IN THE SUPREME COURT OF NOVA SCOTIA
Citation: McAsphalt Industries Ltd. v. Chapman Bros. Ltd. 2008 NSSC 324

Date: 20081030
Docket: SH 242656
Registry: Halifax

Between:

McAsphalt Industries Limited

Plaintiffs

and

Chapman Bros. Ltd.

Defendants

Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	March 3, 4, 5 and 6, 2008, in Halifax, Nova Scotia
Counsel:	David Farrar, Q.C. for the plaintiff Thomas P. Donovan, Q.C. for the defendant

By the Court:

[1] This proceeding arises out of the sale by the plaintiff (and defendant by counter-claim) to the defendant (and plaintiff by counter-claim) of a polymer modified asphalt cement in October 2004. The plaintiff seeks payment of invoices totalling $140,437.13, as of the date of trial. The defendant counterclaims for damages in the amount of $203,012.58, allegedly incurred as a result of a defect in the cement supplied by the plaintiff.

BACKGROUND

[2] The plaintiff produces asphalt products, including the cement concerned in this proceeding, designated PG64-28P (hereafter "the PG64 cement" or “the product”). The defendant is a paving company. In the fall of 2004 the defendant was the successful bidder on a repaving project at Sutherlands River, NS, known as Project 2004-038.

[3] Pursuant to its contract with the Nova Scotia Department of Transportation and Public Works (“the Department”), the defendant was required to place one

layer, or "lift", of asphalt made using the PG64 cement. This lift was to go on top of a "base lift" of a different cement, PG58-28, which would be obtained from another supplier. The asphalt cement is mixed with sand and gravel aggregates to produce the "hot mix" that is applied to the road surface. The contract with the Department required the defendant to use the PG64 cement, in a job mix formula (i.e. the percentage of PG64 in the “hot mix” asphalt) of 5.6 percent.

[4] On August 5, 2004, Cyril Chapman, the defendant’s principal, phoned Guy Kendziora, the plaintiff’s marketing manager for the Atlantic region, and inquired about a price for PG64 cement to be used on the paving project. The plaintiff agreed to provide the defendant with the PG64 cement at a price of $449.00 per metric ton, free on board the defendant's asphalt plant in New Glasgow, NS, with payment to be made within 30 days of invoicing. The plaintiff represented that the product could be used with conventional paving equipment, provided that the temperature of the tank was maintained at a temperature of between 150 and 160˚C, and provided that the product was rolled within a specified period to avoid setting.

[5] On August 6, 2004, Mr. Kendziora faxed a document entitled "Recommendations for using PG 64-28 PMA for Hot Mix Asphalt." Under the heading "equipment," this document stated that "[c]onventional equipment is sufficient for mixing and laying hot mix asphalt which is manufactured using PG 64-28 PMA." Mr. Kendziora confirmed at trial that the defendant's Barber Greene asphalt plant was "conventional equipment." He also confirmed that he knew that the defendant had not previously used PG64 cement.

[6] The PG64 cement was made at the plaintiff's facility at Valleyfield, PQ. According to Anton Kucharek, the plaintiff's Director of Technical Services, the production of the PG64 cement was subject to a Quality Control Plan. The defendant produced certificates of analysis dated October 1, 7 and 22, 2004, each indicating that the batch of PG64 being tested met the required specifications. Mr. Kucharek was unable to locate a certificate between October 7 and 22, and suggested that the lot of PG64 had not been changed from the lot tested on October 7.

[7] The PG64 cement was trucked to the plaintiff's through-put facility in Dieppe, NB, during the week of October 14, 2008. At Dieppe, the product was

pumped from the plaintiff's trucks into a tank, in which it was reheated. It was required to pass through a filter with 3/8 inch openings. It was pumped back out through the filter into a truck when it was time to deliver to the purchaser. When the cement that was eventually delivered to the defendant arrived in Dieppe, the plant manager, Brent Kinghorn, noticed that one of the trucks was unloading unusually slowly, and that it appeared to contain "cubical" chunks of undissolved polymer that were clogging the filter. While he was not certain what this material was, he knew it was "something foreign." Mr. Kinghorn reported this incident to Mr. Kendziora. Mr. Kinghorn's evidence was that the "chunks" he observed were about one-half inch in size; this was a phenomenon that he not previously encountered, and which he had not encountered again when he gave evidence. After consultation with personnel at Valleyfield, he was advised to heat the PG64 and to keep the tank mixers on for about 24 hours.

[8] The evidence of Mr. Kucharek was that polymer residue occasionally appears in the cement, but he agreed that "chunks" of polymer should not be present. Mr. O'Toole also testified that undissolved polymer should not be present in the cement.

[9] By October 18, 2004, the defendant had finished laying the bottom lift, and the first shipments of polymer-modified PG64 cement arrived from the plaintiff's facility in Dieppe. The reverse of the bills of lading stated that the plaintiff;

> Warrants title to the product sold and delivered hereunder. Buyer declares itself familiar with the nature and use of the product and assumes all liability resulting from or in any way connected with the possession handling or use thereof after the delivery of the product. No claims as to quality of product delivered or for non delivery of product should be greater than the value invoiced for the shipment to which any claim results.

[10] While the plaintiff has submitted that Mr. Kinghorn's evidence was that he did not know which customer received the product in which he saw the chunks, the defendant says that this is incorrect, given the dating and timing of the bills of lading to Modern Enterprises, to which PG64 was shipped on October 14 (before the allegedly contaminated product arrived in Dieppe) and October 20 (when the defendant had already received its shipment). As such, the defendant says it is the only customer that could have received the allegedly contaminated product seen by Mr. Kinghorn.

[11] The defendant prepared the hot mix in a Barber-Greene DM-66 plant, known as a drum-mix plant, located in Thorburn, NS. The plant feeds aggregate into a mixing drum, by means of a conveyor belt, while pumping liquid asphalt from an

asphalt tank through a filter. The filter has mesh openings 1/8 inch in size. The plant operator was Wayne Chaisson, who had several decades' experience in such work. Mr. Chaisson calibrated the plant to ensure that the correct amount of liquid asphalt was entering the mixing drum. This was done by setting the dials in the control trailer to the appropriate setting, in this case 5.6 percent. Along with Blair Morrow, from the Jacques Whitford consulting firm, Mr. Chaisson was responsible for ensuring that the plant was operating correctly and was properly calibrated. The liquid asphalt content entering the mixing drum was metred by the plant, and the results were monitored by the operator, Mr. Chaisson, in the control trailer. Mr. Chaisson said the reading was made after the PG64 left the holding tank and passed through the strainer. As to the accuracy of the calibration, the defendant says the requirement was for the belt-scale to be accurate within .5 percent, but that the Jacques Whitford Quality Control Report prepared by Mr. Morrow indicates that it was perfectly accurate, showing a deviation of zero percent.

[12] The defendant began laying the top lift of PG64 hot mix on October 19, 2004.

[13] On October 20 Jeffery Chapman, the defendant's superintendent and engineer, noticed compaction problems with the hot mix as it was being laid, consistent with a liquid asphalt content in the hot mix. The plant was shut down in order to ascertain the source of the problem. According to Mr. Chaisson and Mr. Morrow, there was no apparent problem with the calibration of the plant, even when the liquid asphalt content was below the required percentage. They said the computer readings in the control trailer indicated that 5.6 percent PG64 was entering the mixing drum.

[14] After the problem arose, Cyril Chapman called Mr. Kinghorn in Dieppe, who told him that there had been "trouble with the material that came down from Valleyfield." Mr. Kinghorn recommended removing the filter on the defendant's plant and proceeding with the work without it. Mr. Chapman received similar advice from Mr. Kendziora, who suggested checking the filter. He testified that he made this suggestion because he believed that a reduced asphalt content could result from undissolved polymer, or some other restriction, in the cement. He was aware, from speaking to Mr. Kinghorn, that there had been undissolved polymer chunks in the cold product in Dieppe.

