

CANADA / JUDGMENT

## 345 Builders Ltd. v. Su

2021 BCSC 2509

### COURT

Supreme Court of British Columbia

### DECIDED

24 December 2021

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2021 BCSC 2509 345 Builders Ltd. v. Su

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

345 Builders Ltd. v. Su,

2021 BCSC 2509

Date: 20211224

Docket: S181673

Registry: Victoria

Between:

345 Builders Ltd.

Plaintiff

And:

Nan Su

Defendant

Before: The Honourable Mr. Justice Riley

Reasons for Judgment

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Place and Dates of Trial:

Victoria, B.C.

June 7-11, 14-18, 2021

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Place and Date of Judgment:

Victoria, B.C.

December 24, 2021

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## Introduction

- [1] This law suit is focused on the purchase of a piece of real property in Jordan River, British Columbia and the construction of a custom designed house on that property. The property in question is a high-bank waterfront lot with a civic address of 3617 Waters Edge Drive, Jordan River, British Columbia. From this point forward I will refer to it as Lot 2, which is the lot number included within the property's legal description.
- [2] Acting through its principal Mr. Nicholson, the plaintiff 345 Builders Ltd. ("345 Builders") entered into an arrangement with the defendant Mr. Su for the construction of a custom designed house on Lot 2. The deal morphed over time, and the exact nature and legal character of the arrangement is in dispute between the parties. The situation was greatly complicated by a series of real estate transactions involving third parties with prior interests in Lot 2.
- [3] The plaintiff 345 Builders takes the position that the construction work was done under a "cost plus" building contract (the "Building Contract") signed in mid-February 2017, and that as the project was approaching completion Mr. Su stopped paying, so 345 Builders stopped work and placed a lien on the property. 345 Builders claims for a total of \$39,416 that has yet to be paid by Mr. Su under the terms of the Building Contract.
- [4] The defendant Mr. Su takes the position that he and 345 Builders entered into a fixed-price contract, in the form of an earlier contract of purchase and sale dated 29 March 2016 (the "CPS"), governing both Lot 2 itself (to be sold to Mr. Su for \$200,000) and construction of the house (at a fixed price of \$200,000). The parties later signed the Building Contract in which the house would be constructed for an estimated price of \$202,160, and Mr. Su ultimately refused to pay anything to 345 Builders in excess of that amount. Mr. Su says 345 Builders

failed to complete the work at the agreed upon price under the CPS, or alternatively under the Building Contract, as a result of which he had to pay a further \$25,632.17. Mr. Su counterclaims for damages in that amount, plus additional damages for alleged construction deficiencies.

### Witness Credibility

- [5] As a general observation I would say that there were significant concerns with respect to the credibility and reliability of the two key witnesses, the plaintiff's principal Mr. Nicholson, and the defendant Mr. Su. Both had difficulty recalling some aspects of their dealings with each other. Both gave evidence at trial that was, at least on some points, inconsistent with their answers given at examination for discovery, and with their conduct and written correspondence at the time of the events in question. For example, Mr. Nicholson asserted that his practice was never to start a construction project without a contract in place, and that in this case he signed a contract with Mr. Su within two weeks of starting construction, but on my view of the evidence neither of those things were accurate. For his part, Mr. Su's position at trial was that the entire building arrangement was governed by the 29 March 2016 CPS, when throughout the building phase of his relationship with Mr. Nicholson he repeatedly cited the terms of the Building Contract, albeit selectively and in a self-serving way.
- [6] I am also alive to the various factors that the trier of fact is expected to consider in assessing witness credibility as set out in *Gichuru v. Smith*, 2013 BCSC 895 at para. 129, *aff'd* 2014 BCCA 414. I further acknowledge the distinction between credibility and reliability as discussed in cases such as *Mather v. MacDonald*, 2016 BCSC 948 at para. 18-19. In this case I need to consider both concepts. I have concerns that the two principal witnesses allowed their interests in the case to influence their recollections, a consideration which impacts on witness credibility. I am also concerned that the witnesses were unable to recall with any real precision many important details of their mutual dealings, which bears on the reliability of their testimony. To borrow a phrase from Mr. Justice Smith in *Fame Construction Ltd. v. 430863 B.C. Ltd.* (1997), 30 B.C.L.R. (3d) 68 (S.C.) [*Fame Construction*] at para. 69, "[s]poken words are ephemeral and human memory is subject to many frailties". Taking all of these principles together, my task as the trier of fact is to assess the extent to which the witness testimony is "in harmony with the preponderance of the probabilities" emerging from the totality of the evidence: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at p. 357.
- [7] One final point I should note at the outset is that Mr. Su is not fluent in English. He testified at trial through a Mandarin interpreter. I find, however, that Mr. Su's limitations in both speaking and writing English did not have any material affect on his ability to understand the business he conducted with Mr. Nicholson and his company. Throughout his dealings with Mr. Nicholson and the other individuals described below, Mr. Su had ready access to at least one professionally qualified interpreter and several other friends and acquaintances

who were prepared to assist him in that capacity, several lawyers who worked in both English and Mandarin, and a real estate agent who spoke both languages. Mr. Su had an interpreter with him at virtually all of the face-to-face meetings with Mr. Nicholson and the others involved during the negotiations, at least up to the point where construction began. With regard to written communications, Mr. Su would frequently arranged for one of his interpreters to write emails in English on his behalf, or translate emails he received from others. Mr. Su also had access to Google translate to convert typewritten text from Mandarin into English and vice versa. From all of this, I conclude that Mr. Su had no difficulty understanding the various business transactions in which he engaged himself. Although at points in cross-examination, Mr. Su fell back on a lack of familiarity with English to claim ignorance of a particular point, I did not find this testimony convincing and I do not accept it.

## Facts

### Initial Ownership of Lot 2

- [8] Lot 2 was originally owned by 0745324 B.C. Ltd., operating under the name Terrafund ("Terrafund"). On 27 February 2015, prior to the involvement of either of the parties to this action, Terrafund entered into a contract of purchase of sale agreeing to sell Lot 2 to Church Hill Meadows Ltd. ("Church Hill"), at a sale price of \$199,900. The original completion date was 30 June 2015. That date was later extended on a number of occasions, up to and including the dates on which Mr. Su and 345 Builders became involved in various transactions focused on Lot 2.

### Mr. Su's Initial Offer to Purchase Lot 2

- [9] The defendant Mr. Su is a mandarin speaking retired business man who emigrated from China to Canada in the mid 2000s and later decided to settle in the Sooke area. He and his wife were interested in building a house in Jordan River, on a property with a view of the ocean. Mr. Su contacted a realtor, Mr. Fedosenko, to help him search for a suitable property. Mr. Fedosenko was a witness for the plaintiff in the trial in this matter. He testified about his dealings with Mr. Su and Mr. Nicholson, the principal of the plaintiff 345 Builders.
- [10] Mr. Fedosenko showed Mr. Su a number of properties. Mr. Su was interested in Lot 2. His initial plan was to purchase it and then hire a builder to build a custom house on the property. Mr. Su testified that when speaking with Mr. Fedosenko about Lot 2 he specifically enquired about whether he would be able to cut down trees at or near the edge of the slope to improve his view of the ocean, and Mr. Fedosenko told him he would be able to do so. In cross-examination, Mr. Su's position calcified, when he claimed that he had been "scammed" by Mr. Fedosenko into believing he would be allowed to cut trees for a better ocean view. In his testimony, Mr. Fedosenko denied this, explaining that he was in no position to make such assurances so he would not have done so. I find it unlikely that Mr. Fedosenko would

have represented to Mr. Su that he could cut down trees on the slope of a waterfront property without knowing whether or not that was true. In any event, Mr. Su's complaint about this is with Mr. Fedosenko, who was Mr. Su's real estate agent in a limited dual agency arrangement, and who is not a party to this proceeding. Moreover, even after learning about the restrictions on tree cutting, Mr. Su still wanted to purchase Lot 2. Indeed, when the transfer finally went ahead - months later, after a number of significant changes to the structure of the transaction as explained below - Mr. Su agreed to place a restrictive covenant on the property that barred cutting of trees near or on the slope.

- [11] On Mr. Su's instructions, Mr. Fedosenko filled out an offer to purchase Lot 2, which was accepted. On 2 March 2016, Mr. Su entered into a contract of purchase and sale in which he agreed to buy Lot 2 from Church Hill for \$230,000, with an initial deposit of \$10,000. The completion date was 29 April 2016. Mr. Fedosenko wrote the contract of purchase and sale after meeting with Mr. Su and a Mandarin interpreter. Mr. Su paid the \$10,000 on 11 March 2016. However, the transaction did not complete because Mr. Su was unable to come up with financing to pay the balance of the purchase price.

### **Initial Meetings Between Mr. Su and Mr. Nicholson**

- [12] After the collapse of Mr. Su's initial contract of purchase and sale, he was still interested in purchasing Lot 2. Knowing that Mr. Su was having difficulty securing financing for both the property and subsequent house construction, Mr. Fedosenko decided to introduce Mr. Su to a builder who might be able to assist. What Mr. Fedosenko had in mind was a "builder's terms" arrangement, in which the builder would enter into one agreement to purchase the bare property from the developer and a second agreement to sell the property with a finished house to the home buyer. The closing date for both transactions would be months down the road, with the developer receiving a substantial deposit up front to protect its interests. Mr. Fedosenko testified that he has done about 100 "builder's terms" transactions over the past decade or so.
- [13] Mr. Nicholson is a red seal certified carpenter. He is an experienced builder who had been running his own residential construction business, 345 Builders, for at least ten years before the events in issue in this case. Mr. Nicholson knew Mr. Fedosenko and had worked with him in building projects in the past. In that context, Mr. Fedosenko decided to introduce Mr. Nicholson to Mr. Su as a prospective builder in the proposed builder's terms arrangement.
- [14] Mr. Fedosenko arranged a meeting attended by Mr. Nicholson, Mr. Su and Mr. Su's interpreter. The initial meeting took place at a property a few lots away from Lot 2, but it was unproductive and the parties went their separate ways. At some point thereafter, it became apparent that Mr. Su was interested in purchasing Lot 2.

- [15] Mr. Nicholson, Mr. Su and his interpreter met a second time at Lot 2, where they discussed the lot and the potential placement of the house Mr. Su wanted to build. Later that day, Mr. Nicholson, Mr. Su and his interpreter met at the Cold Shoulder Café in Jordan River. At some point during these meetings, Mr. Su showed Mr. Nicholson some hand drawn floor plans for the house he wanted to build. The plans were in metric dimensions, roughly 1400 square feet in size.
- [16] The parties had some preliminary discussions about how much it would cost to build the house based on Mr. Su's plans. At trial, Mr. Nicholson testified that he told Mr. Su a reasonable estimate was \$140 per square foot, but the final price could be under or over that depending on the options and the quality and price of the finishing. At \$140 per square foot, the total construction cost would be just under \$200,000. Mr. Su made mention of things like a covered porch and crown mouldings. Mr. Nicholson said Mr. Su could decide on such details later, but with these elements the total would likely exceed the \$200,000 estimate, which was based on "middle of the road" or "standard" finishing. Mr. Nicholson's professed belief was that Mr. Su was comfortable proceeding on this basis. For his part, Mr. Su testified that he made it clear from the outset that he wanted crown mouldings and a porch, and Mr. Nicholson never said anything about the price quote of \$140 per square foot being an estimate. In cross-examination, Mr. Su conceded the possibility that Mr. Nicholson told him he would not be able to get everything he wanted at the price he wanted to pay, although Mr. Su consistently rejected the suggestion that the \$140 per square foot price was only an estimate.
- [17] Considering the testimony of both parties on this point, I accept Mr. Nicholson's account of the conversation and I reject Mr. Su's version. It is highly implausible that an experienced builder such as Mr. Nicholson would commit to a firm price quote of \$140 per square foot based on a hand-drawn floor plan, with no formal building specifications as to the quality of building materials and finishing. The buyer could later insist on lavish materials and finishing that would almost certainly cause the builder to suffer a net loss on the project. I accept Mr. Nicholson's testimony that he gave an estimate, based on standard or middle of the road materials, making it clear that additional features and expensive finishing would increase the price. I find that Mr. Su heard the \$140 per square foot estimate and seized on it, choosing to ignore Mr. Nicholson's qualifying remarks.

### The "Builder's terms" Arrangement

- [18] Mr. Fedosenko, acting in the capacity as a realtor under "limited dual agency agreements" with Terraform, Church Hill, Mr. Su, and 345 Builders, arranged a meeting for the purposes of negotiating a builder's terms arrangement for the purchase of Lot 2 and the construction of a residence on the property. Mr. Fedosenko, Mr. Cownden, Mr. Nicholson, Mr. Su, and Mr. Su's interpreter were all present at the meeting, which took place on 24 March 2016 at Mr. Fedosenko's office. All parties in attendance were prepared to go forward with a builder's terms arrangement. Mr. Fedosenko explained in his testimony that he was the "architect" of

the deal but in the end everyone agreed to it.

- [19] I pause here to note that in between the 24 March 2016 meeting at Mr. Fedosenko's office in which the parties agreed to go forward with the builder's terms arrangement, and 29 March 2016 when the last of the documents was executed, there was some email correspondence between Mr. Nicholson and Mr. Su. In particular, on 27 March 2016, Mr. Nicholson sent an email asking Mr. Su if he had done anything to bring the overall size of the house under 1,400 square feet, so the total cost would not exceed the \$200,000 estimate Mr. Nicholson had previously given. In response to this email, Mr. Su prepared a revised set of hand drawn floor plans. The plans were once again in metric dimensions, with a handwritten notation indicating that the floor space was 856 square meters, which, as noted on the top of first page, was equal to 1,383.8 square feet. These plans were then attached as an addendum to the 29 March 2016 contract of purchase and sale between 345 Builders and Mr. Su, as described in more detail in paragraph 23 below.
- [20] To return to the description of the builder's terms arrangement, the objective of the arrangement was for Mr. Su to ultimately acquire Lot 2 together with a custom built house for a total of \$400,000. Of this, \$200,000 would go to the developer Terrafund for the lot, and \$200,000 would go to 345 Builders for construction of the house. The transaction was structured so that the developer, Terrafund, would retain title to the property until the construction was finished, with a substantial deposit to protect its interest. This meant Mr. Su did not have to obtain bank financing until the house was actually constructed. In addition to all of this, a further \$25,500 would go to Church Hill to cover preparatory work done on the property and to assign its interest in Lot 2 to 345 Builders. To achieve this overall result, the builder's terms arrangement had three components.
- [21] First, Church Hill would receive \$25,500 in exchange for an assignment of its interest in Lot 2 to 345 Builders. The first \$10,000 would come from the release of the funds Mr. Su had deposited in connection with his initial, now defunct, offer to purchase Lot 2. Mr. Fedosenko testified that he specifically went over this aspect of the arrangement with Mr. Su and his interpreter, and Mr. Su agreed. With respect to the remaining \$15,500, Mr. Fedosenko initially testified that he did not know where the balance of those funds would come from, but then added that Mr. Nicholson (on behalf of 345 Builders) would be responsible for it. Later still, Mr. Fedosenko said he explained to Mr. Su that the entire figure, \$25,500, was "part of the deal" and it would go "on top of" the \$400,000, and everyone agreed with that arrangement. In cross-examination, Mr. Fedosenko acknowledged that there was nothing in writing about this \$25,500 payment, but maintained that it was discussed and agreed upon by all of the parties during the 24 March 2016 meeting. Mr. Fedosenko explained that it was the price of Church Hill's agreement to grant an assignment of its interest in Lot 2. Mr. Fedosenko also clarified in cross-examination that Mr. Nicholson was to be responsible for paying the final \$15,500 to Church Hill.

