Date: 20250116
Docket: CI 23-03-00862
(Brandon Centre)
Indexed as: Dynamic Capital Equipment Finance Inc. v. Faurschou Ag Centre Inc.
Cited as: 2025 MBKB 9

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COURT OF KING'S BENCH OF MANITOBA
(GENERAL DIVISION)

B E T W E E N:

DYNAMIC CAPITAL EQUIPMENT FINANCE INC.	)	Charles Roy
	)	for the plaintiff
plaintiff,	)	
	)	
- and -	)	
	)	
FAURSCHOU AG CENTRE INC.,	)	Aaron W.K. Challis
defendant.	)	for the defendant
	)	
	)	
	)	Judgment delivered:
	)	January 16, 2025

LEVEN J.

SUMMARY

[1] This was a summary judgment hearing held on August 29, 2024. The Statement of Claim was filed on July 20, 2023, and the Statement of Defence was filed on September 7, 2023. The major issue was alleged breach of contract.

[2] The evidence consisted of affidavits by the plaintiff Dynamic's former collections manager John Warren ("Mr. Warren"), and the defendant Faurschou's president ("Mr. Faurschou"), and transcripts of cross-examinations of these two individuals. The Warren affidavit was affirmed March 15, 2024. The Faurschou affidavit was affirmed July 26, 2024.

[3] For reasons explained below, I find that Faurschou breached its contract with Dynamic, and that it must pay certain damages, interest and costs to Dynamic.

FACTS

[4] This is not a comprehensive recitation of all evidence and argument; it is a concise summary of certain important matters.

[5] The plaintiff ("Dynamic") paid the defendant ("Faurschou") about $1.6 million to buy agricultural equipment ("the Equipment"), which would eventually be used by a Manitoba farm ("Fat Cat"). Dynamic would lease the Equipment to Fat Cat. Dynamic and Fat Cat signed leases. Some of the Equipment was delivered to Fat Cat. As of the hearing date, some of the Equipment was sitting in Faurschou's yard. Faurschou said that Dynamic is welcome to pick it up. Some of the Equipment had not yet been manufactured. Dynamic sued Faurschou for about $1.2 million. Dynamic then moved for summary judgment against Faurschou, citing contract, tort and unjust enrichment.

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[6] Under the ***Personal Property Security Act***, C.C.S.M. c. P35, Dynamic has a security interest in the Equipment. Fat Cat is listed as the debtor. Fat Cat has defaulted on some lease payments to Dynamic, and is apparently seeking farm debt relief under the ***Farm Debt Mediation Act***, S.C. 1997, c. 21. There is no evidence before the court about the details or status of the mediation.

[7] Until the litigation, Dynamic and Faurschou had almost no direct communication. Although the details are not completely clear, almost all of their communication was through third parties, including Fat Cat and a broker called Iron Leasing. However, there is no dispute that Dynamic provided Faurschou with about $1.6 million by wire-transfer (about $1.5 million on June 17, 2022 and about $100,000 on August 4, 2022), or that both parties intended that Faurschou would buy farm equipment for Fat Cat. Faurschou accepted the money, thereby entering into at least an implied contract. By way of verbal shorthand, I will refer to this money as the $1.6 million.

[8] As this was a summary judgment motion, there was no discovery of documents. There are likely documents sent or received by Iron Leasing and by Fat Cat, which have not been shared. There are no affidavits by employees of Iron Leasing or Fat Cat.

[9] Presumably, both Dynamic and Faurschou expected to make some sort of profit. It was unclear how that profit would be calculated. On cross-examination, neither Mr. Warren nor Mr. Faurschou were asked about this matter.

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[10] There was no express agreement about the timing of the delivery. Under section 31(2) of ***The Sale of Goods Act***, C.C.S.M. c. S10, the delivery was implied to be within a "reasonable" time, although this only emerged during the litigation. Mr. Faurscho (cross-examined on his affidavit) said that, in his personal experience, for agricultural equipment, delivery times of six months were common, and delivery times of a year sometimes occurred. There was no other evidence about typical delivery times for agricultural equipment in Manitoba or Canada.

[11] There was no dispute that all of the Equipment in question came from a manufacturer called InteliRain and a distributor called Rainfine. In simple terms, there were three types of equipment: pivots, systems, and containers (sometimes called "Sea-Cans"). There was no evidence about typical delivery times for pivots, systems and containers, in general.

[12] On June 21, 2022, Fat Cat asked Faurschou for $540,071.04. It is not clear where this amount came from. Fat Cat threatened to cancel the whole deal unless Faurschou agreed. Fat Cat promised to repay the loan after the next harvest. Faurschou paid this sum to Fat Cat. It did not tell Dynamic. (As noted above, other than sending and receiving the two wire-transfers, Dynamic and Faurschou never communicated.)

[13] Fat Cat promised to repay the $540,071.04, but never did. By way of verbal shorthand, I will call this the Fat Cat Loan.

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[14] Faurschou contacted Rainfine and InteliRain, and made several payments to them. They shipped some equipment, and Fat Cat received it. Faurschou made these payments to Rainfine: about $102,000 (February 24, 2022), about $240,000 (June 24, 2022), about $100,000 (June 27, 2022), about $33,000 (August 23, 2022), about $207,000 (June 15, 2023), and about $395,000 (December 29, 2023). Faurschou made payments to InteliRain: about $31,500 (April 26, 2022), about $157,000 (June 30, 2022), about $62,000 (August 2, 2022) about $122,000 (January 19, 2024). As noted above, the Statement of Claim was filed July 20, 2023. The total paid to Rainfine was about $1,077,000. The total paid to InteliRain was about $372,000.

[15] If we look only at the payments made after the Statement of Claim was filed, about $395,000 was paid to Rainfine, and about $122,000 to InteliRain, for a total of about $517,000.

[16] Dynamic must have communicated many times with Iron Leasing and with Fat Cat, but the details of those communications were unclear. Mr. Faurschou had almost no knowledge of this matter, and Mr. Warren was asked almost no questions about this matter. A few documents about communications with Fat Cat and Iron Leasing were attached to the affidavits, but the summary judgment motion hearing pre-empted a full discovery of documents.

