

CANADA / JUDGMENT

Abstract Construction Inc. v. Margolis

2020 BCSC 59

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Supreme Court of British Columbia

DECIDED

17 January 2020

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2020 BCSC 59 Abstract Construction Inc. v. Margolis

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Abstract Construction Inc. v. Margolis,

2020 BCSC 59

Date: 20200117

Docket: S161701

Registry: Victoria

Between:

Abstract Construction Inc.

Plaintiff

And

David Howard Margolis and Lisa Faith Wolfe

Defendants

Before: The Honourable Madam Justice MacNaughton

Reasons for Judgment

Counsel for the plaintiff:

J. Hall

Counsel for the defendants:

G. Harney

Place and Date of Trial:

Victoria, B.C.

December 2-3, 2019

Place and Date of Judgment:

Victoria, B.C.

January 17, 2020

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Background

- [1] Abstract Developments Inc. ("ADI") provided construction management services for sites that it was developing on its own behalf and for homeowners who contracted with it to build custom homes.
- [2] In April 2011, ADI entered into a construction management contract (the "Contract") with the defendants, David Margolis and Lisa Wolfe (collectively, the "Owners"), to build a single-family home on the Owners' property on Resthaven Dr. in Saanich, BC (the "Project").
- [3] Briefly, the Contract required ADI to obtain all the necessary permits and to arrange for and oversee all trades, suppliers, and professionals working on the Project including managing their quotes, schedules, and workmanship. The Contract called for month-end billing. In exchange for ADI's services, the Owners would pay ADI a fee calculated at 15% of all invoices rendered by tradespeople, subcontractors, and material suppliers employed on the Project. ADI could also employ its own employees for on-site work, but they were not subject to the 15% management fee.
- [4] There was no term in the Contract dealing with its assignment.

- [5] After some initial design delays, construction on the Project started in January 2012. The Project was substantially completed in January 2013. As the Contract provided for a 12-14 month schedule, delay was not really an issue and, according to Kyle Ryan, the Project manager, the Project was substantially completed at a cost that was within 3% of the original budget.
- [6] Initially, the Project went smoothly. Mr. Ryan managed the Project and Shawn Johnson was the site superintendent responsible for supervision of the construction on site. Monthly invoices were issued by ADI and paid by the Owners.

The Parties' Falling Out

- [7] At some point in about December 2012, the parties began to disagree about the quality of the finishing stages of the construction. The Owners said the finishings were substandard. For the most part, the work the Owners believed was substandard related to work done in the latter part of 2012 and early 2013. Up until the end of December 2012, the Owners paid ADI for all the invoices as rendered.
- [8] ADI sued the Owners for breach of contract for unpaid invoices for work done. The Owners defended and counterclaimed for damages for unfinished and negligently performed work (the "Previous Action"). The Previous Action between ADI and the Owners went to trial before Justice Grist over 16 days in the spring of 2015.
- [9] As described in Justice Grist's reasons, indexed as *Abstract Developments Inc. v. Margolis*, 2015 BCSC 2239, the performance breaches alleged by the Owners were ADI's failure to manage the construction of the home to "assure the high standard of construction" required by the Contract. At para. 21 of his reasons, Justice Grist set out the specific deficiencies outlined by the Owners.

The Corporate Reorganization

- [10] At some point in the middle of 2012, before the falling out, ADI's parent corporation, the Abstract Developments Group of Companies Inc. (the "Group"), reorganized its various subsidiaries. The reorganization redefined the responsibilities of the Group's subsidiaries and resulted in the incorporation of some new companies.
- [11] Mr. Ryan, who is now the Chief Operating Officer of the Group, testified that the Group started using individual project-specific companies to undertake its growing development projects. ADI, previously a developer/builder, focused on development activities for the Group and Abstract Construction Inc. ("ACI"), another subsidiary, took over the Group's construction management responsibilities.