- [22] Second, the 27 February 2015 contract of purchase and sale between Terrafund (as seller) and Church Hill (as buyer) would be amended such that Church Hill assigned its interest as buyer to 345 Builders. The deposit was to be increased to \$50,000, and the completion date was extended to 21 July 2016. This was accomplished by way of a written addendum to the 27 February 2015 contract of purchase and sale. The addendum was dated and signed on 24 March 2016 by Mr. Nicholson on behalf of 345 Builders, Mr. Cownden on behalf of Church Hill, and Mr. Proselio on behalf of Terrafund. The evidence indicates that 345 Builders paid the \$50,000 deposit to Terrafund on 29 March 2016. On the same date, 345 Builders made a further payment of \$5,000 to Church Hill for "labour" in relation to Lot 2.
- [23] Third, there was a separate contract of purchase and sale for Lot 2 with 345 Builders as the seller and Mr. Su as the buyer, defined earlier as the CPS. The total purchase price was to be \$400,000, with a deposit of \$150,000, consisting of: (i) \$10,000 to be released from the trust account of Mr. Fedosenko, (ii) \$40,000 to be paid by Mr. Su to 345 Builders on 29 March 2016, and (iii) a further \$100,000 to be paid by Mr. Su to 345 Builders on 1 April 2016. The contract included a term that 345 Builders would provide an occupancy permit prior to closing, and the handwritten floor plans drawn up by Mr. Su, referred to in paragraph 19 above, were attached as an addendum to the agreement. The CPS is dated 24 March 2016, but purports to be signed by both parties on 29 March 2016. It includes an addendum, signed by both Mr. Su and Mr. Nicholson, stating, "Seller and Buyer have approved building plans and buyer has gone over all aspects of the sale with his Interpreter".
- [24] Mr. Fedosenko gave detailed evidence as to the discussions that took place between the parties and the circumstances leading up to the execution of the CPS. Although Mr. Fedosenko testified both in direct and in cross-examination that Mr. Nicholson signed the document on 24 March 2016, the date next to Mr. Nicholson's signature is actually 29 March 2016. For his part, Mr. Nicholson also testified that he actually signed the document on 24 March 2016. I find that nothing turns on this detail. With regard to Mr. Su, Mr. Fedosenko recalled that Mr. Su had an interpreter with him throughout their dealings. Mr. Su consulted a lawyer, and the lawyer presented some proposed amendments, but Mr. Nicholson would not agree to them. Mr. Nicholson's position was that the CPS had to be an "unconditional" deal or he would not do it. In the end, the contract was signed without the changes proposed in the email from Mr. Su's lawyer. Mr. Fedosenko had a clear recollection of the circumstances in which Mr. Su signed the CPS, in the presence of an interpreter, and I find Mr. Fedosenko's evidence on this point to be credible and reliable.
- [25] The evidence indicates that the original \$10,000 deposit made as part of Mr. Su's defunct initial offer to purchase Lot 2 was released on 24 March 2016. Although the CPS between 345 Builders and Mr. Su provides for the \$10,000 deposit to be released directly to 345 Builders, Mr. Nicholson testified at trial that he had no recollection of receiving it. In fact, Mr. Fedosenko released those funds to Church Hill. Mr. Fedosenko testified that Mr. Su gave him clear instructions to this effect. The authorization to release funds form was marked in evidence. It is dated 24 March 2016 and is signed by both Mr. Cownden and Mr. Su. It states

that the \$10,000 deposit is to be released to the "Seller", Church Hill. I note that this document was signed on 24 March 2016, some five days before Mr. Su signed the CPS between himself and 345 Builders. The evidence is clear that Mr. Su paid the additional \$140,000 of the deposit to 345 Builders by way of a bank draft dated 29 March 2016.

- [26] At trial, Mr. Nicholson maintained that the \$200,000 quote for the house construction was an estimate, and that he told Mr. Su design changes and higher quality finishing would increase the price. I accept this testimony. However, the difficulty for Mr. Nicholson is that the CPS specified a price of \$200,000 for the construction, with no reference to the term "estimate", no reference to the quality of finishing, and a "complete agreement clause" expressly stating that no prior warranties, representations, or agreements were to be part of the contract.
- [27] During his testimony, Mr. Nicholson admitted saying during examination for discovery that the effect of the builder's terms arrangement was that his company would acquire Lot 2 in an undeveloped state for \$200,000 and would then sell Lot 2 with a constructed house to Mr. Su for \$400,000. He agreed it was, in effect, a "fixed price" arrangement in which 345 Builders would construct the house for \$200,000. Mr. Nicholson agreed that, at the time he entered into the builder's terms arrangement, his belief was that at this price he could build the house Mr. Su had discussed, with standard finishing, for a total price of \$200,000, with a fair return. However, later in the examination for discovery Mr. Nicholson qualified that position by adding that his understanding and discussion with Mr. Su was that he would build the house, "at a standard of finish that [Mr. Su] could afford", for \$200,000.
- [28] For his part, Mr. Su testified at trial that he got a lawyer to review the CPS. Mr. Su's lawyer suggested some changes, but they were not accepted by Mr. Nicholson. Mr. Su decided to sign the contract anyway, because he really wanted the property, as did his wife. Mr. Su gave evidence that he signed the 29 March 2016 CPS at Mr. Fedosenko's office, in the presence of his interpreter. Mr. Su said Mr. Fedosenko spent about five minutes discussing the terms with him before he signed it. Mr. Su was adamant that the \$400,000 price was to include everything, including taxes and legal fees. He denied that the price of \$200,000 for the house was an estimate, or that anyone said anything to him about the quality of finishing increasing the cost above the price quoted in the contract. I do not accept that testimony, largely for the reasons set out above. I prefer instead the evidence of Mr. Fedosenko and Mr. Nicholson on this point. However, as noted above, the terms of the CPS specified a firm price of \$200,000 for the construction without reference to the term "estimate", made no provision for price increases based on quality of finishing, and included a "complete agreement" clause.

## Commencement of Work at Lot 2

- [29] Preparatory work at Lot 2 began shortly after the parties reached agreement on the builder's terms arrangement. This is reflected in 345 Builders receipts for construction expenses commencing on 30 March 20216 and continuing thereafter.

- [30] On 27 April 2016, Mr. Nicholson submitted a building permit application for Lot 2, listing Terrafund as the property owner and 345 Builders as the contractor. As it turns out, the building permit was not issued for some time, owing to the Capital Regional District ("CRD")'s concerns about the geotechnical stability of Lot 2, as a high bank waterfront property.
- [31] Mr. Nicholson testified that in the course of preparing the building permit application, he created a computer generated floor plan, dated 20 April 2016. This plan was different from Mr. Su's original hand drawn floor plan in that the measurements were converted to imperial, and the pitch of the roof was reduced to reduce the overall cost. The second page of the diagram shows the plan for the foundation, and the original location of the septic field. This is significant because the septic field was originally slightly below the grade of the house, but it later had to be re-positioned to a location on higher ground than the house itself, as a result of which it was necessary to install a septic pump.

### **Lapse of the Original Builder's terms Arrangement**

- [32] Recall that both contracts of purchase and sale negotiated as part of the builder's terms arrangement had completion dates of 21 July 2016. On 26 July 2016, the contract between Terrafund as seller and 345 B.C. Ltd. as buyer was extended to 27 October 2016, with a further deposit of \$5,000 to be paid by 4 August 2016. However, the CPS between 345 Builders as seller and Mr. Su as buyer was never formally extended.
- [33] Mr. Fedosenko gave evidence, which I accept, that he did not receive instructions to extend the CPS. Mr. Fedosenko agreed in cross-examination that he did not return the \$150,000 deposit to Mr. Su, explaining that Mr. Su was willing to make "another arrangement to buy the property". Mr. Su wanted the lot and he wanted the house built. Mr. Fedosenko was clear in his testimony that he had instructions from all parties to hold the deposit, explaining that he was in touch with the parties more or less daily over this time frame.
- [34] Mr. Nicholson also testified that there was never any discussion or agreement to extend the deadline for completion of the CPS between 345 Builders as seller and Mr. Su as buyer. However, it should be noted that in examination for discovery, Mr. Nicholson agreed that after the closing date passed, he "continued working" as if the CPS was still in place.
- [35] Mr. Su testified that even though his original CPS with 345 Builders did not complete before the 21 July 2017 closing date, no one told him the contract was cancelled. When the closing date came and went, Mr. Su did not ask for the return of his deposit, because he still wanted to buy the property. When asked about this issue at examination for discovery, Mr. Su initially agreed that neither party performed their obligations under the CPS, but later asserted that the agreement continued because 345 Builders never returned his money. Mr. Su acknowledged that there was no written agreement extending the initial CPS, and he did not ask for the return of the money paid under it, although after he bought Lot 2 (on 15 November 2016, as described below) he asked his realtor to ensure that there was an

accounting for the funds. Mr. Su denied the suggestion that he did not have access to the \$250,000 required to complete the transaction as of 21 July 2016, asserting that he had the necessary funds in his RBC account. However, a copy of a bank statement marked in evidence at trial showed that as of 29 July 2016, the total value of Mr. Su's RBC accounts and investments was \$175,000. In re-examination, Mr. Su added that he had investments funds of \$400,000 in the bank, although the evidence reflects that these funds were locked in and thus inaccessible to him.

## Design Changes

[36] In an email dated 14 August 2016, Mr. Nicholson asked Mr. Su if he wanted to meet at the site to discuss the height of the foundation, noting as well that the position of the house on the lot had to be changed. In his trial testimony, Mr. Nicholson volunteered that the footprint for the house had to be shifted by seven feet in one direction, because of his mistake in failing to appreciate that the original location was not far enough from an easement in favour of the neighboring property. Mr. Nicholson also gave evidence, which I accept, about the site meeting with Mr. Su in which the two of them discussed the size of the crawl space and the overall height of the house. They used a ladder which Mr. Su climbed to see what kind of view he would have. This led to a decision by Mr. Su to raise the overall height of the house. On Mr. Su's instructions, the height of the crawl space was increased, which in turn led to a later decision to include windows in the crawl space that were not part of the original design. I accept Mr. Nicholson's testimony that he told Mr. Su these changes would increase the cost of both labour and construction materials.

## Continuing Delays in Completion of the Builder's Terms Arrangement

- [37] Mr. Fedosenko's understanding was that the original builder's terms deal was becoming increasingly unlikely to complete because of problems with the building permit. The CRD was insisting on a restrictive covenant against the title to Lot 2, for the purpose of ensuring that measures would be put in place to protect the integrity of the bank leading down to the waterfront.
- [38] Mr. Fedosenko's reflections on what was occurring, which are probably in the nature of narrative, are confirmed by an email from Mr. Nicholson to Mr. Su, dated 14 August 2016, reporting on the status of the construction. Mr. Nicholson reported that the lawyers "still have not put the Geotech on the title to the lot yet, and there is no permit". In cross-examination at trial, Mr. Su agreed that this was also his understanding of the situation.
- [39] The problems with the CRD came to a head in the fall of 2016. At one point, Mr. Fedosenko, Mr. Nicholson, Mr. Su, and his interpreter attended a meeting at the CRD offices to discuss the matter. The CRD was insisting on a restrictive covenant that included limitations on the removal of vegetation just above and on the slope leading down to the water. Neither Mr. Nicholson nor Terrafund would agree to a restrictive covenant while still holding title to the property. Neither party wanted to assume any responsibility for development activity that

might be contrary to the terms of the proposed restrictive covenant, more specifically the risk that Mr. Su might cut trees on or near the bank while they continued to hold title to the property. Mr. Nicholson explained in his testimony that it was believed that Mr. Su had been cutting trees on or near the slope. He had been told to stop, but the parties were concerned that he might continue to do so.

## Revised Approach

- [40] Mr. Fedosenko's proposed solution to the impasse was for Mr. Su to acquire title to Lot 2 immediately, as an alternative to the builder's terms arrangement that had previously been agreed upon. Mr. Fedosenko first proposed this in an email to Mr. Su on 18 October 2016. The next day, Mr. Fedosenko met with Mr. Nicholson, Mr. Su, and Mr. Su's interpreter to discuss the situation.
- [41] Mr. Fedosenko also made arrangements for Mr. Su to meet with Mr. Farley, a notary, to get some advice about the restrictive covenant and how to go about structuring the transfer of title. Mr. Farley testified as a witness for the plaintiff at trial. He stated in his evidence that he met with Mr. Su and his interpreter two or three times to discuss the restrictive covenant and proposed transfer of title to Lot 2. It appears that the first meeting between Mr. Farley and Mr. Su took place on 6 or 7 October 2016, based on an email identified in evidence by Mr. Su's interpreter. After the meeting, on 7 October 2016, Mr. Su sent an email to Mr. Fedosenko advising that, "[i]n order to reduce the time and complexity of all the paperwork, I will pay the remaining fee for Lot 2 and close the deal". The second meeting between Mr. Farley and Mr. Su took place on 5 November 2016, when Mr. Su signed Mr. Farley's instruction letter. As indicated, Mr. Farley indicated that there might have been a third meeting, and Mr. Su in fact gave evidence about a third meeting but, as described below, that was a brief meeting to deal with some "follow up" documents.
- [42] In his trial testimony, Mr. Farley identified a letter from his notary public firm dated 4 November 2016, confirming his instructions from Mr. Su to register the restrictive covenant for the benefit of the CRD, and to discharge the existing easement in respect of a neighboring property and replace it with a narrower easement. Mr. Farley testified that he was aware there were other transactions and other parties involved in the Lot 2 transfer, but he did not know the details. Mr. Farley's understanding was that title to Lot 2 was to be registered in Mr. Su's name, and the restrictive covenant and revised easement would then be registered against the title. Mr. Farley testified that he reviewed the contents of his instruction letter with Mr. Su and the interpreter, although he had no recollection of the interpreter translating the letter verbatim for Mr. Su.
- [43] The statement of adjustments, prepared by Mr. Farley and identified by him in his testimony indicates that the transfer of the title to Lot 2 to Mr. Su was completed on 15 November 2016. The transferor was, in fact, Terraform, not 345 Builders as provided for in the 29 March 2016 CPS. The stated purchase price for the lot was \$190,000. Mr. Su received credit for a \$55,000 in deposit funds previously paid. After fees and adjustments, Mr. Su had to pay a balance of

\$149,855.15 on completion. The evidence indicates that Mr. Su effected these payments by way of two bank drafts, one in the amount of \$110,000 and the second in the amount of \$39,855.15.

