

CANADA / JUDGMENT

1501642 Alberta Ltd. v. Braza Construction Ltd.

2022 BCSC 391

COURT

Supreme Court of British Columbia

DECIDED

10 March 2022

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2022 BCSC 391 1501642 Alberta Ltd. v. Braza Construction Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

1501642 Alberta Ltd. v. Braza Construction Ltd.,

2022 BCSC 391

Date: 20220404

Docket: 232639

Registry: New Westminster

Between:

1501642 Alberta Ltd. c.b.a. High End Hotel Construction

Plaintiff

And

Braza Construction Ltd.

Penta Capitol Investment Ltd.

Defendants

And

Tarsem Dosanjh and Tryon Land Surveying Ltd.

Defendants by Way of Counterclaim

Corrected Judgment: The text of the judgment was corrected

at para. 4 on April 4, 2022

Before: The Honourable Mr. Justice Dley

Corrigendum to Reasons for Judgment

Counsel for the Plaintiff and Defendant by Way of Counterclaim, Tarsem Dosanjh:

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Place and Date of Trial:

New Westminster, B.C.

January 31, February 1, 2, 4, 7-11, 14-18 and 22-23, 2022

Place and Date of Corrigendum:

New Westminster, B.C.

April 4, 2022

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Introduction

- [1] This lawsuit arises out of the construction of a hotel in Fort St. John, British Columbia. The dispute rests on the significance of a surveyor's nail in a power pole and whether that nail should have been regarded as the benchmark for the elevation level of the main floor.
- [2] The nail was apparently placed by the surveyor. The framer was told by the general contractor that the nail was the indicator of the main floor elevation level, but that turned out not to be the case and the hotel was built too low. Remediation work was required to compensate for the elevation error.
- [3] The framer argues that reliance was placed on the directions of the general contractor who must bear responsibility for the elevation error.
- [4] For the reasons that follow, I conclude that fault for the elevation error rests with the general contractor and the framer should be paid for the work and materials supplied. I award the sum of \$382,000 to the framer.

The Parties

- [5] 1501642 Alberta Ltd. is a framing company doing business as High End Hotel Construction ("High End"). Its principals are Tarsem Dosanjh ("Mr. Dosanjh") and his son, Sam Dosanjh.
- [6] Mr. Dosanjh has been in the framing business since 1988. He started out doing residential construction and, in 2009, began framing hotels in Alberta. He has constructed over 20 motels/hotels with experience as both a general contractor and as a subtrade.
- [7] Mr. Dosanjh worked on-site and conveyed information about the particular job to Sam Dosanjh, who did the company's administration and invoicing from his home office.
- [8] Penta Capital Investment Ltd. ("Penta") is the owner of land in Fort St. John upon which the Best Western Hotel was constructed. Its principal is Fareed Momen.
- [9] Braza Construction Ltd. ("Braza") was incorporated to be the general contractor for the construction of the hotel. Its principals are Mr. Momen and Jagjit Gill. Mr. Momen was the "money" source while Mr. Gill's role was to be the on-site supervisor.
- [10] Mr. Momen is a sophisticated businessman. He has worked as a realtor, builder, and developer. He has experience in the development of apartment and condominium projects.
- [11] Mr. Gill has been in construction since at least 1997 and has built single family homes, duplexes, and fourplexes. He has not built any commercial projects to the scale of this hotel.

The Project

- [12] Mr. Momen considered Fort St. John to be an attractive market for a hotel facility. He caused Penta to purchase undeveloped acreage for the site of what was to be a four-storey Best Western Hotel. Penta engaged various consultants to design the project, including architects, structural engineers, geotechnical engineers, and surveyors.
- [13] Of particular relevance to this lawsuit was the involvement of the structural engineers, Mainland Engineering Ltd., and the surveyors, Tryon Land Surveying Ltd. ("Tryon," as distinct from its principal Geoff Tryon, who is referred to as Mr. Tryon).
- [14] Mr. Momen visited the site periodically from his home base in the Lower Mainland. Messrs. Gill and Dosanjh were on-site during construction.

The Contractual Relationships

- [15] Mr. Momen had looked unsuccessfully to find a framer willing to work on a fixed-price basis. He learned of Mr. Dosanjh and invited him to look at the project. Mr. Dosanjh met with the project engineers, Mainland Engineering, and visited the site. On May 23, 2015, Mr. Momen sent Mr. Dosanjh a proposed contract which the latter rejected. On May 25, they met in Richmond and agreed on a fixed-price contract of \$835,000 (the "May 25 Contract"). Mr. Dosanjh signed the contract as presented.
- [16] Mr. Dosanjh maintains that he signed the May 25 Contract because Mr. Momen assured him that it was only prepared so that Penta could secure financing and that another agreement would be executed later. Mr. Momen denies that the May 25 Contract was signed under such circumstances and insists that it was intended to be the binding agreement between the parties.
- [17] Sam Dosanjh was upset that his father had executed the May 25 Contract because he had prepared another agreement to cover High End's work. Sam Dosanjh sent his form of contract to Mr. Momen who did not respond because he was of the view that a contract had already been signed and that another agreement was unnecessary.
- [18] Sam Dosanjh conceded that, because the May 25 Contract had been signed by his father, it was regarded as a "legally binding contract." The pleadings refer to the May 25 Contract as the basis for the claim.
- [19] High End's scope of work included the installation of piles, the foundation, and the framing of the hotel, restaurant, and pool.
- [20] The May 25 Contract included the following obligations of Mr. Dosanjh and High End to:
1. Supply all material, labour, tools, and equipment for the foundation piling;
 2. Supply labour and concrete for the foundation and slab;

3. Supply labour for framing the hotel, restaurant, and pool;
4. Supply a boom or crane as necessary;
5. Complete the work in accordance with the plans and specifications provided by Braza's consultants; and
6. Complete the work in accordance with all on-site instructions issued by Braza's authorized representative;

[21] The May 25 Contract allowed for changes to be made as long as the change was accompanied by a "written work order." Any change to the contract price was required to be by way of a written agreement.