[17] On an unknown date, through unknown channels, Dynamic learned of the Fat Cat Loan. I infer that it was not pleased.

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[18] There was no evidence about how long it takes to manufacture a pivot, a system or a container. If they have to be shipped to Manitoba, there is no evidence about how long shipping to Manitoba takes. There is no evidence about whether Dynamic and Iron Leasing, or Dynamic and Fat Cat, ever discussed these issues.

[19] After December 2022, Fat Cat began missing lease payments to Dynamic. If Dynamic's lawyers and Fat Cat's lawyers exchanged correspondence, it was not in evidence.

[20] There is one piece of evidence that Faurschou slowed down delivery of some equipment to some extent. In paragraph 36 of his affidavit (affirmed July 26, 2024), Mr. Faurschou refers to "Henry" (a representative of Rainfine) and "Duane" (a representative of Fat Cat):

> In December, 2022, Henry advised that 1.5 Pivots and 3 Containers were ready to be shipped. I advised Duane of this and requested that he give me back the $540,071.04 CAD, but he refused to do so. On December 21, 2022, Henry asked me where this Equipment should be delivered to. I told Henry to hold off on delivering this Equipment until I received payment from Duanne.
>
> [underlining added]
>
> [I will call this the "Hold Off Directive".]

[21] At paragraph 45 of his affidavit, Mr. Faurschou referred to a December 14, 2023 letter that he sent to Rainfine, found at Tab "Y" of the affidavit. Such a letter is found at Tab "Y". However, at Tab "Y" there is also an undated letter from a Rainfine representative named Leonard to Mr. Faurschou.

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The text of the letter suggests that it must have been written between June 22, 2022 and November 24, 2023. It says:

> On June 22, 2022 you paid a deposit on three centre pivots with associated seacans.
>
> One of these pivots has been delivered and paid for. The other two have been <u>in storage for several months now</u>. Despite repeated demands for payment, <u>you have refused to provide the purchase price</u> for these pivots.
>
> We cannot hold on to these pivots indefinitely. Please provide the remaining amount owed for the pivots, as calculated on the attached invoice on or before November 24, 2023.
>
> If you cannot provide the remaining purchase price by November 24, 2023, we will consider the deposit forfeited and we will proceed to sell the pivots to other customers at the best value we can get.
>
> [underlining added]

[22] Mr. Faurschou was not cross-examined about this letter.

THE DEMAND LETTER AND THE ULTIMATUM LETTER

[23] On May 17, 2023, Dynamic's Alberta lawyers sent Faurschou a demand letter ("the Demand Letter). It said that Dynamic had paid Faurschou $2,022,232.76. The Demand Letter was apparently wrong. The only evidence of any payments by Dynamic to Faurschou were the two wire-transfers for approximately $1.6 million total. $2,022,232.76 was apparently the <u>value</u> of four pivots, four systems, eight containers, plus GST.

[24] There was an issue about the "deposits" paid for some or all of the Equipment. This topic arose in the cross-examination of Mr. Faurschou. He said that sometimes, when farm equipment is purchased, the "deposit" is paid upon delivery, rather than up front. Of course, this is not how the word "deposit" is

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traditionally used. The evidence and argument on this point were incomplete. However, it may well be that everyone expected Fat Cat to pay some amount of money to Rainfine and/or InteliRain when it actually received pieces of equipment. As noted, there were no affidavits by any representatives of Fat Cat.

[25] The Demand Letter alleged that Faurschou had failed or refused to pay the manufacturer of the pivots and Sea-Cans for three specific pivots and six specific Sea-Cans (listed by serial number). The Demand Letter demanded that, before May 26, 2023, Faurschou either pay Dynamic $2,022,232.76 or otherwise resolve the matter with Dynamic. If the matters were not resolved, Dynamic reserved the right to claim the sale price of the pivots and Sea-Cans and interest and costs. If the Alberta lawyers were aware that some equipment had been properly delivered to Fat Cat long before the Demand Letter, the Demand Letter apparently ignored this fact. The Demand Letter mentioned Rainfine but, for some reason, did not mention InteliRain.

[26] On May 30, 2023, the Alberta lawyers emailed Faurschou's former Manitoba lawyers. The email reiterated some of the assertions in the Demand Letter and added a new piece of information, that Fat Cat had defaulted on its agreements with Dynamic. It repeated the warning that Dynamic would start legal action if the dispute were not resolved.

[27] On May 30, 2023, Faurschou's former lawyers emailed the Alberta lawyers, saying that they were gathering documentation and would reply shortly. They never did.

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[28] On June 21, 2023, the Alberta lawyers emailed Faurschou’s former lawyers, issuing a new deadline. By June 27, Faurschou must either deliver the outstanding pivots and Sea-Cans, or refund the funds paid by Dynamic for the undelivered equipment. It did not specify a dollar figure. The email also said that Dynamic hired Manitoba lawyers (who have represented Dynamic in this litigation ever since). I will call this “the Ultimatum Letter”. There was no reply to the Ultimatum Letter.

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[29] The Statement of Claim was filed on July 20, 2023, and the Statement of Defence was filed on September 7, 2023.

THE PLEADINGS

[30] Dynamic provides financial services, and Faurschou is in the machinery and equipment industry.

[31] In the Statement of Claim, Dynamic claimed $1,213,339.80, and further or in the alternative damages for unjust enrichment, a declaration that Faurschou converted certain funds; and/or a declaration that Faurschou breached an express or constructive trust; and/or an accounting/tracing order; payment of interest on $1,143,724.80 from June 17, 2022 to the date the interest is paid; pre and post-judgment interest on $69,615 from August 4, 2022 to the date the interest is paid; general and special damages; costs, and other remedies.

[32] Specific performance (i.e. delivery of undelivered equipment) is not one of the remedies requested in the Statement of Claim.

[33] Nor does the Statement of Claim allege that Faurschou committed a "fundamental breach" of its contract with Dynamic.

[34] The Statement of Claim made allegations which turned out to be unfounded. It alleged that Dynamic and Faurschou entered into various written agreements. It is now clear that they never did.