- [44] To put the foregoing transaction in context, it seems that the builder's terms arrangement that Mr. Fedosenko had originally brokered between Terraform, 345 Builders, and Mr. Su basically morphed into an arrangement in which Mr. Su would obtain title to Lot 2 directly from Terraform, and then Mr. Nicholson would build the house. However, there was no written contract or agreement setting out the terms on which Terraform agreed to transfer of the title to the property directly to Mr. Su, and no written terms on which 345 Builders would construct the house.
- [45] Mr. Nicholson testified that he went to Mr. Farley's office where he met with Mr. Fedosenko, Mr. Su, and the interpreter to discuss the restrictive covenant and the option of Mr. Su taking title to Lot 2, but he gave no details in his testimony in chief. In cross-examination, Mr. Nicholson agreed that after the lapse of the original CPS between 345 Builders and Mr. Su, Mr. Nicholson "continued working" as if that contract were still in place.
- [46] In his testimony in chief, Mr. Su testified that he went to Mr. Farley's office on three occasions. On the first occasion, his Mandarin interpreter was with him. On the second occasion, his friend Mr. Zhang, a Mandarin-speaking realtor, was with him. On the third occasion, Mr. Su went to Mr. Farley's office alone, to deal with some "extra documents" that his interpreter told him had to be signed.
- [47] Mr. Su's understanding was that 345 Builders did not want to take the title to Lot 2 because of "water and rock issues". Upon learning this, Mr. Su's position was that if "water and rock issues" were the only problem, then he would take title to the property. Mr. Su said no one read the contents of Mr. Farley's 4 November 2016 letter to him; it was simply presented to him. All he knew was that his friend Mr. Zhang showed him where to sign and he signed the letter on 5 November 2016. Mr. Su acknowledged that the document contained an assertion that he read and understood the contents. He appreciated that as a result of the 15 November 2016 transaction, title to Lot 2 was transferred into his name, although he claimed at trial that this did not necessarily make him the "owner" of the property. Mr. Su testified that Mr. Zhang briefly talked about the statement of adjustments but no one went over it with him line by line. Mr. Su claimed to have some uncertainty about how much he was even required to pay for Lot 2 when he acquired it in the 15 November 2016 transfer. Mr. Zhang told him it was "not very much", so he should accept it.
- [48] With respect to the terms on which 345 Builders was to build the house on Lot 2, there is evidence, in the form of emails referred to below, that the parties discussed a "building contract" in November of 2016. However, it would appear from Mr. Nicholson's trial testimony that the actual terms of that contract were not discussed or agreed upon at that time. In cross-examination, Mr. Nicholson agreed that during examination for discovery he said that he simply sent a standard form building contract to Mr. Su, without discussing or

reviewing the terms with him. Further, in examination for discovery Mr. Nicholson had conceded that a principal reason for the building contract was the bank's insistence on having one as part of Mr. Su's mortgage approval process. However, Mr. Nicholson qualified that position by adding that while the bank insisted on it, the building contract also protected both parties - 345 Builders and Mr. Su - because, as Mr. Nicholson put it, "a building contract, even in its simplicity, is good for both of us, I think".

- [49] It should be noted that by the point that Mr. Su acquired title to Lot 2, he had paid a total of \$299,885, in the form of: (i) his initial deposit of \$10,000 on the 2 March 2016 contract of purchase and sale, (ii) his subsequent deposit of \$140,000 in relation to the 29 March 2016 CPS with 345 Builders as the seller and himself as the buyer, and (iii) a payment of \$149,885 to complete the transfer of Lot 2 into his name. After accounting for the deposits 345 Builders had paid out to Terraform for the lot, and Church Hill for assignment of its interest in the lot, 345 Builders held the balance, some \$69,500, for use in the construction of Mr. Su's house.

## Construction

- [50] Having obtained a restrictive covenant to prevent erosion on the slope at the edge of Lot 2, the CRD issued a building permit to Mr. Su (as the owner) and 345 Builders (as the contractor) on 2 December 2016. Thereafter, 345 Builders ramped up construction on Mr. Su's house. Over the next five months or so, Mr. Nicholson and Mr. Su were in frequent contact, both in person and by email. The evidence tendered at trial includes dozens of emails between Mr. Nicholson and Mr. Su, from December of 2016 through to May of 2017, with respect to various aspects of the construction. Both parties referred to these emails in their trial testimony. I should note that many of Mr. Su's emails were either written by his interpreter on Mr. Su's instructions, or written by Mr. Su in Mandarin and then converted to English via Google Translate. However, I find that nothing turns on this, as Mr. Su had full capacity to obtain assistance in understanding English as explained in paragraph 7 above. Several themes emerge from the correspondence.
- [51] One theme was Mr. Su's ongoing concern about the cost of materials and finishing, and about doing things to reduce the overall cost of construction. Mr. Su consistently instructed Mr. Nicholson to use the least expensive materials. For example, in a series of emails on 2 December 2016, Mr. Nicholson reviewed roofing options, and Mr. Su replied that he wanted roofing that was "firm, stable, looks good", but is still "cheap". On 27 February 2017, in discussing the flooring and bathroom finishing, Mr. Su said he wanted the cheapest options available. Also, there was a series of emails commencing on 22 February 2017, after expressing concern about keeping the cost down and his ability to pay, Mr. Su suggested that he could work at the site as Mr. Nicholson's cleaner. In a subsequent email Mr. Su said he wanted to do everything he could to save money and be helpful. Mr. Nicholson testified at trial that ultimately Mr. Su helped with cleanup work on at least one occasion, but he hurt his hand, after which the balance of the cleanup work at the site was done by subcontractors

and billed as part of the construction costs. For his part, when questioned about this topic at trial, Mr. Su agreed that he repeatedly asked Mr. Nicholson to "save money" and look for the "cheapest price" for materials and finishing.

- [52] Another topic discussed in the emails was design changes. For example, in an email dated 8 December 2016, Mr. Nicholson referenced the increase of the crawl space and discussed the layout options. On 6 January 2017, Mr. Su sent an email asking for a thicker wood beam above the front door, to handle the weight of a chandelier that he had purchased. In an email dated 27 February 2017, Mr. Su gave instructions regarding the installation of pipes for a central vacuum system. Near the end of the construction, when the parties began to fall out, Mr. Nicholson sent an email identifying all of the design changes and cost implications, the details of which are discussed below. In his examination for discovery, Mr. Su flatly denied making any design changes during the course of construction. However, later in his examination for discovery Mr. Su admitted that after construction began, he requested an extension to the roof to cover the walkway between the main room and the kitchen, and he also instructed Mr. Nicholson to make the foundation taller so the house would be higher up. At trial, Mr. Su admitted that the roof extension and the windows in the crawlspace were additions to the original design, but he denied that there were any other extras or changes to the original design. Based on the content of the emails listed above, and the testimony of various workers and contractors called as witnesses for the plaintiff as discussed below, I find that Mr. Su in fact directed a number of design changes in the course of the construction.
- [53] Another theme within the emails had to do with the timing of the construction work and the status of Mr. Su's payments. On 2 December 2016, Mr. Nicholson sent an email explaining that he had the building permit, he would be starting the following Monday, and he expected to pour concrete by the end of the week. Mr. Su replied with an email saying he wanted the concrete pouring to start by Wednesday or Thursday, to which Mr. Nicholson responded curtly that Mr. Su should stop telling him when to do the work. In an email dated 1 March 2017, Mr. Su advised that he had arranged for the B.C. Hydro account and stated, "I hope we can finish up soon so you can get your money". In an email exchange on 2 to 3 March 2017, Mr. Su reported that he was expecting the bank to approve his financing any day and then said, "your work has to follow, then the money will follow as well". In an exchange on 14 to 16 April 2017, Mr. Su and Mr. Nicholson continued to discuss the status of Mr. Su's financing. Mr. Su asked how much he had to pay as of that date, and enquired when he would be able to move in. On 18 April 2017, Mr. Nicholson gave a status report on the construction and then said that Friday was the last day he could work without receiving more money. On 2 May 2017, Mr. Nicholson sent an email asking Mr. Su how he liked the new house. In his trial testimony, Mr. Nicholson explained that the construction had progressed to the point where Mr. Su was able to stay in the house, and that from this point forward Mr. Su was living at the property. In cross-examination, Mr. Su confirmed that he moved into the house in late April of 2017. On 29 May 2017, Mr. Nicholson said he was waiting for the next payment, and he could not keep working until he gets more money. Mr.

Su replied "no problem", and asked Mr. Nicholson to send him the original receipts so he could check them.

- [54] This theme in the emails about the progress of construction corresponds with the viva voce testimony of Mr. Nicholson, who testified that at least twice over the spring of 2017, he had to stop construction at Lot 2 until Mr. Su paid for the work already performed. Mr. Nicholson conceded in cross-examination that there was nothing in the building contracting expressly requiring Mr. Su to make payments as the work progressed. Mr. Su also gave evidence about this, although his take on the situation was that he was forced to make payments to get Mr. Nicholson to finish the job. In cross-examination, Mr. Su agreed that throughout the first five months of 2017, he repeatedly promised Mr. Nicholson that he would be paid for the work.
- [55] To return to the emails, the correspondence about payment was tied to discussions about the status of Mr. Su's financing. This, in turn, was tied to discussion about the building contract. These topics first arose in an email dated 8 February 2017, in which Mr. Su told Mr. Nicholson that Mr. Wang from the bank called to say that the contract did not meet the bank's requirements. I will discuss the details of the building contract below. Staying with the issue of bank financing for the time being, the emails reflect continuing efforts by Mr. Su to finalize his bank financing throughout February and into March. The tension between Mr. Nicholson and Mr. Su on this topic appeared to come to a head in an email exchange on 6 to 7 March 2017, in which Mr. Su offered an explanation for why the mortgage approval had not been obtained yet, and Mr. Nicholson replied by saying he fully understood what happened, namely that Mr. Su did not have his financing lined up before asking Mr. Nicholson to start building. Mr. Su replied that he wanted to meet with Mr. Nicholson face to face and concluded by saying, "rest assured that I will pay you".
- [56] I should note that in cross-examination at trial, Mr. Nicholson initially denied knowing what kind of mortgage Mr. Su was arranging with the bank. However, when confronted with the emails discussing financing, Mr. Nicholson had to concede that he was aware at the time that Mr. Su was negotiating a construction mortgage.
- [57] It appears that Mr. Su received mortgage approval some time in early April 2017, although the mortgage was not formally registered against the title to Lot 2 until 25 April 2017. From early April onward, Mr. Su provided bank drafts to Mr. Nicholson on a periodic basis as the construction progressed. There were continuing email exchanges in which Mr. Nicholson asked for further advances of funds while Mr. Su made demands regarding the status of the construction, as discussed above.

## The Building Contract

- [58] In the course of his testimony, Mr. Nicholson identified a written Building Contract, signed by Mr. Nicholson on behalf of 345 Builders and Mr. Su on his own behalf (the "Building Contract"). This document, which is undated, reads as follows:

Building Contract

agreement dated

Between: 345 Builders Ltd

(Hereinafter the builder)

And: Nan Su

(Hereinafter the owner)

The 'owner' is or will be the owner of the following land

Legal: Lot 2, Section 2, Renfrew Dist. Plan VIP83339

a consideration of the building work that is to follow for the proposed residence the agreement is as follows:

1. The amount of 12% of all labour and materials will be paid to the builder. (Excluding the labour that the builder supplies). An estimated price is \$140 per square foot. House is 1444 sq'. Total estimated price \$202,160.
2. Construction has started 2 December 2016. Estimated completion will be April 1 2017.
3. Any changes to the plans after this contract has been signed will be paid for by hourly charge which is \$50 per hour.
4. The builder and employees of the builder are fully covered under Workmen's Compensation guidelines. House is covered under New Home warranty with Travelers Guarantee.
5. The builder agrees to build everything up to the standard of the British Columbia Building Code.
6. All prices are subject to GST.

Building Contractor

x \_\_\_\_\_

Signature of Mr. Nicholson

Owner

x \_\_\_\_\_

**Signature of Mr. Su**

[59] In chief, Mr. Nicholson testified that the contract "had been shown" to Mr. Su some time prior to 2 December 2016. Mr. Nicholson said it was a standard form contract, similar to the one he always uses, and that his practice was not to start construction until a contract is in place. As to when it was signed, Mr. Nicholson testified in chief that after he showed it to Mr.

Su, the two of them signed it at the building site, some time in early to mid December 2016, less than two weeks after the work started. I find that cannot be so, because other evidence referred to below indicates that the version initially provided to the bank lacked certain elements that are present in the Building Contract as tendered in evidence at trial. In cross-examination, it was suggested to Mr. Nicholson that the contract was not signed on site, but rather while the parties were sitting in a parked car outside a building supply store. Mr. Nicholson said he could not recall that, but was also not prepared to deny it. I find that Mr. Nicholson in fact has no independent recollection of when or where the Building Contract was signed.

