SUPREME COURT OF NOVA SCOTIA

Citation: *Kocken Energy Systems Inc. v. Fulton Engineered Specialities Inc.* 2017 NSSC 103

Date: 20170418
Docket: Bwt. No. 415491
Registry: Bridgewater

Between:

Kocken Energy Systems Inc. a body corporate,
incorporated under the laws of the Province of Nova Scotia

Plaintiff

v.

Fulton Engineered Specialities Inc.,
incorporated under the laws of the Province of Ontario,
and Walter Widla

Defendants

Judge: The Honourable Justice Patrick J. Duncan

Heard: October 17 and 18, 2016, in Bridgewater, Nova Scotia

Counsel: Kathryn Dumke, Q.C., for the Plaintiff
Fulton Engineered Specialities Inc., Defendant, unrepresented
Walter Widla, Defendant, unrepresented

By the Court:

Introduction

Plaintiff's claim

[1] The plaintiff Kocken Energy Systems Inc. (Kocken) is a Nova Scotia company that designs and builds plants for oil and gas field use. Its equipment is used around the world including North and South America, East Asia, and the Middle East.

[2] Arthur Sagar was, at all times material to this action, the President of Kocken and the principal representor of information from Kocken to the defendants.

[3] The defendant Fulton Engineered Specialities Inc. (Fulton) is a manufacturer of pressure vessels and other industrial equipment, with full American Society of Mechanical Engineers (ASME) certification required to build pressure vessels.

[4] The defendant Walter Widla was, at all times material to this action, the President and directing mind of Fulton. He was the principal representor of information from Fulton to Kocken.

[5] In January 2013, the parties entered two contracts. Each contract required Fulton to supply Kocken with certain gas plant equipment and pressurized vessels that Kocken required for contracts that it held with third parties. The first of these was with Project Support Services Asia (PSSA) to supply gas and field equipment for a project of Mari Gas Company Limited (Mari Gas) in Pakistan. The second contract was for a supply to Polish Oil, also for a project in Pakistan. Both contracts required completion on timelines set out by Kocken. Fulton was advised that if there was non-compliance with the timelines then Kocken was subject to forfeiture of performance guarantees provided in its agreements with the third parties.

[6] Based upon the representations of the defendants as to the status of the work, Kocken paid Fulton progress payments on the two contracts. Kocken alleges that the work was not completed, the contracted for product was not supplied, and the monies paid to Fulton were not refunded, despite demands for same.

[7] The plaintiff claims return of the monies paid to Fulton in an amount of $422,300.00 together with damages equal to the full amount of the performance

guarantees which were drawn upon by Kocken's third party customers. It has been submitted that this cost was incurred as a direct consequence of the defendant's failure to perform on their contracts with Kocken.

Counterclaim

[8] The defendants filed a counterclaim seeking damages arising from what it pleaded was a breach of contract by the plaintiff in unjustifiably and unilaterally repudiating the contract and failing to pay monies that Fulton claims were owed because of that breach.

[9] For the reasons that follow, the claims of the plaintiff are allowed and the counterclaim of the defendants is dismissed.

Facts

Purchase Order #00110008 (January 9, 2013)

[10] During the first week of January of 2013, Albert Sager, President of Kocken and Walter Widla, of Fulton, discussed the possibility of Fulton manufacturing pressurized vessels for a Kocken project under which it had contracted with Mari Gas Company Limited (Mari Gas) to supply equipment for a gas plant in Pakistan.

[11] Sager told Widla that Kocken was required to submit a performance bond for on time delivery and performance of the equipment. He advised that the project was on a tight schedule and that the delivery of the pressurized vessels had to be completed within 16 weeks from the date of a purchase order. If interested, then Fulton could submit a quotation on all or some of the parts forthwith.

[12] By January 7, 2013, Fulton had provided quotes for the manufacture of the pressurized vessels for a price of $641,000 and confirmed to Kocken it would complete the manufacture in accordance with the timelines discussed.

[13] On January 9, 2013, Kocken issued Purchase Order #00110008 for a total contract price of $641,000 which was to be paid as follows:

a) 20% deposit with the purchase order;

b) 30% upon receipt of "major materials"; and

c) 50% upon readiness for shipment.

