Citation: *38274 Yukon Inc. (Super Save Propane) v. Fireweed Helicopters Inc.,* 2023 YKSM 4

Date: 20230417
Docket: 21-S0060
Registry: Whitehorse

SMALL CLAIMS COURT OF YUKON
Before Her Honour Judge Ruddy

38274 YUKON INC. doing business as
SUPER SAVE PROPANE (YUKON)

Plaintiff

v.

FIREWEED HELICOPTERS LTD.

Defendant

Appearances:
Mark Wallace and
Dmitri Klinov — Counsel for the Plaintiff
James R. Tucker and
Stephanie Dragoman — Counsel for the Defendant

REASONS FOR JUDGMENT

[1] The plaintiff company, 38274 Yukon Inc., is in the business of supplying and delivering propane fuel, operating under the name Super Save Propane (Yukon) ("Super Save"). The defendant, Fireweed Helicopters Ltd. ("Fireweed"), operates a helicopter charter business. Fireweed's head office and hangar, located at 60 Lodestar Lane ("Lodestar Property") in Whitehorse, Yukon, is heated by a boiler fueled with propane. On December 8, 2021, Super Save filed a Notice of Claim ("Claim") seeking liquidated damages from Fireweed for breach of contract in relation to an agreement to supply propane to Fireweed.

The Evidence

[2] In support of its Claim, Super Save called James Lisson, Super Save's Director of Sales. In defence, Fireweed called Bruno Meili, Fireweed's owner, and Nicholas Estrada, Fireweed's former Director of Maintenance. In addition, the parties filed 12 documents as exhibits in these proceedings.

[3] The basic facts are relatively straightforward and, by and large, are not in dispute.

[4] On November 10, 2017, Super Save and Fireweed entered into a contract entitled Propane Supply and Equipment Agreement (the "Agreement"), whereby Super Save would supply propane to Fireweed's Lodestar Property for a term of five years. The Agreement included the provision of necessary equipment, most notably a 1,000-gallon propane tank. The Agreement is filed as exhibit 1.

[5] The parties agree that Fireweed opted for the auto-fill service, meaning propane levels would be monitored by Super Save and filled as required without the customer having to call to arrange a delivery. At the relevant time, Super Save did not offer a remote monitoring service. Rather, Super Save customers requesting the auto-fill service were placed on a regular route serviced by a Super Save driver who would periodically check the propane levels. Any tanks with less than 60% propane would be filled; tanks with more than 60% would not. Tanks are filled to a maximum of 80% to allow for the propane to boil and create vapour, which, in turn, creates the pressure necessary to fuel appliances like Fireweed's boiler.

[6] According to Mr. Lisson, frequency of auto-fill monitoring varies depending on the time of year. Mr. Lisson indicated that Fireweed was set up for triweekly monitoring in the colder, winter months when propane usage would be at its highest.

[7] In January 2020, Whitehorse was experiencing a prolonged period of extremely cold weather. Mr. Estrada indicated temperatures were in the minus 30 to minus 40-degree range. On January 13, 2020, Mr. Estrada arrived for work at the Lodestar Property at 8:00 a.m. Upon entering, he noted the hangar to be cold and found that the boiler was not working. He contacted the boiler technician who arrived at approximately 9:00 a.m. The technician could not find anything wrong with the boiler itself.

[8] Mr. Estrada checked the propane tank and noted the level of propane to be what he described as empty or very low. He contacted Super Save but was advised they would not be able to make a delivery that day, but would try in the next day or two. Mr. Estrada told Super Save that the Fireweed hangar houses a lot of expensive equipment that must be heated to avoid damage. Super Save advised Mr. Estrada that they would do their best but could not guarantee a same-day delivery.

[9] Evidently, Super Save was able to make the necessary arrangements. Exhibit 8, a Super Save fill ticket, shows that propane was delivered to Fireweed at 12:53:08 on January 13, 2020. The starting percentage of propane in the tank, before the delivery, is noted to be 20%. A total of 1,964 litres was delivered, and the finishing percentage is noted to be 80%.

[10] Mr. Estrada agreed that Super Save provided Fireweed with a tank blanket, although he does not recall receiving it that day. Exhibit 2 is another Propane Supply and Equipment Agreement which relates to the rental of a tank blanket. It is dated January 13, 2020. According to Mr. Lisson, tank blankets are used in extremely cold weather to help the tank function properly. He says the propane will boil as required provided the outside temperature is warmer than minus 42 degrees Celsius. However, he noted that the colder the outside temperature, the harder it is for the propane to create the necessary vapour. A tank blanket is used to create energy to help the propane to boil in cold weather so that it continues to pump properly.