[22] Mr. Momen caused Braza to be incorporated so as to provide information to his bank that a general contractor was in place. Penta and Braza formalized their relationship by a \$8.4 million contract dated June 15, 2015, which gave total control of the work to Braza and included the following obligations of Braza to:

1. Effectively direct and supervise the work;
2. Be solely responsible for constructions means, sequences, procedures, and coordinating the various parts of the work; and
3. Provide all necessary supervision and appoint a competent representative to be on-site while work was being performed.

The Elevation Error

[23] The levels for the hotel were set out in the plans that were provided to Mr. Dosanjh.

[24] On May 20, 2015, Mr. Dosanjh and Mr. Momen went to Tryon's office in Fort St. John and met with surveyor, Brian Elliott. Also present at the meeting was Harpreet Aulakh, who was assisting the parties with respect to introductions to local suppliers. Mr. Dosanjh asked about the elevation level for the main floor at this meeting.

[25] High End began construction in late June 2015.

[26] On the first day of construction, Mr. Dosanjh asked Mr. Gill where the elevation level was for the main floor. Mr. Gill pointed him to a nail/pin and ribbon affixed to a power pole as the elevation level. Mr. Dosanjh saw that the site had been excavated to the pin level. Using the nail as the elevation marker, Mr. Dosanjh determined that the top of the piles were to be level with the nail. The grade beams would sit on top of the piles with the floor level then being 30 inches above the piles.

[27] High End's work was reviewed and inspected by the geotechnical engineers. Surveyors were present from time to time and particularly with respect to marking the locations for the piles. Mr. Gill called for the inspections and the surveyors.

- [28] In late September 2015, when High End was well into framing the hotel and commencing work on the fourth floor, it became apparent that there was an issue with respect to the main floor elevation. Excavation work for the hook up of storm and sanitary lines showed that the hotel had been built too low and the expected gravity feed was not possible. It turned out that the main floor had been constructed 1.1 metres too low.
- [29] As a result of the error, Penta paid for remedial work to ensure that the connections to city services could be completed along with other associated work in the parking lot.

Issue

- [30] Mr. Dosanjh says that he asked for the elevation level when he attended at the surveyor's office on May 20, 2015. Mr. Dosanjh says that he relied on Mr. Gill to provide him with the elevation level for the main floor. He maintains that the site excavation was consistent with the marking on the power pole.
- [31] Braza's position is that the nail and ribbon was simply a benchmark and that Mr. Dosanjh was required to use that mark to calculate the elevation in accordance with the levels set out in the plans. Mr. Gill denies that he told Mr. Dosanjh that the nail was the marker for the elevation level.
- [32] It is not contested that the hotel was built too low. The question is whether the responsibility for the error should rest with Braza, High End, or a combination of both. The answer to that question rests on the credibility and reliability of the evidence presented by the parties.

Credibility and Reliability

- [33] Credibility and reliability of evidence are separate matters. Credibility is determined by the truthfulness of a party's testimony. Reliability is concerned with the accuracy of evidence. Although these concepts differ, they often overlap in the determination of the issue presented. In both instances, all of the evidence must be examined to assess the particular issue for determination.
- [34] The assessment of credibility has been succinctly summarized in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the

demeanour of a witness generally (Wallace v. Davis, [1926] 31 O.W.N. 202 (Ont.H.C.); Farnya v. Chorny, [1952] 2 D.L.R. 152 (B.C.C.A.) [Farnya]; R. v. S.(R.D.), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (Farnya at para. 356).

[35] An expansive summary of assessing and weighing evidence was set out in R. v. Rochemont, 2017 BCSC 930 at paras. 106-107:

[106] The assessment of a witness's oral testimony necessarily entails an assessment of credibility. The role of the court is not usually reduced to simply choosing between two or more versions of events. It is not an "all or nothing process". In determining facts, i.e., making findings as to what actually occurred in any given case, the court is free to reject some aspects of a witness's evidence and accept others and, indeed, to assign different weight to different parts of a witness's evidence.

[107] Accepting all or part of the testimony of any witness involves an assessment of credibility (truthfulness/honesty) and reliability (accuracy) of both the witness and the evidence. That in turn involves consideration of many different factors including:

- internal consistency of the witness's account of events;
- consistency with other evidence afforded by witnesses, documents or physical evidence;
- whether the evidence is reliably corroborated or contradicted by other evidence;
- the witness's ability/opportunity to observe the events in question and to reliably recall/communicate same;
- the demeanour of the witness and whether the questions are answered in a frank and forthright fashion without evasion, speculation or exaggeration;
- whether the witness has any interest in the trial outcome or has any motive to fabricate;
- whether (based on properly admissible evidence) the witness has "poor character for truthfulness"; and
- the inherent plausibility of the evidence and its consistency with the probabilities affecting the case as a whole.