[14] Delivery was required to be “ASAP” and as “mutually agreed to by Kocken and the Seller prior to work being done” (Term 7).

[15] Kocken paid the 20% deposit in the amount of $128,200 on January 17, 2013. Fulton agreed to complete their work no later than April 23rd, 2013 and to have the product ready for delivery on April 24th, 2013.

[16] Per industry standards, “major materials” are defined as “shells”, being the body of pressure vessels to be manufactured, and “heads”, being the caps at the end of the pressure vessel to be manufactured. The shells are rolled and the heads are premanufactured for assembly by a manufacturing plant such as Fulton.

[17] By January 14th, 2013, Fulton submitted fabrication drawings for review by Kocken. Within 48 hours, Kocken’s design engineer, William Famulak, had reviewed Fulton’s drawings, made annotations and issued revisions to Fulton. At this point, Fulton should have been ready for fabrication of the shells of the pressure vessels.

[18] On February 13, 2013, Widla sent an email to Kocken that led Kocken to believe that Fulton was progressing with their work and that major materials were on hand. Widla described photos attached to his email as “…the pictures of the heads and nozzles that we have for this project.” Widla continued in the email: “I’m waiting for the pictures of the caps and pipe shells for the smaller vessels and will send them as soon as I get them.”

[19] On March 15, 2013, Fulton issued an invoice for the second milestone payment in the amount of $192,300. The invoice itemized each pressure vessel in its scope of supply and included the words “progress payment for the receipt of major materials” on every line item.

[20] On March 26, Sager emailed Widla, again asking for Production Schedules. Mr. Widla replied the same day with an itemized report that suggested all would be completed by April 30.

[21] Fulton had not supplied copies of purchase orders and delivery slips supporting its claim that it had received “major materials”. Kocken relied upon the photos of materials, the representations of Widla and Fulton, and on Fulton’s invoice as proof that a progress payment was due. Kocken paid the second milestone payment in the amount of $192,300 on the 27th of March, 2013.

[22] The milestone payments in its contracts with Mari Gas and Polish Oil obliged Kocken to produce, among other things. material test sheets for all materials used in construction, and invoices for major materials. In late March and early April 2013, Kocken contacted Fulton several times by telephone requesting proof of receipt of major materials. The proof was not provided.

[23] Kocken retained a project manager, Hisham Rushdi, to attend and determine the true state of affairs at Fulton in Ontario. Mr. Rushdi visited Fulton's Ontario facility on April 3 and discovered that no structural fabrication had begun and that materials said to be on site were not.

[24] On April 14 Sagar emailed to Widla citing the misrepresentations of Widla in relation to Fulton's acquisition of materials and progress on fabrication. He advised that Rushdi would return to Fulton on April 15 and was to be shown copies of all Fulton purchase orders for the Mari Gas project (as well as a list of major materials that Fulton Trinidad purchased for the second contract with Polish Oil).

[25] Under pressure from Kocken, Widla provided an invoice issued by Canadian Plate and Profiles Inc., dated March 1, 2013, as evidence of the purchase of major materials for the shell manufacture. Kocken became suspicious as the date had been written in by hand whereas the balance of the invoice information was printed. Kocken contacted the vendor, Canadian Plate and Profiles Inc., and requested a copy of all invoices connected to the project which had been issued to Fulton.

[26] Canadian Plate and Profiles Inc., provided a copy of the original invoice showing that it was dated April 1, 2013 and that the materials had not been delivered. In addition, the copy provided to Fulton was further altered by deleting the words "Please collect cheque". *i.e.,* the original invoice showed that Fulton did not have credit with Canadian Plate and delivery of any materials was to be on a cash on delivery basis.

[27] Further investigation demonstrated that Widla contacted Canadian Plate on April 15th seeking the pricing and delivery information for a materials order and asking for an invoice to be emailed to him the same day. It is apparent that once that was in hand Mr. Widla, or someone acting under his direction, altered the invoice before producing it to Fulton. That evening Widla emailed Canadian Plate

asking them to delay on producing the order "until we provide final dimensions and details". On April 18, Widla requested that Canadian Plate provide:

> …copies of 2 typical MTRs for each of the 4 thicknesses on this order. Just samples of material currently in your inventory is enough. Can you provide this morning?