[11] Fireweed's next propane delivery was in February 2020. Mr. Estrada testified that he believed the tank was again "dangerously low" but agrees that he did not have to contact Super Save to request a delivery. Exhibit 9, a second fill ticket, shows that Super Save delivered propane on February 10, 2020. The starting percentage of propane is noted to be 25%.

[12] In their testimony, Mr. Meili and Mr. Estrada both expressed dissatisfaction with the service Fireweed received from Super Save under the Agreement, primarily relating to the timing of the two deliveries in January and February 2020. Mr. Meili says that nothing was done at that time as there was only one other service provider in Whitehorse whom he described as being "about the same as Super Save".

[13] In the summer of 2021, Mr. Estrada learned of a new propane supplier, Borealis Fuels & Logistics Ltd. ("Borealis"). As he had heard good things about the company, Mr. Estrada contacted Borealis to see what they could offer. He advised Mr. Meili.

Mr. Meili testified that they decided to switch to Borealis because they offered better service and a better deal. Borealis also offered an auto-fill service with a level gauge that allowed for remote monitoring.

[14] On July 19, 2021, Fireweed entered into a contract with Borealis for the supply of propane and equipment ("Borealis Agreement"), which is filed as exhibit 10. Borealis removed Super Save's tank from the Lodestar Property.

[15] Mr. Lisson says that Super Save was advised in July 2021, that their tank had been removed and replaced by a competitor's tank. This led to a series of telephone calls and emails between Mr. Lisson and Mr. Meili. The emails have been filed as exhibit 4.

[16] An email sent from Mr. Lisson to Mr. Meili, dated August 4, 2021, attached a letter, filed as exhibit 7, advising Mr. Meili that Fireweed was in breach of the Agreement and that it was open to Super Save to repudiate the Agreement and seek the balance of the contract price. Super Save indicated that Fireweed had 10 days' notice to fulfill its obligations under the Agreement.

[17] Fireweed opted not to have Super Save continue as their propane supplier.

[18] The Customer Enquiry, filed as exhibit 3, shows that the final delivery of propane by Super Save to Fireweed was May 27, 2021.

[19] Super Save sent Fireweed a final invoice, dated November 24, 2021, and filed as exhibit 6, in the amount of $17,600.07 plus GST for a total of $18,480.07. This was Super Save's calculation of the balance owing under the Agreement.

[20] Super Save's based its calculation on clause 13 of the Agreement, a liquidated damages clause. The actual calculation is set out in exhibit 5, a propane usage summary of the total litres of propane delivered to Fireweed under the Agreement. The calculation is written by hand on the document as follows: Total number of litres provided (45,013) divided by the number of months into the Agreement (43) to get the average monthly number of litres (1,046.813) multiplied by the number of months remaining in the Agreement (17) for a total of 17,795 litres multiplied by the price per litre (.989) for a total of $17,600.07.

Positions of the Parties

[21] Super Save argues that Fireweed breached the Agreement by contracting with an alternate service provider before expiry of the term of the contract. They claim liquidated damages for breach of contract pursuant to clause 13 of the Agreement plus pre- and post-judgment interest at the contractual rate of 24% per annum.

[22] Fireweed argues that they were not in breach of the Agreement on the basis that Super Save breached the Agreement before Fireweed entered into a contract with Borealis. In the alternative, Fireweed argues that it legally terminated the Agreement in compliance with the terms and conditions thereof.

[23] With respect to damages, as noted, Super Save relies on clause 13 of the Agreement in support of its claim for liquidated damages. Fireweed argues that clause 13 is punitive and therefore unenforceable. Fireweed further argues that should I find the liquidated damages clause to be unenforceable, it is not open to the Court to impose contractual damages.

[24] With respect to interest, Fireweed argues that contractual interest does not apply to an award of liquidated damages.

[25] The burden of proof, for the most part, rests on Super Save to prove the Claim. The burden of proving that the liquidated damages clause is unenforceable rests on Fireweed. The standard of proof is on a balance of probabilities.

Issues

[26] Based on the positions of the parties and the pleadings, the following issues must be resolved in assessing whether Super Save has met its burden:

1. Did Super Save breach the terms of the Agreement thereby entitling Fireweed to repudiate the Agreement?

2. In the alternative, did the terms of the Agreement allow Fireweed to give notice terminating the Agreement effective immediately, and, if so, did Fireweed give notice as required?

3. If issues 1 and 2 are answered in the negative, did Fireweed breach the terms of the Agreement?

4. Is the liquidated damages clause in the Agreement enforceable?

5. In the alternative, is Super Save entitled to contractual damages?

6. If successful, is Super Save entitled to interest at the contractual rate of 24% per annum set out in the Agreement?

Issue 1: Did Super Save Breach the Agreement?