[36] I accept the evidence of Mr. Dosanjh. He was consistent in his testimony and had a good recollection that was consistent with other witnesses; in particular, his evidence was consistent with Mr. Aulakh's, who had no vested interest in the outcome of this litigation. Any inconsistencies were minor and of no consequence. He was responsive to questions in cross-examination and did not hesitate to concede that there were some areas where he had little or poor recall. He was not evasive. It was apparent that he was careful in giving his testimony without resorting to speculation or exaggeration.

- [37] I do not accept the evidence of either Mr. Momen or Mr. Gill.
- [38] Mr. Momen is a sophisticated businessman who had invested much into this project. It was apparent that the project was financially challenging. His concession to that fact, coupled with the tardiness or failure to fully pay subtrades, highlights the degree to which finances were a central issue throughout the construction. He entered into an agreement with Mr. Gill, who would be paid out of the general contractor's agreement. Mr. Gill was not paid for his time or services. Mr. Momen had a motivation to keep the costs down.
- [39] Mr. Momen testified that he could not recall Mr. Dosanjh asking Mr. Elliott about the elevation level. He said that he may have been out of the room at the time. I take that to be simply a convenient excuse to buffer against the independent evidence of Mr. Aulakh who heard Mr. Dosanjh making those inquiries.
- [40] In many instances, Mr. Momen sidestepped questions on cross-examination where the answer would have been damning to his position. He countered the questions by saying that Mr. Gill was on site: "ask Mr. Gill."
- [41] Mr. Gill was asked. Mr. Gill was not helpful. He was particularly evasive. Even the simplest of questions went unanswered. Instead, Mr. Gill tended to veer off into a sphere that spoke brightly of the defendants but had little relevance to the actual question asked.

Who was Responsible for the Elevation Error?

- [42] The initial conversation with the relevant parties concerning the main floor level occurred at Tryon's office on May 20, 2015; present were Messrs. Dosanjh, Momen, Aulakh, and Elliott.
- [43] Mr. Aulakh was a local resident who had experience in residential construction and offered to assist the parties with introductions to local trades and suppliers. He was interested in the hotel's construction and attended the site on a regular basis. He has no vested interest in the outcome of this litigation.
- [44] I was impressed with Mr. Aulakh's evidence. He had a good recall of matters and his recollection was confirmed in some respects by others. I accept his evidence.
- [45] Mr. Dosanjh was clear and unequivocal in his recollection of the requests he made to determine the main floor elevation level. He made the request at the meeting with Mr. Elliott on May 20, 2015. Mr. Aulakh confirmed that Mr. Dosanjh made the request.
- [46] Mr. Elliott did not take notes of the meeting. He did not know of High End until this litigation commenced and had no recollection of meeting Mr. Dosanjh. Yet, there is no question that the meeting occurred. That is agreed upon by the others. Mr. Elliott's lack of recall causes me to conclude that his evidence does not assist with what occurred at the meeting or what was discussed. However, I do accept his evidence that a surveyor would be called by the general contractor to check the main floor elevation after the foundation forms were in place, but that that was not done in this case.

- [47] Mr. Elliott says that the elevation point was written on a stake and nailed to the power pole. However, there is also evidence that there was a metallic strip stapled to a pole.
- [48] Mr. Momen was present and I am satisfied that he was aware of Mr. Dosanjh's request to ensure that the elevation marker was placed by Braza's surveyor. I accept Mr. Dosanjh's evidence that, prior to construction, he specifically asked Mr. Gill to point out the elevation marker for the main floor. I accept that Mr. Gill pointed to the nail and ribbon as that marker.
- [49] Mr. Gill acknowledged that he spoke with Mr. Momen about the request for the elevation marker. Although Mr. Gill was not present for the May 20 meeting, he had met with Tryon surveyors earlier in the year. Mr. Gill had the contact information for Tryon.
- [50] Mr. Momen said that all contacting with Tryon regarding the piles and foundation was done through Mr. Dosanjh. I do not accept that evidence.
- [51] Mr. Momen testified that Mr. Gill did not have the surveyor's phone number. However, in direct contradiction to Mr. Momen's testimony, Mr. Gill acknowledged that he did indeed have Tryon's phone number.
- [52] Mr. Elliott had no recollection of speaking with Mr. Dosanjh. Mr. Dosanjh said that he had no communication with Tryon after the May 20 meeting other than speaking with surveyors about the location of piles that needed to be marked.
- [53] Mr. Tryon was the crew chief for the surveyors. He discussed the benchmarks with a person that can only be identified as being Mr. Gill. Mr. Tryon did not speak to the framers and none were on site.
- [54] Mr. Dosanjh was clear and certain of his evidence. Mr. Momen's evidence is not reliable. Mr. Gill gave a number of versions regarding his contacts with Tryon and Mr. Dosanjh's presence during some of those discussions. Mr. Gill's evidence was fraught with inconsistencies, confusion, and evasions--it is also unreliable.
- [55] Mr. Momen said that he could not remember Mr. Dosanjh asking the surveyor for the benchmark and elevation number. That evidence stands alone and is inconsistent with the recollections of Messrs. Dosanjh, Aulakh, and Gill. When Mr. Momen says he does not recall, I take that to mean he is of the view that the request was never made. I reject that position. On May 22, 2015, Mr. Momen sent an email to Mr. Elliott asking for survey points and elevation marks. That is a further indicator that a request had been made of the surveyor for that information.
- [56] All of the evidence shows that Mr. Dosanjh requested the elevation mark for the main floor. There can be no doubt about that question.
- [57] Mr. Momen says that he received a photograph from Rob Diwell, who was part of the crew installing sewer and water mains. The photograph purportedly depicted the survey post showing the elevation level written on it. Mr. Momen did not retain that photograph and his