[35] In essence, Dynamic alleged that Faurschou did not use all of the money provided by Dynamic to buy equipment. Among other things, this was an alleged breach of contract.

[36] The Statement of Defence mentioned that Faurschou acted as Dynamic's "agent" to secure ownership of the equipment for Dynamic. It did not elaborate on this notion that there was some sort of agency relationship.

[37] The Defence agreed that Dynamic paid Faurschou about $1.6 million ($1,617,786.40). It asserted that, by the date the Defence was filed, Faurschou had paid Rainfine and InteliRain $932,864.43 for the equipment. Fat Cat had some of the equipment. Therefore, Faurschou argued that the "maximum" that Faurschou might owe Dynamic at the date of the Defence was $684,921.97 ($1,617,786.40 minus $932,864.43).

MISSING FACTS

[38] As noted above, Mr. Faurschou was never questioned about the timing of his various payments to Rainfine and InteliRain. For example, as soon as he received the $1.6 million, he could have paid the whole $1.6 million to Rainfine and InteliRain. He did not. He has never asked why.

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[39] He was never asked about his delay in making payments to Rainfine and InteliRain. He was never asked point blank if Faurschou couldn't afford to pay Rainfine and InteliRrain shortly after receiving the $1.6 million was because, after making the Fat Cat Loan, Faurschou was too cash-poor.

[40] He was never asked about how much profit he thought he would make. He was never asked why, after the Statement of Claim was filed, he kept paying more money to Rainfine and InteliRain (about $517,000). He was never asked why he didn't contact Dynamic (directly or through its lawyers) to ask if it would have preferred a cheque for $517,000 rather than more equipment.

[41] Mr. Warren was never asked how much profit Dynamic expected to make and how much it has actually made to date. That might have shed some light on quantum of damages. He might have had no first-hand knowledge about this issue, but he would have been able to search for business records that would have shed light on this issue.

[42] Mr. Warren was never asked when and how Dynamic found about the Fat Cat Loan. He was never asked why, upon finding out, it didn't contact Faurschou to ask for more information. Again, he might have had no first-hand knowledge about this issue, but he would have been able to search for business records that would have shed light on this issue.

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LAW

Sale of Goods Act

[43] Section 31(2) of Manitoba's *Sale of Goods Act* says: "Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed the seller is bound to send them within a reasonable time."

Evidence Act

[44] Section 49 of ***The Manitoba Evidence Act,*** C.C.S.M. c. E150 deals with business records:

> **Definitions**
>
> **49(1)** In this section
>
> **"business"** includes every kind of business, profession, occupation, calling, operation, or activity, whether carried on for profit or otherwise, and whether carried on by or as part of the operation of government;
>
> **"record"** includes any information that is recorded or stored by means of any device.
>
> **Where business records admissible**
>
> **49(2)** Any writing or record made of an act, transaction, occurrence or event is admissible as evidence of the act, transaction, occurrence or event if
>
> > (a) it is made in the usual and ordinary course of any business; and
> >
> > (b) it was in the usual and ordinary course of business to make the writing or record at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter.
>
> **Notice of intention to produce**
>
> **49(3)** Unless the court orders otherwise, no writing or record shall be received in evidence under this section unless the party producing the

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writing or record has, at least seven days before its production, given notice of his intention to produce it to each other party to the action and has, within five days after receiving any notice in that behalf given by any other party, produced it for inspection by that other party.

Surrounding circumstances

49(4) The circumstances of the making of any writing or record to which reference is made in subsection (2), including lack of personal knowledge by the maker, may be shown to affect its weight, but the circumstances do not affect its admissibility.

Previous rules as to admissibility, etc.

49(5) Nothing in this section affects the admissibility of any evidence that would be admissible apart from this section or makes admissible any writing or record that is privileged.

[underlining added]

[45] ***The Dictionary of Canadian Law***, ***Fifth Edition*** defines "agent" as "A person to whom common law or statutory duties have been delegated by another, or a person who acts for or represents another, for a limited purpose, whether by express or implied authority…to create contractual relations on behalf of a principal, or in another capacity…"

[46] ***The Dictionary of Canadian Law***, ***Fifth Edition*** defines "fundamental breach" as the "failure, by one party, to observe the terms going to the 'root' of a contract, thereby enabling the innocent party to treat the contract as at an end. Such a breach has also been described as one that has 'frustrated the commercial purpose of the entire venture.'"

[47] ***The Dictionary of Canadian Law***, ***Fifth Edition*** defines "repudiation" as the "clear intention by one party that it intends not to be bound by a contract. The innocent party may elect to treat the contract as continuing in full effect, in which case the contract remains in force for both parties, thus entitling each

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party to sue the other for damages for any past or future breaches. Or it may elect to accept the repudiation, in which case…the contract is terminated, and the parties are discharged from future obligations. Rights and obligations that have already matured are not extinguished…"

Case Law

[48] In ***Dakota Ojibway Child & Family Services et al. v. MBH***, 2019 MBCA 91, the court examined the new summary judgment rules in Manitoba at paragraphs 108 to 111. The standard of proof is a balance of probabilities. The moving party must prove that there is no genuine issue requiring a trail. Then, the responding party must try to establish why a trial is required.

[49] In ***Business Development Bank of Canada v. Cohen***, 2021 MBCA 41 at paragraph 43, the court observed that,

> …a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.

[50] In ***Chavda v. Alliance Profit Network Inc.,*** 1996 CanLII 10498 (AB KB) ("***Chavda***"), the defendant contracted to provide certain machines, including a coffee machine, to the plaintiff. The plaintiff paid up front. All but the coffee machine were delivered in five weeks. The coffee machine might have been delivered in five weeks, but it was damaged in transit. The defendant had trouble trying to get money from the third party responsible for the damage.

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Then, after 11 months, the defendant tried to deliver the coffee machine. The plaintiff refused to accept it, and sued for the price, and applied for summary judgment. Relying on Alberta legislation, which had a provision similar to section 31(2) of Manitoba's ***Sale of Goods Act***, the court held that 11 months was unreasonable. The defendant's difficulties with the third party were no excuse. The defendant had to pay the plaintiff the price of the coffee machine.