- [60] Recall that in an email to Mr. Nicholson on 8 February 2017, Mr. Su reported that Mr. Wang had called to advise that the contract did not meet the bank's requirements, because it had no start date, no finish date, and no signatures. Mr. Su added that "last November you said you would send me the contract but I never got it". Both parties were asked about this email in their trial testimony. Mr. Nicholson said he had no reason to doubt its accuracy, although he could not account for Mr. Su's assertion in the email that the contract provided to the bank had not been signed. For his part, Mr. Su acknowledged sending the email, but he claimed that the reference to November was a typographical error, explaining that he meant to type 1 for January, but mistakenly typed 11 for November. Mr. Su testified that the topic of the building contract first came up in December of 2016 or January of 2017, when he enquired about a mortgage and learned that the bank would require a building contract to approve the financing. I have some difficulty accepting Mr. Su's testimony on this point. I note Mr. Su's reference in the email to discussion about a building contract "last November" would actually fit with the timeline on which the title to Lot 2 was transferred into Mr. Su's name on the understanding that 345 Builders would build a house on the property.
- [61] However, even accepting that the topic of a building contract was discussed between the parties in November of 2016, there is no evidence that the parties actually negotiated and agreed on specific terms of a building contract at that time. Mr. Nicholson testified that the contract "had been shown" to Mr. Su prior to 2 December 2016, but there is no reliable evidence that Mr. Su actually signed a contract before the version of the Building Contract entered into evidence was signed. I find that the parties probably discussed a building contract in November of 2016, but they did not actually agree on terms. Because the Building Contract marked in evidence has a start date, an end date, and signatures, I infer that it did not exist at the time of Mr. Su's email on 8 February 2017. It must have been created and signed at some point after that.
- [62] I infer that the Building Contract that was tendered in evidence was signed by the parties and provided to the bank some time between mid February and mid March of 2017, and it was most likely signed on 14 February 2017. I draw that conclusion based on contemporaneous emails over that time frame. In particular, on 10 February 2017, Mr. Nicholson reported that he would be home on the weekend and they could meet and sign the contract. On 13 February 2017, Mr. Su sent an email to Mr. Nicholson expressing

concern that Term 1 of the Building Contract said Mr. Su had to pay a total estimated price of \$202,160, whereas Term 2 said that all materials were to be paid by the owner. Mr. Su's position was that all he had to pay was \$202,160, and that is what he wanted the contract to say. Mr. Nicholson testified that after receiving this email, he accepted Mr. Su's concern about the reference to materials in Term 2, so he deleted it. Mr. Nicholson did not accept Mr. Su's assertion that all he should have to pay was \$202,160, so no changes were made to Term 1. On 14 February 2017, Mr. Su sent an email indicating that he would be "at the home hardware around 11:50 p.m." This is most likely when the parties met to sign the contract. Indeed, this accords with Mr. Su's testimony that the parties met at the parking lot of a building supply store to sign the contract. In a subsequent email dated 1 March 2017, Mr. Nicholson told Mr. Su that he gave the necessary documents to the bank on 17 February 2017. On 6 March 2017, Mr. Su sent an email confirming his understanding that Mr. Nicholson gave a copy of the contract to the bank "before", and Mr. Su gave another copy "later", but the bank still may not be satisfied. Mr. Su suggested another in-person meeting with Mr. Nicholson to resolve the issues. Finally, in an email on 12 March 2017, Mr. Su reported that he had spoken with the bank on the preceding day, and there would be no problem with the mortgage. On the totality of the evidence, I find it most likely that the Building Contract was signed on 14 February 2017, and it was most certainly signed before Mr. Su's 12 March 2017 email.

- [63] Mr. Su's position at trial was that the initial CPS dated 29 March 2016 applied throughout, and the Building Contract was only signed at the insistence of the bank, for financing purposes. When it was put to Mr. Su in cross-examination that he never once communicated that position to Mr. Nicholson in the many, many emails he sent over the duration of the construction or thereafter, Mr. Su initially did not respond, but later reluctantly agreed. Mr. Su acknowledged signing the Building Contract, and in cross-examination he agreed in principle that when he signs a document making promises, he should be obliged to follow those promises. And although Mr. Su's position was that the Building Contract was only entered into because the bank required it, he also asserted in cross-examination that the Building Contract was a binding agreement between himself and 345 Builders. He agreed that he sent emails quoting the price of \$202,160, a figure which he considered to be binding against the plaintiff. Mr. Su claimed to be ignorant of the word "estimated" in Term 1 of the signed Building Contract, asserting that he was presented with the document and he signed it without realizing it included that term. I do not accept that evidence. It is inconsistent with the content of Mr. Su's own email dated 13 February 2017, which uses the phrase "estimated price of \$202,160". In the same vein, Mr. Su asserted during examination for discovery that he did not understand what the word "estimated" meant because he could not read English. I do not accept that assertion, based on the evidence that Mr. Su had ready access to interpreters throughout his dealings with Mr. Nicholson, and the email referred to above, written by an interpreter on Mr. Su's behalf, suggesting very specific changes to language used in the earlier draft of the Building Contract.

## Invoicing Practices and Billing Inquiries

- [64] Mr. Nicholson testified that he invoiced Mr. Su regularly as the construction progressed, and that on each occasion when he sent an invoice, he also sent a spreadsheet itemizing the work performed and the associated costs. Mr. Nicholson referred in his testimony to the following invoices:
- (a) An invoice dated 30 March 2016, in the amount of \$140,000, for a "deposit". The description on the invoice stated, "Deposit for building house, paying Adrian, and paying bank for lot." In his testimony, Mr. Nicholson volunteered that that he may not have sent Mr. Su a spreadsheet with this invoice. In cross-examination, Mr. Nicholson went further, conceding that he could not remember ever giving Mr. Su a copy of the invoice itself.
  - (b) An invoice dated 3 March 2017, in the amount of \$20,000, for "general construction". The description on the invoice stated, "bill, deposit". Mr. Nicholson testified that he sent this invoice to Mr. Su along with an up-to-date spreadsheet.
  - (c) An invoice dated 3 April 2017, in the amount of \$50,000, for "deposit". The description on the invoice stated, "deposit for house". Mr. Nicholson testified that he sent this invoice to Mr. Su along with an up-to-date spreadsheet. The invoice number on this document is out of sequence with the other invoices. Although it is dated 3 April 2017, the invoice number precedes the numbering for earlier invoices.
  - (d) An invoice dated 20 April 2017, in the amount of \$30,000, for "general construction". Although the date on the invoice was 20 April 2017, the "ship" date was listed as 30 March 2017. The description on the invoice stated, "kitchen and flooring". Mr. Nicholson testified that he sent this invoice to Mr. Su along with an up-to-date spreadsheet.
  - (e) An invoice dated 30 May 2017, in the amount of \$38,603.29, for "general construction". The description on the invoice stated "painting, flooring, kitchen, siding". Again, Mr. Nicholson testified that he sent this invoice to Mr. Su along with an up-to-date spreadsheet.
  - (f) An invoice dated 22 June 2017, in the amount of \$46,414.69, for "general construction". The detailed description stated "final bills for work done". Mr. Nicholson gave evidence that he sent this invoice to Mr. Su along with an updated spreadsheet.
- [65] I have a number of concerns about the accuracy and reliability of these invoices. All of them are quite non-descript. Many are in round numbers, and refer only to deposits. Based on the payment history, described below, some of the invoices were issued before payment was received, but others were issued afterward, and would appear to have been written in round numbers simply to correspond with the amounts of money Mr. Su had paid, rather than reflecting actual work done. One of the invoice numbers is out of sequence with the others, in terms of the dates on which the invoices purport to have been issued. In the end, I do not have any confidence as to when the first four invoices (subparagraphs (a) to (d) above) were issued and what work they actually reflect. With respect to the latter two invoices (subparagraphs (e) and (f) above), I consider it much more likely that they were generated to

reflect actual work done and amounts unpaid as of the date of their issuance. I infer that these final two invoices are cumulative, meaning that the final invoice dated 22 June 2017 in the amount of \$46,434.69, was actually intended to include the unpaid amount of \$38,603.29 from the preceding invoice.

- [66] A more reliable source of evidence with respect to the work performed at various points in time are the contemporaneously created emails, enclosing updated copies of the spreadsheet used by Mr. Nicholson to document the work done and the associated construction costs. These emails, referred to in the trial testimony of both parties, indicate that Mr. Nicholson sent Mr. Su periodic updates on the status of the construction, construction costs, and how those costs were billed to Mr. Su.
- [67] The first such email was sent by Mr. Nicholson to Mr. Su on 3 March 2017. It enclosed a spreadsheet which Mr. Nicholson said "tracks everything as it comes in", plus the 12% commission. Mr. Su replied by saying that he could not "double check the bills", which I infer was an assertion that he did not consider it feasible or realistic to do a line-by-line analysis of the work for which Mr. Nicholson was billing him. Mr. Su indicated in the email that his primary concern at the time was that Mr. Nicholson provide the necessary information to the bank. Mr. Su wrote, "you need money and I need money too", and "it all depends on the pace".
- [68] In an email exchange from 14 to 16 April 2017, Mr. Su asked how much he now had to pay and when he could move in. Mr. Nicholson responded that another \$50,000 payment would bring the house "really close to finished" and "the rest will have to wait till after occupancy to find out the final bill". Mr. Su replied quoting the Building Contract square footage of 1,444, estimated price per square foot of \$14, total price of \$202,160, and completion date of 1 April 2017. Mr. Su said he had already paid \$170,000 and should only have to pay another \$32,160 before completion. Mr. Su asked Mr. Nicholson to "double check" the amounts. Mr. Nicholson responded by sending Mr. Su an updated copy of the spreadsheet for the project showing the "work done so far".
- [69] On 28 May 2017, Mr. Nicholson sent an email telling Mr. Su he needed more money, and attaching an updated spreadsheet. Mr. Nicholson indicated that Mr. Su currently owed \$38,603.23. He went on to explain that his company had paid out \$75,363.25 for the lot and \$223,240.04 for construction, for a total of \$298,603.29. Mr. Nicholson also gave an explanation for some of the things that went "over budget", including the deeper foundation and crawl space (\$6,200), colored metal roof (\$570), extra wide siding (\$980), relocation of the septic tank with a pump system (\$3,200), extension of the roof connecting the main room to the kitchen (\$1,200), crown moulding in the master bedroom (\$600), front deck and stairs (\$5,700), central vacuum system (\$650), and premium countertops (\$7,000).
- [70] At trial, the plaintiff called evidence from a number of individuals who worked on Mr. Su's house to give evidence about the design changes over the course of the construction. Mr. Cummaert, a carpenter, gave clear evidence about Mr. Su's instructions to increase the size

of the crawl space and the overall height of the house, the roof extension, and the addition of a deck. Mr. Cummaert testified that these changes, made during the course of the construction, required additional material and labour. Mr. Schwartz, another carpenter, and Mr. Holder, a labourer, also gave testimony about the additional work and materials associated with changes in the size of the crawl space and height of the walls. Mr. Gardiner, a designer and installer of septic systems, testified about the increased cost associated with a change in the location of the septic field. It had to be moved to meet regulatory standards, and because of a change in elevation the repositioned septic system required a pump that was not contemplated in the original plans, resulting in additional costs of some \$2,500 to \$3,500.

- [71] On 29 May 2017, Mr. Nicholson sent an email indicating that he needed the next payment. He said he could not keep working until he received another payment from Mr. Su.
- [72] On 31 May 2017 Mr. Su sent an email asking for the receipts and asking how much it would cost to finish the house. Mr. Nicholson responded in an email dated 1 June 2017, stating that he would have his accountant scan the receipts and send them to Mr. Su. With regard to the costs to finish the house, Mr. Nicholson gave an estimate of additional costs for tiling (\$3,500), plumbing (\$5,000), countertops (\$1,000 to \$7,000), and labour (\$1,000), in addition to the currently unpaid balance of \$38,603.23. I note that this amount, \$38,603.23, corresponds with the outstanding amount indicated in the second last invoice, described in subparagraph 64(e) above.

### Payments Made by Mr. Su

- [73] The evidence indicates that in Mr. Su paid the following amounts to Terraform and 345 Builders in connection with his acquisition of Lot 2 and subsequent construction of the residence:

Date

Recipient /

Beneficiary

Payment Method

Purpose

Amount

02 Mar 2016

Terraform

RBC Draft

Lot 2 Deposit

\$ 10,000.00

20 Mar 2016

345 Builders

RBC Draft

Builder's terms Deposit

\$ 140,000.00

15 Nov 2016

Terraform

RBC Draft

Lot 2 Purchase

\$ 110,000.00

15 Nov 2016

Terraform

RBC Draft

Lot 2 Purchase

\$ 39,855.15

01 Mar 2017

345 Builders

BMO Draft

Construction

\$ 50,000.00

10 Apr 2017

345 Builders

BMO Draft

Construction

\$ 20,000.00

19 Apr 2017

345 Builders

BMO Draft

Construction

\$ 30,000.00

01 May 2017

345 Builders

BMO Cheque

Construction

\$ 20,000.00

06 May 2017

345 Builders

BMO Draft

Construction

\$ 20,000.00

Total

\$ 439,855.15

### **The Builders Lien**

[74] On 27 June 2017, Mr. Nicholson sent an email to Mr. Su advising that he had placed a lien on the property and that the construction insurance would run out the next day. Mr. Nicholson asked Mr. Su to pay the outstanding balance.

[75] A copy of the builders lien, filed with the land title office on 23 June 2017, was marked in evidence. In the lien, 345 Builders claims that as of 22 June 2017, the unpaid amount that Mr. Su owed was \$46,414.69, which corresponds with the outstanding amount in the final invoice as described in subparagraph 64(f) above.

### **Further Correspondence**

[76] On 5 August 2017, Mr. Nicholson sent Mr. Su an email indicating that he would not be able to get a final occupancy permit until Mr. Nicholson, as the builder, approved the work. He said if Mr. Su paid the outstanding amount, he would look after the final approval.

[77] On 6 August 2017, Mr. Nicholson sent an email setting out his position that the parties were working under a cost plus contract. Mr. Nicholson went on to explain his position on the significance of the \$140 per square foot estimate, and the effect of additions and alterations to the original house design. Mr. Su responded with an email stating his position that he has

already paid more than the "contract price", and the total now demanded by Mr. Nicholson was "against [his] promise". In cross-examination, Mr. Su was repeatedly asked what "contract" he was referring to when he used the term "contract price". Mr. Su initially said it was the 29 March 2016 contract of purchase and sale, although he had no answer when it was put to him that he never mentioned this contract to Mr. Nicholson in emails over the course of the construction. Mr. Su reverted to saying that his reference to "contract price" was a reference to either the 29 March 2016 CPS or the Building Contract. Mr. Su's position was that, in either case, he had already paid Mr. Nicholson more than the "contract price".