[15] The defendant's filter, when removed, was found to be clogged with chunks of what Jeffery Chapman described as "rubber pellets,", while Mr. Morrow said it was like a "rubber boot." After being cleaned out, according to Mr. Chaisson, the filter clogged again in half an hour. At trial, Mr. Kucharek stated that the material clogging the filter in photographs he inspected was polymer; while he and Mr. Kendziora suggested that some other object or material may have caused the blockage, the evidence of the defendant's workers was that the polymer was clogging the filter, although there was also some coked asphalt.

[16] The defendant was required to remove and replace part of the second lift, as it did not meet the specifications of its contract with the Department of Transportation. The defendant says there were no problems with the asphalt content of the hot mix before the PG64 cement was introduced; at that point, however, the asphalt fell below the Department's specifications. The plaintiff suggests that the Jacques Whitford tests on hot mix samples from the first and second lifts "consistently produced results falling well below the required job mix formulas," and says Mr. Morrow agreed that "the results should have told him that his gauge was not dispensing enough liquid asphalt into the mixing drum." The plaintiff says sample tests after the strainer was removed continued to produce

results below the required job mix formula. According to the defendant, however, when the defendant's personnel removed the filter (on the advice of Mr. Kinghorn and Mr. Kendziora), the asphalt content rose to 5.82, and remained within the Department's specifications.

[17] The Department contracted AMEC Earth and Environmental to provide quality assurance for asphalt products. According to the plaintiff, both its own and AMEC's tests indicated that the PG64 met the specification required each time it was tested. The plaintiff says that Jeffery Chapman acknowledged that the PG64 was "within specification 'for the performance standard'." Lewis O'Toole, an asphalt technician with AMEC, testified that samples taken on October 19 and October 22, 2004, showed that the PG64 cement provided by the plaintiff was within the required specifications. The AMEC tests on October 19 showed asphalt content of 5.12; three samples taken from the hot mix laid on October 20, however, showed a drop in asphalt content from 5.03 to 4.56, then to 4.36.

[18] The submission of the defendant is that the restriction in the filter was caused by undissolved chunks of polymer that were not intended to be in the product, with the further result of a reduced asphalt content that caused the

defendant to fail to meet the Department's specifications. The defendant offers the inference that, as the build-up in the filter became worse, the flow of liquid asphalt into the mixing drum was restricted. The result was a reduced asphalt content in the hot mix. Mr. Kucharek agreed that chunks in asphalt cement were undesirable and could restrict the flow of asphalt cement; similarly, Mr. Kendziora agreed that undissolved polymer chunks (or any other kind of restriction) could clog the filter and cause the asphalt content to drop.

[19] The reduced asphalt content led the Department to reject the portion of Lot # 2 that was laid on October 20 for failing to meet the specifications. This amounted to approximately 1950 metric tons of hot mix. The defendant's appeal of AMEC's test results failed on the basis that the average asphalt content of the four samples from Lot # 2 was 5.02, a deviation of .58 from the job mix formula. The defendant was also subject to a penalty of $2,400.00 on account of a deviation in the asphalt content of Lot # 1 of more than .3. It should be noted that the Department initially rejected the entire 2,400 tons of the lot, but further testing confirmed that approximately 400 tons was acceptable.

FINDINGS OF FACT

[20] I have made certain findings of fact, as follows, based on all the evidence.

(1) The plaintiff offered to sell, and the defendant agreed to buy, polymer-modified asphalt, designated PG 64-28P ("the product"), to be used in a paving contract to be carried out by the defendant under an agreement with the Nova Scotia Department of Transportation and Public Works, at Sutherland's River, NS, commencing in October 2004. Delivery was agreed to be f.o.b. the defendant's asphalt plant.

(2) The defendant's personnel were not familiar with the product, not having used polymer-modified asphalt previously. The defendant relied on the plaintiff's assurances that the product could be mixed using "conventional" equipment. The plaintiff did not make any qualification as to the type of equipment required to mix the product. The defendant's mixing plant constituted "conventional" equipment of the kind contemplated by the plaintiff.

(3) In the course of negotiating a sale agreement with the defendant, the plaintiff represented that it had expertise in the manufacture and the delivery of the product. The plaintiff represented that the product could be used with conventional paving equipment, provided that the temperature of the tank was maintained at a temperature of between 150 and 160 ˚C, and provided that the product was rolled within a specified period to avoid setting.

(4) The product was manufactured at the plaintiff's establishment in Valleyfield, PQ, and was shipped from there to the plaintiff's plant at Dieppe, NB. It was the practice of the plaintiff to analyze each weekly batch to assure that the product met the quality control standard for the product. The defendant produced certificates of analysis dated October 1, 7 and 22, 2004, each indicating that the batch of PG64 being tested met the required specifications. The defendant did not produce a certificate between October 7 and 22 and

could not provide a firm explanation as to why there was no such certificate.

(5) Personnel at the Dieppe plant encountered undissolved polymer while unloading a shipment of the product from Valleyfield on October 18, 2004. They did not notice any undissolved polymer when they reloaded the tank trailer to ship the product to the defendant.

(6) The plaintiff did not inform the defendant of the existence of undissolved polymer prior to delivering the product to the defendant's plant on October 19, 2004. The plaintiff did not carry out any tests to determine whether the undissolved polymer had been sufficiently dissolved to permit the defendant to operate its plant without any restriction. There was no opportunity for the defendant to carry out any intermediate inspection of the product between the time it arrived at its plant and the discharge of the product into a holding tank.

(7) There is no evidence that the defendant's equipment was not conventional equipment or that it was not operating properly during the relevant period. The asphalt plant was operating without any apparent difficulties prior to the introduction of PG 64-28P into the production of asphalt. When the defendant began mixing a "hot mix" using the product, however, the filter on its asphalt plant jammed. Inspection of the filter revealed chunks of foreign material were restricting the flow of asphalt. The material clogging the filter was undissolved polymer.

(8) Upon being informed of the problem experienced by the defendant, the plaintiff's representatives informed the defendant's representative that a similar problem had occurred at the Dieppe plant and advised them to run the plant with the filter removed. Doing so allowed the defendant to produce hot mix with a sufficient asphalt content. Operating the defendant's asphalt plant without a filter was not a conventional operating procedure.

(9) The defendant's plant did not have an effective means of confirming the asphalt content of the hot mix prior to its placement on the road surface.

(10) The Department rejected approximately 1950 metric tons of paving asphalt laid by the plaintiff. The cause of the rejection was the below standard asphalt content (of three tests) of asphalt which was outside tolerance set in the contract. The plaintiff was required to repave 1951.68 tons of asphalt.

(11) The defendant paid for all the PG64 of which it took delivery, with the exception of invoices in the amount of $140,437.13.

ISSUES

[21] The issues in the proceeding are (1) whether the plaintiff breached an express or implied warranty by supplying the defendant with cement that was contaminated with undissolved chunks of polymer; (2) if there was a breach of warranty by the plaintiff, whether it caused a loss to the defendant; (3) if the plaintiff's breach did cause the defendant's loss, the measure of damages; and (4) whether the plaintiff is entitled to recover from the defendant the price of cement supplied and not paid for.