[51] In ***Matic et al. v. Waldner et al.***, 2016 MBCA 60, at paragraph 55, the court commented that there are three requirements for a binding contract: the intention to contract, the essential terms of the contract have been settled, and the terms are sufficiently certain.

[52] In ***Legend Seeds Inc. v. Quarry Seed Ltd. et al.,*** 2014 MBQB 67, at paragraph 33, the court pointed out that a court may imply terms into a contract: a) based on customs or usage; b) as the legal incidents of a particular class or kind of contract; or c) based on the presumed intentions of the parties where the implied term must be necessary to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed.

[53] ***Dousel v. Mascioli,*** [1997] OJ No. 2570 (Gen Div), dealt with anticipatory breach of contract and repudiation at paragraphs 14 to 19. Anticipatory breach requires conduct which amounts to a total rejection of the obligations of the contract; lack of justification for such conduct; and acceptance

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of the repudiation by the innocent party. Filing a statement of claim can be one form of acceptance.

[54] ***Queen v. Cognos Inc.,*** 1993 CanLII 146 (SCC) explained negligent misrepresentation.

[55] ***Rana et al. v. Ramzen et al,*** 2023 ONSC 5792 explained fraud and deceit.

[56] ***Federal Business Development Bank v. T & T Engineering Ltd.,*** 1982 CanLII 3927 (BCSC) explained the tort of conversion.

[57] ***Broadband Communications North Inc. v. 6901001 Manitoba Ltd.,*** 2021 MBQB 25, explained mitigation of damages.

[58] ***Potter v. New Brunswick Legal Aid Services Commission***, 2015 SCC 10, discussed anticipatory breach and repudiation. At paragraph 149, the court observed that, in order to rise to the level of repudiation, the breach must be fundamental.

[59] ***6660894 Canada Ltd. v. 57110 Manitoba Ltd.,*** 2020 MBQB 50, dealt with fundamental breach at paragraph 39. A fundamental breach can be described as one that has frustrated the commercial purpose of the entire venture. Upon breach, the parties are discharged from future obligations. Any rights and obligations that have already matured are not extinguished.

[60] ***Winship v. Stantec Consulting Ltd.,*** 2016 ABQB 468, dealt with performance within a reasonable time, at paragraph 109. The court can consider many factors, including the nature of the cause(s) of the delay.

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[61] ***Remedy Drug Store Co. .v Farnham***, 2015 ONCA 576, dealt with acceptance of repudiation, at paragraph 576. Repudiation must be clear and unequivocal.

[62] The parties filed other case law, and I have carefully reviewed it.

[63] I also note ***Finelli et al. v. Dee et al.***, 1968 CanLII 260 (ON CA)("***Finelli***"). The plaintiffs paved driveways. The defendant was a homeowner. They contracted for the plaintiffs to pave the defendant's driveway by about October 1966 (no exact deadline was agreed upon). The defendants phoned the plaintiff's sales manager and told him that they wanted to cancel the contract. He agreed. On November 1, when the defendants were away, the plaintiffs came and paved the driveway. The defendants wouldn't pay, so the plaintiffs sued for the value of the work done. In a short decision, the Court of Appeal examined the question of whether the defendants rescinded the contract or repudiated it. In either case, the plaintiffs were not entitled to recover the contract price.

[64] In ***The Law of Contracts*** (8th ed.), Professor Adams looked at implied contractual terms at pp. 348 to 349: "The cases implying terms into contracts often conceal a judicial control over agreements that would otherwise be unfair. The power to imply terms into contracts is a flexible judicial tool…It should be noted that the implied term cases do not require proof of any bad motive and so good faith, in this context, must have an objective meaning, equivalent to fairness, or reasonableness, as the comparison to the civil law suggests..."

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[65] At page 538, Adams discussed the principle of mitigation of damages: "The burden of proving that the plaintiff ought to have mitigated loss is on the contract-breaker."

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Kings Bench Rules

[66] Relevant *Rules* from the ***Court of King's Bench Rules***, Man. Reg. 553/88 (the "***Rules***") include:

> **Proportionality**
> **1.04(1.1)** In applying these rules in a proceeding, the court is to make orders and give directions that are proportionate to the following:
>
> (a) the nature of the proceeding;
>
> (b) the amount that is probably at issue in the proceeding;
>
> (c) the complexity of the issues involved in the proceeding;
>
> (d) the likely expense of the proceeding to the parties.
>
> …
>
> **Summary judgment motion**
>
> **20.01(1)** A party may bring a motion, with supporting affidavit material or other evidence, for summary judgment on all or some of the issues raised in the pleadings in the action.
>
> **Motion must be heard by pre-trial judge**
>
> **20.01(2)** Subject to subrule 50.04(2), a motion for summary judgment may only be scheduled after a pre-trial conference for the action has been held. The motion is to be heard by the pre-trial judge for the action.
>
> **CONDUCT OF SUMMARY JUDGMENT MOTION**
>
> **Responding evidence**
>
> **20.02** In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on the mere allegations or denials of the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

Granting summary judgment

20.03(1) The judge must grant summary judgment if he or she is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.

[underlining added]

Powers of judge

20.03(2) When making a determination under subrule (1), the judge must consider the evidence submitted by the parties and he or she may exercise any of the following powers in order to determine if there is a genuine issue requiring a trial:

(a) weighing the evidence;

(b) evaluating the credibility of a deponent;

(c) drawing any reasonable inference from the evidence;

unless it is in the interests of justice for these powers to be exercised only at trial.

Only genuine issue is amount

20.03(3) If the judge is satisfied that the only genuine issue is the amount to which a party is entitled, he or she may order a trial of that issue or grant judgment with a reference to determine the amount.

Only genuine issue is question of law

20.03(4) If the judge is satisfied that the only genuine issue is a question of law, he or she may determine the question and grant judgment accordingly.

…

Material facts

25.06(1) Every pleading shall contain a concise statement of the material facts on which the party relies for a claim or defence, but not the evidence by which those facts are to be proved.