[27] Fireweed argues that Super Save breached two terms of the Agreement: the auto-fill service and the price charged, and further argues that either or both breaches were sufficient to entitle Fireweed to repudiate the Agreement.

[28] The law of repudiation is summarized in the British Columbia Supreme Court decision in *Agrifoods International Corp. Ltd. v. Beatrice Foods Inc*. (1997), 34 BLR (2d) 294 (BC SC) at para. 24:

> If one side breaches the obligations of a contract, that does not necessarily bring the contract to an end. If the breaches are not so serious as to be held fundamental to the whole purpose of the contract, the innocent party must continue to perform its own obligations and its remedy is limited to damages. If the breaches are so serious as to be fundamental, that too does not automatically bring the contract to an end. Instead, the innocent party must exercise an election whether or not to accept the breaches as a repudiation of the contract and by some means notify the other of its choice if it decides to accept the repudiation. The election must be made in a timely way. If it is not made and communicated to the other party, then the contract continues and the innocent party and the offender both remain bound to perform the rest of their obligations under it.

[29] Thus, the breach must be fundamental and the election to repudiate the contract must be communicated to the other party in a timely way.

[30] In the Alberta Provincial Court decision in *Super Save Disposal (Alberta) Ltd. v. Shenwei Enterprises Ltd*., 2016 ABPC 224 ("2016 *Shenwei Enterprises Ltd*."), Ingram J. addressed the question of timeliness of the required notice at para. 16, as follows:

> In any event, a substantial and fundamental breach by a party to a contract does not, in itself, end the contract. The innocent party has options: it could sue for damages or other relief or it could treat the

> contract as ended, discharging the contract and ending both parties' obligations, provided the contract is ended within a reasonable time after the innocent party became aware of the breach. In my view, a reasonable time in this case would consist of enough time to determine that the breach was "fundamental", or whatever as described above, and sufficient further time as it should have taken the defendant to contract for replacement services. …

Auto-fill Service

[31] With respect to the auto-fill service, as there is no such term in the written Agreement, a threshold question to be addressed is whether the auto-fill service can properly be considered a term of the Agreement.

[32] There is little doubt that Super Save offered an auto-fill service and that Fireweed accepted that offer. While clearly a verbal contract, is it one that forms part of the Agreement at issue. Clause 10 of the Agreement reads:

> This Agreement constitutes the full agreement between the parties hereto and there are no promises, representations or warranties affecting this Agreement, and no amendment to this Agreement shall be effective unless in writing and signed by an authorized signatory of the parties hereto.

[33] In this case, the agreement with respect to provision of the auto-fill service was not reduced to writing as required by the Agreement. In the circumstances, can the auto-fill service be considered an implied term of the Agreement?

[34] In *Energy Fundamentals Group Inc. v. Veresen Inc.,* 2015 ONCA 514, the Ontario Court of Appeal outlined the limited circumstances in which a court may imply terms in a contract:

> 30 As observed by the application judge, a contractual term may be implied "on the basis of the presumed intentions of the parties where necessary to give business efficacy to the contract or where it meets the 'officious bystander test.'" (*M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619).
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> 31 The officious bystander test was most famously articulated in *Shirlaw v. Southern Foundries (1926) Ltd.,* [1939] 2 K.B. 206 at 227, [1939] 2 All E.R. 113 at 124 (C.A.):
>
> > *Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying. Thus, if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common: "Oh, of course."
>
> 32 The business efficacy test in its modern form originated in *The Moorcock* (1889) 14 P.D. 64, [1886-90] All E.R. Rep. 530 (C.A.) at 68:
>
> > In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties...

[35] In the case at bar, the Agreement is silent on the logistical question of how and when propane is to be delivered to Fireweed. I am satisfied that the verbal agreement to institute the auto-fill service reflects the parties' actual intentions in this regard and is necessary to give business efficacy to the Agreement. Indeed, it may even meet the officious bystander test in the circumstances, as clearly there must be some agreement as to how the necessity and timing of a delivery is to be determined. As such, I am satisfied that the auto-fill service is an implied term of the Agreement.

[36] Having so determined, the next question is whether Super Save breached the auto-fill term. Fireweed argues that the auto-fill service promised a worry-free supply of propane, but that Super Save breached the auto-fill term in January 2020, by permitting

Fireweed's tank to reach a level of propane that was so low that Fireweed's heating system would not function. They argue that this was a fundamental breach given the potentially disastrous consequences to the expensive equipment Fireweed stored at the Lodestar Property, should the hangar be without any source of heat in the winter months.