LAW AND ARGUMENT

Action for price of goods

[22] The plaintiff brings the proceeding under s. 50(1) of the *Sale of Goods Act*, R.S.N.S. 1989, c. 408, which provides:

> **Action for price**
> 50 (1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

[23] According to the plaintiff, when property in the goods passed to the defendant, a contract of sale was created, and the defendant was obligated to comply with ss. 29 and 30 of the Act, which provide:

> **Duties of seller and buyer**
> 29 It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.
>
> **Delivery and payment are concurrent conditions**
> 30 Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

[24] The plaintiff says the defendant was obliged to pay for the cement upon delivery in accordance with the Act. In January 2005 the defendant made a

payment of $230,000.00 on a total account of $370,437.13, leaving an outstanding balance of $140,437.13, which Cyril and Jeffery Chapman agreed at trial had not been paid.

[25] The defendant contends that the product supplied by the plaintiff was of such a quality that it could not be used in the intended manner to produce satisfactory hot mix. The defendant maintains that it could only produce a satisfactory hot mix by operating its plant without a filter, in a manner in which it was not designed or intended to be operated. The defendant says the unsatisfactory quality of the product was such that the plaintiff failed to meet an express warranty that "conventional equipment" was sufficient for mixing the product, as well as implied conditions (imposed by the *Sale of Goods Act*) that the product was fit for the purpose for which it was intended, and that it was of merchantable quality.

[26] The plaintiff asks the court to draw an adverse inference based on the fact that, in a letter to Mr. Kendziora dated January 11, 2005, the defendant referred to a report (apparently by Imperial Oil) to the effect that "the cause of the plugging of the strainer was directly caused by overheating of the asphalt, resulting in the polymer separated [*sic*] from the asphalt forming a bond to the coked asphalt and

plugging the strainer." The plaintiff says the defendant's failure to lead evidence respecting this report should attract an adverse inference.

[27] An adverse inference may be drawn "against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it": J. Sopinka et al., *The Law of Evidence in Canada*, 2d edn. (1999) at §6.321. The defendant notes the comment of the Federal Court of Appeal in *Pfizer Canada Inc. v. Apotex Inc.*, 2004 FCA 398; [2004] F.C.J. No. 1985, that the court may draw an adverse inference "from a party's failure to produce evidence of a fact that it is better placed than the other party to prove, when the evidence is peculiarly within the knowledge of that party and the other party lacks the means of proving it" (para. 7).

[28] The defendant also submits that an adverse inference should not be drawn where a party has adduced other evidence on the fact in issue. In *R. v. Jolivet*, [2000] 1 S.C.R. 751; [2000] S.C.J. No. 28, Binnie J. said, at para. 28:

> ... The circumstances in which trial counsel decide not to call a particular witness may restrict the nature of the appropriate "adverse inference". Experienced trial

> lawyers will often decide against calling an available witness because the point has been adequately covered by another witness, or an honest witness has a poor demeanour, or other factors unrelated to the truth of the testimony....

[29] The defendant adds that it was open to the plaintiff to call Mary Gale, the author of the Imperial Oil report, to testify. The plaintiff objected to the introduction of the Imperial Oil report in evidence without calling Ms. Gale, but the defendant says there were reasons for not calling her, including the fact that she would have to come from Ontario at the defendant's expense; that her testimony that the filter was clogged with polymer was unnecessary, since the evidence was available from other witnesses; and that Mr. Kucharek and Mr. Kendziora admitted on discovery that the filter was clogged with undissolved polymer. The defendant also says that the plaintiff did not object when counsel was informed that Ms. Gale would not be called, did not advise that an adverse inference would be sought and did not take steps to call her on its own part.

[30] The defendant says it never believed that the cause of the clogged filter was coked asphalt; rather, it says, the letter referred to by the plaintiff merely indicated that it believed that "a report prepared by Imperial Oil indicated that the reason for the presence of polymer chunks was overheating leading to the separation of the polymer from the asphalt."

[31] In the circumstances, and for the reasons advanced by the defendant, I decide against drawing an adverse inference.

Express warranty

[32] The defendant says the plaintiff's statement that "conventional equipment" was sufficient for mixing the product was an express warranty. In considering whether a statement by a seller was intended to be promissory in nature, the defendant submits, considerations of timing and reliance are relevant.

[33] The defendant says that a statement as to the quality or character of goods made close to the time of contracting will more likely be considered a term of the contract. In *Georgetown Seafoods Ltd. v. Usen Fisheries Ltd.* (1977), 16 Nfld. & P.E.I.R. 254; 1977 CarswellPEI 28 (P.E.I.S.C.), a case dealing with a sale of fish, MacDonald J. said:

> 12 What, then, was the nature and extent of the warranty on the part of the plaintiff to the defendant, if any at all, as to the quality of the fish?
>
> 13 I find that from the conversation between the plaintiff and the defendant there was an express undertaking that the fish were to be of good quality. It has often been said that if a representation as to quality is made contemporaneously with the negotiations on the contract then such is very strong proof that such is to be

> considered as a term of the contract and not merely an expression of opinion or "puff" having no legal liability. Both the plaintiff and the defendant were in the fish processing business and had dealt with each other on previous occasions. While there was no specific mention made as to what use the fish would be put, I find from the terms of the contract and from the type of fish which were sold that the purpose for which the defendant would use the fish arises, inevitably, by implication.... [Emphasis added.]

[34] As to reliance, where the statement concerns a matter that is or should be within the knowledge or control of the seller, and about which the purchaser is ignorant, this will generally lead to an inference that the seller intended the statement to be relied upon, and to be promissory in nature: G.H.L. Fridman, *Sale of Goods in Canada*, 5th edn. (2004), pp. 140-141. Fridman cites *Oscar Chess Ltd. v. Williams*, [1957] 1 All E.R. 325 at 329 (C.A.).

[35] Mr. Kendziora informed Cyril Chapman that “conventional equipment” would be sufficient for mixing the asphalt, after Mr. Chapman had asked about the price and about mixing the product. According to the defendant, Mr. Kendziora knew that Chapman’s had not used polymer-modified asphalt before. As to knowledge, the defendant says the plaintiff clearly had knowledge and control, as well as access to its own testing procedures. The defendant, by contrast, was unaware of the nature and quality of the product. The defendant says both timing

and the parties' relative knowledge support the conclusion that the plaintiff's statement respecting "conventional equipment" was a warranty.

[36] I am satisfied that the representations by the plaintiff amounted to an express warranty as to the usability of the product with conventional mixing equipment.

[37] I also note at this point the statement on the reverse of the bills of lading that the "[b]uyer declares itself familiar with the nature and use of the product and assumes all liability resulting from or in any way connected with the possession handling or use thereof after the delivery of the product." There was little argument on this point, and I am not satisfied that it deprives the defendant of the right to pursue a claim arising out of a latent defect, as was the case here. I also note that the bill goes on to indicate that "[n]o claims as to quality of product delivered or for non delivery of product should be greater than the value invoiced for the shipment to which any claim results. This would seem to indicate that claims respecting the quality of the product – which is the issue here – were contemplated.

Fitness for purpose

[38] I note that the discussion of the quality of the PG64 supplied by the plaintiff is concerned with that quantity of the product that was used in the asphalt that was rejected and which required remediation.

[39] The *Sale of Goods Act* implies a condition that goods are fit for a particular purpose in certain situations, as described in s. 17(a):

> 17 Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness, for any particular purpose, of goods supplied under a contract of sale, except as follows:
>
> (a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the [seller's] skill or judgement and the goods are of a description that it is in the course of the sellers business to supply, whether he be the manufacturer or not, there is an implied condition that the goods shall be reasonably fit for such purpose, provided that, in the case of a contract for the sale of a specified article under its patent or other trade-name, there is no implied condition as to its fitness for any particular purpose....