explanations for not being able to retrieve what would clearly be a "momentous" piece of evidence do not stand up to scrutiny. Mr. Momen has been the affiant in three affidavits with respect to this litigation and never mentioned the photograph. Mr. Gill was not aware that Mr. Diwell had taken a photograph. Even Mr. Diwell was uncertain as to whether he took a photograph. I am not satisfied that a photograph was taken.

- [58] I am convinced that Mr. Gill spoke to Tryon about the elevation level and he understood the nail and ribbon to be the elevation mark. I am satisfied that Mr. Dosanjh told Mr. Gill what he needed the elevation level for and was directed by Mr. Gill to the nail in the power pole.
- [59] Mr. Dosanjh was familiar with the plans and was aware of the elevation requirements. He followed the plan; the piles and slab were constructed in accordance with the plans. Unfortunately for all parties, the benchmark was not correctly identified.
- [60] After the elevation error was confirmed on September 30, 2015, Mr. Momen arrived in Fort St. John two or three days later, and met with Mr. Dosanjh and Mr. Gill. Mr. Dosanjh says that Mr. Momen indicated that it was the surveyor's error and not to say anything to anyone, including the city inspector. High End was to continue with the construction. Mr. Dosanjh testified that he had no reaction to the error since High End had just followed the directions he had been given.
- [61] Mr. Momen's recollection of the meeting is far different. He testified that Mr. Dosanjh took responsibility for the error and offered to do whatever was necessary to remedy the issue.
- [62] Mr. Gill's recollection of the meeting does not accord with Mr. Momen's version. Mr. Gill recalled that Mr. Dosanjh did not agree as to who would pay for the solution to the error and there was no discussion that he would pay. I conclude that Mr. Dosanjh had not acknowledged that he was at fault or that he would pay for a solution.
- [63] Mr. Gill has said that the surveyor had placed the elevation benchmark on the power pole and the writing on an orange stake by the pole. He said that Mr. Dosanjh called the surveyor before commencing work. I do not accept Mr. Gill's evidence. Mr. Elliott did not know Mr. Dosanjh and there was no indication from the surveyor that he spoke with anyone other than Messrs. Momen and Gill.
- [64] Mr. Gill has denied knowing what the elevation benchmark was for or what the marking on the pole signified. I reject that evidence. Mr. Gill had dealt with surveyors and elevation marks from his residential construction. Mr. Gill was far more knowledgeable than he professed in his testimony.

- [65] Mr. Gill testified that he and Mr. Momen asked the surveyor where the elevation mark was on the pole. Mr. Gill said that Mr. Momen advised him that the mark was on the pole. When Mr. Gill gave this evidence, it was apparent that the testimony was damaging to Braza's position. Mr. Gill's answers were evasive, obtuse, and uncertain. He refused to answer questions directly; instead meandering about in his answers as if trying to stay on a prepared script.
- [66] Mr. Gill conceded that, in residential construction, a surveyor would check the elevation after the foundation was poured. According to Mr. Elliot's testimony, this is likewise consistent with the protocol in commercial construction. Mr. Gill failed to call the surveyor to check the elevation. If the call had been made at that time, the solution to the error would have been rather straightforward. Thus, even if Mr. Dosanjh was partly to blame in the initial elevation error, the mistake could have been noted and corrected before the framing commenced.
- [67] Mr. Dosanjh has denied removing the stake after being told of the problem by Mr. Gill. He says that there was no stake close to the pole with elevation numbers written on it.
- [68] There is some question as to what stake is at issue. Mr. Gill has described an orange stake in the ground near the pole. Mr. Elliott says that he nailed the stake to the power pole. Another witness, Mike Haab, says that there was a tag stapled to the pole higher than the nail and ribbon.
- [69] It is not entirely clear as to what stake was in place or whether there even was a stake affixed to the pole or in the ground at the time of the elevation error discovery.
- [70] Braza says that Mr. Dosanjh removed the marker in order to cover up his mistake. Mr. Diwell says that the person who had the most to gain by removing the stake was Mr. Dosanjh.
- [71] It is a serious accusation to make--that Mr. Dosanjh removed a surveyor's stake or marker in order to absolve himself of blame and deflect liability to others. There must be proof to show that Mr. Dosanjh (or someone from High End) likely removed the marker. I am not convinced that it was likely. It is equally possible that Mr. Gill or someone from Braza removed the marker so as to direct blame at the surveyor. The proof is not convincing enough--at best, it is speculation, and that is not enough to prove the allegation.
- [72] Braza makes the following argument in its submissions:

A contractor must act according to the terms of the contract and the directions of the consultant authorized under the construction contract. In the absence of an express provision to the contrary, a contractor is in breach of the contract if it does not carry out the performance obligations in the contract or if it performs work which does not meet the requirements of the express terms and specifications and the implied terms of the contract. A contractor who undertakes to carry out the work according to specifications must adhere strictly to all the details, and is not entitled to make substitutions or changes without the owner's consent. If the contractor holds itself out as qualified to do the work, then a failure to do so competently is a

breach of contract. Whether work or material supplied by the contractor is defective or not is a question of fact in each case, depending on the proper interpretation of the specifications, and on expert or other relevant evidence as to what is reasonable: TG Heintzman and I Goldsmith in Heintzman "and Goldsmith on Canadian Building Contracts, 5th ed (Toronto : Carswell, 2014-) at 4-35, 5-2,5-5, 7-29, 7-30, and cases cited therein. [. . .]

[Emphasis added.]

- [73] Braza's reference to the applicable case law is appropriate, but those cases were determined on the basis of their own unique facts. Where the builder departed from plans and instructions, liability was attached. That is not the case here, where the builder followed the owner's and general contractor's instructions.
- [74] High End did not construct the hotel to the height as set out in the plans, but constructed the hotel as instructed by Braza. Thus, the fault lies with Braza and that is where, in the normal course, the owner would seek recourse. However, since Penta and Braza are so closely related, relief is sought against High End.
- [75] I am not convinced that Mr. Dosanjh made an error on his own. He had made a request to have the elevation level provided so that the main floor level would be constructed at the proper height. The level as provided to him was not correct. That was the fault of either Mr. Gill on behalf of Braza, or the surveyor, who may have incorrectly affixed the marker. The surveyor is no longer part of this action and it is not necessary to determine his liability, if any.
- [76] Even though Braza incorrectly instructed High End at the outset, Braza had the opportunity to check on the elevation level at the time the foundation forms were constructed. Braza failed to call the surveyor at that juncture. Had Braza done what the surveyor expected, the error likely would have been discovered and the necessary correction made with minimal inconvenience.
- [77] I therefore conclude that, although High End constructed the hotel at the wrong level, it was not the cause of the error; the cause was Braza. Accordingly, High End did not breach its obligations.

The Extras

- [78] High End has claimed \$184,000 for additional work and materials over and above the fixed price of \$835,000.
- [79] Mr. Dosanjh has testified that there were numerous changes made throughout the project. He requested change orders from Mr. Gill, who agreed to the additional charges, but failed to follow through with the written documentation. Mr. Dosanjh says that he was continually told that the written change orders would be provided by Mr. Momen, who simply sloughed off the requests.

- [80] Mr. Momen says that while there were some changes, those changes did not affect the square footage of the hotel and therefore were encapsulated in the original scope of work. Mr. Gill had difficulty even acknowledging that there were any changes.
- [81] It is apparent from the revised drawings that were provided in July, that there were a number of changes. Some changes were more significant than others. For example, the elevator shaft required additional work because of the design change. The roof was altered so as to include a number of peaks and valleys. The changes were noted in the drawings by balloon highlighting; the changes were obvious. In spite of that, Mr. Gill refused to concede the question of changes.
- [82] The question is whether High End should be compensated for the extra work that was required. The issue is complicated because the May 25 Contract required all changes to be confirmed by written change orders. No written change orders were produced.
- [83] High End takes the position that it trusted Braza to follow through on the verbal assurances that were given by Messrs. Momen and Gill. Braza says that there were no assurances given.
- [84] In light of the doubts I have regarding the veracity of the evidence of the Braza principals, I conclude that it was likely that assurances were given as outlined by Mr. Dosanjh. This project was not well funded and Mr. Momen was determined to complete the construction on the backs of the subtrades. That is evident from the common theme in the testimony of others who had difficulty getting paid for their work.
- [85] Mr. Gill was motivated in keeping the costs down because his remuneration was entirely dependant on the profitability of the construction. I have no doubt that he made promises to Mr. Dosanjh about payment for work that he did not intend to honour.
- [86] However, the May 25 Contract is clear: written change orders were required. It is apparent that other subtrades had verbal change orders, but it is not apparent as to what contractual arrangements existed between those parties.
- [87] The agreement for the construction of the block wall assists in determining the need for written authorization for changes. The parties agree that this was not part of the original scope of work. Thus, a change order was not required, but the parties set out their agreement in a written document.
- [88] Mr. Momen says that he prepared the agreement regarding the block wall, whereas Sam Dosanjh says he was the author. I prefer Sam Dosanjh's version of events because he sent this agreement to Mr. Momen by email. There is no dispute that the parties agreed to its contents, but nonetheless Mr. Momen refused to sign it. I therefore infer that Mr. Momen was prepared to entice High End to engage in ongoing construction on the notion of an agreement, without committing to anything in writing. This was consistent with Mr. Momen's and Braza's approach to written documentation.