[28] A Manufacturers Test Report (MTR) is necessary information as part of the ACME certification package. In Mr. Sagar's evidence he concluded that Widla did this to establish the *bona fides* of Fulton's claim to have the materials. If Fulton had proceeded and used a different MTR numbers on fabricated materials that were unrelated to the actual materials used it would have been "outrageous", testified Mr. Sagar.

[29] In fact, the materials appear to have been ordered from Canadian Plate on or about April 15th, which would have made it impossible for Fulton to complete construction by April 23, 2013. The order was cancelled by Widla before the end of April.

[30] In summary, it was determined that the construction of the pressure vessels had not commenced and that major materials, necessary for the construction, had not been purchased or received by Fulton notwithstanding representations to the contrary made by Widla and Fulton in February, March and April. All such representations by Widla were false.

[31] Fulton had not met the conditions necessary to issue an invoice on March 15th, 2013. Fulton had not ordered the required materials, did not have control over the materials required to complete the contract, and no invoice had been issued to Fulton by the supplier of the materials.

[32] Following the discovery that Widla had misrepresented the receipt and invoicing of major materials it had become apparent that Fulton would be unable to complete the project within the time allotted. Kocken declared the contract breached on April 29th, 2013, and demanded its payments on account be refunded.

[33] Despite demands for payment, Fulton has refused to refund monies that it received from the plaintiff on this contract.

Purchase Order #24120010

[34] Kocken was also contracted by Polish Oil for the supply of equipment for a gas plant in Pakistan. The contract similarly required the manufacture of pressure vessels on a tight timeline and with penalties for late delivery or equipment performance failure.

[35] Shortly after the Mari Gas contract was put in place, Sagar asked Widla if Fulton would be interested in supplying for the Polish Oil contract and was told that Fulton would be.

[36] On January 18th, 2013, Kocken issued Purchase Order No. 24120010 to Fulton for the Polish Oil project. Fulton advised Kocken that the manufacture of the vessels in the Purchase Order would be completed by its manufacturing plant operating in Trinidad as Fulton Trinidad.

[37] The purchase order contracted for the manufacture and delivery of vessels and equipment. The parties agreed:

(i) that the equipment would be delivered on an "as soon as possible" basis, and within 16 weeks from the purchase order date of January 18th, 2013;

(ii) a total contract price of $509,000;

(iii) a payment schedule that required:

  (a) 20% deposit at the time of the purchase order;

  (b) 30% against receipt of major materials;

  (c) 50% upon readiness for shipment.

[38] On January 31, 2013, Kocken paid Fulton the 20% deposit of $101, 800.

[39] Concurrently, with the March and April 2013 dispute over whether Fulton had major materials for the Mari Gas order, Widla made demands for a second payment on the Fulton Trinidad Purchase order, which Kocken was not prepared to pay in view of Widla's and Fulton's conduct on the Mari Gas order.

[40] In early June of 2013, it became clear, upon Kocken dispatching its President to Trinidad, that the delivery of the manufactured items under Purchase Order 24120010 would not and could not be completed as per the contract with Fulton.

[41] As a result, Kocken attempted to negotiate directly with Fulton Trinidad for an extension and delivery on an as soon as possible basis. Fulton Trinidad declined

and advised Kocken that all negotiations would have to go through Widla. Kocken then declared this contract breached and requested the return of its deposit. Fulton failed to deliver the materials contracted for and refused to repay the amount already received from Kocken.

Issues

1. Were the contracts for the manufacture of pressure vessels between the plaintiff and the defendant breached by the defendant?

2. Did the defendant Walter Widla and Fulton Engineered Specialties Inc. make fraudulent misrepresentations to the plaintiff?

3. What damages, if any, is the plaintiff entitled to as against each of the defendants?

Analysis

Issue 1: *Were the contracts for the manufacture of pressure vessels between the plaintiff and the defendant breached by the defendant?*

[42] I am satisfied, based upon the evidence adduced, that Kocken and Fulton entered into two enforceable contracts that called for the supply by the defendant Fulton to the plaintiff of certain enumerated manufactured goods necessary to the plaintiff's ability to fulfill its contractual obligations with Mari Gas and Polish Oil, respectively.

