STATE OF MAINE
Cumberland, ss

BUSINESS AND CONSUMER COURT
BCD-CV-17-18

PASSAMAQUODDY WILD BLUEBERRY COMPANY,

Plaintiff

v.

ORDER ON MOTION FOR REMITTITUR OR FOR NEW TRIAL

CHERRYFIELD FOODS, INC. and OXFORD FROZEN FOOD LIMITED,

Defendants

Before the Court is a Motion for Remittitur or for New Trial brought by Defendants Cherryfield Foods, Inc. and Oxford Frozen Food Limited. Oral argument was held on August 30, 2019. Thereafter the parties filed further written submissions, the last of which were received on October 30, 2019 once certain portions of the trial transcript were prepared and received. Plaintiff Passamaquoddy Wild Blueberry Company (PWBC) is represented by Attorneys Daniel Mitchell, John Woodcock III and Benjamin Dexter. Defendants are represented by Attorneys John Aromando, Sara Murphy and Eric Wycoff. The Court has reviewed the written submissions of the parties, the portions of the trial transcripts provided, pertinent case law, and issues the following order denying the motion.

STANDARD OF REVIEW

Defendants bring this motion under M.R. Civ. P. 59(a) seeking a remittitur of damages or a new trial on Count I of Plaintiff's Complaint. Defendants also seek an amendment of the Judgment pursuant to M.R. Civ. P 59(e) to strike the award of interest made by the Court after the jury verdict. Defendants claim that the jury verdict on Count 1 bears no rational relationship to the evidence admitted at trial, and further that the Court should not have provided for interest as the Plaintiff had included interest as a component of its damages in its presentation and argument to the jury.[1]

Remittitur and New Trial

At the outset, the Court has been asked by Defendants to decide if Plaintiff is correct that the jury could have considered "sunken" as well as "avoided" costs, or if the Defendant is correct that this would be "double counting." Under Maine law, Plaintiff is entitled to the contract price for its 2017 crop, "but less expenses saved *in consequence of the Defendant's breach*." [emphasis added, pg. 3 Defendant's Reply, citing 11 M.R.S. 2-708(1)]. The overriding principle, as the parties agree and as the jury was instructed, is to place the Plaintiff in as good a position it would have enjoyed had there been no breach. Plaintiff is not entitled to recover for costs expended before the breach occurred if those costs would have been expended even without a breach.

It follows then, that determining the amount of damages Defendant owed Plaintiff for breach of their contract in 2017 required reasonable, retrospective *estimates* about two things.

[1] In their Opposition to the motion Plaintiff agreed that the jury made a mathematical error in calculating the amount of its verdict on Count I. Plaintiff agrees that the correct amount should be $1,166,886 instead of $1,167,066 which was the calculation made by the jury. The Court will amend the Judgment accordingly.

First, the jury had to reasonably estimate, based upon the evidence presented, the number of pounds of berries that could have been harvested in 2017, and to multiply that number by the contract price. Second, the jury had to reasonably estimate, based upon the evidence presented, the costs that PWBC would have been able to avoid by not having to perform their obligations under the contract in 2017. In contrast to the costs Plaintiff avoided through breach, expenditures made in preparation of performance on the contract, prior to breach, would have been incurred regardless. Awarding Plaintiff the estimated contract price for their berries minus avoided costs puts Plaintiff in the position they expected to be in prior to breach. Therefore additional, expected sunk costs are not recoverable in this case.

The jury was instructed on how to calculate damages in Count I as follows: "With respect to Count I, you must calculate the damages that Plaintiff would have recovered from Defendants if Defendants had purchased Plaintiff's crop in 2017. *This requires you to determine the contract price Plaintiff would have obtained for blueberries had they been grown, less any expenses Plaintiff saved or avoided because it did not cultivate and harvest blueberries that year."* [emphasis added]. The Court does not believe that there was any objection to this instruction by either party. More importantly, the Court believes that this is a correct statement of the measure of damages in this case. The next question for the Court becomes whether the jury verdict is rationally based on the evidence.

In *C.N. Brown Co. v. Gillen,* 569 A.2d 1206, 1209 (Me. 1990) the Law Court stated what is now oft-repeated as the standard for granting a new trial. The Court held that the assessment of damages is "the sole province of the jury, and the amount fixed must not be disturbed by the Court unless it is apparent that the jury acted under some bias, prejudice or improper influence, or made some mistake of law or fact." In order to prevail on a motion brought under Rule 59(a)

the moving party must therefore "show that the jury verdict was so manifestly or clearly wrong that it is apparent that the conclusion of the jury was the result of prejudice, bias, passion, or a mistake of law or fact." *Binette v. Dean*, 391 A.2d 811.

Defendants do not point to any evidence of prejudice, bias or passion on the part of the jury, and they do not argue that the jury improperly disregarded any instruction, including the instruction on how to calculate the damages recoverable under Count I.[2] Instead, the Defendants essentially argue that the jury was required to pick one or the other of the calculations made by the competing experts, Dr. Yarborough (for Defendants) or Eric Purvis (for Plaintiff) both as to the amount of berries that would likely have been harvested and as to what that same expert testified about the avoided costs. That is, the Defendants assert that no rational jury could have done anything other than select numbers actually posited by either expert, or alternatively, selected numbers that fell in between Plaintiff's expert's "high" numbers and Defendants' experts "low numbers" for both berries and for avoided costs. As Defendants state in their brief, "no other figures are supported by *credible* evidence at trial."