[37] In my view, this contention is simply not supported on the evidence. It is clear that Fireweed's boiler was not working on January 13, 2020. It is also clear that this failure was related to the flow of propane. However, I am not satisfied that the issue was caused by insufficient propane in the tank.

[38] The fill ticket filed as exhibit 8 indicates that the starting volume in the tank on January 13, 2020, was 20%. Even if there were some reason to doubt the accuracy of the estimate of a 20% starting volume, simple math makes it clear that there was a not insignificant amount of propane in the tank. The 1,000-gallon tank, converted to metric, would equal a capacity of roughly 3,785 litres. On January 13, 2020, Super Save delivered 1,964 litres of propane, an amount that would equal roughly 52% of tank capacity. As the tank is filled to 80% of capacity, this would mean that there was roughly 28% volume in the tank before the delivery.

[39] Mr. Lisson testified that a propane tank can still function with as little as 5% volume of propane. If, as I have found, there was between 20% and 28% volume in the tank pre-delivery on January 13, 2020, the evidence does not establish that the failure of Fireweed's boiler was due to insufficient propane.

[40] Mr. Lisson went on to testify that exterior temperature can impact the efficiency of a propane tank. The tank will simply not work as well in extremely cold temperatures. This is the reason it is advisable to use a tank blanket in cold temperatures to assist in supplying additional energy to the tank to keep it functioning properly. This evidence, combined with the fact Fireweed experienced no further problems after it began using the tank blanket, persuades me that the reason for the failure of Fireweed's boiler on January 13, 2020, was the extremely cold exterior temperature rather than insufficient propane.

[41] Accordingly, I am not satisfied that Super Save breached the auto-fill term of the Agreement. Having so determined, there is no need to address whether a breach of the auto-fill term would constitute a fundamental breach or whether Fireweed provided timely notice of repudiation to Super Save.

Price

[42] The price clause on page 1 of the Agreement specifies that Fireweed agrees to pay the price listed as ".859 floating", "which price per litre is exclusive of all sales taxes".

[43] Fireweed argues that Super Save has breached the price term of the Agreement by consistently overcharging Fireweed. This submission is based on exhibit 3, the Customer Enquiry, setting out the delivery history under the Agreement. Counsel for Fireweed noted that the amount charged consistently exceeded the volume delivered times the price per litre of propane plus applicable GST.

[44] This discrepancy was explained by Mr. Lisson through use of exhibit 11, the invoice sent to Fireweed for the January 13, 2020 delivery. Mr. Lisson provided the following explanation for the charges beyond propane and GST:

- Delivery Fee – a transportation fee of $9.80 per delivery;
- Storage Charge – cost recovery relating to the costs of operating and maintaining a bulk plant in a remote location;
- Hazardous Materials Handling – a fee of $8.95 per delivery to cover the cost of permitting and safe transport;
- Pipeline Transportation Fee – a cost recovery fee of $8.78 per delivery; and
- Federal Carbon Tax – collected and remitted to the federal government as required by law.

[45] Fireweed argues that charging these additional fees constituted a breach of the Agreement as Fireweed never agreed to pay anything beyond the price per litre of propane plus applicable sales tax.

[46] Super Save argues that all of the charges are permissible under the Agreement, specifically the following paragraph from page 1 which follows the propane price and reads:

> Super-Save will have the right to change the propane Price at any time during the continuance of the Agreement based on any changes in refinery, transportation, taxation or overhead costs as they occur. The

> Customer's acceptance of price changes may be evidenced by the practices and actions of the parties hereto.

[47] Super Save argues that the reference to "refinery, transportation, taxation or overhead" in the foregoing clause presupposes the types of charges outlined by Mr. Lisson. In addition, counsel for Super Save notes that all of the fees and taxes are transparently listed on each invoice, and that Fireweed effectively accepted the charges by paying each invoice.

[48] Fireweed interprets the above-quoted clause quite differently. They argue that the reference to "refinery, transportation, taxation and overhead" means that any charges of this nature were intended to be included in the price per litre of propane and not in addition to it, as the Agreement is clear that price per litre is exclusive only of sales taxes. They further note that no objection was made by Fireweed to the additional charges as Mr. Meili did not himself review any of the invoices received from Super Save. They were simply paid by his office assistant. As a result, the additional charges were not noted until Super Save provided the Customer Enquiry filed as exhibit 3.