[40] The elements of fitness for purpose were reviewed in *Sound Images Inc. v. Solar Audio and Recording Ltd.*, [1995] N.S.J. No. 91 (S.C.), where Palmeter A.C.J. said:

> 16 For the plaintiff to succeed in establishing this implied warranty it must meet all of the requirements of the statute on the civil burden of proof, that is, by a preponderance of evidence. In its pre-trial brief the plaintiff submits, that to succeed under s. 17(a) of the Act it must prove:
>
> (a) it made know[n] the defendants the purpose for which the goods were required;
>
> (b) it relied on the defendant's skill or judgment;
>
> (c) the goods are of a description it is in the course of the defendant's business to supply; and
>
> (d) the goods were not fit for the purpose for which they were required.

[41] The plaintiff acknowledges that it was aware of the purpose for which the PG64 cement was required, and that the PG64 cement is a class of good which the plaintiff manufactures and supplies in the usual and ordinary course of its business. The plaintiff knew that the defendant proposed to use “conventional equipment” to do the mixing, and had informed the defendant that “conventional equipment” was sufficient for the job. The plaintiff’s position, however, is that there is no evidence that the cement was unfit “for use as a binding agent in ‘hot mix’ asphalt made using conventional equipment.” The plaintiff refers to Fridman’s statement, in *The Sale of Goods in Canada*, *supra*, at pp. 181-182, that “[f]or the buyer to succeed in making a case of breach of the implied condition, he must show ‘that the defect was such as to destroy the workable character of the thing sold thereby amounting

to a fundamental and total breach of the contract.'" (citing *Peter Esakin Const. v. Wohlberg* (1980), 9 Sask. R. 332 at 335 (Sask. Q.B.).)

[42] As to the defendant's reliance on the plaintiff's skill or judgment, such reliance must have been "brought home to the mind of the seller, expressly or by implication," as Lord Wright stated in *Grant v. Australian Knitting Mills Ltd.*, [1936] A.C. 85 (P.C.) at 99. In *Ashington Piggeries v. Hill*, [1972] A.C. 441 (H.L.), Lord Diplock said, at 505:

> ... By holding himself out to the buyer as a manufacturer or dealer in goods of that kind he leads the buyer reasonably to understand that he is capable of exercising sufficient skill or judgment to make or to select goods which will be fit for the particular purpose for which he knows the buyer wants them.

[43] The buyer's reliance is not required to be total or exclusive. In addition, where the seller is also the manufacturer, it is even more likely that reliance will be found. In *Kendall v. Lillico*, [1968] 2 All E.R. 444 at 456, Lord Reid said, "[i]t can only be in unusual circumstances that a buyer does not rely in part at least on the skill or judgment of the manufacturer, or that a manufacturer is entitled to assume that the buyer is not relying on him at least to some extent."

[44] The defendant says the plaintiff was aware that it had no experience with polymer-modified asphalt, such as PG64. The plaintiff, in turn, was a manufacturer and seller of asphalt-related products, including the cement in question, and held itself out as such. By Mr. Chapman's inquiry about mixing the product, the defendant says, it was brought home to the mind of the plaintiff that the defendant was relying on it to produce and supply the cement in a form capable of being mixed in conventional equipment. The PG64 cement, when properly manufactured, can be mixed in conventional equipment. In this case, it is submitted, it was not fit for that purpose due to contamination. Mr. Kendziora agreed on cross-examination that the plant used by the defendant was a conventional hot mix plant.

[45] Submitting that the presence of the contaminant rendered the product unfit for the known intended purpose, the defendant argues that the presence of a foreign substance can be sufficient to render goods unfit, where the goods without the foreign substance would have been fit. In *Wilson v. Rickett Cockerell & Co.. Ltd.*, [1954] 1 Q.B. 598 (C.A.), the defendant claimed that a shipment of coalite that contained explosive was nevertheless fit for purpose. Lord Denning said, at 606, "[t]he consignment is delivered as a whole and must be considered as a whole; not

in bits. A sack of coal, which contains hidden in it a detonator, is not fit for burning and no sophistry should lead us to believe that it is fit."

[46] The implied warranty, it is submitted, required the product to be fit for all usual purposes within the range of the stated purpose. In this case, there was no range of possible uses, but only one: the production of hot mix asphalt.

[47] The plaintiff claims that the defendant has not proven that the alleged defect destroyed the "workable character" of the PG64, in that (1) 5.6 percent PG64 liquid asphalt was still being introduced into the mixing drum despite the alleged "chunking," and (2) the defendant continued to produce hot mix using allegedly "unfit" PG64 cement after experiencing low liquid asphalt content on October 20. In any event, the plaintiff says, there is no proof that the flow of liquid asphalt into the mixing drum was restricted. This view is based on the evidence of the defendant's witnesses, which indicates that (1) the plant was reliable and in good working order; (2) the plant had been properly calibrated; (3) Mr. Chaisson and Mr. Morrow were monitoring the control panel; and (4) the flow readings taken after the PG64 passed through the strainer indicated that 5.6 percent PG64 liquid asphalt was entering the mixing drum. As such, the plaintiff says, the cause of the

low liquid asphalt content is unknown, but presumably resulted from defects in the defendant's own procedures.

[48] While the plaintiff notes that there were no problems with the hot mix after the filter was removed, the defendant responds that this indicates that the product was not fit for use in the manner that the defendant used it, in a standard plant with a standard filter. There was nothing abnormal or idiosyncratic in the defendant's use of the product; as Steyn L.J. said in *Slater v. Finning Ltd.* (1996), 199 N.R. 203 (H.L.), "the implication will normally be that the goods are fit for the purpose for which the goods would ordinarily be used" (para. 29). The defendant also cites *Borgo Upholstery Ltd. v. Canada (Attorney General)* (2003), 211 N.S.R. (2d) 374; 2003 NSSC 32 (affirmed at 2004 NSCA 5), where I concluded that sitting on the edge of a chair did not constitute an "improper" use for the purposes of merchantability and fitness for purpose (paras. 82-84).

[49] While the plaintiff suggests that testing the samples would have identified a problem with undissolved polymer, the defendant points to Mr. Kucharek's evidence that the testing was not designed to find undissolved polymer, although the presence of a significant amount would have affected the results. Mr. O'Toole

stated that the test results would only be affected if polymer chunks were in the sample that was tested.

[50] In response to the plaintiff's submission that there is no evidence of a restriction in the flow of liquid asphalt into the mixing drum, and that the defendant's own procedures must be to blame for the low asphalt content, the defendant asserts that there were no problems with asphalt content either before the PG64 was in use or after the clogged filter was removed. The defendant also says the plaintiff incorrectly characterizes Mr. Chaisson's evidence as being to the effect that the readings showed 5.6 percent liquid asphalt entering the mixing drum after it passed through the filter. While Mr. Chaisson's evidence is not entirely clear on this point, the defendant says, he did testify that it was not possible for the hot mix produced on October 20 to have had the proper asphalt content when it came out of the plant. According to the defendant, there was no evidence that the computer readings should have been affected by a reduction in asphalt content due to a clog. The task of the readout, it is submitted, is to indicate the amount of liquid asphalt the plant is calling for in order to meet the target. In summary, the defendant says that, while its plant did not detect the reduced asphalt content, there is no evidence that it should have done so. Additionally, the defendant says the

plaintiff's argument on this point appears to be an assertion of contributory negligence, which has not been pleaded.