- [89] I am satisfied that Braza promised and agreed to pay High End for extras, regardless of whether there was a written confirmation. Braza should not be rewarded for breaching its oral agreements and representations simply on the basis that the requested and required extra work was not reduced to writing.
- [90] The changes in the design altered the basis upon which High End had tendered its estimate and agreement to build on a fixed price. Braza now endeavours to get the benefits of avoiding a cost plus arrangement while only paying the reduced amount of a fixed price; that would be an unjust result.
- [91] The extent to which Braza has gone to avoid taking any accountability for the design changes was highlighted during the cross-examination of Mr. Gill pertaining to the redesign of the stairs. There was a remarkable exchange between counsel and Mr. Gill where he declined to answer simple questions directly, asked unnecessary questions, and sought to avoid responding to questions that confronted his testimony. Even though it was clear that the stair design was changed so as to enlarge some of the suites, Mr. Gill refused to acknowledge the obvious.
- [92] Mr. Gill has professed not to have good comprehension of the English language and being unable to read. However, Mr. Gill on several occasions answered questions before the interpreter could interject. I also noted that Mr. Gill was able to follow along as documents were being read to him in English. Accordingly, I conclude that he had a much better comprehension of English than he indicated.
- [93] There are other examples of deceit that militate against Penta and Braza.
- [94] Mr. Momen has deposed to various facts in three affidavits filed in support of applications to have lien claims reduced. Some of the facts advanced are simply not true. For example, Mr. Momen deposed that High End's invoices for constructing the block wall were invalid. His attempts to justify that statement in the face of clear contrary evidence were simply disingenuous.
- [95] Braza produced a number of handwritten invoices purportedly from High End. Those were not authored by High End.
- [96] In addition, the defendants produced a significant invoice in the amount of \$90,138.81 (#1044: May 29, 2016) on Handyman Equipment Services ("Handyman") stationary that was made to look authentic so as to claim expenses paid out for work that should have been completed by High End. Handyman was not on site until August 2016 and only did landscaping. The defendants fabricated this invoice and no amount of posturing or sidestepping changes that fact.

- [97] The defendants have also produced an undated estimate from WeCare Restoration regarding deficiency work. On February 2, 2016, Mr. Momen had sent an email to Sam Dosanjh referring to a crooked column. Mr. Momen misspelled crooked as "crooked". The WeCare quote contains the same misspelling. The WeCare quote does not identify its author.
- [98] It may be a pure coincidence that the misspelling appears in both documents or it may be that Mr. Momen was actually the author of the WeCare quote. Looking at the entirety of the evidence, I infer that it is likely that the common error regarding the misspelling originated with Mr. Momen and that the WeCare quote is also a fabrication.
- [99] It serves no useful purpose to catalogue each and every contradiction, inconsistency, or untruth in the testimony proffered by Messrs. Momen and Gill. Looking at the entirety of their evidence in the context of all the evidence, leaves me with no option other than to either reject or give their evidence little weight.
- [100] Regrettably for Penta and Braza, I cannot have any faith in the evidence proffered on behalf of those parties where it conflicts with the evidence of Mr. Dosanjh. In contrast, I found Mr. Dosanjh to be a reasonable, competent and hardworking tradesman who did everything he could to keep up his end of the bargain in spite of the ever-evolving challenges that he was constantly confronted with.
- [101] High End's delays in the completion of its scope of work were not due to its tardiness or unavailability. The delays were as a result of design changes, wrongly measured supplies, and materials not being provided in a timely manner or as reasonably scheduled. Those delays were caused by Braza and/or Penta or within the scope of Braza's responsibilities.
- [102] Mr. Momen testified that he had expected the hotel to be at the lock-up stage of construction by the end of 2015. In spite of the obstacles it faced, High End delivered on time. I am therefore satisfied that High End performed its end of the bargain.
- [103] I am also satisfied that Mr. Gill authorized extra work and materials to be provided. However, some of the billing done by Sam Dosanjh was not accurate or was unsubstantiated. Therefore, I must reduce the amount to be awarded from that which has been claimed.
- [104] The initial May 25 Contract was fixed at \$835,000. High End was paid \$561,819.60. As of November 15, 2015, High End billed \$951,601.88, leaving a claim of \$389,782.60. In February 2016, Mr. Momen removed High End from the job site. In March 2016, High End delivered a final invoice of \$94,500 for extra work required to accommodate design changes to the foundation and framing. High End has broken down its initial billing as follows:

Issued Invoice #

Date of invoice

Amount of invoice

Date Paid

Amount Paid

427001

June 29 2015

\$236,250.00

4-Aug-15

\$69,929.03

427002

July 22 2015

\$78,750.00

4-Aug-15

\$140,043.75

427003

Aug 22 2015

\$65,926.88

27-Aug-15

\$120,487.50

427004

Sept 01 2015

\$101,325.00

22-Sep-15

\$11,000.00

427005

Sept 17 2015

\$101,325.00

29-Sep-15

\$100,359.00

427006

Sept 24 2015

\$22,585.00

30-Oct-15

\$50,000.00

427007

Sept 25 2015

\$101,325.00

16-Nov-15

\$50,000.00

427008

Oct 9 2015

\$101,325.00

7-Dec-15

\$20,000.00

427009

Oct 30 2015

\$5,764.50

Total Paid

\$561,819.28

427010

Nov 15 2015

\$106,575.00

427011

Nov 15 2015

\$30,450.00

Total Invoiced

\$951,601.88

Total Remaining

\$389,782.60

- [105] There was still some work left within High End's scope when it was ordered off the job site. There were also some deficiencies that needed correcting. High End was willing to make the corrections, but Braza was not interested in having High End back.
- [106] High End did not bill \$14,000 of its original \$835,000 estimate. I will use that money to credit Braza with some of the costs it might have incurred for remedial work and for some of the work that High End was required to complete, but did not because it was forced off site.
- [107] In the normal course of events, a claim of this nature is largely an exercise in accounting. The doubtful nature of some of the evidence carves into the mathematical sphere. It should be kept in mind that damages are assessed and not to become mired in what might become a labour of forensic accounting. Calculations are necessary to arrive at an assessment, but it nonetheless remains an assessment.
- [108] I am satisfied that the parties were aware of and agreed to the extra charges. I am also satisfied that Mr. Dosanjh told Mr. Gill in particular, that the extra work would be billed out at \$40.00 per hour and that Mr. Gill agreed to that.
- [109] High End's claim was succinctly set out in its written submissions as follows:
7. The plaintiff claims for \$300,230.72 inclusive of GST for work invoiced and performed by the plaintiff under the original contract between the parties.
 8. The plaintiff also claims for \$184,001.88 related to labour and materials supplied by the plaintiff that were additional to the original agreement, but which the plaintiff says were requested and approved by the defendants, as follows:
 - a) \$6,300 inclusive of GST for work assisting with the backfilling of the grade beams of the Hotel prior to the pouring of the slab.
 - b) \$4,501.88 for materials supplied by the plaintiff to the defendants during the grade beam stage of work.
 - c) \$28,350 inclusive of GST in relation to a four-storey concrete block wall constructed at the south end of the Hotel by the plaintiff's crew and a subcontractor to the plaintiff.
 - d) \$36,750 inclusive of GST for work performed by the plaintiff in assembling and installing the revised trusses of the Hotel.
 - e) \$10,500 inclusive of GST for the rental of cranes necessitated by revisions to the Hotel truss plans.
 - f) \$3,150 inclusive of GST for the rental of a crane required to fix a steel beam that had been incorrectly ordered by the defendants, or incorrectly sized by the beam supplier.

- g) \$5,250 inclusive of GST for drilling charges incurred on behalf of the defendants in relation to a change in the elevator design for the Hotel.
- h) \$13,650 inclusive of GST for beams and rim boards sold to the defendants at the beginning of the plaintiff's work on the Hotel.
- i) \$4,200 inclusive of GST for changes to the plaintiff's work in relation to revisions to the Hotel stair layout.
- j) \$7,875 inclusive of GST for changes to the Hotel canopy design.
- k) \$8,925 inclusive of GST for the construction of an additional mechanical walkway above the 4th floor hallway to allow access to mechanical services.
- l) \$33,600 inclusive of GST for bulkheads on the 3rd and 4th floor that were not included in the original architectural or structural plans for the Hotel.
- m) \$8,400 inclusive of GST for extra shear walls in the Hotel required as a result of the changes to the truss plan.
- n) \$10,500 inclusive of GST for changes to beam layouts in the Hotel required as a result of the changes to the truss plan.
- o) \$2,100 inclusive of GST for electrical closets not specified in the original architectural or structural plans for the Hotel.

[Emphasis in original.]

[110] High End is not entitled to be paid for correcting deficiencies since that was part of its obligations to perform the contract. High End is entitled to be paid for additional work that it provided and proved.

[111] As an example of how I have treated the entitlement to the extras, I have referred to the claims for the drops and crane charges.

[112] The contract required High End to construct whatever drops were necessary. However, the initial plans did not have those drops outlined--the services were to be concealed within the joists. High End based its bid on the plans without drops. It would be unjust to disallow the additional cost that was unforeseen to High End. High End based its fixed price on the original plans. Accordingly, the extra amount for the drops must be paid for.

[113] High End was to pay for crane charges, but that was based on the initial design which consisted of basically a straight roof. High End intended to hire a crane that would hoist all of the trusses onto the roof, to be installed from there. However, the design change resulted in a number of peaks and valleys.

- [114] I accept Mr. Dosanjh's evidence that it was safer to prefabricate the new design for the trusses on the ground and to have the larger structures lifted onto the roof from time to time. It was therefore reasonable for High End to construct the new design on the ground, which was an added cost that was not contemplated at the time of contracting based on the initial plans. Accordingly, I award High End the full amount of its claim for the extra crane charges.
- [115] High End concedes that it should not be paid for the canopy design change. I therefore deduct the sum of \$7,875 from High End's claim.
- [116] The difficulty with High End's continuing claim after January 12 is the unreliability of the final invoice that Sam Dosanjh rendered on March 15, 2016. The invoice was for \$94,500. He says that the invoice was comprised mostly of labour costs for additional work or extras. He has not produced the time sheets to substantiate any of the labour as claimed. He says that the time sheets were stolen.
- [117] Sam Dosanjh says that the crew maintained time logs that were completed daily. He kept the time logs in his computer bag. In 2019, his house was burglarized and the computer bag and time sheets were stolen. He was therefore unable to produce those records to confirm the claim.
- [118] It is surprising that relevant documents such as the time sheets had not been disclosed in the litigation. It seems somewhat convenient to explain that the records are not available because of a theft. Although a computer bag might have some attraction to a thief, it is unlikely that time sheets would have the same lure. Without that information, the defendants are not able to consider, verify, or critique the time spent as claimed.
- [119] I am unable to assess the accuracy of the claim in light of the late billing for work that was done as far back as the foundation and framing. One would assume that the billing for extra work would have been billed as the respective invoices were rendered from time to time. I infer that this last invoice was a hopeful attempt to garner profits from a job that may not have been as profitable as initially anticipated. The invoice has no basis upon which an assessment can be made to determine if the costs were actually incurred and capable of being claimed as an extra. I therefore, reject the March invoice in its entirety.
- [120] The result is that a total of \$102,000 (rounded) shall be deducted, leaving a net award of \$82,000 for extras. The sum total owing to High End amounts to \$382,000.