[49] In my view, the Agreement is clear that Super Save had the right to change the propane price. The reference to "refinery, transportation, taxation and overhead" makes it equally clear that the propane price may be affected, not just by changes in the refinery cost of propane, but also changes in taxation, which would include the carbon tax, and changes in Super Save's own overhead costs. Thus, it was made clear to Fireweed that, in setting the propane price, Super Save would be factoring in costs beyond the refinery cost of propane. They could, therefore, have simply factored all of

the additional charges into the price charged per litre of propane, rather than providing the customer with a breakdown. The fact that they opted to provide a detailed breakdown, does not negate the fact that the Agreement clearly contemplates price encompassing costs beyond that of propane.

[50] I am not satisfied, therefore, that Super Save breached the price clause in the Agreement.

[51] I would further note that if I had been satisfied Super Save had breached the price clause, I would, nonetheless, have found that Fireweed, in paying the invoices without objection, effectively accepted the charges and cannot now claim a breach. The charges were in no way hidden from Fireweed. The fact Mr. Meili as owner opted not to review the invoices does not change the fact that the invoices were reviewed and paid by an employee of Fireweed without issue.

Issue 2: Notice of Termination

[52] The relevant provision of the Agreement with respect to termination is found in the Term condition on page 1 which reads:

> TERM: 5 years (herein called the "Term") commencing on the 10 day of November/17 and shall be renewed thereafter for successive like periods until terminated by either party upon written notice to the other party not less that (sic) one hundred and eighty (180) days prior to the expiration of the then current term.

[53] Fireweed argues that the Agreement places no limitation on the timing of the effectiveness of written notice to terminate; therefore, either party had the right under the Agreement to give notice of termination at any time effective immediately.

Super Save argues that the termination provision does not allow for termination of the original Term, but rather relates to stopping the automatic renewal process. Thus, at issue is whether the phrase "until terminated by either party" is intended to modify just the automatic renewal provision or both the automatic renewal and the Term itself.

[54] In *Rhebergen v. Creston Veterinary Clinic Ltd*., 2014 BCCA 97, the British Columbia Court of Appeal addressed the question of interpreting contractual terms as follows:

> 73 The contractual intent of parties to an agreement must be objectively determined. This is achieved by construing the plain and ordinary meaning of the impugned words, not in isolation, but in the context of the agreement as a whole and the factual matrix (or surrounding circumstances) in which the agreement was reached. Evidence of the factual matrix includes "circumstances known to both parties that illuminate the meaning a reasonable person would give to the words employed": *Water Street Pictures Ltd. v. Forefront Releasing Inc.*, 2006 BCCA 459 (B.C. C.A.) at para. 24, (2006) 57 B.C.L.R. (4th) 212 (B.C. C.A.). Ambiguity only arises where, "on a fair reading of the agreement as a whole", the language of a provision is reasonably capable of more than one meaning: *Water Street Pictures Ltd.* at paras. 23-24, and 26.
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> 74 A clause is not ambiguous simply because of a difference of opinion as to whether the hypothetical activity triggers the compensable provision. If the clause can be construed by an application of the plain and ordinary meaning of its words and the ordinary rules of grammar, then the clause is not ambiguous…

[55] In my view, on a plain reading, the most logical interpretation of the provision would favour the plaintiff's position, namely that it is intended to relate to termination of the automatic renewal process rather than termination of the Term. I so conclude for two reasons. Firstly, the reference to termination immediately follows the reference to the automatic renewal. Secondly, this interpretation makes the most sense when the termination provision is read in conjunction with the temporal requirement that notice be

given at least 180 days prior to the end of the then current term, such that there is six months' notice of the intention to terminate the automatic renewal. Such a temporal requirement makes absolutely no logical sense if termination is also intended to relate to termination of the Term.

[56] Accordingly, I am not satisfied that Fireweed had the right to terminate the Agreement, at any time, effective immediately.

[57] That being said, even if I were satisfied that Fireweed had such a right, the Agreement is clear that written notice of termination would be required. In addition to the reference to a requirement of written notice in the Term provision, clause 9 of the Agreement states:

> All notices to Super-Save required under this Agreement shall be delivered either in person to the office address of Super-Save or by confirmed facsimile to the facsimile number of Super-Save. Super-Save shall not recognize any other mode of delivery of notice.

[58] Fireweed argues that it gave oral notice, which, while not in writing, was effectively accepted by Super Save in invoking clause 13 of the Agreement. They further argue that written notice was a mere technicality.

[59] In my view, this argument fails for several reasons. Firstly, there is absolutely no evidence that Fireweed ever gave even oral notice of an intention to terminate. Mr. Meili gave no evidence to suggest that he ever told Mr. Lisson that Fireweed was terminating the Agreement, and the emails filed as exhibit 4 indicate that Mr. Meili was basically non-responsive to Mr. Lisson's efforts to address Fireweed's concerns.

[60] The only evidence that could, indirectly, be considered to be "notice", is the removal and return of Super Save's tank by Borealis. I fail to see how this would amount to notice to terminate.