[51] I am satisfied on a balance of probabilities that the PG64 cement was unfit for the purpose for which the defendant purchased it, and of which the plaintiff was aware: to mix in a conventional asphalt plant (of the type operated by the defendant) in a conventional manner (i.e. with the filter on) in order to produce hot mix. The plaintiff was clearly aware that this was the sole purpose for which the defendant needed the product. I am also satisfied that the defendant's questions respecting the use of the product were sufficient to alert the plaintiff that the defendant was relying on its advice with respect to the use of the PG64. The evidence does not establish that the defendant's own procedures or equipment were defective, nor has the plaintiff pleaded contributory negligence. The product was unfit for producing hot mix in the sole manner that was contemplated by the parties under the agreement of sale.

Merchantable quality

[52] In addition to the requirement that goods be fit for purpose, the *Sale of Goods Act* implies a condition that goods be of merchantable quality, at s. 17(b):

> 17 Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness, for any particular purpose, of goods supplied under a contract of sale, except as follows:
>
> (b) where goods are bought by description from a seller who deals in goods of that description, whether he be the manufacturer or not, there is an implied condition that the goods shall be of merchantable quality, provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed....

[53] In *Sound Images, supra*, Palmeter A.C.J. identified the elements under s. 17(b) as follows, at para. 17:

> (a) the goods were bought by description;
>
> (b) from a seller who deals in goods of that description; and
>
> (c) the goods were not of marketable quality.

[54] The plaintiff does not dispute that the PG64 was bought by description, or that it is a dealer in goods of that description. It does, however, dispute the defendant's claim that the product it supplied was of unmerchantable (or unmarketable) quality. Merchantability was described in the following terms in *Murray v. Sperry Rand Corporation* (1979), 96 D.L.R. (3d) 113 (Ont. H.C.J.) at 119-120:

> 40 Decisions on this clause and others of its type have been many. They are reviewed in Linden, *Canadian Tort Law* (1968), pp. 474 ff. It is there observed:
>
> > In other words, not only must the article be saleable in the market, but it must also be reasonably fit for the general purposes such goods serve.
>
> 41 In *Grant v. Australian Knitting Mills Ltd.*, [1936] A.C. 85, [1936] 1 W.W.R. 145 (P.C.), Lord Wright said, at p. 100, that:
>
> > ... merchantable does not mean that the thing is saleable in the market simply because it looks all right; it is not merchantable in that event if it has defects unfitting it for its only proper use but not apparent on ordinary examination: ...

[55] Commenting on Lord Wright's view that unmerchantability means that the goods are not usable for any purpose for which they would normally be used (see *Cammell Laird & Co., Ltd. v. Manganese Bronze & Brass Co., Ltd.*, [1934] A.C. 402), Lord Guest said in *Kendall v. Lillico*, *supra,* at 477:

> The test ... must be whether the article is saleable in the ordinary market for such goods under that description. The test put forward by Lord Wright may be one factor or one guide in the determination of merchantability, but it cannot be the determining factor since purpose is not the sole test of merchantability and the test omits all reference to price. If the test of unmerchantability is that the article is fit for no use, few goods would be unmerchantable because use can always be found for goods at a price.

[56] Also in *Kendall v. Lillico*, Lord Pearce stated that goods may be unmerchantable if there is a hidden defect and no warning is supplied, even if the goods would have merchantable with a warning of the defect (p. 487).

[57] The defendant cites the flexible approach to merchantability set out in *Strandquist v. Coneco Equipment*, 1999 ABCA 357; 1999 CarswellAlta 1179 (Alta. C.A.):

> 23 Lord Wilberforce concurred in the speech of Lord Pearce on the topic of merchantability [in *Kendall v. Lillico*]. Lord Pearce said that merchantability has to do with quality (not purpose), and that the trial judge had been wrong to use the 1934 "of no use" test. He agreed with the qualification respecting price, item (c) above, and said that the 1934 test was misleading. Goods of lower quality, "seconds," are not necessarily merchantable.
>
> 24 Lord Pearce added another qualification.... He said that the meal which would kill young poultry or young pheasants would not be marketable unless it were accompanied by a very clear and explicit warning that it would kill such birds, as well as a warning that the strength of the toxin was unknown. He doubted very much that goods so labelled would have been marketable without a price abatement.
>
> 25 Worse still, that meal with that contamination sold without such a warning label was simply a hidden trap, as Lord Pearce pointed out. The absence of a warning label was a separate serious defect in quality. Goods which are merchantable if sold with a clear warning, may well not be merchantable if sold without one: see p. 119 (AC). He thought that goods sold without such a warning and without a price abatement could never be merchantable....
>
> 26 That reasoning appeals to us. It may well be an example of the salutary rule that a short formula of words cannot provide a safe definition of "merchantable" which can be used in all circumstances.... None of the legislatures which enacted the original *Sale of Goods Act* attempted such a definition.

[58] The plaintiff cites *MacIsaac v. Chebucto Ford Sales Ltd.* (N.S. Co. Ct.), [1989] N.S.J. No. 5 (Co. Ct.), where Palmeter Co. Ct. J. (as he then was) said:

> I accept the definition of merchantable quality as accepted in the case of *Hardwick Game Farm v. Suffolk Agricultural and Poultry Producers Association*, [1969] 2 A.C., 31, [1968] 2 ALL E.R. 444 (H.L.):
>
> > "... the goods should be in such a state that a buyer, fully acquainted with the facts, and therefore knowing what hidden defects exist and not being limited to their apparent condition would buy them obtainable for such goods if in reasonable sound order and condition and without special terms." ...
>
> Counsel for each party referred to *The Sale of Goods* (London: Pitman Publishing Limited, 1975, 5th Ed.) by P.S. Atiyah. At p. 91, Professor Atiyah is quoted:
>
> > "It will be apparent that the concept of merchantability is an extremely flexible one, and this flexibility is in no way restricted by the new statutory definition. It does not seem to be going too far to say that, in effect, the concept merely requires the goods to be of the sort of quality reasonably to be expected having regard to all the circumstances of the case. The new definition, far from being, as definitions frequently are, a straight-jacket, turns out to be largely a non-definition; it delegates to the Court the task of deciding what is reasonable and the circumstances of each particular case, guided no doubt by general acceptance of what reasonableness requires in various classes of cases."
>
> This concept of merchantability is I suggest quite flexible and must be defined by relationship to the circumstances of each particular case.

[59] The defendant also cites *Veinotte v. Gould*, [1993] N.S.J. No. 257 (S.C.), where MacAdam J. cited (at para. 68), with apparent approval, the headnote to Canadian *William A. Rogers Ltd. v. Lucerne Metal & Plastic Products Ltd.*, [1949] O.R. 135 (Ont. C.A.), which stated:

> Where the circumstances of a sale of goods are such that clauses a and b of s. 15 of the *Sale of Goods Act* apply to the contract, there are absolute warranties by the seller that the goods are reasonably fit for the purpose for which they are intended and are of merchantable quality. The buyer, in order to be entitled to damages for breach of these warranties, need not show the cause of the defect in the goods, but

> he must prove that the defect, latent or patent, existed when the goods were delivered by the seller....

[60] Upon arriving from Dieppe, the product was immediately pumped from the plaintiff's trucks into the defendant's storage tanker. There was no examination – and, the defendant says, no possibility of examination – at that time. The plaintiff was aware of the contamination when the product was at Dieppe, but did not investigate whether it was still contaminated when it was shipped out, and no warning was given respecting the state of the product. Further, the plaintiff knew of the specific purpose for which the product was purchased.

[61] The defendant says the product was unmerchantable both according to Lord Wright's test – unfit for its ordinary and proper purpose, as made known to the seller – or by the analysis arising from *Kendall v. Lillico*, *supra*. The latter case would suggest a consideration of the statements of quality made by the seller, specifically that the product was allegedly merchantable as "polymer-modified liquid asphalt suitable for the production of hot mix using conventional equipment." The defendant says the product was not merchantable without a warning.