### **Revised Quantum of the Plaintiff's Claim**

- [78] At trial, Mr. Nicholson testified that the amount claimed by 345 Builders in its builders lien is inaccurate in several respects. Some of Mr. Nicholson's adjustments were in Mr. Su's favour and others were to his detriment. First, Mr. Nicholson indicated that he failed to include the \$30,000 payment that Mr. Su made by cheque on 1 May 2017. Second, Mr. Nicholson explained that he failed to include receipts for a number of expenditures related to the Lot 2 construction, totalling \$9,669.12.
- [79] Mr. Nicholson testified, with the benefit of an aid memoire or tabulation document that was marked as an exhibit for identification only, that the revised quantum of the plaintiff's claim was \$39,160.50. The basis for that calculation is set out in my analysis below.
- [80] Mr. Nicholson conceded in cross-examination that the net result of his revised approach is that 345 Builders is now claiming some \$8,000 less than the amount asserted in its builders lien. By my calculation, the difference between the lien amount of \$46,411.69 and the plaintiff's revised claim amount of \$39,160.50 is actually \$7,251.19.

### **Completion of the Construction by Mr. Su**

- [81] Mr. Su testified that after the falling out with Mr. Nicholson, he took steps to finish construction of his house on his own. He tendered in evidence a series of contractor bills and receipts for materials and labour costs incurred from 12 December 2017 to 28 March 2018, totalling \$25,632.17.
- [82] On 28 February 2018, the CRD issued a certificate of occupancy confirming that construction was complete and ready for occupancy. I should note that in cross-examination, Mr. Su agreed that he had been living in the house from late April of 2017 onward.
- [83] Mr. Su also presented evidence with respect to alleged deficiencies in the construction. However, I did not find that evidence convincing because the defendant establish that the work was actually deficient in the sense that it was below the quality of workmanship normally expected in residential construction.

## Analysis

### (1) Nature and Status of the CPS

- [84] In closing argument, counsel for Ms. Su was critical of the fact that the plaintiff's notice of civil claim makes no reference to the CPS, under which 345 Builders was to be the seller and Mr. Su was to be the buyer with respect to both Lot 2 and a fully-constructed house. In the response to counterclaim, the plaintiff expressly denied that the house construction was governed by the CPS. The plaintiff's position, as I understand it, is that the CPS was never completed, or lapsed, making it legally irrelevant. Thus, the plaintiff's claim against the defendant is based principally if not entirely on the Building Contract. On the other hand, the defendant's case rests principally on the contention that the original CPS continued to apply throughout, and that the plaintiff breached it by failing to deliver a fully-constructed house, with a valid occupancy permit, for \$200,000.
- [85] Even though the CPS is the focus of the defendant's claim and not the plaintiff's claim, it makes most sense to address it first, because the CPS arose first in point of time. If the defendant is right about the legal status and character of the CPS, this could be determinative of the entire action.
- [86] The CPS provided that 345 Builders would sell Lot 2, together with a completed house as described in the "building plans" attached as addendum to the contract, for \$400,000. It is common ground that of this amount, \$200,000 was for the purchase of Lot 2, and \$200,000 was for the constructed house.
- [87] Relying on the testimony of Mr. Nicholson and Mr. Fedosenko as to what was said at the meeting leading up to the execution of the CPS, the plaintiff says the \$200,000 quote for the house was an estimate rather than a fixed price. However, term 18 of the CPS states that the written agreement constituted the entire contract between the parties, and there were no other "representations, warranties, guarantees or promises" made by either party. I therefore agree with counsel for Mr. Su that the doctrine of "merger" applies here, because the preliminary discussions of the parties were superseded by a written contract that contained a clear "entire agreement clause", as discussed in *Precursor Capital Corp. v. HydrRx Farms Ltd.*, 2018 BCSC 1150 at paras. 42-51. On this basis, I conclude that the CPS included an agreement for 345 Builders to provide a fully-constructed house, built in accordance with the attached building plans, for a fixed price of \$200,000.
- [88] However, I must also note that the CPS was silent as to the materials and quality of finishing to be used in the construction. The attached building plans describe the dimensions and layout of the house, but do not include any specifications as to the materials or quality of finishing. It is possible that the absence of any reference to materials and quality of finishing, or any mechanism for determining these things, was so fundamental as to reflect a failure of the parties to form a meeting minds on one of the essential elements of a construction contract, namely the "nature of the work", as discussed in *Fame Construction*. Specificity on such matters is particularly important in a fixed price contract, where there is

an inherent tension between the price element of the agreement on the one hand and the quality of the materials and finishing on the other. However, this point was not argued before me and I need not address it in view of the conclusion I have reached below.

- [89] The focus of the argument in closing submissions had to do with the completion date of 21 July 2016 as specified in Term 4 of the CPS. The plaintiff's position is that closing date came and went, there was no agreement to extend it, and the defendant was not ready, willing and able to complete, thus the contract lapsed and neither party had any further obligation under it.
- [90] The defendant's response is that the contract did not complete because of the plaintiff's failure to even begin construction of the house by the completion date, due to problems the plaintiff encountered in obtaining a building permit. On this basis, defendant's counsel submits that while the plaintiff had repudiated the CPS, the defendant did not elect to terminate it, choosing instead to proceed with the contract because he still wanted to buy the property with a constructed house on it, despite the passage of the 21 July 2016 completion date.
- [91] The defendant's submission fits with the jurisprudence on repudiation and its effect. As explained in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at para. 40, "the effect of repudiation depends on the election made by the non-repudiating party"; if the non-repudiating party treats the contract as still being in force and effect, the contract will continue to bind both sides, with either party having "the right to sue for past or future breaches".
- [92] However, the facts of this case do not support a finding that 345 Builders "repudiated" the CPS. The contract did not complete on the closing date because neither party was in a position to fulfill its obligations on that date. 345 Builders was not in a position to provide Mr. Su with title to Lot 2 together with a fully constructed house, and Mr. Su was not in a position to pay the balance of the purchase price.
- [93] The general rule is that where neither party is able to close on the agreed-upon completion date, the contract remains in force and either party is entitled to set a new date for completion: *Norfolk v. Aikens*, (1989) 64 D.L.R. (4th) 1 (B.C.C.A.) [*Norfolk*] at p. 22. However, party A can only hold party B to a new completion date where party A is ready, willing, and able to fulfill its own obligations under the contract: *Norfolk* at p. 24; *Toor v. Dhillon*, 2020 BCCA 137 at paras. 69-88. In *RPS Construction Ltd. v. Goraya*, 2009 BCCA 288 at para. 34, Mr. Justice Chiasson questioned whether some of these propositions were applicable to a later claim for damages rather than an immediate claim for specific performance, but then added, "[t]hat is not to say the ability of a purchaser to complete is not relevant".
- [94] In the case at bar, there was no formal agreement for a new completion date, and neither party notified the other of an intention to set one. I find that this was because the parties were effectively at an impasse. 345 Builders could not obtain a building permit to construct the house due to the demands of the CRD for a restrictive covenant against the title based on

concerns about the slope stability, and Mr. Su could not obtain bank financing to complete the transaction without a fully-constructed house on the property. In this context, an important consideration is whether the inability to complete was a function of the plaintiff's breach, or alternatively a function of events beyond the control of either party as contemplated by the doctrine of frustration.

- [95] Counsel for Mr. Su says the inability of 345 Builders to obtain a building permit was a function of its own conduct, in refusing to register a restrictive covenant against the title to Lot 2. On this basis, counsel submits that this was a repudiation or anticipatory breach of the contract by the plaintiff. I do not agree. I find that the contract was effectively frustrated by the actions of a third party, with respect to circumstances not in the contemplation of the parties, namely the CRD's insistence on a restrictive covenant to prevent the removal of trees near or on the slope, based on concerns about bank instability as reflected in a geotechnical report commissioned by Mr. Nicholson during the building permit application process. Frustration occurs where a "supervening event" arises for which the parties have made no provision, such that performance of the contract becomes a thing which is "radically different" from that originally agreed upon: *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58 at paras. 53, 55. That is what happened in this case.
- [96] Defendant's counsel submits that after the original completion date passed, the parties carried on as if nothing changed, and the transfer of title to Mr. Su on 15 November 2016 was "a mere variation" of the original CPS under which 345 Builders was the seller and Mr. Su was the buyer. I do not agree with this submission, for several reasons.
- [97] To begin with, I do not agree that the parties carried on as if nothing changed after the passing of the 21 July 2016 completion date. It is true that Mr. Su's deposit was not returned, but I accept the evidence of Mr. Fedosenko that this was because he had instructions from all parties to hold the deposit, and Mr. Su in particular was interested in making "another arrangement" to acquire the lot and build his house. Although Mr. Nicholson stated in examination for discovery that he "continued working" as if the CPS were still in place, that was not an entirely accurate description of what was happening. For one thing, Mr. Nicholson was unable to do anything beyond mere preparatory work on Lot 2, because of the continuing inability to get a building permit. Moreover, with the assistance of Mr. Fedosenko and latterly Mr. Farley, Mr. Su and Mr. Nicholson were considering a different kind of transaction that would allow the parties to achieve the commonly desired end result.
- [98] That leads me to the next point, which is counsel's assertion that the transfer of title that took place on 15 November 2016 was a "mere variation" of the 29 March 2016 CPS. I do not agree. The CPS was part of a builder's terms arrangement in which the developer (Terraform) would continue to hold title to the lot, and only after construction was complete would the builder (345 Builders) acquire title from the developer, and then transfer the lot together with a fully constructed house to the customer (Mr. Su). That is not what occurred on 15 November 2016, when Mr. Su acquired title to Lot 2 directly from Terraform, on the understanding that 345 Builders would then build the house. It was no longer a builder's

terms arrangement. It was, instead, a more conventional arrangement in which Mr. Su first acquired title to the land from Terraform, followed by a separate arrangement in which 345 Builders would construct the house for Mr. Su.

- [99] The next question is whether the fixed price construction portion of the CPS somehow survived this metamorphosis. I find that it did not. I have concluded that the CPS as originally agreed upon by the parties came to an end under the doctrine of frustration. A new deal was arranged in which Mr. Su acquired the title to Lot 2 directly from Terraform. At that point, the parties had a general understanding that 345 Builders would build the house for Mr. Su, but there was no meeting of the minds on the terms of the construction work.
- [100] At trial, Mr. Su maintained that throughout his dealings with Mr. Nicholson, he believed that 345 Builders was committed to building the house for a fixed price of \$200,000, based on the house construction component of the CPS. I do not accept that Mr. Su honestly believed that to be the case. It is inconsistent with Mr. Su's conduct in persistently asking Mr. Nicholson to use the "cheapest" materials and finishing in the course of the construction, and his offer to do work at the site to reduce the overall cost; if Mr. Su believed that the builder was truly obliged to build the house for a fixed price of \$200,000, he would not have been particularly concerned about construction costs, materials, and finishing. Moreover, and perhaps more importantly, throughout the spring of 2017, when Mr. Su and Mr. Nicholson were embroiled in a dispute about how much Mr. Su still owed, Mr. Su repeatedly referred to the Building Contract, taking that position that he was not obliged to pay any more than \$202,160, which is the "estimate" specified in Term 1 of the Building Contract. Mr. Su made no mention of the CPS, or the \$200,000 price governing the house construction component of that contract.
- [101] I find that by the time construction of Mr. Su's house began in earnest on 2 December 2016, the parties had no firm agreement on the essential elements of a building contract. In *Fame Construction Ltd.*, Mr. Justice Smith explained at para. 47 that the essential elements of a construction contract are: (i) the parties, (ii) the subject matter, (iii) the time for performance, and (iv) the price. There is "no enforceable contract if the parties fail to agree on any one of these essential elements". In the present case, the parties had no agreement on elements (iii) and (iv). I will address each of these points below.
- [102] The parties had no meeting of the minds on the essential element of the time for performance. It is easy enough to infer the existence of an implied agreement between 345 Builders and Mr. Su that the construction was to begin more or less immediately after registration of the restrictive covenant and subsequent issuance of the building permit. However, the parties had no discussion much less agreement on the completion date for the construction.
- [103] Nor did the parties have any meeting of the minds on the essential element of price. Relying on the terms of the CPS, Mr. Su felt he had a commitment for 345 Builders to construct the house for a fixed price of \$200,000, but Mr. Nicholson had asserted, even

prior to the CPS, that the \$200,000 figure was only an estimate based on standard finishing, with the possibility that the total price could increase based on design changes or more expensive finishing. And since the "complete agreement" provision in the CPS no longer applied, there is no basis for saying that the pre-contract discussions between Mr. Nicholson and Mr. Su were "irrelevant" under the doctrine of merger. I appreciate that under the law of contract, the question is not the subjective belief of the parties. The test for determining whether the parties formed a consensus ad item is an objective one, requiring a consideration of the outward expressions of the intent of the parties: *Greenhill Properties (1977) Ltd. v. Sandcastle Recreation Centre Ltd.*, 1998 CanLII 4687 (B.C.S.C.) [*Greenhill Properties*] at para. 89; see also *All Out Contracting Ltd. v. Gourlay*, 2020 BCSC 481 [*All Out Contracting*] at para. 31. I find that as of 15 November 2016, there was no such agreement on the element of price.

- [104] The defendant relies on *RPS Construction Ltd. v. Goraya*, 2010 BCSC 835 [*RPS Construction*], a decision on a re-trial following the Court of Appeal decision cited above. The case involved an agreement similar to the builder's terms arrangement in the present case. Originally, the plaintiff RPS was to acquire a bare lot from a developer, and would then sell the lot together with a constructed house to the defendant Mr. Goraya, with a single closing date for both the land transfer and the completed construction. Later, when RPS encountered financial difficulty, Mr. Goraya agreed to purchase the lot directly from the developer, on the understanding that RPS would thereafter build the house as per the original agreement. The parties later ended up in a dispute about the construction portion of the contract. In these circumstances, Mr. Justice Truscott held that despite the change in the structure of the transaction for acquisition of the lot, the original contract, including the terms governing the house construction remained in place. This aspect of the analysis is first discussed at para. 30-33 of Truscott J.'s decision.
- [105] Counsel for Mr. Su says RPS Construction is more or less on all fours with the case at bar, since it involved a land transfer and a building contract with a single completion date, where circumstances later changed and the customer ended up buying the bare lot directly from the developer up front, with the construction portion of the agreement to be performed later. Despite this, Truscott J. held that the original agreement, including the terms governing the house construction, survived and continued to bind both parties. However, in my view that conclusion very much turned on the specific facts, and in particular Truscott J.'s finding at para. 32 that, on "the totality of the evidence", "both parties agreed to the extensions necessary to continue and to complete the construction" and they "extended the completion date on the contract until completion of the construction". By contrast, in the present case there was never any agreement to extend the completion date, the party now seeking to enforce the original contract was not ready, willing, and able to fulfill its obligations under it, and there was in fact no discussion much less agreement to a completion date for the construction.

