information where you were asking, "well, are there any similar projects that this company has undertaken," why would that be relevant information for you in determining whether or not that 15 percent anticipated profit was reasonable?
>
> A: Well, I would have no idea what range of products FPS was making. So one product, a smaller product might yield a smaller gross profit or a larger gross profit. So there may be quite a range of gross profits, depending on the type of product and the size and the costs that they had to incur at the time and, you know, where it was being installed. There are all kinds of variables.
>
> Q: And would you agree with me that one of those variables is the company's prior experience in manufacturing that type of a product?
>
> A: That's correct.
>
> Q: So almost akin to a start-up who hasn't done this type of work before, there might be more of a risk that their venture won't be profitable because they don't have the experience to run with this design. Is that fair?
>
> A: If it was a start-up, I would expect that they would bid a higher gross profit or expect a higher gross profit than if they had some experience.

[66] The failure of FPS to disclose this vital information to its expert makes me disinclined to accept that, on balance, the gross profit loss claimed by FPS is a sufficiently accurate representation of that loss.

[67] My second concern in relying upon Mr. Mackay's report relates to the fact that substantial portions of the report calculating lost profits are premised upon a "Confidential Costing Sheet dated June 2, 2015". Mr. Mackay assumes that "the costing information provided to me at Appendix D was reasonable and included all direct costs involved in the manufacture of the Freezer".

[68] However, at trial, during the cross-examination of Ms. Leung, for the first time, it was disclosed that there was a subsequent Costing Sheet prepared on August 25, 2015. The August 25, 2015, Costing Sheet was not disclosed in this litigation. It may be that the subsequent costing sheet had similar information to the June 2, 2015 Costing Sheet, thus not changing Mr. Mackay's opinion, however, the existence of a more recent Costing Sheet with potentially different costs, that was not provided to Mr. Mackay for his opinion causes me concern about accepting the opinion as accurately representing FPS's lost profit had the project completed.

[69] These factors cause me concern about relying upon Mr. Mackay's conclusions. To be clear, I am not impugning Mr. Mackay's expertise or methodology. However, the output of an expert's opinion is only as sound as the inputs and assumptions upon which that expert bases the opinion. In this case, I conclude that Mr. Mackay was not provided with the best or most accurate information upon which to make his assessment of FPS's lost profit.

[70] Expectation damages are unavailable where the plaintiff has either not lost profit or cannot prove what the profits would have been. FPS has failed to, on balance, establish with accuracy the profits it would have earned if the parties completed the project. FPS failed to sufficiently establish a "pattern of earning" related to producing the Freezer, or similar types of the carton freezers upon which the Court may base an award of expectation damages: See Halsbury's Laws of Canada (online), *Damages*, "Breach of Contract: General Principles: Introduction: Measuring the Plaintiff's Damages for Breach of Contract" (V.1(1)(b)) at HDA-36.

[71] Based on the foregoing, I am not persuaded that FPS has met its burden to establish, on balance, the profits it lost, known as expectation damages, resulting from the failure of XTL to complete the project. I dismiss FPS's counterclaim.

IV. Disposition

[72] Given the foregoing, I am satisfied that FPS has proved an appropriate offset to the Contract Advance in the amount of NZ$378,236.87 as well as the amounts related to the August 2016 travel in the amount of CA$5,344.21 and CA$2,811.58.

[73] I have sympathy for FPS (and FSL) in that XTL made several reassurances that financing would be obtained and the project would move forward. These representations ultimately turned out to be hope over reality. However, FPS, being a sophisticated business operation should have known the risks it, and by extension, FSL, took by continuing work whilst the Freezer project's funding was in jeopardy. I understand that FSL in particular continued with work on the project because it was concerned that it would be difficult to stop and then re-start the project. Had the project gone according to plan this would have perhaps been a sound business decision, but unfortunately in this case, continuing work when the project was in jeopardy was an error, amounting to a failure to mitigate losses, that should not be XTL's responsibility.

[74] In summary, I order as follows:

a) FPS's counterclaim is dismissed;

b) The amount of FPS's set-off claim against the return of the amounts of the partial payments paid by XTL for the Freezer project is as follows:

i. NZ$378,236.87 in respect of reasonable expenses incurred by FSL from May 2015 to the end of January, 2016;

ii. CA$5,344.21 for the travel expenses incurred by FPS related to meetings convened by XTL in August 2016; and

iii. CA$2,811.58 for installation services related to the meetings convened by XTL in August 2016;

c) For clarity, the amounts referenced above quoted in New Zealand currency, shall be converted to either Canadian or United States currency as agreed to in writing by the parties;

d) If the parties are unable to agree as to the exchange rates for the currency conversion, they have leave to set the matter before the Registrar for a determination; and

e) XTL is entitled to pre and post judgment interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

V. Costs

[75] Rule 14-1(9) of the *Rules* provides that costs of a proceeding must be awarded to the successful party unless the court otherwise orders. The general rule is that costs follow the event and are awarded to the party that is substantially successful: *The Owners, Strata Plan LMS 3259 v. Sze Hang Holdings*, 2017 BCCA 346 at para. 90; *Marquez v. Zapiola*, 2014 BCCA 35, citing *Fotheringham v. Fotheringham,* 2001 BCSC 1321, leave to appeal ref'd, 2002 BCCA 454.

[76] In my view, when looked at holistically, XTL has been substantially successful in this trial. XTL has defeated FPS's counterclaim. Further, XTL successfully achieved a return of a portion of the funds it advanced to FPS for the manufacture of the Freezer project in an amount greater than FPS was prepared to return.

[77] Accordingly, unless the parties have further submissions to make on costs, I conclude that XTL has enjoyed substantial success and is entitled to its costs at Scale B.

[78] If there are any issues that may impact the costs award of which the Court is unaware, the parties have leave to arrange an appearance before me through Supreme Court Scheduling for the purpose of arguing the issue of costs.

VI. Conclusion

[79] Should there be any issues that require additional consideration by the Court or if there are arithmetic calculations that require attention that the parties wish to bring to the Court's attention and upon which the parties are unable to agree, they have leave to make arrangements, within 30 days of this order, through Supreme Court Scheduling, to appear before me by video for those purposes.

[80] I thank counsel for their well-prepared and argued submissions.

"Gibb-Carsley J."