[62] The plaintiff submits that the defendant has not proven that the alleged defect in the PG64 was present upon delivery, noting Mr. Chaisson's evidence that there was no difficulty in pumping the product from the plaintiff's truck into the defendant's plant. The defendant says there is no possible conclusion other than that the pre-existing chunks of polymer remained in the product upon delivery. The defendant says there is no evidence that there should have been a problem in pumping the product into the asphalt tanker.

[63] The plaintiff also says the PG64 was sold as a product meant for one particular use in the ordinary course, and was fit for that purpose, as evidenced by the fact that the defendant continued to use the product until the completion of the project, and that it passed sample tests. Further, the product complied with the description in the contract, so that to a buyer by description, the product would have been good tender. Finally, the plaintiff says, the PG64 as described in the contract, and with the possible presence of polymer beads, was reasonably capable of being put to a use for which a buyer, knowing of the defect, would be likely to buy it. In other words, the plaintiff's position is that the presence of polymer beads (which it denies) would have no impact on the quality of the product.

[64] The defendant's response is, essentially, that merchantability requires a product to be usable in its normal or ordinary manner. In this case, the product was only usable when the filter was removed, which was not the ordinary or normal manner of operating the plant. The plaintiff, the defendant submits, was aware of the contamination and provided no warning.

[65] I am satisfied that the product that was incorporated into the rejected asphalt was unsaleable for the purpose for which it was intended, as it was unusable in the normal and ordinary manner in which the plaintiff knew the defendant intended to use it. The fact that the product was ultimately capable of use when the defendant adjusted its equipment and operated it in an abnormal and unconventional manner does not render the product merchantable under the terms of the contract of sale.

[66] The claim advanced by the plaintiff falls into two categories.: PG64 product that was of acceptable quality and which was mixed into asphalt that met the necessary specifications, and product that was of defective quality and which caused parts of the defendant's paving work to be rejected. The plaintiff's claim is allowed insofar as it relates to product that was of usable quality, i.e. to the extent that it was mixed into asphalt that was not rejected by the Department. The

plaintiff's claim for payment must fail with respect to that quantity of the product that failed to meet the necessary express and implied warranties.

DAMAGES

[67] With respect to the plaintiff's claim, there does not appear to be any clear explanation by the parties of the connection between the outstanding invoices and the quantity of asphalt that was rejected. That being the case, I rely on the defendant's statement that it was required to repave 1951.68 metric tons of hot mix asphalt. If the asphalt used was composed of 5.6 percent PG64, this would suggest that approximately 109.29 tons of PG64 were included in the repaved quantity. At the contract price of $449.00 per ton, this suggests a value for the rejected PG64 of $49,073.04. Based on the calculation that the rejected PG64 (the quantity of which I have derived from the amount used in the repaving work) was $49,073.04, the plaintiff is entitled to its claim minus this amount, leaving a total of $91,363.19.

[68] It remains to calculate what, if any, damages are due to the defendant arising from the plaintiff's breach.

[69] The defendant says its losses would not have been incurred but for the plaintiff's breaches of warranty. The defective asphalt supplied by the plaintiff caused the defendant to fail to meet the Department's specifications. Further, the defendant says this was a reasonably foreseeable result of the supply of the contaminated product. The issue, the defendant says, is whether the plaintiff ought to have foreseen the consequences as liable to result had it turned its mind to the breach: *Victoria Laundry v. Newman Industries*, [1949] 2 K.B. 528 (C.A.) at 540. The defendant notes Mr. Kucharek's agreement that chunks of polymer could clog a filter, restrict asphalt content and lead to the production of off-specification hot mix. The defendant also points out that Mr. Kendziora and Mr. Kinghorn each recommended removing the defendant's filter based on the assumption of a clog, after the polymer chunks had been seen in Dieppe.

[70] The defendant seeks compensation in the amount of $178,644.56. This includes damages for the cost of ripping up the rejected asphalt and repaving, as well as lost profits from the period of the delay. The defendant's evidence on damages was supplied primarily by Jeffery Chapman, who prepared a written breakdown of costs that was in evidence. The plaintiff submits that Mr.

Chapman's evidence, including the written breakdown, should receive little weight.

Remediation costs

[71] As to the assessment of damages for the remedial work, the defendant cites *Penvidic v. International Nickel*, [1976] 1 S.C.R. 267, where the plaintiff suffered losses due to the defendant's delay in preparing the site where the plaintiff was to lay ballast and track for a railroad. Spence J., for the court, considered how to determine damages where quantification is difficult, at pp. 278-280:

> Viscount Haldane L.C., in *British Westinghouse Electric and Manufacturing Company Limited v. Underground Electric Railways Company of London, Limited*, said at pp. 688-9.
>
> > The quantum of damage is a question of fact, and the only guidance the law can give is to lay down general principles which afford at times but scanty assistance in dealing with particular cases. The judges who give guidance to juries in these cases have necessarily to look at their special character, and to mould, for the purposes of different kinds of claim, the expression of the general principles which apply to them, and this is apt to give rise to an appearance of ambiguity.
> >
> > Subject to these observations I think that there are certain broad principles which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed.
>
> The difficulty in fixing an amount of damages was dealt with in the well known English case of *Chaplin v. Hicks*, which had been adopted in the Appellate

Division of the Supreme Court of Ontario in *Wood v. Grand Valley Railway Company*, where at pp. 49-50, Meredith C.J.O. said:

> There are, no doubt, cases in which it is impossible to say that there is any loss assessable as damages resulting from the breach of a contract, but the Courts have gone a long way in holding that difficulty in ascertaining the amount of the loss is no reason for not giving substantial damages, and perhaps the furthest they have gone in that direction is in *Chaplin v. Hicks*, [1911] 2 K.B. 786. In that case the plaintiff, owing, as was found by the jury, to a breach by the defendant of his contract, had lost the chance of being selected by him out of fifty young ladies as one of twelve to whom, if selected, he had promised to give engagements as actresses for a stated period and at stated wages, and the action was brought to recover damages for the breach of the contract, and the damages were assessed by the jury at £100. The defendant contended that the damages were too remote and that they were unassessable. The first contention was rejected by the Court as not arguable, and with regard to the second it was held that "where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case": per Fletcher Moulton, L.J. at p. 795.

When *Wood v. Grand Valley Railway Company*, *supra*, reached the Supreme Court of Canada, judgment was given by Davies J. and was reported in 51 S.C.R. 283, where the learned justice said at p. 289:

> It was clearly impossible under the facts of that case to estimate with anything approaching to mathematical accuracy the damages sustained by the plaintiffs, but it seems to me to be clearly laid down there by the learned judges that such an impossibility cannot "relieve the wrongdoer of the necessity of paying damages for his breach of contract" and that on the other hand the tribunal to estimate them whether jury or judge must under such circumstances do "the best it can" and its conclusion will not be set aside even if the amount of the verdict is a matter of guess work.

I can see no objection whatsoever to the learned trial judge using the method suggested by the plaintiff of assessing the damages in the form of additional compensation per ton rather than attempting to reach it by ascertaining items of expense from records which, by the very nature of the contract, had to be fragmentary and probably mere estimations....