[61] Furthermore, I am not satisfied that the requirement that notice be in writing was simply a technicality. In *Ariston Realty Corp. v. Elcarim Inc*., 2014 ONCA 737, the Ontario Court of Appeal addressed the question of whether actual notice can replace written notice as follows:

> 19 It is well-established that contracts are to be interpreted in accordance with the intentions of the parties, as evidenced by the words used, and in light of the underlying context of the agreement. This court summarized the basic principles of commercial contract interpretation in *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673, 74 B.L.R. (4th) 161, at para. 16:
>
> > The basic principles of commercial contractual interpretation may be summarized as follows. When interpreting a contract, the court aims to determine the intentions of the parties in accordance with the language used in the written document and presumes that the parties have intended what they have said. The court construes the contract as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective. In interpreting the contract, the court must have regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties. The court should interpret the contract so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity. If the court finds that the contract is ambiguous, it may then resort to extrinsic evidence to clear up the ambiguity.
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> 20 These principles did not guide the trial judge's interpretation of the contract. The trial judge interpreted the holdover clause to require that Elcarim was aware Ariston introduced Context to the property, regardless of whether written notice of the introduction was provided. In doing so, she

> effectively replaced the requirement of written notice with a requirement of actual notice.
>
> 21 In my view, such an interpretation does not accord with sound commercial principles and good business sense. The requirement of written notice, rather than actual notice, is intended to promote commercial certainty and to reduce the potential for litigation, such as that with which we are now dealing.

[62] I would adopt this reasoning in concluding that the requirement that notice be in writing was not a mere technicality that could be unilaterally dispensed with. My view may have been different in the event of an Agreement between Super Save and an unsophisticated residential customer, but in this instance, Fireweed is a commercial company, in business for over 30 years, and well-versed in the use and expectations of contracts.

[63] With respect to the argument that Super Save effectively accepted Fireweed's "notice" by invoking clause 13, this argument is premised on the wording that the liquidated damages is not invoked unless Super Save "accept(s) the purported termination by the Customer and terminate(s) this Agreement". Therefore, Fireweed argues, that invocation of the liquidated damages clause effectively means Super Save has accepted notice of termination.

[64] I do not find this to be a persuasive argument as the clause uses the term "purported termination". The Merriam-Webster dictionary defines purported as "to have the often specious appearance of being, intending, or claiming (something implied or inferred)." Other definitions equate purported with alleged. Adopting these definitions, I fail to see how a "purported termination" can be considered to be actual notice.

Issue 3: Did Fireweed Breach the Agreement?

[65] There are two terms of the Agreement relevant to the question of whether Fireweed did indeed breach the Agreement: clauses 1 and 2(b). Clause 1 reads in part:

> …The Customer covenants to purchase all of its propane requirements exclusively from Super-Save during the initial term of this Agreement or any renewal thereof at the Price in effect from time to time. The Customer further covenants that it shall not purchase propane from any other source except Super-Save during the Term of this Agreement or any renewal thereof and acknowledges that the covenant not to purchase propane from any other source other than Super-Save is a negative covenant on its part.

[66] Clause 2(b) reads, in part: "No Equipment shall be removed from any Customer location without the prior written consent of Super-Save…". The Schedule of Equipment on page 1 of the Agreement includes the 1,000-gallon storage tank.

[67] The facts are clear that prior to completion of the initial Term, Fireweed contracted with Borealis to become its new propane supplier. This is a clear breach of clause 1. The evidence is equally clear that Borealis removed and returned Super Save's tank. This is a clear breach of clause 2(b).

Issue 4: Is Clause 13 Enforceable?

[68] Clause 13 of the Agreement reads in part:

> If Customer (a) purports to terminate this Agreement or (b) the Agreement is terminated for any other reason other than pursuant to stipulations set out in the paragraph entitled Term on page 1 of this Agreement, prior to the expiration of the Term or any renewal thereof, Super-Save will have the option to either (a) affirm this Agreement and Customer hereby

> irrevocably agrees to any and all permanent, interlocutory or interim relief that Super-Save may seek from the courts to enforce its rights hereunder, or (b) accept the purported termination by Customer and terminate this Agreement, in which case the Customer covenants and agrees to pay Super-Save as liquidated damages an amount equal to the average monthly volume of propane supplied under this Agreement to the Customer up until the date of termination of the Agreement times the Price per litre in effect on the date of termination multiplied by the number of months left in the Term of the Agreement or any renewal thereof. Customer acknowledges that the foregoing liquidated damages are a reasonable calculation of the anticipated income stream loss to Super-Save occasioned by the breach of the Agreement by the Customer and are not imposed as a penalty. …

[69] Fireweed argues that this liquidated damages clause amounts to a penalty and is therefore unenforceable.