- [106] In summary, my conclusion is that the completion date for the CPS lapsed, there was no agreement to extend it, and the contract was frustrated by a supervening event not within the contemplation of the parties. The parties worked out a new deal for Mr. Su to acquire Lot 2. Thereafter, Mr. Nicholson and Mr. Su had a general understanding that 345 Builders would construct the house, but they had no meeting of the minds on the essential elements of a building contract.
- [107] I should add that, by 15 November 2016, Mr. Su had paid out a total of \$299,885 in the course of his dealings with Terraform, Church Hill, and Mr. Su. After accounting for amounts paid for Lot 2, and to buy out Church Hill's interest, 345 Builders had at least \$69,500 of Mr. Su's money, possibly more depending on a determination of who bore ultimate responsibility for the total of \$15,500 paid to buy out Church Hill's interest. At this point, 345 Builders was effectively holding the excess funds in trust for Mr. Su, for use in the construction of his house. This is indeed how Mr. Nicholson treated the money, using it to cover costs construction, and then accounting to Mr. Su on an ongoing basis as to his use of the funds.

(2) Nature and Status of the Building Contract

- [108] I find that from late November 2016 until the Building Contract was signed on or about 17 February 2017, the parties did not have a legally binding agreement governing their relationship. The fact that the parties agree to work together on a building project is not enough to create an enforceable contract: *Rafal v. Legaspi*, 2007 BCSC 1944 at para. 21-22. If the matter had come to court in those circumstances, it might well have been governed by the law of quantum meruit.
- [109] The parties may or may not have carried on in this fashion through to the point of their falling out, were it not for the bank's insistence that Mr. Su have a contract in place as a requirement of the Mr. Su's mortgage. Mr. Nicholson testified, and I accept, that he had some discussion with Mr. Su about a building contract, and that he sent Mr. Su a copy of "standard form" contract that he used. This was likely in late November or early December of 2016. Mr. Nicholson suggested in his testimony that the parties had a signed building contract in place within a few weeks of construction, but I cannot accept that testimony because it is clear on the totality of the evidence that the version of the Building Contract tendered in evidence was not signed until on or about 14 February 2017.
- [110] There is some evidence, in the form of an email from Mr. Su to Mr. Nicholson, that the parties had discussed a building contract as far back as November 2016. Mr. Su testified that the reference to November in that email was mistaken and he meant to say January. I find that unlikely, but in the end it matters not because there is no reliable evidence that the parties discussed the actual terms of the contract, much less reached a binding agreement on those terms, until the bank insisted that they do so.
- [111] Mr. Su testified that the Building Contract was only put in place for the purposes of his securing bank financing. For his part, Mr. Nicholson conceded in his examination for discovery that a principal reason for the Building Contract was the bank's insistence on

having one as part of Mr. Su's mortgage approval process, although Mr. Nicholson added that the Building Contract was also for the benefit and protection of both parties. I accept that the bank's insistence on a written contract was the catalyst that forced the parties to make a formal agreement, but that does not change the fact that they ultimately did enter an agreement. This is not a situation where the Building Contract was a mere sham or prop to satisfy the bank. I find that the parties negotiated and agreed on the terms of the Building Contract, both with an intention to be bound by it.

- [112] Mr. Su argues that the Building Contract is invalid due to a lack of consideration. Counsel submitted that where two parties enter into a binding contract, one party's subsequent attempt to impose additional and onerous new terms on the other by entering into a new contract will generally fail based on the maxim that "past consideration is no consideration", as discussed in *Delaney v. Cascade River Holidays* (1983), 44 B.C.L.R. 24 (C.A.) at para. 16 per Nemetz C.J.B.C. in dissent, and *First Royal Enterprises Ltd. v. Armadillio's Restaurant Ltd.*, 1994 CanLII 792 (B.C.S.C.) at para. 23, appeal allowed in part (1995), 15 B.C.L.R. (3d) 254 (C.A.). I have no quarrel with that legal proposition, but I find that it has no application in this case based on my conclusion as to the status of the original contract, the CPS. The CPS ceased to bind the parties when the completion date came and went, the contract was frustrated, and the parties worked out a new deal for the transfer of Lot 4. They had no agreement on the essential terms of a construction contract by the time the building permit was issued on 2 December 2021. On those findings, I reject Mr. Su's argument that the Building Contract is invalid due to a lack of consideration.
- [113] Having found that that the parties were bound by the Building Contract, a further issue arises as to whether the agreement is properly characterized as a fixed price contract, a cost-plus contract, or something in between.
- [114] The starting point for the analysis is the text of the Building Contract itself. Terms 1 and 3 speak to the issue of remuneration. Term 1 starts by saying "[t]he amount of all labour and materials will be paid to the builder", excluding labour supplied by the builder. This language clearly implies a cost plus building arrangement. However, Term 1 then refers to an "estimated price" of \$140 per square foot, with a total of 1,444 square feet, for a total of \$202,160. The inclusion of this language suggests something other than an exclusively cost plus fee structure. This view is reinforced somewhat by the text of Term 3, which states that any changes to the plans after the contract has been signed will be paid for at a rate of \$50 per hour. In a basic cost plus contract, it would be unnecessary to include terms of remuneration for changes made during the construction, since under a cost plus fee structure the customer would be billed for all labour and materials, plus the markup, for all of the work, including any changes made during the course of construction. So this is another aspect of the written agreement suggesting something other than an exclusively cost plus fee structure.

- [115] The initial discussions between Mr. Nicholson and Mr. Su in March of 2016, and their discussions during the negotiation and drafting of the Building Contract, included both cost plus discussions and discussions about estimates.
- [116] For his part, Mr. Nicholson testified, and I accept, that he told Mr. Su his company would do the work on a cost plus basis. However, even on Mr. Nicholson's evidence, there was also extensive discussion about a price estimate based on Mr. Su's original building design. Mr. Nicholson repeatedly told Mr. Su that he could build the house for \$140 per square foot, but that the price could end up being lower or higher depending on the quality of materials and any changes to the design. Mr. Nicholson said he could complete the job at \$140 per square foot, with "middle of the road" finishing, and no design changes. He made it clear that if Mr. Su opted for more expensive finishing, or if there were design changes, the cost would be more than \$140 per square foot.
- [117] Turning to the evidence of Mr. Su, he made it clear from the outset that his budget was \$400,000 for both the land and the house, and that was more or less all he could afford. Mr. Su also testified that Mr. Nicholson committed to building the house for \$140 per square foot, but I find that Mr. Su was selective in what he chose to hear or acknowledge; he seized on the figure of \$200,000 as if it were a firm price quote, ignoring Mr. Nicholson's statements that this was only an estimate.
- [118] In *C.J. Smith Contracting Ltd. v. Kazem-Pour*, 2014 BCSC 689 [C.J. Smith Contracting] at para. 79, Madam Justice Adair set out a "helpful summary of the factors often considered by the courts in considering the nature of a building contract", taken from *Strait Construction Ltd. v. Odar*, 2006 BCSC 690 at para. 18, affirmed 2007 BCCA 437. I would adapt that list of factors and apply it to the present case as follows:
1. Whether the agreement provided for a percentage of the project cost as a fee to the contractor. The Building Contract expressly provided for a 12% markup on all materials and labor, excluding the builder's own labor. This factor weighs in favour of a cost plus characterization.
  2. Whether price was of overriding importance for the owner and was that communicated to the contractor. There was evidence that price was of overriding importance to Mr. Su and this was indeed communicated to Mr. Nicholson. This factor weighs in favour of a finding that there was a fixed price element to the contract.
  3. Whether an estimate was provided and whether the owner relied on it. Mr. Nicholson gave an estimate of \$140 per square foot in his initial discussions with Mr. Su, and he gave a firm figure of \$200,000 for the construction component of the builder's terms arrangement during the negotiation of the CPS. To be clear, Mr. Nicholson made it clear throughout that these figures were estimates based on standard finishing and with no design changes. An estimate was also included in Term 1 of the Building Contract. There is also evidence that Mr. Su relied on the estimate, although I find that he seized on it without regard to the qualifications expressed by Mr. Nicholson. This factor suggests that the contract included a

kind of conditional fixed price component, or at least an estimate component.

4. Whether the owner required the contractor to design a project at a specified cost, or sought assurances as to what the project would cost. Mr. Su did furnish an initial floor plan, a variation of which was appended to the original CPS. The parties clearly had that floor plan in mind when they entered into the written Building Contract, although changes were made as the construction progressed. This factor does not point strongly in one direction or the other.
5. Whether the contractor paid for the materials and labour and then billed the owner on a regular basis for the work done. I find that Mr. Nicholson did in fact pay for the materials and send invoices (which were quite vague and generally unhelpful), together with detailed spreadsheets, on an ongoing basis. This factor weighs in favour of a cost plus characterization.
6. Whether the contractor made it clear that it was not assuming any of the risk that the final price would exceed the estimate. Mr. Nicholson did in fact make it clear throughout the process that Mr. Su would be responsible for any cost increases attributable to more expensive finishing and design changes, and Term 3 of the Building Contract specified that the customer would be billed for changes in the course of construction. This tends to weigh in favour treating the estimate in Term 1 as a form of price quote or ceiling on cost, subject to subject to billing for additional work attributable to design changes. I say this because under a straight cost plus arrangement the customer would be billed for all materials, labor, and markups, including those associated with design changes, making it unnecessary for the builder to spell out the consequence of design changes.
7. Whether the contractor provided the owner with information regarding rates for labour and equipment rental etc. The spreadsheets that Mr. Nicholson sent periodically to Mr. Su included information about the status of the construction, and the costs or rates being charged to Mr. Su, as the work progressed. This factor weighs in favour of a cost plus characterization.

[119] The reference to an "estimate" in Term 1 of the Building Contract requires some further consideration. There is authority for the notion that a reasonably informed estimate furnished by a builder holding him or herself out to have sufficient knowledge and skill can in some circumstances form the basis of a contractual term regarding price: *Wolski v. Puckett*, 2006 BCSC 977 at para. 55 [*Wolski*]; *Cherry Homes Ltd. v. Perler*, 2004 BCSC 28 [*Cherry Homes*] at paras. 76-78. However, one must always have in mind that the term "estimate" is by its very nature different from a definitive fixed price. Thus, the mere inclusion of the term "estimate" in the written contract is not necessarily a basis for holding the builder to that figure.

[120] As stated in *Golder Associates Ltd. v. Mill Creek Developments Ltd. et. al.*, 2004 BCSC 665 [*Golder Associates*] at para. 20, "[w]hile an estimate for the cost of services to be provided is not a guarantee or warranty at law, it may have contractual effect, in effect setting a limit

beyond which fees may not go", citing *Price v. Roberts and Muir* (1987), 19 B.C.L.R. (2d) 75 (B.C.C.). Mr. Justice Masuhara went on to discuss some of the reasons why estimates may not be binding, including the possibility that the scope of the work may expand, or that unforeseen circumstances may arise, in addition to the potential vagueness of the estimate itself, which may call for a "substantial margin of error": see *Golder Associates* at para. 21, citing *Kidd v. Mississauga Hydro Electric Commission et. al.* (1979), 97 D.L.R. (3d) 535 (H.C.J.) at p. 540. Later in the decision, Justice Masuhara referred to case law discussing the "15% leeway rule" sometimes applied to estimates in the construction context.

- [121] In the present case, Mr. Nicholson held himself out to Mr. Su as an experienced builder. He received a preliminary design of the house, on the basis of which he offered an estimate of \$140 per square foot, subject to certain qualifications. Mr. Nicholson later requested and received a revised design, less than 1,400 square feet, to bring the total estimated cost under the \$200,000 figure that went into the CPS. At the time the parties negotiated the CPS, Mr. Su repeated certain conditions or qualifications on the \$200,000 estimate that went into that contract. Of course, the CPS contained a "complete agreement" clause barring any reliance on those representations as terms of the CPS when it was in force, but the CPS was frustrated and ceased to bind the parties. Moving forward to the signed version of the Building Contract, it included the \$140 per square foot estimate, along with a total estimated cost of \$202,160 based on a square footage of 1,444. However, another clause in the same term of the Building Contract provided for a cost plus fee structure.
- [122] Considering the text of the Building Contract in light of all of the factors taken from *C.J. Smith Contracting*, my conclusion as to the characterization of the Building Contract is as follows. I find that the parties agreed to a cost plus construction contract, but the contract also included an estimate clause that must be interpreted to have some contractual effect. I would interpret the estimate clause to have two implied limitations. First, it must be interpreted to permit price increases for premium materials and finishing, and for design changes. Second, given its very nature as an estimate rather than a fixed price quote, the lack of specificity in the floor plans that formed the basis for the initial \$140 per square foot estimate, and the overall structure of the Building Contract which also included a "cost plus" clause, I would interpret the estimate clause to be nothing more than a rough outer limit on the total amount Mr. Su would be required to pay.
- [123] Mr. Su submits that the Building Contract failed to specify the manner and timing of payment. On that basis, counsel submitted that Mr. Su was not required to pay anything to 345 Builders until construction was complete.
- [124] There is authority for the proposition that the conduct of the parties before and during the formation of a contract can assist in the interpretation of the terms of the written contract: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 56-58. In the present case, I find the conduct of the parties to be instructive as to the terms of payment under the contract. When the construction got under way at the beginning of December 2016, Mr. Nicholson initially used the balance of funds on hand from Mr. Su to fund the work. It was

clearly understood between the parties that after those funds ran out, Mr. Su would be expected to make further payments as the construction progressed. Such an understanding can be readily inferred from the conduct of the parties, including Mr. Su's efforts to obtain a mortgage to fund the construction commencing some time in December of 2016 or January of 2017, and the efforts of both parties to finalize the contract so that Mr. Su could obtain funds to pay 345 Builders for the construction on an ongoing basis.