[72] *Penvidic* has come to stand for the principle that difficulties in assessment does not permit the party responsible for the damages to avoid paying. In *British Columbia Hydro & Power Authority v. Marathon Realty Co.* (1992), 89 D.L.R. (4th) 419 (B.C.C.A.), Seaton J.A. said, at 424, that where there is a loss that cannot be calculated with precision or is difficult to quantify, "the court has an obligation to do so, keeping in mind that the onus is on the plaintiff." The defendant also cites *Miller Dredging Ltd. v. "Dorothy MacKenzie" (The)* (1994), 119 D.L.R. (4th) 63 (B.C.C.A.); *TNL Paving v. British Columbia (Ministry of Transportation and Highways)*, [1999] B.C.J. No. 1708 at para. 411; *Golden Hills Ventures Ltd. v. Kemess Mines Inc.*, 2002 BCSC 1460 at paras. 930-931; *McPhee v. Gwynne-Timothy*, 2005 NSCA 80 at paras. 98-99; and *Mellco Developments Ltd. v. Portage la Prairie (City)*, 2002 MBCA 125 at para. 107.

[73] The defendant says the *Penvidic* method is appropriate, with the qualification that it has a more precise calculation of the revenue it claims it would have earned from each item of remedial work, along with a measure of profit based on its historic profits for such work. If a third party had been engaged to complete the work, the defendant says, its losses could be calculated on the basis of how much the third party was paid. However, the defendant itself was required to do

the work, which consisted principally of cold planing the defective asphalt and repaving the road. The defendant says the costs involved – including, but not limited to, costs of overhead, materials, labour, fuel, equipment, trucking, and quality control – are "enormous yet difficult to quantify." The defendant has provided records of the particulars of the extra work that was done and has provided evidence for determining the costs incurred as a result of the supply of the contaminated product, in the amount of $178,644.56.

Cold planing and repaving

[74] According to Jeffery Chapman, the defendant lost production time from 3:30 p.m. on October 20 until the end of the day, while determining the source of the compaction problem and reduced asphalt content. Further time was lost on October 21 in deciding whether to operate the plant without a filter. The defendant has not assessed a specific cost for lost production time. From October 26 until October 28 the defendant was engaged in shouldering the asphalt road with gravel. According to the defendant, the hot mix plant would have been operating but not producing hot mix during the shouldering work; it needed to be keep operating in order to do the repaving, which began on October 30 and was finished on

November 4. The defendant thus incurred the cost of operating an idle plant, including fuel, labour and employee accommodation costs. Jeffery Chapman estimated a cost of $1,500.00 to operate a hot mix plant for a 24-hour period. The defendant has itemized this expense beginning on October 28. The defendant acknowledges that, as the plaintiff argues, the daily expense of $1,500.00 is “not an exact perfect number”; as noted above, the defendant’s position is that this is a cost incapable of precise calculation, but a reasonable estimate.

[75] The cold planing of the rejected hot mix began on October 29. The defendant estimates a cost of $1,412.00 per hour for cold planing work, based on costs of equipment and personnel. Jeffery Chapman estimated a profit margin of 20 percent, which he subtracted from the claim, leaving a cost of $1,129.60 per hour, and $13,555.20 for a 12-hour day. Traffic control costs were estimated at $2,556.00 per day, or $2,332.80 after subtraction of the 20 per cent profit margin. Finally, the defendant claims $1,500.00 for operation of the plant on October 29. The total claim for operations on October 29, then, is $17,388.00.

[76] On October 30, the defendant repaved the section of road that had been cold-planed the day before. According to the material transfer tickets, 947.96

metric tons of hot mix was laid on October 30. The hot mix using the PG64 cement carried a contractual price of $56.00 per metric ton. Subtraction of a 20 per cent profit margin yields a cost of $44.80 per metric ton (not $46.00, as the defendant submitted). Multiplied by 947.96 metric tons, this indicates a total repaving cost on October 30 of $42,468.61.

[77] Also on October 30, the defendant required a material transport vehicle for repaving work, to which it attributes a cost of $1.50 per metric ton, based on the fact that the Department paid an extra $1.50 per metric ton to use such a vehicle. Multiplied by 947.96 tons, this indicates a cost of $1,421.94. The plaintiff says the defendant owned the material transport vehicle and thus incurred no out-of-pocket costs in its operation. Jeffery Chapman's evidence was that the allowance of $1.50 per metric ton did not cover the actual cost of operating the vehicle, denying that the use of the vehicle was cost-free. A further $194.40 per hour for traffic control on October 30 (based on the equipment and personnel required) yields a cost of $2,041.20. The total costs claimed for October 30, then, would be $45,931.75.

[78] The plaintiff submits that if, as Mr. Chapman agreed, the asphalt plant could produce 250 tons per hour, and paving could be done at the same rate as asphalt

production, it is not clear why the work on October 30 “apparently took 10.5 hours to repave what should have been a 4 hour job.” The defendant says there is no evidence that this work should have taken four hours, considering set-up and preparation time, joint cleaning and other repaving-related tasks mentioned by Jeffery Chapman. Further, the plaintiff says there has been no pleading of failure to mitigate, and that it is not open to the plaintiff to make such an argument in the absence of pleading and evidence. I am not satisfied that this is a matter of mitigation, rather than a straightforward issue relating to the determination of damages.

[79] Raising another point with respect to the repaving on October 30, the plaintiff says Mr. Chapman admitted that, while he included a contract price for the purchase of asphalt, the defendant had not actually paid the plaintiff for asphalt purchased after October 22. As such, the plaintiff submits, the cost to the defendant was not as suggested in the breakdown prepared by Jeffery Chapman.

[80] On November 1, the defendant resumed cold planing the rejected asphalt, spending nine hours. The resulting cost of equipment and personnel (as described earlier) would be $1,412.00 per hour. Subtracting 20 percent gives a charge of

$1,129.60 per hour, and a total of $10,166.40 for nine hours' work. The price for traffic control was estimated at $1,749.60 for the day. The cost for operating the plant for the day was estimated at $1,500.00. The total claim on account of work done on November 1, then, would be $13,416.00.

[81] The cold planing continued on November 2, for 10.5 hours. The defendant's estimate for this (calculated on the same basis as set out above) is $11,860.80 for the day. Traffic control, at $194.40 per hour, comes to $2,041.20 for the day, after deducting profit, plus $1,500.00 to operate the plant. For November 3, the defendant claims only the cost of operating the idle plant for the day, that is, $1,500.00. The total claim relating to November 2 and 3, then, is $16,902.00.

[82] The repaving was completed on November 4, with the laying of 1003.72 metric tons of hot mix. At $44.80 per ton (after subtracting the profit margin), this totals $44,966.66. A material transport vehicle, at $1.50 per metric ton, cost $1,505.58. Traffic control, at $194.40 for 12 hours, came to $2,332.80. The total for November 4 would be $48,805.04.

[83] The total costs the defendant attributes to the remediation work, then, amounts to $142,442.79. I am satisfied that there is a compensable loss arising from this work, although a good deal of the cost involved is not verified by evidence beyond that of Jeffery Chapman himself.

[84] The plaintiff says there is “no reasonable explanation” why the breakdown of costs indicated that it took 31 hours to remove the rejected pavement, but only five to eight hours to lay it. The defendant says it actually took 31.5 hours to remove the pavement, and notes that Jeffery Chapman testified that there is no correlation between the time required to pave as opposed to the time required to remove the rejected hot mix. The defendant says there is no evidence that 31.5 hours is an unreasonable amount of time to cold place 1.5-2 km. of highway, and adds that, to the extent that this is offered as a claim that it failed to mitigate its damages, failure to mitigate is an affirmative defence that must be pleaded.

[85] The defendant says it would have finished paving on October 27 but for the requirement to repave the defective asphalt. The additional nine days of quality control services resulted in charges from Jacques Whitford of $1,558.00 per day, a total of $16,125.30 ($14,022.00 plus HST of $2,013.30). The plaintiff says Mr.