[70] A clear and effective summary of the law in relation to enforcement of liquidated damages clauses can be found in the British Columbia Supreme Court decision in *Super Save Disposal Inc. v. Blazin Auto Ltd*., 2011 BCSC 1784:

> 26 The enforceability of a liquidated damages provision in an agreement engages two competing objectives: freedom of contract versus the right of the courts to intervene in a given case to relieve against an oppressive or unconscionable result flowing from enforcement of the liquidated damages term. It is well settled that the enforceability of such a term turns on whether it is a genuine pre-estimate of the expected loss that a party will sustain in the event of a breach of contract or a penalty clause so oppressive or unreasonable that equitable intervention is justified to prevent an injustice.
>
> …
>
> 30 Though the parties may use the words "liquidated damages" or "penalty" in the agreement itself, the parties' characterization of the clause in the contract as one or the other is not conclusive: *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd., supra*. Similarly, the absence of such characterizing phrases is neither fatal to the plaintiff's claim for liquidated damages or to the defendant's challenge that the clause at issue amounts to a penalty: *Bayliss Sign Ltd. v. Advantage Holdings Ltd.* (1986), 8 B.C.L.R. (2d) 230 (B.C. Co. Ct.), at p. 241. In each

> case, the court must make an assessment as to whether the clause is in truth a genuine pre-estimate of anticipated loss in the event of a breach, or an *in terrorem* clause inserted to compel performance of a contractual obligation.
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> 31 Judicial interference with a liquidated damages provision will be justified if enforcement of the term results in payment of a sum which is extravagant and unconscionable in comparison with the greatest loss that could conceivably be proved to have followed from the breach: *32262 B.C. v. See-Rite Optical, supra*, at para. 13.
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> 32 Conversely, a liquidated damages provision is more likely to be enforced where the claim approximates the amount to which the claimant would otherwise have been entitled according to principles of general contract law: *32262 B.C. v. See-Rite Optical Ltd, supra*, at para. 16 to 18.
>
> 33 The onus of establishing that a stipulated sum is a penalty rather than a genuine pre-estimate of damages that the parties have agreed in advance will be sustained in the event of a breach of the contract, rests on the party against whom the stipulated sum is claimed. …

[71] Fireweed argues that the liquidated damages clause in this case is unconscionable as it seeks to reimburse Super Save for all of the money Fireweed would have paid for the remainder of the term. In seeking gross revenue rather than net profit, the clause amounts to an unconscionable penalty.

[72] Fireweed relies, in particular, on the trial and appellate decision of 2016 *Shenwei Enterprises Ltd.* At trial, the Court was not provided with evidence relating to the costs of servicing a waste disposal contract. Nonetheless, the trial judge concluded:

> 26 In my view, having regard to all of the circumstances of the case including the amount of the service charge in each case, and the probable cost of providing the service, in my view the loss of the income stream does not represent a close approximation of the maximum damages recoverable at common law and the clause cannot be upheld as a bona fide liquidated damages clause. It is a penalty in an amount which is extravagant and unconscionable in comparison to the greatest loss that could be proven to have followed from the defendant's cancellation of the agreement or breach by non-payment.

[73] This finding was upheld on appeal to the Alberta Court of Queen's Bench, as it then was, *Super Save Disposal (Alberta) v. Shenwei Enterprises Ltd*., 2017 ABQB 805:

> 30 I agree with Judge Ingram. The clause as set out in paragraph 11 of the contract which claims as liquidated damages an amount equal to the amount of the monthly charges plus applicable sales taxes that would ordinarily become due to the contractor for the balance of the term is a measurement of gross income and not a genuine pre-estimate of loss of net profit in the context of the contract between the parties. It is an unreasonable and oppressive response to the repudiation of the contract, and therefore a penalty, not a genuine pre-estimate of damages. This is not because there was any proof before the trial judge of the quantitative difference between the gross income and net profit figures, but because qualitatively it is unfair and inequitable to charge a gross income amount, whatever it is, when the loss suffered by Super Save was loss of net profit, whatever it is, on a liquidated damages provision in a contract.
>
> 31 I uphold the decision of Judge Ingram in dismissing Super Save's civil claim.

[74] Super Save argues that the expenses of servicing the Agreement were negligible in this case as Fireweed was on an established Super Save route. They further note that the breach deprived them of both the profit and the ability to spread the cost of the tank over a five-year term. Therefore, the liquidated damages calculation is a true reflection of their loss. As this case involves two sophisticated commercial entities who freely chose to enter into the Agreement, Super Save submits that the Court ought not to interfere.