- [125] Against that backdrop, I would interpret the clause stating "[t]he amount of 12% of all labour and materials will be paid to the builder" [underlining added] in Term 1 of the Building Contract to mean that the "owner", Mr. Su, had an obligation to pay for the construction on an ongoing basis. That interpretation fits with the factual matrix, the dealings between the parties, and their expectations at the time that the Building Contract was signed.
- [126] Alternatively, if the text could not reasonably bear that interpretation, then the text of the Building Contract is silent as to the terms of payment. If that is the case, I would rely on the conduct of the parties before, during, and after the signing of the Building Contract as a basis for finding an implied contractual term under which Mr. Su was required to pay on an ongoing basis as the construction progressed. In addition to the pre-contract conduct of the parties as described above, I would also refer here to the billing practices between 345 Builders and Mr. Su after the Building Contract was signed.
- [127] There is case law recognizing that the delivery of invoices by a builder and payment of those invoices by the customer can be compelling evidence of the terms of an agreement. By way of example, in *Greenhill Properties* there was no written contract when the construction work in issue in that case began. The court went on to infer that the parties had a meeting of the minds, and the best evidence as to the agreement on terms of payment came from the builder's invoices, which set out an itemized list of costs, plus an eight percent markup and a three percent overhead fee. On these facts, Mr. Justice Burnyeat reasoned that "the invoices could not have been clearer", and a reasonable person could only believe that the customer had assented to the terms proposed by the builder: *Greenhill Properties* at paras. 92-95. Madam Justice Adair took a similar approach in *C.J. Smith Contracting* at paras. 80, 98-101. Of course, I accept that the significance of invoices will depend on all the circumstances, including the degree of detail in the invoices, and how much they reveal about the builder's fee structure. In the case at bar, the most relevant evidence is not the invoices, which for the most part were pro forma and did not say anything about the plaintiff's fee structure or the terms of payment. What is much more relevant is the contemporaneous email correspondence, in which Mr. Nicholson consistently advised Mr. Su on the status of the work, requested payment, and enclosed spreadsheets setting out a breakdown of the costs. Over the course of a number months, Mr. Su paid the invoices. In my view, even if one were to take the view that the terms of the Building Contract are silent as to the manner of payment, the conduct of the parties, including the plaintiff's billing practices and the defendant's conduct in paying the bills on

an ongoing basis, provides a compelling basis on which to infer an implied contractual term that 345 Builders would invoice Mr. Su, with a supporting spreadsheet, as the work progressed, and Mr. Su would thereafter pay the outstanding amounts.

[128] Mr. Su asserted in his testimony and submitted in closing argument that he had "no choice" but to make the payments Mr. Nicholson demanded of him, otherwise Mr. Nicholson would not have continued with the work. In my view, that position does not accord with the stance Mr. Su consistently took in emails with Mr. Nicholson during the course of the construction. Mr. Su repeatedly gave Mr. Nicholson assurances that if Mr. Nicholson continued to do the work, Mr. Su would continue to pay. That was the very nature of the agreement between the parties. Mr. Su used the promise of continuing payments to get Mr. Nicholson to do the work, and Mr. Nicholson used his ability to stop working to get Mr. Su to make payments. As Mr. Su put it in an email to Mr. Nicholson on 3 March 2017, "You need money and I need money too. It all depends on the pace".

[129] There is nothing surprising or improper about this dialogue, in the context of an agreement including either an express or implied term requiring the customer to pay the builder for the construction work on an ongoing basis. It may well be that Mr. Su felt pressure to pay for the construction as it progressed in order to ensure that there were no delays in the completion of the construction, so that he would be able to take possession of the property, just as Mr. Nicholson assumed risk by continuing the work while amounts were still owing, and felt pressured to continue the work so that he would get paid. That was the nature of the bargain. Mr. Nicholson would not carry the entire cost of the construction until the date of completion. Mr. Su clearly understood that early on, and on that basis he had been pursuing bank financing by December of 2016 or January of 2017 at the latest, in order to fund the construction.

### (3) Determination of Amounts Due under the Building Contract

[130] The revised amount of the plaintiff's claim is \$39,160.50, which Mr. Nicholson calculated as follows:

#### Description

#### Amount

(a) Mr. Nicholson's labour (framing only):

\$ 22,438.72

(b) 345 Builders materials and subcontract expenses:

\$ 189,939.50

(c) Additional 345 Builders materials and subcontractor expenses:

\$ 9,669.12

(d) Subtotal for labour and expenses:

\$ 222,047.22

(e) Markup (12% of \$ 222,047.22):

\$ 25,354.34

(f) GST on markup (5% of \$ 25,354.34):

\$ 1,267.72

(g) Total due to 345 Builders:

\$ 248,669.50

(h) Less amount from Mr. Su following payments to Terraform (re: Lot 2) and Church Hill (re: assignment of interest):

\$ 209,500.00

(i) Unpaid balance:

\$ 39,160.50

[131] With respect to item (a) above, Mr. Nicholson testified that the cost of his labour was calculated based on the work hours recorded in his running spreadsheet. I note that Term 1 of the Building Contract expressly says the builder will charge a 12% markup on all labour and expenses, except labour supplied by the builder. Despite this, Mr. Nicholson has included item (a) in the list of items on which he charged a 12% markup. This approach is not consistent with the Building Contract and requires correction.

[132] With respect to item (b), materials and subcontractor expenses, the plaintiff tendered in evidence copies of all receipts used to arrive at the total of \$189,939.50. Mr. Nicholson was cross-examined at length about these receipts. Among other things, it was suggested that a number of them were double counted and he agreed that if that was the case, the total would be wrong. However, in re-examination, Mr. Nicholson testified that his "tabulation" actually excluded duplicates. It was also suggested that Mr. Nicholson improperly included a \$10,500 receipt for work done by Church Hill in his materials and subcontractor expenses, when this had already been accounted for as part of the Lot 4 transfer. However, having gone through the receipts, I can say with some confidence that the Church Hill amount was not included in Mr. Nicholson's total. I say that because, after eliminating all double counting, and including only Mr. Su's portion of subcontractor work on the worker timesheets, my own tabulation of receipts tendered to prove the number in item (b) above was just over \$1,000 higher than Mr. Nicholson's figure. I conclude Mr. Nicholson's figure of \$189,939.50 is fair and not overstated, with two exceptions. The first is his mistaken inclusion of a bill in the amount of \$3,893.51 for windows that were in fact for another job. The second is his mistaken inclusion of an \$80 item that was also destined for another job.

Deducting these amounts from Mr. Nicholson's figure, the net amount of materials and subcontractor expenses per item (b) above should in fact be \$185,965.99.

[133] With respect to item (c), additional materials and subcontract expenses, again the plaintiff tendered a collection of receipts used to calculate this amount. These receipts were collected after-the-fact such that Mr. Nicholson thought they had been overlooked in his earlier calculations. The receipts themselves were marked in evidence in two separate bundles, namely Ex. 3, Tabs 43 and 44. I have gone through these receipts as well. The single item at Tab 43, in the amount of \$2,030.44, is legitimate and should be included in the plaintiff's materials and subcontract expenses. However, all of the receipts at Tab 44 are in fact duplicates of receipts already included in item (b) above. In the result, I would reduce the plaintiff's additional materials and subcontract expenses, per item (c) above, to \$2,030.44.

[134] Items (d), (e), (f), and (g) require no explanation or further comment.

[135] With respect to item (h), Mr. Nicholson testified that of the \$280,000 total funds he received from Mr. Su, he had \$209,500 remaining after accounting for the amounts he had paid out. By my calculation, this figure balances with the other evidence, as follows. With respect to the amounts paid out by 345 Builders, the evidence that: (i) 345 Builders paid Terraform a total of \$55,000, consisting of an initial deposit of \$50,000 on 29 March 2016, and an increase in deposit of \$5,000 on 5 August 2016 in respect of the agreement to purchase Lot 2, and (ii) 345 Builders paid Church Hill a total of \$5,000, through Terraform, on 29 March 2016, and a further \$10,500 on 3 May 2017, to compensate Church Hill and Mr. Cownden for initial clearing work on Lot 2 and for the assignment of its interest in Lot 2. Taking all of these figures together, 345 Builders paid out a total of \$70,500 to Terraform and Church Hill. This means that of the \$280,000 that 345 Builders had received from Mr. Su, \$209,500 of it remained to pay for the construction of the house.

[136] Making the necessary corrections and adjustments, the amounts that the plaintiff was properly entitled to charge under the Building Contract can be re-stated as follows:

Description

Amount

(a) 345 Builders materials and subcontract expenses:

\$ 186,045.99

(b) Additional 345 Builders materials and subcontract expenses:

\$ 2,030.44

(c) Subtotal for materials and subcontract expenses:

\$ 190,076.43

(d) Markup (12% of 199,076.43):

\$ 22,809.17

(e) GST on markup (5% of 22,809.17):

\$ 1,140.46

(f) Mr. Nicholson's labour (framing only):

\$ 22,438.72

(g) Amount due to 345 Builders:

\$ 236,464.78

[137] There is another adjustment that must be made with respect to the amounts that 345 Builders billed to Mr. Su. Recall Mr. Fedosenko's evidence, which I accepted, that the parties agreed to pay Church Hill a total of \$25,500 to compensate for work already done on Lot 2, and to get Church Hill to assign its interest in the property. Of this, \$10,000 came from the release of Mr. Su's initial deposit on his unsuccessful contract to purchase Lot 2. Mr. Su freely assented to the release of these funds, according to the evidence of Mr. Fedosenko, and the release of funds document signed by Mr. Su himself. With respect to the remaining \$15,500 to be paid to Church Hill, Mr. Nicholson ultimately billed Mr. Su for these amounts. However, Mr. Fedosenko gave clear evidence that Mr. Nicholson, on behalf of 345 Builders, was to pay that portion of the amount due to Church Hill. This was part of the arrangement in which 345 Builders took an assignment of Church Hill's interest in Lot 2. I find that Mr. Nicholson improperly billed Mr. Su for this money. An adjustment must be made in Mr. Su's favour in that regard. Accordingly, while the amount due under the Building Contract was \$236,464.78, the amount Mr. Su was required to pay as of the date that 345 Builders stopped working was \$220,964.78.

(4) Whether Either Party was in Breach of the Contract

[138] Recall that Mr. Su had paid 345 Builders a total of \$280,000, and after accounting for amounts that 345 Builders paid out in connection with Mr. Su's acquisition of Lot 4, there was a total of \$209,500 available to pay 345 Builders for work done under the Building Contract. After crediting Mr. Su for that amount against the net amount of \$220,964.78 payable by Mr. Su under the Building Contract, Mr. Su owed \$11,464.78 at the point in time that he refused to pay any more and 345 Builders stopped work. Having found that Mr. Su had a contractual obligation to pay as the work progressed, the question is whether his failure to pay amounted to a breach of that obligation.

[139] Mr. Su clearly owed money, because the amounts due under the Building Contract exceeded the amount that he paid to date. But Mr. Su's position was that he should not have been required to pay any more because the cost of construction already exceeded the price estimate provided for in the Building Contract, and the project was still not complete. In

that context, it is necessary to determine whether the cost of construction had ballooned to the point where Mr. Su should not have been required to pay any more in view of the estimate clause in the contract. I would resolve that issue in three steps. The first step is to determine what I will refer to as the "adjusted estimate", that is, extent to which the estimate must be adjusted upward to account for material upgrades and changes that were not part of the original design. The second step is to determine the further costs to complete the construction, which I will refer to as the "cost of completion". The third step is to consider whether the total of the actual cost to the date of Mr. Su's refusal to pay, plus the cost of completion, are so far above the adjusted estimate as to amount to a breach of the plaintiff's obligations under the Building Contract.

### Step One: Determining the Adjusted Estimate

- [140] The estimate of \$202,160 as specified in Term 1 of the Building Contract must be adjusted to account for any material upgrades and design changes.
- [141] Before getting into the details, I should note that at trial the plaintiff tendered an expert report from Mr. Craxton, who was recognized by the court as an expert in quantitative appraisal, that is, the appraisal of construction costs. Mr. Craxton's report includes an entire section quantifying the cost of additions to the scope of the work under the Building Contract. Mr. Craxton formed his opinion after reviewing, among other things, the original building plan, the receipts submitted by 345 Builders to support its costs of construction, and photographs of the exterior of the house.
- [142] In cross-examination, Mr. Craxton conceded that he never attended the site to examine the house himself, nor had he ever done estimates for construction work in the Sooke area, although he has done estimates for residential construction in parts of British Columbia outside the Lower Mainland. Mr. Craxton acknowledged that in formulating his opinions, he took into account costs of inputs as set out in a "2019 RS Means Cost database for the Victoria area", which he then adjusted for 2017 based on inflation data from Statics Canada. The raw data from the database was not reproduced in Mr. Craxton's report, because the database is a lengthy document.
- [143] Even after taking into account the limitations in Mr. Craxton's analysis as drawn out in cross-examination, I find that the approach he took in appraising additional costs of construction was rational and reliable, and I accept the opinions in his report regarding the costs of work beyond the scope of the original estimate in the Building Contract. This conclusion is, of course, subject to proof of the underlying facts, a topic which I will turn to next.
- [144] For the sake of completeness, I will list all aspects of the project in respect of which Mr. Nicholson claimed to have increase costs, although in the end I only accept some of them, for the reasons that follow:

- (a) The height of the house and the expansion of the crawl space. With respect to the crawl space, it appears to be common ground that it ended up being deeper than contemplated in the plans, but Mr. Su relies on the testimony of Mr. Nicholson who said at one point that the foundation had to be deeper because of rocky ground on the lot. I do not find this argument convincing. Regardless of the reason, the crawl space was larger than the original design, and this had cost overrun implications. According to Mr. Craxton's report, the change in depth of the crawl space increased the construction costs by \$6,503. With respect to the height of the house, Mr. Su claimed that the height was accurately reflected in the floor plans which he gave to Mr. Nicholson when the project began. I do not accept that evidence. I prefer instead the evidence of Mr. Nicholson and other witnesses called by the plaintiff, who testified that Mr. Su gave instructions to raise the overall height of the house. There is at least one email referencing a site visit where the increase in the height of the house was discussed. In his report, Mr. Craxton opined that the change in height increased the costs of construction by \$12,636. Adding the cost increase for the crawl space and the cost increase for the building height, I would adjust the estimate by a total of \$19,139 to account for these design changes.
- (b) Colored metal roof. Mr. Nicholson testified that Mr. Su opted for a colored metal roof, which according to Mr. Craxton's report, resulted in an increased cost of \$258. However, the emails reflect that Mr. Nicholson asked Mr. Su what kind of roofing he wanted, and Mr. Su replied that he wanted the cheapest option available. In these circumstances, I am not satisfied that it was properly related to Mr. Su that the color of the roof was a materials upgrade that would increase the cost. I would not make any adjustment to the estimate on account of this expense.
- (c) Extra wide siding. Mr. Nicholson testified that Mr. Su wanted extra wide siding, which was an upgrade in materials. Mr. Nicholson said this was one of the finishing items that he broached with Mr. Su at the very outset of their dealings, and I accept his evidence on that point. According to Mr. Craxton's report, the use of this material increased the costs of construction by \$1,465, and I would adjust the estimate to account for this.
- (d) Relocation of septic field with pump system. Mr. Nicholson gave evidence, supported by the testimony of other witnesses, that the position of the septic had to be moved from the location noted in the original design. The final location was on higher ground than the house, which meant that a pump system was required. Counsel for Mr. Su pointed out in closing argument that the relocation of the septic field was Mr. Nicholson's fault, because he failed to consult the property lines and the footprint of the easement. In his trial testimony, Mr. Nicholson volunteered that he made a mistake in the initial decision on where to locate the house on the lot; he said this was an error on his part. For that reason, I would not make any adjustment for the cost associated with moving the septic field. However, the evidence indicates that the increased cost was not due solely to the change in location itself; it was also due to the fact that the only real option was to place the septic field on higher ground than the house. This meant a pump system was required. This was not attributable to any

mistake that Mr. Nicholson made, but a function of the geography of the lot. Mr. Craxton's report indicates that the total cost of the changes to the septic system was \$7,623, but does not allocate that between the relocation cost and the cost of the pump system. Mr. Gardiner, the septic system contracted by the plaintiff for this job, testified that the cost of switching from a "gravity" based septic system to a "pressure" based system, i.e. a pump, was between \$2,500 and \$3,500. I would make an adjustment in the amount of \$3,000 to account for this unanticipated cost.