[43] I am satisfied that the plaintiff fulfilled its obligations under the contracts with Fulton up to and including the time when it became apparent that the defendant could not (or would not) perform its obligations under the contracts. Kocken's personnel were available and responsive to any concerns expressed by Fulton, even when it was evident that Fulton was making requests that had already been satisfied, sometimes repeatedly. This included the prompt return of revisions to Fulton's fabrication drawings and plans when requested.

[44] Kocken made two milestone payments to Fulton on the Mari Gas contract and one on the Polish Oil Contract, in good faith and as called for by the two agreements. The plaintiff justifiably refused further payments when it discovered the defendants'

misrepresentations and demonstrated inability to complete its obligations under the contracts.

[45] Each contract was entered by the parties with the express understanding that completion by Fulton within a specified timeframe was an essential condition of the contract and that any delay in delivery by Fulton could in turn trigger the exercise by Mari Gas and Polish Oil of Kocken's performance guarantees if Kocken missed its delivery deadline.

[46] The defendant Fulton failed to perform its promises under the contracts and has put forward no defence to explain such failure.

[47] The plaintiff paid a total of $320,500 on the first contract and an additional $101,800 on the second contract. The defendant delivered nothing. I conclude that the defendant Fulton is liable for having breached its contracts with the plaintiff.

Issue 2*: *Did the defendant Walter Widla and Fulton Engineered Specialties Inc. make fraudulent misrepresentations to the plaintiff?

[48] The plaintiff alleges that Walter Widla is liable for damages suffered because of his fraudulent misrepresentations to the plaintiff during the life of the first Purchase Order. Specifically, Kocken alleges that Widla made false representations to it as to the progress that Fulton was making in completing the work it had contracted to perform.

[49] In *Bureau v. Darde,* 2013 NSCA 121, at paragraph 8, the Nova Scotia Court of Appeal cited with approval the decision in *Derry v. Peek* (1889), 14 App. Cas. 337, as to the elements of fraudulent misrepresentation, which are:

1. the making of a representation;
2. the representation was false;
3. the representation was made knowingly; without belief in its truth, or recklessly indifferent whether it was true or false; and
4. the creditor relied on the representation and turned over property to the debtor.

[50] Farrar J.A. writing on behalf of the court stated:

> 18 The false statement made by the defendant need only be materially connected to the actions of the plaintiff that resulted in damage. In other words, were the misrepresentations made by Mr. Darde connected to the actions of Morris Bureau that resulted in them suffering damages? …. Linda

> D. Rinaldi, Remedies in Tort Law, vol. 1, loose-leaf (consulted on October 15, 2013), (Toronto, Ont.: Carswell, 1987), explains the law where fraud or deceit is involved at p. 5-36:
>
> > s.38 Materiality is a question of fact, and every case depends on its own particular circumstances. It is no defence that the plaintiff was negligent or foolish in relying on the misrepresentation.
> >
> > ...
> >
> > s.38.1 The test for materiality is a subjective one, that is, whether or not the representation was material as between the parties. The true question is not whether the representation would have caused a reasonable person to act, but whether it was a true inducement to the plaintiff.

[51] As set out in more detail later, Widla made representations to Fulton beginning in February and continuing through March that were intended to show that Fulton was in receipt of "major materials "which, if true, required Kocken to make the second payment on the first contract. An invoice dated March 15, 2013 was issued to Kocken requiring it to pay the second milestone payment in the amount of $192,500. Fulton issued this invoice without being in receipt of the heads and shells required for the construction of all major vessels. The invoice was not justified as Fulton had not met the conditions for payment.

[52] Kocken paid the second milestone payment on March 27th, 2013, in reliance on Fulton's false representations that they were in receipt of all major materials required for the construction.

[53] Subsequent events leave no doubt that Widla knew that his statements were false and that his intention in making those statements was to obtain payment of the second milestone monies which he knew that Fulton was not entitled to.

[54] It became apparent on April 15, 2013, during the attendance of Kocken's project manager at the Fulton plant that but for two vessels, no construction had commenced, no shell plates had been received, and that it was impossible for Fulton to deliver on time.

[55] Shortly after April 15, 2013, Kocken received the documentation from Canadian Plate, the purported supplier of the shell materials. As noted previously this paperwork was falsified to induce Fulton into believing that materials for the shells had been ordered on March 1, 2013.