[75] Super Save points to another waste disposal case, *Tristar Cap & Garment Ltd*. *v. Super Save Disposal Inc.*, 2014 BCSC 690*,* which held:

> 35 At common law, Super Save would be entitled to the loss of the income stream under the contract for two years, less its costs of providing the services prescribed in the contract. Assuming minimal costs would be incurred to service an extra bin, the income stream represents a close

> approximation of the maximum damages recoverable at common law for Tristar's breach of contract.

[76] In considering the application of the law to the liquidated damages clause in this case, I would note that what is sought by Super Save is not fully income stream or gross revenue as Fireweed contends. As has already been discussed above, Super Save, on its invoices, itemized a number of fees related to their overhead costs of servicing the Agreement, including transportation and storage fees. These costs are not included in the liquidated damages calculation.

[77] With respect to Super Save's submission that they have lost the ability to spread the cost of the tank over a five-year period, I find that there was no evidence before me to support a finding that this is an actual loss or, if it is, how such a loss might be calculated.

[78] What is clear on the evidence is that the liquidated damages calculation in clause 13 includes not just lost profit, but also the refinery cost of propane, a cost that Super Save would, of course, not be required to pay as they are no longer providing propane to Fireweed. The uncontradicted evidence is that Super Save's profit margin on the Fireweed account is 76%. This means that 24% would have to be the refinery cost of the propane. This is not a negligible cost. The effect of the liquidated damages clause would effectively entitle Super Save to 24% more than their anticipated lost profits. This, in turn, would be 24% more than the maximum damages recoverable at common law.

[79] In my view, this is sufficiently excessive to warrant judicial interference. I am satisfied that clause 13 amounts to a penalty and is therefore unenforceable.

Issue 5: Is Super Save Entitled to Contractual Damages?

[80] Fireweed argues that Super Save's Claim should be dismissed in its entirety in the event the liquidated damages clause is found to be unenforceable on the basis that Super Save did not seek contractual damages in their claim. They rely on the 2016 *Shenwei Enterprises Ltd.* decision in which the trial judge held:

> 27 This court has jurisdiction to relieve against penalties. see *Dorland Property Management* v. *George Hood* 2000 ABPC 165. I therefore dismiss the plaintiff's Civil Claim. Damages were not claimed; only a claim under the contract for contractual "liquidated damages".

[81] The dismissal was upheld on appeal.

[82] In this case, Super Save argued that while it's primary claim was for liquidated damages, they, nonetheless, also sought: "Such further and other relief as Super Save should request and this Honourable Court should see fit to grant". As such, it is open to the Court to grant contractual damages in the alternative.

[83] On the facts of this case, I am satisfied that contractual damages are the appropriate remedy for Fireweed's breach of the Agreement.

[84] I am satisfied that the calculation for liquidated damages is a reasonable starting point, less, of course, the refinery cost of propane. I note, however, that there were errors in Super Save's initial calculation. Specifically, as the breach crystallized when Fireweed entered into the contract with Borealis on July 22, 2021, the total litres of

propane should have been divided by 44 months rather than 43 to get the average monthly litres. Further, the average monthly litres should have been multiplied by 16 remaining months rather than 17. I calculate damages as follows:

Total litres:	45,013
Divided by:	44 months
Equals:	1,023.023 litres per month
Times:	16 months remaining
Equals:	16,368.363 litres
Times	$.989 per litre
Equals:	$16,188.31

[85] This figure then must be reduced by 24%, or $3,885.19, to reflect the refinery cost of propane, leaving $12,303.12 as the estimated lost net profit.

Issue 6: Contractual Damages

[86] Super Save seeks contractual interest at a rate of 24% per annum, based on the Terms of Payment clause on p. 1 of the Agreement, which reads:

> It is understood and agreed that terms of payment are net 10 days from date of invoice on approved credit and the Customer agrees that overdue accounts are subject to an interest charge of 24% per annum.

[87] As pointed out by Fireweed, liquidated damages do not amount to an “overdue account”. I would similarly find that damages for lost profits as awarded in this case do not constitute an “overdue account”.

[88] Therefore, I conclude that Super Save is not entitled to contractual interest on the damages awarded. They are, however, entitled to pre- and post-judgment interest calculated under the *Judicature Act*, RSY 2002, c. 128.

Conclusion

[89] Judgment in favour of the plaintiff is as follows:

1. Fireweed shall pay to Super Save damages in the amount of $12,303.12 for breach of contract; and

2. Pre- and post-judgment interest pursuant to the *Judicature Act*.

[90] As neither party was fully successful, each will bear its own costs.

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RUDDY T.C.J.