- [12] Justice Grist found that, after the reorganization, sometime in August 2012, ACI took over performance of the Contract. The reorganization did not impact what occurred on the Owners' site. Mr. Ryan continued as the Project manager, and Mr. Johnson as the site superintendent. The subcontractors, material suppliers, and the ADI tradespeople who had worked on the site continued with their work although they were now retained or employed by ACI.
- [13] The Owners were never given explicit notice of the change from ADI to ACI, and the Contract was never assigned. However, from the documents attached to the various invoices sent to the Owners after the reorganization, the subcontractors and material suppliers began to bill ACI, and ACI employed its own tradespeople. The Owners continued to pay ADI as they had done previously.
- [14] In his reasons at paras. 18-19, Justice Grist found that one of the Owners, Mr. Margolis, had begun to work as a consultant for the Group and, in that position, he knew of the corporate reorganization. However, Justice Grist accepted that the Owners had no idea that the change would affect the Contract they had signed with ADI.
- [15] At para. 19, Justice Grist also accepted that the conduct of the litigation before him suggested that none of the parties to that action, or their counsel, realized the significance of the change in corporate identity.
- [16] After the first day of trial, Justice Grist raised a concern about the pleadings as drafted. He suggested that, as a result of the corporate reorganization, ADI could not make a contractual or lien claim for work that had been performed by ACI and that the Owners' counterclaim appeared to relate to deficiencies in work performed by ACI. Justice Grist suggested that the pleadings needed to be amended and that ACI should be added as a party. He repeated his concern during the trial, but no amendment was sought until the final day of trial.
- [17] After both parties had closed their case and argument was about to begin, ADI applied to amend its pleadings--not to add ACI as a party, but to plead that ACI was a subcontractor and/or an agent of ADI, unjust enrichment, and quantum meruit. Justice Grist dismissed the application to amend: para. 46.
- [18] Justice Grist reviewed the claim advanced by ADI and concluded that its claim for work under the Contract did not extend past August 2012. He determined that upon the Owners paying the August invoice, ADI had no further claim. The work thereafter was performed by ACI, who was not a party to the proceedings. He dismissed ADI's claim for money owing under the Contract and its builders lien claim. At para. 69, Justice Grist said:
- [69] The claim for damages resulting from alleged failures to adequately manage the project after August 2012 presents a complicated issue. Under the [Contract], [ADI] is responsible for these services, but the actual management work was performed by [ACI]. Any future claim by [ACI] will not be a contractual one, and if there is a route to a remedy for [ACI], and there may not be, it will likely be one based on a quantum meruit assessment, perhaps with the

assistance of a quantity survey. If this is the case, any of the [Owners'] complaints of inadequate performance which might be found to have substance could be taken into account. I offer these extemporaneous remarks, without the benefit of argument or authority, because I regret the fact that the Court has been forced to deal with this case as presented, and in the hope they may aid in a more complete resolution of the more expansive building dispute. As things stand, the [Owners] have held back substantial amounts from the invoices they were presented with during the time [ACI] was managing the project and on hearing the list of deficiencies they present, I find that the payments held back are sufficient to cover any potential damages they may have suffered during this time. Accordingly, I find no damages attributable to [ADI] past the August 2012 invoice.

The Appeal

- [19] As it related to ACI's status as a subcontractor and with respect to the quantum meruit claim, Justice Grist's decision was appealed.
- [20] On appeal, ADI argued that the record before Justice Grist provided sufficient evidence for all the claims to be adjudicated, and if the record was deficient, he should have allowed the parties to call further evidence.
- [21] In oral reasons delivered on January 25, 2017, the Court of Appeal upheld Justice Grist's finding that the proposed amendments raised entirely new claims, which would have changed the course of the trial had they been pleaded at the outset, and were unsupported by the evidence: *Abstract Developments Inc. v. Margolis*, 2017 BCCA 44.

The Current Action

- [22] On April 26, 2016, ACI filed a notice of civil claim, pleading quantum meruit and seeking judgment in the amount of \$125,132.47. The Owners defended and counterclaimed for damages for negligent performance of work.
- [23] The Owners applied to strike ACI's claim on the basis that it disclosed no cause of action, was res judicata, or was an abuse of process.
- [24] In unreported oral reasons for judgment released on January 11, 2019, Justice Dley concluded that it was "far from obvious that the claim [was] bound to fail". He determined that Justice Grist specifically set apart the post-August work and contemplated a further claim based on quantum meruit: paras. 12-13.
- [25] Justice Dley also concluded that the issues between ACI and the Owners were not res judicata, issue estoppel did not apply, and ACI's claim was not an abuse of process: paras. 15-19.