[56] It was on April 15, 2013 at 8:54 a.m. that Widla first contacted Canadian Plate with a request for "the plate material". Later that day Widla requested an invoice for the priced request for quotation. The Canadian Plate invoice was then backdated to the 1st of April, 2013. Widla, or someone acting on his direction deleted that date and entered the March 1st date to deceive the plaintiff. Fulton's order from Canadian Plate was subsequently reversed.

[57] In summary, I find as a fact that Fulton and Widla made false representations to Kocken as to the receipt of major materials to induce the plaintiff to pay the second milestone payment on the Mari Gas agreement. The plaintiff paid the defendant $192,500 in reliance on those representations. The conduct of Widla before and after the payment show that Widla made those representations knowing them to be false.

Issue 3: *What damages, if any, is the plaintiff entitled to as against each of the defendants?*

[58] The plaintiff seeks:

1. Special damages representing the amount Kocken paid to Fulton as progress payments on the contracts; and
2. Consequential damages equivalent to the value of the two performance bonds exercised by Mari Gas and Polish Oil.

Return of monies paid to Fulton

[59] Fulton completely failed to perform its contractual undertakings and in doing so caused a fundamental breach of the two contracts as between it and the plaintiff. Therefore, the plaintiff is entitled to have the monies it paid returned.

[60] Fulton received the funds and so is liable for repayment of the funds it received. However, Fulton would not have received the second payment on the first contract but for the fraudulent misrepresentations of the defendant Widla. Therefore, I conclude that Walter Widla is jointly and severally liable with Fulton for the amount paid by Kocken as the second milestone payment on the first contract.

[61] I order Fulton to pay to Kocken:

(i) the amount of $ 128,200, being the amount of the deposit paid on the first contract, together with prejudgment interest beginning on the date of payment being January 17, 2013;

(ii) the amount of $101,800 being the amount of the deposit paid on the second contract, together with interest thereon for the period commencing on the date of payment, being January 31, 2013.

[62] I further order that Fulton and Walter Widla are jointly and severally liable to pay to the plaintiff the amount of $192,300 together with pre-judgment interest thereon for the period commencing March 27, 2013, being the date on which the second milestone payment was made under the first contract.

Consequential damages

[63] The plaintiff claims that the defendants should be liable for the amounts of the two performance bonds that were exercised by Mari Gas and by Polish Oil because of Kocken's failure to deliver on time.

[64] In *Hadley v. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145, the court set out this rule:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.

[65] The question then is whether damages of the sort claimed by the plaintiff would have been within the reasonable contemplation of the parties had they put their minds to the potential breach when the contract was entered into? *See, RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc* 2008 SCC 54, at paragraph 12.

[66] On the facts of this case it is also relevant to consider that the special circumstances of the plaintiff's contractual obligations to Mari Gas and to Polish

Oil, including the potential forfeiture of the performance bonds for failure to deliver on time, were conveyed both verbally and in writing to the defendants.

[67] Both purchase orders issued to Fulton resulted from contracts Kocken had entered into with Polish Oil and Mari Gas. Kocken was required by the terms in each contract to issue a performance guarantee for any breach of contract which included, a condition for on-time delivery.

[68] Mr. Sagar testified that he told Widla prior to the completion of the contracts between Kocken and Fulton that they were working under very tight timelines and that there were performance guarantees in place. Documentary evidence supplemented Mr. Sagar's testimony in this respect. The conduct and communications of Kocken representatives with Fulton was consistent throughout – it was made clear that there was a hard, short deadline by which Fulton was expected to complete its work, or else there could be penalties incurred by Kocken.

[69] The defendants stated, at paragraph 5 of the Amended Statement of Defence, that:

> 5…the Defendants admit…that in January 2013 the Plaintiff contacted Fulton inquiring about the manufacture of certain gas plant equipment and pressurized vessels, that the Defendants understood the manufacturing process was on a tight schedule and was to be completed within 16 weeks of the Purchase Order.