Chapman was unable to account for a credit of $5,028.24 credit, “such that the contract increase should have been approximately $9,000.00 rather than the $14,022.00 claimed.” Jacques Whitford billed the defendant $2.92 per ton for asphalt inspection and $1,558.00 per day for quality control services provided at the plant. The defendant says the credit pertained to the per-ton inspection charge, not the daily charge. Jacques Whitford did not charge the defendant for the additional inspection that was required as a result of the repaving, but did charge the daily fee, which, the defendant says, was unrelated to the credit for asphalt inspection. It appears to me that the defendant’s explanation is sufficient to support the cost claimed.

[86] On October 21 the defendant was informed that the average asphalt content of Lot 1 of the top lift was .48 below the job mix formula, resulting in a penalty of $1.00 per metric tonne for $2,400.00 metric tons. The defendant says this penalty would not have been incurred but for the defective asphalt. In addition, the defendant appears to be claiming $2,588.57 on account of additional asphalt inspection fees. The plaintiff points out that further testing done after the initial rejection of the 2,400 MT of the first lot resulted in a reduction of the amount that the defendant was required to replace, and suggests that Mr. Chapman “appears to

have calculated his losses on the basis of the replacement of the entire lot." The defendant acknowledges that the amount that was laid on October 21 (after the filter was removed) was allowed to stand, and says the calculated loss was based on the amount actually removed. The defendant says its repaving costs were based on the section that was actually rejected, in the amount of 1,951.68 MT.

[87] The plaintiff also says many of the vehicles referred to in the breakdown of costs belonged to the defendant, and that Jeffery Chapman did not show receipts for rental of vehicles. On a related point, the plaintiff says the aggregate used in the repaving work came from the defendant's own quarry in Mount Thom, NS.

[88] As to interest, Mr. Kendziora notified the Department that the plaintiff had not been paid. The result was that the Department retained a certified cheque for $150,000.00, tendered by the defendant as a deposit. Because this amount remained outstanding, the defendant was charged interest of two percent *per annum* from March 3, 2005 to March 3, 2007, when it was reduced to .8 percent *per annum*. The defendant claims on account of resulting interest charges of $7,200.00. The plaintiff questions this amount, arguing that Jeffery Chapman simply did the calculation himself without leading any supporting evidence.

[89] The defendant says the Department also held back $69,635.83 until April 28, 2006, on account of the dispute between the parties. The defendant claims it would have collected interest of $3,392.08 on this amount between November 5, 2004, and April 28, 2006.

Conclusion re remediation damages

[90] Jeffery Chapman agreed on cross-examination that the cost of repaving, as he had calculated it, included the cost of PG64 provided by the plaintiff. He was specifically referred to the cost of repaving in the context of the work done on October 30, but there is no suggestion that this statement does not apply to the entire repaving project. He further agreed that this amount had not actually been paid. At a contract price of $449.00 per ton for the PG64 product, the defendant calculates a cost for the product of $25.14 per ton of hot mix asphalt, based on the job mix formula of 5.6 percent (i.e., 449 multiplied by 5.6 percent equals 25.14). The defendant repaved 947.96 tons on October 30 and 1003.72 tons on November 4, a total of 1951.68 tons. At $25.14 per ton, this indicates a cost for PG64 of $49,065.24.

[91] The defendant submits that the costs attributable to the supply of the contaminated product amount to $178,644.56. This requires a downward adjustment for several reasons, including my query with respect to the per-ton price claimed for the hot mix ($44.80 rather than the $46.00 claimed) and the lack of substantiation for various operational, equipment and personnel costs. Further, the defendant should not be able to base any part of its claim on the cost of PG64 that it has not been required to pay for.

[92] On a careful review of the evidence I am satisfied that the defendant is entitled to compensation arising from the costs of remediation. I accept the plaintiff's view that Mr. Chapman's description of the costs of remediation cannot be accepted without reservation, however. For instance, I am not satisfied that the cost of transporting aggregate, cold planing and operating the mixing plant can be accepted in the amounts claimed. The defendant's costs claims were not sufficiently substantiated by independent evidence to be accepted in their entirety. Applying *Penvidic* –as the defendant suggests is appropriate in the circumstances – I conclude that the defendant (and plaintiff by counterclaim) is entitled to damages of $80,000.00, payable by the plaintiff (and defendant by counterclaim).

Lost revenue or profit

[93] The defendant must prove on a balance of probabilities that it would have earned profit if not for the breach, though it is not required to prove a precise amount, nor need it identify specific contracts that were lost. In *Houweling Nurseries Ltd. v. Fisons Western Corp.* (1988), 49 D.L.R. (4th) 205 (B.C.C.A.), McLachlin J.A., as she then was, said at 210-211:

> The basic rule is that damages for lost profits, like all damages for breach of contract, must be proven on a balance of probabilities. Where it is shown with some degree of certainty that a specific contract was lost as a result of the breach, with a consequent loss of profit, that sum should be awarded. However, damages may also be awarded for loss of more conjectural profits, where the evidence demonstrates the possibility that contracts have been lost because of the breach, and also establishes that it is probable that some of these possible contracts would have materialized, had the breach not occurred. In such a case, the court should make a moderate award, recognizing that some of the contracts may not have materialized had there been no breach.
>
> The matter may be put another way. Even though the plaintiff may not be able to prove with certainty that it would have obtained specific contracts but for the breach, it may be able to establish that the defendant's breach of contract deprived it of the opportunity to obtain such business. The plaintiff is entitled to compensation for the loss of that opportunity. But it would be wrong to assess the damages for that lost opportunity as though it were a certainty.

[94] Upon being informed that the asphalt laid on October 20 had been rejected, the defendant says, it was left in uncertainty as to when it would be required to

complete the remediation work, and was therefore unable to accept any work between October 28 (when the project ought to have been completed) and November 5. According to Jeffery Chapman's evidence, as well as his journals from the same period of 2001, 2003, 2005 and 2006, the defendant would have expected to be doing profitable work at that time of the year.

[95] The defendant does not point to any specific contracts that were lost, but says this is not required; all the is required is that, on a balance of probabilities, it lost profits. The defendant says its operational costs for the remediation work – all costs, minus the penalty, increased inspection charges, interest and lost interest – amount to $162,410.06. The defendant claims lost profits of $40,602.52. This figure is based on operational costs of $162,410.06, divided by .8, for lost revenues of $203,012.58, which, multiplied by .2 (the represent the historical 20 per cent profit margin), yields lost profits of $40,602.52.

[96] The plaintiff notes that it was put to Jeffery Chapman that the defendant had four other asphalt plants that could have been used to realize on other opportunities, his response was that this was not the case due to "the uncertainty of the whole situation." The defendant admits that there would be a contingency as to

whether all of the resources that were devoted to the remediation work would have. However, the defendant points to Mr. Chapman's evidence that this was a historically busy time of year, and claims that the contingency is a small one and that the estimate of operational costs is conservative. As such, the defendant says, the court should not apply a contingency in determining the lost profits.

[97] While the defendant may not be obliged to point to contracts that it would otherwise have been able to carry out, the evidence offered to support the claim for lost profits is essentially speculative. I am not satisfied that the defendant has established on a balance of probabilities that it lost profits it would otherwise have earned.

CONCLUSION

[98] The plaintiff's claim is allowed in part. Based on the calculation that the rejected PG64 (the quantity of which I have derived from the amount used in the repaving work) was $49,073.04, the plaintiff is entitled to its claim minus this amount, leaving a total of $91,363.19. The defendant's counterclaim is allowed in the amount of $80,000.00. Pre-judgment interest is mandated as part of an award

of damages pursuant to s. 41(I) of the *Judicature Act*. I direct simple interest at a rate of five percent.

[99] If the parties are unable to agree on costs, I will accept written submissions within 30 days of the release of this decision.

J.