Separate claims or defences

25.06(2) Where a party seeks relief in respect of separate and distinct claims, or raises separate and distinct grounds of defence, the material facts supporting each claim or ground of defence shall be stated separately as far as may be possible.

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Pleading law

25.06(3) A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded.

…

Condition precedent

25.06(5) Allegations of the performance or occurrence of all conditions precedent to the assertion of a claim or defence of a party are implied in the party's pleading and need not be set out, and where the opposite party intends to contest the performance or occurrence of a condition precedent, the pleadings of the opposite party shall specify the condition and its pleadings of non-performance or non-occurrence.

Inconsistent pleading

25.06(6) A party may make inconsistent allegations in a pleading where the pleading makes it clear that they are being pleaded in the alternative.

Inconsistent or new claims

25.06(7) An allegation that is inconsistent with an allegation made in a party's previous pleading or that raises a new ground of claim shall not be made in a subsequent pleading but by way of amendment to the previous pleading.

Notice

25.06(8) Where notice to a person is alleged, it is sufficient to allege notice as a fact unless the form or a precise term of the notice is material.

Documents or conversations

25.06(9) The effect of a document or the purport of a conversation, if material, shall be pleaded as briefly as possible, but the precise words of the document or conversation need not be pleaded unless those words are themselves material.

Contract or relation

25.06(10) Where a contract or relation between persons does not arise from an express agreement, but is to be implied from a series of letters, communications, or conversations, or otherwise from a number of circumstances, it shall be sufficient to allege the contract or relation as a fact.

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Nature of act or condition of mind

25.06(11) Where fraud, misrepresentation or breach of trust is alleged, the pleading shall contain full particulars, but malice, intent or knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.

Presumption of law

25.06(12) A party need not plead a fact which the law presumes to be in the party's favour, or as to which the burden of proof lies on the opposite party.

Claim for relief

25.06(13) Where a pleading contains a claim for relief, the nature of the relief claimed shall be specified either simply or alternatively, and, where damages are claimed,

(a) the nature of the relief claimed, including the amount of special damages, for each claimant in respect of each claim shall be stated;

(b) the amounts and particulars of special damages need only be pleaded to the extent that they are known at the date of the pleading, but notice of any further amounts and particulars shall be filed and served as they become known; and

(c) the amount of general damages claimed need not be stated.

Claim for general relief implied

25.06(14) A claim for general relief will be implied in any pleading where relief is claimed.

…

Contents — motions

39.01(4) An affidavit for use on a motion, including a motion for summary judgment, may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit.

[underlining added]

DYNAMIC'S ARGUMENT ON FUNDAMENTAL BREACH AND REPUDIATION

[67] At paragraphs 50 to 55 of its brief, Dynamic explained its position on repudiation and anticipatory breach. At paragraph 50, Dynamic argued: "A

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party, by its express language or conduct may repudiate his or her contractual obligations before they become due. The innocent party can then accept the repudiation and seek damages. The innocent party must communicate its "acceptance" of the repudiation."

[68] At paragraph 51, Dynamic argued: "Faurschou, by its conduct, as a matter of what it said or has done, repudiated the purchase agreements for the undelivered equipment…"

[69] At paragraphs 54 to 55. Dynamic argued:

> It is the position of Dynamic that it communicates its acceptance of the repudiation when it sent the demand letter from its counsel requiring compliance with the obligations under the purchase agreements and, failing which, Dynamic would commence legal proceedings. Even if the Court does not accept that this communication was a valid communication of acceptance of repudiation, Dynamic unequivocally communicated its acceptance of the repudiation by filing the enclosed statement of claim and seeking damages…

[70] Faurschou's arguments about repudiation are at paragraphs 56 to 87 of its brief. Faurschou argued that the time that elapsed between the payment of the $1.6 million and the final delivery of the final equipment was not unreasonable (as per section 31(2) of the ***Sale of Goods Act***).

[71] Faurschou's brief said nothing about the fact that Faurschou told Rainfine to "hold off" on the delivery of some equipment.

[72] Faurschou argued that the Demand Letter did not amount to clear and unequivocal "acceptance" of repudiation. Even the Statement of Claim did not amount to such clear and unequivocal "acceptance".

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[73] Furthermore, Faurschou argued (paragraph 106) that Dynamic has security interests in the equipment [against Fat Cat] and that Dynamic has not mitigated its damages [in respect of anything done by Faurschou]. Dynamic should recover from Fat Cat first (by way of enforcing the security interests).

[74] In its brief, Faurschou pointed out that the Warren affidavit contained statements of information and belief, without indicating the source of the information and/or the fact of the belief.

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DECISION

Flaws in both affidavits

[75] Rule 39.01(4) of the ***Rules*** says: An affidavit for use on a motion, including a motion for summary judgment, may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit. [underlining added]

[76] Both affidavits repeatedly violated this Rule.

[77] For example, in the Faurschou affidavit, at paragraph 12, Mr. Faurschou said that it was Faurschou's understanding that Dynamic and Fat Cat would be entering into a lease. He did not specify the source of this understanding.

[78] At paragraph 15, he said that it was his understanding that Dynamic would have to approve a certain invoice. He did not specify the source of this understanding.

[79] At paragraph 20, he said that Faurschou understood that four pivots and four systems were under one lease. He did not specify the source of this understanding.

[80] At paragraph 52, he said that Faurschou understood that four pivots and four systems were under one lease agreement. He did not specify the source of this understanding.

[81] At paragraph 53, he said that Faurschou was told that there was one lease for all the equipment. He did not specify the source of the information (who told Mr. Faurschou).

[82] Mr. Warren's affidavit was even worse. Mr. Warren was employed by Dynamic from June 2023 to April 2024. Therefore, he had no direct knowledge of any events outside of this time frame. He did attach various documents to his affidavit that fall under the definition of "business records" and are therefore admissible, subject to weight, under the ***Manitoba Evidence Act***.

[83] At paragraph 3, he said that it was his understanding that Iron Leasing was a broker. He did not state his source, but this was never in dispute, so it's uncontentious.

[84] At paragraph 4, he said that it was his understanding that Iron Leasing was dealing directly with Faurschou. No source is stated, but it's uncontentious.