[70] Mr. Widla gave the following evidence in Discovery, at page 20 of Exhibit Book (p. 36 of original Discovery transcript):

> Q. Okay, so in terms of the contract that you had with Kocken, there was communication, and you confirmed that also in your pleadings and so did we, that the time line for the production was 16 weeks, correct?
>
> …
>
> Q. Well, I mean initially for 0011, right? And then…. But the same was true that it was an urgent production on 2412.
>
> A. Correct
>
> Q. And so, generally speaking, you had four months to complete (the same?)?
>
> A. Yes.
>
> Q. And in terms of a production time line, that's a reasonable amount of time?
>
> A. It was.

[71] And at page 44 (p. 217 of original Discovery transcript):

> A. …Our assumption was that this particular project was taking a back seat to other work that Kocken was doing and it just wasn't important enough.
>
> Q. Did you actually confirm with them that that was the case?
>
> A. I don't think so.
>
> Q. Right. Because in fact in every email that they sent you, they're screaming at you, 'Why isn't anything happening? Why are you not moving forward?'
>
> A. Yes.

[72] In addition to these admissions there are very specific written references in evidence showing that Fulton and Widla understood delay could trigger significant penalties.

[73] Sagar sent Widla an email of January 3, 2013 stating that "shipment is required in 16 weeks, maximum". In an email of January 4, 2013 Widla wrote to Sagar that: "We have 3 facilities where we can build these vessels *so that your required schedule can be achieved*."

[74] William Famulak, of Kocken, sent this email of March 20, 2013 to Widla:

> I am extremely distressed to see that no fabrication has commenced and that the excuse for this is that minor details are missing… I have to insist that fabrication begins immediately. …. The point is that we cannot hold up fabrication of an entire gas plant over such minor details. This is killing the project….
>
> KOCKEN is responsible for liquidated damages of up to 10% if we miss our delivery. We are talking about 1.3 million USD in penalties for the two projects PLUS the loss of our reputation and the loss of two pending projects which total another 10+ million USD. … I require production schedules from both projects before the week is out. My clients are not happy and they are beginning to panic… as we are. …

[75] To the same effect there is an April 7, 2013 email from Sagar to Widla:

> We are extremely behind schedule and see no way that you can meet the timeline that you sent us before you left for China. Kocken will certainly incur penalties from our clients and be forced to pay liquidated damages of up to 10% of the project value. On the Mari Gas project, this amounts to US $680,000. On Polish Oil there is another $500,000. We are at a loss to understand how this happened. Nothing significant has taken place at your

> shop since the start of the project, yet we have paid you almost a half million dollars.

[76] When asked about this email in Discovery examination Mr. Widla acknowledged the meaning of the email and replied that "Obviously, it's urgent." When asked what his interpretation of this was, Mr. Widla stated:

> A … It said that if they're late, these are the penalties that they can incur. And this doesn't necessarily have anything to do with our schedule. We don't know what commitment they have with their client. We don't know if there's any extra time. That is up to the client to control the project as well.

[77] Considering the specific information that was in Fulton's possession as to the urgency of complying with the Kocken timeline, this answer was disingenuous.

[78] Evidence was led as to steps taken by Kocken to find another manufacturer of the needed equipment following Fulton's breach, but despite the plaintiff's efforts the supplies to Mari Gas and to Polish Oil were substantially delayed.

[79] Mr. Sagar testified that as a direct result of Fulton's breach of contract Kocken did not meet the deadlines imposed under its contract with Mari Gas. On October 29th, 2015 Mari Gas exercised its rights under Kocken's performance guarantee in the amount of US $340,265 This evidence is uncontradicted.

[80] Mr. Sagar testified that on September 30th, 2014, Polish Oil drew against the performance guarantee in an amount of US $500,215. He attributed this loss to the delay created by Fulton. This evidence is also uncontradicted.

[81] I find that the plaintiff has met the evidentiary burden upon it to show that the parties had a reasonable contemplation that a delay in the completion and delivery of the Fulton work product could result in the execution of the performance bonds by Kocken's customers. I also find that the specific terms of the potential losses were repeatedly brought to the attention of Fulton and Walter Widla beginning at a time prior to entering the two contracts with Kocken. This information was reinforced repeatedly during the life of the contracts.

[82] Kocken is entitled to be compensated for the loss of the performance guarantees in an total amount of US $ 840,480.00 together with prejudgment interest thereon. I have no hesitation in ordering the payment of this sum by Fulton to Kocken.