The Counterclaim and Set-Off

- [121] The defendants' counterclaim is based on allegations that High End was responsible for the elevation error, delays in completion, and uncompleted work. I dismiss the counterclaim for the following reasons.

- [122] Braza claims over \$326,000 for increased costs due to the elevation error. Braza was responsible for the elevation error. Accordingly, all claims that flow from that issue must be rejected.
- [123] Penta claims over \$661,000 as lost profit due to the delay in completion of the project. High End was not responsible for any delay. Braza was responsible for causing the delays as a result of design changes or material not being provided in a timely manner. Accordingly, I must also reject all claims that flow from that issue.
- [124] The defendants claim over \$234,000 as increased costs to rectify construction deficiencies attributable to High End. It is not necessary to repeat the concerns with the reliability of Braza's evidence. However, the evidence put forward in support of this issue is questionable. For example, the fabricated invoice produced on Handyman stationary by the defendants makes up almost 40% of the amount claimed.
- [125] High End has not been paid for a significant amount of work that it had completed as of the beginning of February 2016. There had been ongoing inspections and High End had been diligent in resolving the deficiencies as outlined by Mainland Engineering. At the time High End was dismissed from the site, it had resolved most of the deficiencies from the most recent inspection. Only four outstanding matters remained and High End was willing to remedy those matters.
- [126] There was no reasonable basis upon which High End was evicted from the job site. It had performed its work as permitted within the schedule that was otherwise controlled by Braza which determined when materials would arrive on site. High End was prepared to finish whatever work was still outstanding. The fact that materials arrived late or were incorrect were not matters that High End bears responsibility for. Consequently, it would be unjust to shift other costs incurred by Braza to High End.
- [127] I am satisfied that those deficiencies that were properly within High End's scope and not completed, are compensated for within the \$14,000 that High End has not billed under the fixed price agreement. Accordingly, I dismiss Braza's claim for increased costs for deficiencies.

Costs

- [128] Each party seeks special costs and points to the conduct of the other as so egregious that such an award is merited.
- [129] High End seeks special costs from Mr. Momen because of his participation in setting out false facts in affidavits, as well as his late disclosure, exaggerated claims, and fabricated invoices. High End also criticized Mr. Momen for trying to induce Mr. Urich, the principal of Handyman, to give evidence in support of the fabricated Handyman invoice. Counsel for High End argue that Mr. Momen caused them to spend additional time preparing for trial.

- [130] The defendants also leveled criticism at High End for presenting claims without documentation and for destroying evidence.
- [131] Courts do not routinely award special costs to a successful litigant. If that were the case, there would be little use for party and party costs. The principles governing an award for special costs are summarized by Justice Gropper in *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 73:
- a) the court must exercise restraint in awarding special costs;
 - b) the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order;
 - c) simply because the legal concept of "reprehensibility" captures different kinds of misconduct does not mean that all forms of misconduct are encompassed by this term;
 - d) reprehensibility will likely be found in circumstances where there is evidence of improper motive, abuse of the court's process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant;
 - e) special costs can be ordered against parties and non-parties alike; and
 - f) the successful litigant is entitled to costs in accordance with the general rule that costs follow the event. Special costs are not awarded to a successful party as a "bonus" or further compensation for that success.
- [132] There is no question that Mr. Momen's evidence has been harshly judged and that his lack of candour and reliability have affected the outcome of this case; the outcome has been similarly affected by comparable deficiencies in Mr. Gill's evidence. As was explained in more detail above, their evidence has little weight due to both credibility and reliability issues.
- [133] However, High End's claim has also been affected by questions about the accuracy of some of its billing methods and records.
- [134] High End must also share responsibility for the manner in which Mr. Urich was attacked for failing to give testimony that implicated Mr. Momen in witness tampering or intimidation. This was a completely baseless attack.
- [135] The result is that there is some justification for considering an award of special costs. However, there has been sufficient concern regarding all parties that no one should be awarded special costs and I decline to do so.
- [136] High End is entitled to costs on a party and party basis.

Interest

[137] High End is entitled to prejudgment interest. In order to convenience the calculations, I will order that the interest be calculated on the entire amount from January 1, 2016. I have selected that date because, although some of the charges arose or were billed after January 2016, the bulk of the outstanding amount was incurred as of December 2015.

Summary

[138] The results are summarized as follows:

- a) There shall be a declaration that High End is entitled to a builders lien in the amount of \$382,000 over lands and premises owned by Penta and described as:

PID: 029-545-161

Lot A, Section 30, Township 83, Range 18 West of the 6th Meridian, Peace River District, Plan EPP49469

- b) Judgment against the defendants in the amount of \$382,000;
- c) Court Order Interest to be calculated from January 1, 2016;
- d) The counterclaim is dismissed; and
- e) High End is entitled to costs on a party and party basis against all defendants.

"S.D. Dley J."

DLEY J.

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