- (e) Roof extension. Mr. Nicholson testified that Mr. Su instructed him to make an extension of the roof to cover the walkway between the main room and the kitchen, which was designed to be separate from the rest of the house. Counsel for Mr. Su complained that the need for roofing over this part of the house would have been obvious from the outset. However, whether this change was obvious or not, the fact is that the design had to be changed, such that more materials were required. According to Mr. Craxton's report, the costs were increased by \$1,599. I would adjust the estimate to account for this.
- (f) Crown moulding. Mr. Nicholson testified that this was an upgrade in finishing. Mr. Su denied ever being told that this would be an increased cost, but I prefer the evidence of Mr. Nicholson on this point. As noted above, I find that during the initial discussions about pricing, Mr. Su seized on the figures of \$140 per square foot and \$200,000 in total, choosing to ignore what Mr. Nicholson said about those figures being estimates and about the potential for costs to increase where Mr. Su wanted upgraded finishing. Mr. Su conceded in cross-examination that it was possible Mr. Nicholson told him he could not have everything he wanted at the price he wanted to pay. I find that evidence to be apt in dealing with this particular item. According to Mr. Craxton's report, the crown moulding increased the costs of construction by \$458, and I would make an adjustment in the estimate to account for this.
- (g) Front deck and stairs. Mr. Nicholson testified that the original house design did not have a front deck. Stairs would always have been required, but Mr. Su also requested a deck. For his part, Mr. Su initially testified to having no independent recollection, one way or the other, about discussing decks with Mr. Nicholson during the design phase. However, later in his testimony he was referred to his hand-drawn floor plan, provided to Mr. Nicholson on or after 27 March 2016, and attached to the 29 March 2016 CPS, which showed a front deck, covered with a roof, in dimensions that appear to match photographs taken after the deck was built. I find the floor plan and the photographs to be the most reliable evidence on this point. However, I do note that the sketch shows only three steps, whereas the subsequent photographs appear to show eight. Mr. Craxton's report indicates that the total cost of the changes to the front deck and stairs was \$5,128. I would therefore increase the estimate by \$1,500 to account for the extra steps not included in the floor plan.
- (h) Central vacuum system. Mr. Nicholson testified that this was an extra requested by Mr. Su. In closing argument, Mr. Su submitted that the plaintiff did not finish the project and never provided a vacuum system. That is true, but I understood Mr. Nicholson's evidence to be that the added cost related to roughing in the pipes for the central vacuum system. I see evidence

of that in the email correspondence between the parties. In his report, Mr. Craxton opines that the addition of a built in vacuum system increased the construction costs by \$1,198, but this opinion does not distinguish between the costs of the piping and the costs of the vacuum system itself. In my view, the best evidence on this point comes from Mr. Nicholson's email, indicating that the installation of the vacuum system increased the construction costs by \$650. I would adjust the estimate by that amount.

[145] Tallying up all of these items, I conclude that the estimate must be increased by a total of \$27,711 to account for material upgrades and design changes, plus an additional \$3,504.19 for the plaintiff's 12% markup and associated GST, for a grand total of \$31,215.19. The adjusted estimate is therefore \$233,375.19.

[146] At the time Mr. Su refused to pay any more to the plaintiff, the actual cost of construction was \$236,464.78, which was slightly in excess of the adjusted estimate of \$233,375.19. However, as noted above, this was only an estimate, not a fixed price or a binding price quotation. Expressed as a percentage, the actual costs were 1.1% above the adjusted cost estimate. Considering that figure alone, I would not be prepared to hold that the plaintiff had breached its duty to adequately and accurately estimate the cost of construction and stay within it, so as to give Mr. Su justification in refusing to pay the outstanding amount. However, that is not the end of the analysis, because it is still necessary to address the cost of completion.

## Step Two: Determining the Cost of Completion

[147] Recall that on 29 May 2017, Mr. Nicholson sent an email requesting payment of the outstanding amount that Mr. Su owed, \$38,603.20. Mr. Nicholson's email contained a detailed breakdown of the costs to date, the amounts Mr. Su had already paid, as well as an explanation for the increase in construction costs. (Of course, I have found Mr. Nicholson's figures were not accurate and in fact Mr. Su only owed a net amount of \$11,464.78 at this point in time.) On 21 May 2017, Mr. Su replied to Mr. Nicholson's demand for payment by asking how much more it would cost to complete the project. Mr. Nicholson responded by setting out a very basic list of further costs, including tile labour (\$3,500), plumbing (\$5,000), countertops (\$1,000 to \$7,000), painting (\$1,000), and labour (\$1,000). Assuming Mr. Su was interested in the cheapest overall cost, I would calculate the total using the low end figure of \$1,000 for the countertops. Adding together the aforementioned figures produces a subtotal of \$11,500, to which it is necessary to add another \$1,449 on account of Mr. Nicholson's 12% markup and GST, yielding a grand total of \$12,949. I would refer to this figure as the anticipated cost of completion.

[148] Mr. Su might well question this approach on the basis that the figures listed in Mr. Nicholson's email dated 31 May 2017 were just another set of unreliable estimates. Looking back on things now, Mr. Su might suggest a more reliable figure for this analysis would be the actual cost that he incurred to finish the construction.

[149] Mr. Su tendered receipts showing that he paid a total of \$25,632.17 to complete the construction of his house. The plaintiff did not quarrel with any of the defendant's receipts. However, I would question the reasonableness of the receipt for quartz countertops in the amount of \$3,395, considering that Mr. Nicholson told Mr. Su the cost of the countertops could be as low as \$1,000. Allowing some room for disagreement about the cost of "standard" countertops, I would give Mr. Su credit in the amount of \$1,500 for this item. It is also necessary to consider that when Mr. Su failed to pay the outstanding balance owing to the plaintiff, some of the costs he incurred to complete the work on his own were duplicative of costs already incurred by 345 Builders, or alternatively attributable to the delayed timeline. These include the cost of a new lot survey in the amount of \$1,667. There may be other costs of this sort, including a portion of the cost associated with extending the course of construction insurance, and some additional building permit fees, but these are difficult to quantify. Deducting the countertop and lot survey costs from the total of \$25,632.17 paid by Mr. Su to finish the work, the net figure is \$22,465.17, which I will refer to as the adjusted actual cost of completion.

### Step Three: Evaluating the Extent to Which the Estimate was Exceeded

[150] The forgoing analysis suggests two different approaches to this stage of the analysis. One approach uses the anticipated cost of completion of \$12,494 (Mr. Nicholson's figure), and the other uses the adjusted actual cost of completion of \$22,465.17 (Mr. Su's figure).

[151] On the one hand, adding the construction costs to date of \$236,434.68 together with the anticipated costs of completion of \$12,494 yields a total cost of \$248,928.68. This figure is \$15,553.49 more than the adjusted estimate of \$233,375.19. Expressed as a percentage, the projected cost of construction exceeded the adjusted estimate by 6.7%.

[152] On the other hand, adding the construction costs to date of \$236,434.68 together with the adjusted actual cost of completion of \$22,465 yields a total cost of \$258,859.88. This figure is \$25,484.69 more than the adjusted estimate of \$233,375.19. Expressed as a percentage, the actual cost of construction exceeds the adjusted estimate by 10.9%.

[153] The final step in the analysis is to evaluate the total cost of construction using the adjusted estimate as a "rough outer limit" on the amount Mr. Su should be required to pay. As explained above, some leeway must be given for the fact that the Building Contract specified a cost plus fee structure, but also included an "estimate". In this context, it would be inappropriate to treat the estimate as a form of fixed price commitment. Some courts have invoked a "15% leeway" principle. For my part, I would not treat this principle as a strict limit, but rather as an analytical tool to evaluate the extent to which the total costs of construction exceeded the adjusted estimate as a "rough outer limit". The ultimate question is whether the final contract price was such a departure from the adjusted estimate that it indicates a failure on the plaintiff's part to "adequately and accurately" estimate the cost of construction in accordance with the degree of skill and knowledge that the plaintiff's principal held himself out to possess, as discussed in Wolski at paras. 55 to 56.

- [154] At the point when Mr. Su refused to pay and the work stopped, the projected cost for the plaintiff to complete the construction was 6.7% above the adjusted estimate. The actual cost of construction with Mr. Su bringing the project to completion on his own were 10.9% above the adjusted estimate. When I consider that range of outcomes in the context of all the evidence and the conduct of both parties, including Mr. Su's failure to pay the outstanding amount very shortly after he was able to move into the house, this case is close to the line.
- [155] This is certainly not a case like *Cherry Homes*, where the total construction costs ended up being three times higher than the builder's rough estimate. The key passage of the judgment on this point is para. 78, where Mr. Justice Wilson reasoned that the contract was "not a cost-plus contract, nor strictly a fixed price contract", but rather a contract "based on an estimate of the anticipated cost". The estimate was properly varied in the course of construction, but the "changes were not so significant that no weight should be given to the estimate", and the estimate was considered binding on the builder, "or, at the very least, the 'rough cost' of the job". Wilson J. concluded that "[n]o justification has been shown why the eventual cost of the job should exceed that 'rough cost' by more than three times".
- [156] In the present case, the margins are much closer to those in *Wolski*. However, in *Wolski* the property owners stopped paying at a point when they had already paid \$340,000 against the builder's estimate of \$300,000. Thus, when the property owners stopped paying, the actual cost already exceeded the estimate by 13%, and the margin would only have been expected to increase thereafter. On those facts, Mr. Justice Johnston reasoned at paras. 54 to 56 of the judgment that the particular contract before him could not be "neatly categorized either as a fixed price or a cost plus contract", but rather one containing "an implied term that the defendant possessed sufficient knowledge and skill so as to be able to accurately estimate the costs of construction of the house". The builder breached that term by failing to "adequately and accurately estimate" the construction costs.
- [157] By contrast, in the case at bar Mr. Su had paid a net amount of \$209,500, when the adjusted estimate with extras was \$233,375.19. In other words, the net amount that Mr. Su had paid had not yet exceeded the adjusted estimate when Mr. Su stopped paying. Depending on which approach is taken, the final cost exceeded the adjusted estimate by somewhere between 6.7% and 10.9%.
- [158] It is trite to say that each case will depend on its own facts. In a side-by-side comparison of one case to another, raw numbers and even percentages can only ever give the court general guidance. As I say, this particular case is close to the line, but in the end I am not convinced that 345 Builders exceeded the estimate in the Building Contract, adjusted to account for extras, to such an extent that it could be said to have breached the terms of the contract.

[159] I would summarize my conclusions in two points. First, I find that Mr. Su breached the Building Contract by failing to pay the outstanding net amount of \$11,464.78 that was due to 345 Builders at the point that Mr. Su refused to pay. Second, I find that the total cost of construction exceeded the adjusted estimate by somewhere between 6.7% and 10.9%, but that in all the circumstances of this case, this did not amount to a breach of the plaintiff's contractual obligation to adequately estimate the cost of construction.

(5) Remedy

[160] I would allow the plaintiff's claim and grant judgment to 345 Builders in the amount of \$11,464.78. The plaintiff is entitled to a declaration of lien in that amount under s. 31(1) of the Builders Lien Act, S.B.C. 1997 c. 45 [Act], plus pre-judgment interest from 27 June 2017.

[161] The plaintiff also requests an order that if the lien amount is not paid within 30 days, the defendant's property be sold under s. 31(2) of the Act. The power to order sale of a property to enforce a lien is discretionary. In this case the amount of the lien as proven at trial is quite small by comparison to both the apparent value of the property, and the amount originally claimed. I therefore decline to exercise my discretion to order conditional sale of the property at this point in time. I would dismiss that aspect of the plaintiff's claim, with liberty to re-apply before me if the outstanding amount plus interest is not paid within three months of this judgment.

[162] I would dismiss the defendant's counterclaim.

## Costs

[163] If the parties are unable to agree on costs, they can file written submissions. Plaintiff's counsel included written submissions on costs in his closing argument, but I would give him leave to file further submissions of four pages or less (plus an affidavit containing any supporting materials) within two weeks of the release of these reasons. Counsel for the defendant may file written submissions of four pages or less (plus an affidavit containing any supporting materials) within two weeks of receiving the plaintiff's written submissions. Counsel for the plaintiff may file a reply of two pages or less (plus any reply affidavit material) within one week of receiving the written submissions of the defendant. If either party takes the view that submissions on costs cannot effectively be dealt with in writing, that party may, within the time limits set out above, submit a request to schedule a further appearance for oral submissions on costs.

"Riley J."

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