[85] However, paragraph 4 continued: "…and obtained from Faurschou the information relevant for the transaction including the delivery of the equipment would be completed in late May/early June of 2022. Iron Leasing advised

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Dynamic of this in the April 27, 2022 correspondence attached at Exhibit 'A'." Exhibit "A" is indeed an April 27, 2022 email from Iron Leasing to Dynamic, but the email never mentions May or June of 2022 or any other delivery date. Mr. Warren stated his "understanding" of a crucial fact underlying Dynamic's Claim, without indicating the source (where the understanding came from).

[86] At paragraph 8, Mr. Warren said that it "was understood by all parties, or at least anticipated by Dynamic" that Faurschou would do certain crucial things. No source for the understanding is provided. The alternative assertion that it was "anticipated by Dynamic" is just a subtle way of saying the same thing – there is no explanation of why it was anticipated by Dynamic. The source is not stated.

[87] In paragraph 15, there are two apparent typographical errors. Two references to "2023" are probably meant to be "2022".

[88] At paragraph 18, Mr. Warren said that Dynamic "understood" that pivots had been delivered or were being delivered concurrently. He didn't specify the source of this information.

[89] At paragraph 20, Mr. Warren said that "Dynamic would not have issued the funds to Faurschou [in the summer of 2022] if it did not believe that Faurschou had already delivered [or would immediately deliver] the Pivots to Fat Cat…" Mr. Warren did not start work at Dynamic until June 2023. His statement is not based on any identified business record. He could not have known about things that happened at Dynamic long before he became

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employed. If someone who had been employed by Dynamic in the summer of 2022 told him, he doesn't identify the source.

[90] At paragraph 23, Mr. Warren said that Dynamic understood, based on the "communications" to it and the way the industry operates, that the equipment had been delivered at a certain time. He did not identify which "communications" he was referring to. Nor did he name of the source of the communications.

[91] At paragraph 27, Mr. Warren said that "Fat Cat's monthly payments [until December 2022] assured Dynamic that the Equipment had been delivered…" Mr. Warren didn't join Dynamic until June 2023. He doesn't quote (or paraphrase) a 2022 business record. If someone at Dynamic felt "assured" of something in 2022, Mr. Warren doesn't name the source of the information.

[92] At paragraph 34, Mr. Warren said that Dynamic "believed" that the Equipment had been delivered to Fat Cat [at the time of the two wire-transfers in the summer of 2022]. Mr. Warren was not at Dynamic. He doesn't quote a 2022 business record. If someone at Dynamic believed something, Mr. Warren does not say who.

[93] Paragraph 36 is a combination of legal argument (alluding to the tort of deceit), and opinion evidence (a conclusion that Faurschou intended to deceive Dynamic). Indeed, it is more akin to purported mind-reading than to opinion evidence.

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[94] At paragraph 39, Mr. Warren said that he believed a second pivot was likely delivered to Fat Cat. He did not refer to any business record. He did not specify the source of this information.

[95] There were no motions to strike out or expunge portions of affidavits that violated Rule 39.01(4). I will simply give the offending portions (except uncontentious portions) zero weight.

Summary judgment

[96] Rule 20.03(1) says:

> The judge must grant summary judgment if he or she is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.
>
> [underlining added]

[97] Motions for summary judgment have become more popular in recent years, aided by modern rules of court (such as Rule 1.04) and an increasing emphasis on access to justice. Summary judgment is often a wonderful vehicle for combining essential justice with the spirit of proportionality.

[98] As a pretrial judge, I authorized a summary judgment motion hearing, based on the pleadings and the submissions of counsel at the first pretrial conference.

[99] No one forced Dynamic to move for summary judgment.

[100] At a summary judgment hearing, parties are expected to put their best feet forward. If a plaintiff has important evidence and argument to put forward in support of its Claim, it must find a way to do so. If its summary judgment motion succeeds but the moving party does not receive every remedy that it

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requested because it failed to put important evidence before the court, it has no one to blame but itself.

[101] Having completed the motion hearing, reserved judgment and carefully reviewed the affidavit, the transcript of cross-examination and the briefs, I am forced to conclude that there is no genuine issue requiring a trial. I am able to uphold part of Dynamic's claim and award it some remedies. In theory, it might have been able to obtain additional remedies after a full trial, but Dynamic chose to move for summary judgment and, having made its bed, it must sleep in it.

[102] There is no dispute that Dynamic wire-transferred about $1.6 million to Faurschou in 2022. Although there was almost no evidence on this point, there must have been at least some brief communication between the parties' office staff in order to facilitate the two wire-transfers. However, there was no other communication between the parties until Dynamic sent the Demand Letter.

[103] Incidentally, Mr. Faurschou's offhand comment that he never communicated with Dynamic because he had no contact information is preposterous. Had Faurschou wished to communicate with Dynamic, it could have figured out how to do so. For that matter, it is obvious that Dynamic could have communicated with Faurschou if it had wanted to.

<u>The Fat Cat Loan</u>

[104] The Statement of Claim did not actually mention the Fat Cat Loan. However, it did allege that Faurschou breached express and/or constructive

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trusts and/or converted certain funds (the tort of conversion). It later emerged that Dynamic had the Fat Cat Loan in mind.

[105] Some of Dynamic's arguments and requested remedies were based on the Fat Cat Loan. It appears that Faurschou did not tell Dynamic about the loan. It is also obvious that Dynamic eventually found out about it on some date through some channels. Among its other arguments, Dynamic argued that Faurschou violated Dynamic's legal rights by making the loan. Mr. Faurschou was cross-examined about the mechanics of the loan.

[106] Dynamic paid Faurschou about $1.5 million by wire-transfer on June 17, 2022. The Fat Cat Loan was made about June 21, 2022. (Dynamic sent its second wire-transfer to Faurschou on August 4, 2022.) In his cross-examination, Mr. Faurschou said that the $1.5 million went into "General Funds", not into any segregated account. Similarly, the Fat Cat Loan came out of General Funds. As the summary judgment motion pre-empted discovery of documents, Faurschou's bank statements from June, July and August 2022 (and later months) were not in evidence. There is no evidence about how much money was in the account on the date of the Demand Letter or on the date of the Statement of Claim. Mr. Faurschou was never asked these questions in cross-examination. Mr. Faurschou testified that there's "lots of money that goes into that account and out of that account."