[83] It is a more difficult question to determine whether there is a proximate relationship between Walter Widla's false representations and the plaintiff's damages suffered by losing the value of the performance bonds.

[84] I am satisfied that Mr. Widla's false representations were intended to and did delay the plaintiff from finding out that Fulton was not producing the materials it claimed under the first contract. Had Kocken been told the truth in February 2013 when it began pressing Fulton for proof that Fulton was working on the project, then Kocken could have considered terminating the contract and sought out another supplier.

[85] By April 2013, when Widla's deceptions became clear, it was too late to salvage the project in the timelines Kocken was required to meet with Mari Gas. It is an inescapable inference that Widla understood that the effect of his misrepresentations would have this consequence, and put Kocken at risk of losing the performance guarantees.

[86] As such I conclude that Walter Widla is jointly and severally liable with Fulton in the amount of US $340,265 being the amount of the performance guarantee paid by the plaintiff to Mari Gas. These damages arose as a direct consequence of Fulton's failure to perform in relation to the first contract, and of the conduct of Walter Widla, who delayed Kocken from learning that Fulton could not perform, leaving Kocken unable to fulfill its obligations to Mari Gas.

[87] The Polish Oil contract was to be filled by Fulton Trinidad. Once Kocken realized in April 2013 that the Mari Gas contract was not going to be filled on time, it was not prepared to pay Fulton a second progress payment on the Polish Oil contract without certain assurances that Widla and Fulton could not or would not provide. Widla's false representations on the Mari Gas work caused Kocken's refusal to make a second progress payment on the Polish Oil contract. The plaintiff understandably did not trust Fulton or Widla by April of 2013.

[88] It appears that some work was underway in Trinidad and that Kocken wanted to negotiate directly with Fulton Trinidad to complete the supply. If this had occurred, then Kocken may have succeeded in mitigating the potential loss on the Polish Oil contract. However, Fulton was not prepared to permit Fulton Trinidad to do this and so that effort failed. The decision by Fulton has not been shown to have been related to Widla's false representations – Fulton simply refused to permit Kocken to deal with Trinidad directly. It did this, presumably, understanding that its

relationship with Kocken was irretrievably broken by its own conduct and that of Walter Widla.

[89] So, Kocken was not induced by Widla's false representations to pay monies on the second contract. At most, it could be said that the resulting lack of trust led Kocken to attempt to renegotiate the terms for execution of the Polish Oil work. I am not satisfied that the delays causing Polish Oil to execute on the performance guarantee can be attributed personally to Walter Widla.

Prejudgment Interest

[90] The plaintiff is entitled to prejudgment interest. I request that plaintiff's counsel provide a submission as to applicable rate and the calculation of the proposed amount. This can be forwarded to me with an Order following this decision.

Costs

[91] Kocken submits that it is entitled to costs on a party-party basis plus disbursements to be taxed. I agree. The Order will include this provision.

Other claimed remedies

[92] Paragraph 31 of the plaintiff's claim set out other remedies not spoken to at the hearing. I will receive further submissions on any of these issues if counsel requests.

Conclusion

[93] I order Fulton to pay to Kocken:

- the amount of $ 128,200, being the amount of the deposit paid on the Mari Gas contract, together with prejudgment interest beginning on the date of payment being January 17, 2013;
- the amount of $101,800 being the amount of the deposit paid on the Polish Oil contract, together with prejudgment interest thereon for the period commencing on the date of payment, being January 31, 2013;
- the amount of US $500,215 together with prejudgment interest thereon for the period commencing September 30, 2014, being the date on which the performance guarantee was paid by Kocken to Polish Oil.

[94] I find Fulton and Walter Widla to be jointly and severally liable to Kocken and order them to pay:

- the amount of $192,300 together with prejudgment interest thereon for the period commencing March 27, 2013, being the date on which the second milestone payment was made under the Mari Gas contract;
- The amount of US $340,265 together with prejudgment interest thereon for the period commencing October 29, 2015, being the date on which the performance guarantee was paid by Kocken to Mari Gas;
- Costs of this action.

Counterclaim

[95] There is no merit in the defendants' counterclaim. It is dismissed.

[96] Order accordingly.

Duncan, J.