The Court agrees that it would have been "rational" or "reasonable" for the jury to do just that: select one of the expert's estimates both as to berries an as to costs, or to select figures within the "boundaries" set by the experts. That is what a judicial factfinder might do, or what another jury might do. However, that does not mean that the jury could not take other rational approaches to making their own estimates as to what the crop would have yielded and what costs could have been avoided. In addition, Defendants' argument overlooks the instruction that Maine juries are given about how to evaluate testimony from witnesses, including expert witnesses.

[2] The Defendants argument regarding sunk costs v. avoided costs seems directed at rebutting Plaintiff's arguments in this motion on how the jury may have arrived at their figure on avoided costs, but Defendants do not seem to be suggesting that the jury disregarded the Court's instruction on how to determine avoided costs.

They are told, and were told in this case, that they should evaluate the testimony of the experts the same way that they evaluate the testimony of other witnesses. *Alexander, Maine Jury Instruction Manual* Section 6-20. They were also told, with respect to evaluating witness testimony generally, that they are to make their own judgment on credibility, and give the testimony of each witness such significance, if any, that they think it deserves. *Id.* Section 6-24. Defendants seem to be asking the Court at least implicitly to decide which witnesses were most credible and the Court is not willing to do so.

It is noteworthy that Defendants do not here challenge the jury's prediction or estimate of the number of blueberries that PWBC would have grown had Defendants not breached the contract. Their challenge focuses only on the jury's estimate of avoided costs being lower than posited by either expert including their own expert, Dr. Yarborough. As noted by the parties, both experts' estimates of avoided costs seem largely driven by the numbers of pounds they estimate PWBC would have grown in 2017, but the experts used significantly different approaches and methodologies as the foundations for their opinion. Plaintiff's expert estimated that PWBC would have grown between 6.5 or 6.8 million pounds, while Defendants' expert estimated that PWBC would have grown only 3.2 million pounds. Both experts did acknowledge that they were dealing with a fair amount of uncertainty in making what were, in all actuality, reasonable estimates. The jury's determination that 4.4 million pounds would have been harvested may have resulted from the jury computing an approximate average of numbers posited by the parties' experts. Or, the jury's determination could be viewed as discounting by approximately one third the number of pounds posited by Plaintiff's expert. In any event, the Defendants do not challenge the jury's determination of the yield estimated for 2017.

With respect to avoided costs, however, the Defendants seem to be saying that the jury could not make their own independent determination, and instead had to rely solely upon the experts. The Court does not believe this to be the law in Maine. Plaintiff's expert calculated avoided costs to be approximately 1.6 million dollars, while Defendants' expert estimated 1.2 million dollars. The jury determined those costs to be $915, 972. Obviously, the jury's number is much closer to the number posited by Defendants' expert than that posited by Plaintiff's and it may represent a discounting of approximately one quarter of the defense expert's estimate. Defendant insists, however, that no rational jury could do anything other than find a number in between the numbers posited by the experts, both as to poundage and as to avoided costs.

The Court concludes that there is competent evidence in the record supporting the figure the jury found for avoided costs, even if that figure was lower than either expert estimated. There was evidence of prior yields in the record suggesting that yields do not always increase in direct proportion to inputs or costs expended. For example, cutting back on the number of hives in a particular year does not necessarily mean that the yield in that particular year would decrease, or would decrease in proportion to the decrease in the number of hives. The same can be said about "inputs" such as fertilizers, insecticides or fungicides. Weather is always a critical factor, everyone agreed. Given all these uncertainties, the Court does not find it fundamentally irrational for a jury to make independent adjustments, as they saw fit to make, to the experts' opinions both as to poundage as well as to avoided costs. If the jury's discounting of the Plaintiff's opinion for poundage was rationally based - which Defendants seem to be accept - they would be hard pressed to convince the Court that the jury's discounting – if that is what occurred here – of Defendants' experts estimate of avoided costs – constituted an irrational act.

Because this was a jury trial, the truth is, no one can be precisely sure as to how the jurors arrived at these numbers. No motion for further findings of fact can be made after a jury verdict. But the Defendants have failed to point to evidence that any of the jury's determinations were the result of bias, prejudice, improper evidence, or that they were based upon an error of law or fact. Indeed, it seems likely to the Court that the jury agreed with Dr. Yarborough more than they did with Mr, Purvis, both as to poundage and to avoided costs, as the jury's numbers for both were closer to Dr. Yarborough's numbers than to Mr. Purvis' s numbers. As noted above, juries in Maine are instructed that they alone are to determine the credibility of witnesses, including witnesses who testify as experts. The Court concludes that the jury verdict was not "so manifestly or clearly wrong" to justify the granting of this motion.

Interest calculation made by the Court

The Defendants ask the Court to amend the judgment to strike language awarding statutory interest to Plaintiff. While the Court agrees that Plaintiff included interest in their calculations, the jury clearly asked the Court if they should include interest in the *jury's* calculation of interest and the Court clearly responded by saying that they should not. It is abundantly clear from this verdict that the jury did not accept at face value the calculations made by the experts for the parties, and that they made their own calculations. In light of their question and the Court's answer, the motion to amend the judgment to strike any award of interest will be denied.

The entry will be: Motion for Remittitur or for New Trial is DENIED, and Motion to Amend the Judgment is DENIED.

The Clerk may note this Order on the docket by reference pursuant to Rule 79(a) of the Maine Rules of Civil Procedure.

__November 15, 2019_____ _____/s_____

DATE **M. Michaela Murphy**
Justice, Business and Consumer Court