[107] In light of those facts, Dynamic has not established even a *prima facie* case that the funds that Dynamic paid to Faurschou were subject to an express

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trust of some kind. Similarly, there is no *prima facie* basis to support allegations of tortious conversion or any tort.

[108] Indeed, there is no evidence that there was anything legally wrong about the Fat Cat Loan. Was Faurschou unable to buy any more equipment in the summer of 2022 because the Fat Cat Loan left its bank account depleted? The question was never put to Mr. Faurschou.

[109] Perhaps Faurschou exercised poor business judgment in making the Fat Cat Loan, but mere poor judgment does not necessarily amount to a breach of trust or a tort.

The invoices

[110] Similarly, Dynamic's allegations that Faurschou made various negligent and/or fraudulent representations, does not appear to be the strongest element of Dynamic's case. The reality is that Faurschou made almost no representations at all to Dynamic.

[111] Faurschou did provide Dynamic with four invoices for pivots, dated June 10, 2022. Each invoice had a line for a "date" which was filled in. Each invoice also had a line for a "ship date" which was blank. Neither Mr. Faurschou nor Mr. Warren was asked any questions about the significance of the blank "ship dates".

[112] Faurschou also gave Dynamic a July 26, 2022 invoice for eight containers. Again, the "date" was filled in, but the "ship date" was blank. There is no evidence that Dynamic ever contacted Faurschou to ask about the "ship dates".

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Mr. Faurschou was not asked any questions about this. He did say several times that Faurschou had no contact with Dynamic at all.

[113] In its Statement of Claim, Dynamic alleged that, by providing these invoices, Faurschou represented that (on the dates of the invoices) it had either delivered or "shortly would be delivering" all the equipment to Fat Cat.

[114] At paragraph 21 of the Statement of Claim, Dynamic alleged that Faurschou's representations that the equipment had already been delivered or would be delivered shortly constituted negligent or fraudulent misrepresentation. It is conceivable that Fat Cat and/or Iron Leasing told Dynamic something about the timing of delivery, but there is no evidence at all on this point.

[115] As I said, this is not the strongest element of Dynamic's case. Dynamic has not established even a *prima facie* case that Faurschou made negligent or fraudulent misrepresentations.

Agency

[116] In argument, Dynamic made much of the comment in paragraph 5 of the Statement of Defence that Faurschou acted as Dynamic's "agent" to secure ownership of the equipment for the plaintiff. The Statement of Defence was never amended. Therefore, this comment was an admission. Dynamic argued that the law of agency imposed higher duties upon Faurschou.

[117] There is no dispute that Dynamic wanted equipment to be purchased from Rainfine and InteliRain. There is no dispute that Faurschou contacted Rainfine

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and InteliRain, and sent certain sums of money to them to buy the equipment. In that sense, of course Faurschou acted as Dynamic's agent.

[118] There is no dispute that agents have certain legal duties to their principals. However, agency agreements come in many shapes and sizes. What were the precise terms of this agency agreement? Because the parties had almost no communication, it is impossible to know. The essence of Dynamic's grievance is that delivery took too long. Whether the parties are labelled as two parties to a contract, or as "agent" and "principal", when was delivery supposed to happen? Whether as party-to-a-contract or as agent, Faurschou never said a word on this subject. ***The Sale of Goods Act*** says it had to happen within a reasonable time. Labeling Faurschou an "agent" does not change that fundamental reality.

Unjust enrichment

[119] Dynamic also alleged unjust enrichment. Unjust enrichment is often argued when there is no contract at all, but something of value has changed hands. In simple terms, the essence of the unjust enrichment claim is that Dynamic gave Faurschou money to buy equipment, and it has not yet used all of that money to buy equipment for Fat Cat. Faurschou got the money over two years ago. Therefore, Faurschou has been unjustly enriched because it still has some of the money. If that is all 100% correct, it adds nothing to Dynamic's breach of contract claim. Furthermore, as explained below, there are questions

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of fundamental beach and repudiation that are best analyzed through the lens of the law of contract.

[120] Also, an unjust enrichment analysis would require at least some minimal information about how much profit Dynamic and Faurschou expected to make, and how much they actually made. There is no such evidence before the court.

[121] Therefore, I will focus on the breach of contract issue.

<u>Contract for delivery within a reasonable time</u>

[122] Although neither party referred to case law in which an implied contract was created based on such minimal communication, neither party disputed that some sort of contract existed between the parties.

[123] The implied contract was for the purchase of four pivots, four systems and eight containers.

[124] Over two years have passed since Dynamic wired the $1.6 million to Faurschou, and Fat Cat still does not have all of the Equipment (four pivots, four systems and eight containers). The parties agreed that, as of today, Fat Cat has only two pivots, one system and four containers. Two pivots and four containers are in Faurschou's yard.

[125] There is no evidence before the court about how long it takes manufacturers to manufacture pivots, systems or containers. Nor is there any evidence about how long it takes to ship these things to Manitoba. We do have very limited evidence from the cross-examination of Mr. Faurschou about his personal experience in previous years. Without providing any details, or being

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asked to distinguish between pivots, systems and containers, he estimated that six months might be reasonable. He suggested that one year might be reasonable in some cases, but he was not asked to elaborate.

[126] What we do know is that, at one point in the process of ordering the Equipment, Mr. Faurschou told Rainfine to "hold off" on delivery. Although there is no evidence about Faurschou's cash flow over the course of 2022, 2023 and 2024, it is possible that, after making the Fat Cat Loan (and nor being promptly repaid), Faurschou found itself cash-poor and unable to make the payments necessary to make delivery happen as soon as possible.

[127] Faurschou issued the Hold Off Directive on December 21, 2022. Dynamic's Demand Letter was on May 17, 2023. One pivot and two containers were delivered to Fat Cat on June 1, 2023. Dynamic's Ultimatum Letter was on June 31, 2023. Dynamic filed its Statement of Claim on July 20, 2023.

[128] We know that the Statement of Claim did not include a claim for specific performance, even as an alternative remedy.

[129] We also know that, even after the Statement of Claim, Faurschou continued to send payments to Rainfine and InteliRain.

[130] A valid summary judgment hearing does not have to be a perfect hearing. Although a full trial would have left fewer questions unanswered, there is enough evidence before the court to make meaningful findings and draw meaningful conclusions, without the need for a full trial. The test for summary judgment is met.

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<u>Conclusions</u>

[131] There was a contract between Dynamic and Faurschou. The essence of the contract was that Dynamic would pay Faurschou $1,617,786.40 up front (which it did), and Faurschou would purchase four pivots, four systems and eight containers, to be shipped to Fat Cat. There was no explicit agreement upon delivery date.

[132] ***The Sale of Goods Act*** required delivery to be within a "reasonable" time.

[133] There is not enough evidence to determine precisely what a "reasonable" time would have been in this context. However, there was an implied term that Faurschou would not actively delay delivery. Delivery delayed by Faurschou's affirmative actions would not have been "reasonable". The existence of this term met the legal test for implied contractual terms.

[134] On December 21, 2022, Faurschou actively delayed the delivery process by issuing the Hold Off Directive. It is possible that Faurschou's motive for the Hold Off Directive was that it was cash-poor after making the Fat Cat Loan (and not being repaid by Fat Cat). The motive is legally irrelevant. By issuing the Hold Off Directive, Faurschou breached its contract with Dynamic.

[135] It is not necessary to determine whether the Hold Off Directive, in and of itself, was a "fundamental breach" or a "repudiation" of the contract. Later events, including the Demand and Ultimatum Letters, must be considered.

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[136] On some date, from some source, Dynamic learned about the Fat Cat Loan and learned that not all of the Equipment had yet been delivered to Fat Cat. We don't know why, at this point, Dynamic didn't pick up the phone and contact Faurschou to get to the bottom of the problem.

[137] We do know what Dynamic did next (at least in respect of Faurschou): it sent the Demand Letter (on May 17, 2023). The Demand Letter did not necessarily demand repayment. It did say that, if the dispute were not resolved, Dynamic reserved the right to sue. It did not necessarily preclude the possibility that Dynamic might be satisfied if all the Equipment were quickly delivered even at this late date.

[138] Unfortunately, Faurschou did not reply to the Demand Letter in any meaningful way. Whether the fault lay with the client or the (former) lawyers is irrelevant for purposes of this litigation.

[139] Meanwhile one pivot and two containers were delivered to Fat Cat on June 1, 2023.

[140] Dynamic sent the Ultimatum Letter on June 31, 2023. This letter gave Faurschou two options: it could either deliver the rest of the Equipment by June 27 or repay Dynamic by June 27. Faurschou did neither, and did not respond to the letter. Again, for purposes of this litigation it does not matter whether the fault lay with the client or the (former) lawyers.

[141] On July 20, 2023, Dynamic filed the Statement of Claim. The Statement of Claim claimed damages. It did not claim specific performance, even as an

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alternative remedy. It did not explicitly use the word "repudiation". However, the effect of the Statement of Claim was clear enough. Faurschou's time was up. Dynamic would no longer consider delivery at this late date to be reasonable. Dynamic now wanted the balance of its money back (plus interest, plus costs).

[142] Substance matters more than labels.

[143] It is not necessary to determine whether the Statement of Claim was an "acceptance of a repudiation" of the contract. What matters is the substance of the Statement of Claim, in the context of the Hold Off Directive, the Demand Letter, the Ultimatum Letter and Faurschou's baffling failure to respond to the Demand Letter and Ultimatum Letter. Any reasonable business in Faurschou's position would have understood the message: "The time for delivering more equipment is over. You failed to deliver with a reasonable time, and now you must repay the balance of our money."

[144] On the date of the Statement of Claim (July 20, 2023), Faurschou had only spent $932,864.43 of the $1,617.786.40 that Dynamic had wire-transferred back in the summer of 2022. The balance was $684,921.97.

[145] In paragraph 18 of the Statement of Defence, Faurschou argues that $684,921.97 is the "maximum amount that the defendant owes the plaintiff". I find that it is the precise amount.

[146] Faurschou breached its contract with Dynamic, and now owes Dynamic $684,921.97 in damages.

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[147] After the Statement of Claim was filed, Faurschou paid about $395,000 to Rainfine, and about $122,000 to InteliRain, for a total of about $517,000. To be blunt, Faurschou must eat the loss. After the Statement of Claim was filed, Faurschou was put on notice that Dynamic no longer wanted equipment; it just wanted its money back. If Faurschou chose to send some of that money to Rainfine and InteliRain, it did so at its own peril. In theory, Faurschou could have consulted with Dynamic and asked Dynamic to authorize the further payments to Rainfine and/or InteliRain. The only possible inference is that Faurschou know perfectly well how Dynamic would respond to that.

[148] Again, Faurschou is liable to Dynamic for $684,921.97 in damages.

Mitigation

[149] Faurschou argued that Dynamic should have mitigated its losses by trying to collect on its security interests in the Equipment (from Fat Cat). The onus is on Faurschou to prove its mitigation argument. It has not met that onus.

[150] Sometimes, an aggrieved party might have remedies against multiple potential defendants. It may choose which defendant to sue. One defendant might choose to add a different defendant as a third party to the litigation. Faurschou never attempted to add Fat Cat to this litigation.

[151] Of course, if Dynamic ever sues any other party (e.g. Fat Cat) for sums it has already recovered from Faurschou, principles of *res judicata* and/or issue estoppel and/or abuse of process might apply. Dynamic would be precluded from double recovery.

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Interest

[152] Dynamic claimed interest. It is entitled to pre and post-judgment interest at the court rate.

Costs

[153] Dynamic's motion was partly successful. Dynamic successfully proved a breach of contract and some damages. However, it failed to prove other allegations. Both parties filed improper affidavits. Considering all of the factors in Rule 57.01(1), I conclude that each party shall bear its own costs. I thank both counsel for their courtesy.

_____________________________J.

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