- [26] Because of the litigation history with respect to the dispute between ADI/ACI and the Owners, and the litigation costs already incurred by the parties, in the trial before me, counsel proposed proceeding in what I determined was an efficient manner. For the most part, the witnesses who testified before Justice Grist would not be recalled. Mr. Ryan would testify on behalf of ACI and give evidence about the Group, its reorganizaiton, and its two subsidiaries, ACI and ADI. The Owners did not testify.
- [27] The rest of the evidence would be based on two notices to admit which had been served by ACI and were not responded to by the Owners. The first, dated April 15, 2019, was marked Ex. 1 at trial. The second, dated June 3, 2019, was marked as Ex. 2. Because of their failure to respond, the Owners are deemed to admit the facts set out in the notices, and the authenticity of the documents attached to them.
- [28] As a result, with respect to Ex. 1, the Owners admit the authenticity of the 14 invoices rendered between August 13, 2012, and January 31, 2014, and that those invoices "reflect accurately trades and material work performed on the Project in the periods of time reflected in the invoices and hourly labour work performed by forces employed by [ACI] on the Project." The Owners also admit that "[t]he attached invoices reflect the value of work and materials devoted to the Project in the time frame set out in the invoices."
- [29] With respect to Ex. 2, the Owners admit the factual findings set out in Justice Grist's decision; in particular, that they paid in full all invoices issued by ADI up to August 2012, and that from August 13, 2012 to February 25, 2013, ACI issued the Owners invoices numbered 008 to 022 and an unnumbered invoice dealing with holdbacks with respect to the Project. The Owners also admit that, of the ACI invoices, as of June 2015, the sum of \$262,283.70 had not been paid by them to ACI. As of June 2015, the Owners had paid \$112,574.37 directly to material suppliers and tradespeople of ACI, such sum being properly deducted from ACI's accounts. Finally, the Owners admit that, in the spring of 2013, they presented a list of deficiencies to ADI and ACI with claims totaling \$30,714.
- [30] I was advised that the Owners' claim for deficiencies had increased since the spring of 2013.
- [31] The parties suggested, and I agreed, that in the unique circumstances of this case, it was efficient to proceed first with determining whether ACI was entitled to a restitutionary remedy and to sever that issue from the Owners' counterclaim, which would be dealt with after a decision with respect to ACI's claim.

The Legal Issues

- [32] There are two legal issues that I am asked to address. The first is whether ACI's claim is barred by principles of res judicata or abuse of process. The second is whether ACI is entitled to judgment based on the principles of quantum meruit or unjust enrichment.

Res Judicata or Abuse of Process

[33] In this case, the Owners argue issue estoppel. ACI did not argue that this issue had been finally determined by Justice Dley in his reasons. As a result, I will briefly consider it.

[34] The doctrine of res judicata prevents re-litigation of matters that a competent court has already determined. There are two components to the doctrine, issue estoppel and cause of action estoppel. Issue estoppel applies to prevent re-litigation where:

- (a) the same question has been decided;
- (b) the prior judicial decision was final; and
- (c) the parties or their privies were the same

(Danyluk v. Ainsworth Technologies, 2001 SCC 44 at para. 25.)

[35] Cause of action estoppel prevents a party from bringing a second action based on the same factual circumstance as a first action. This applies even if the new claim concerns a different cause of action under the same factual matrix, and applies to all claims that were, or might properly have been, brought in the first action.

[36] The underlying purposes of the doctrine of res judicata are to protect the public interest in the finality of litigation and to ensure that parties bring forward all of the claims and defences with respect to a dispute in the first proceeding by barring a subsequent action if they fail to do so.

[37] As the Supreme Court of Canada explained in Danyluk, the rules are not applied rigidly. The first step is to determine whether the party alleging issue estoppel, who has the burden of proof, has established the necessary preconditions to its operation. If so, the second stage requires the court to determine, as a matter of discretion, whether issue estoppel ought to be applied in the circumstances of the case: para. 33. In the context of court proceedings, the Court confirmed that the discretion is very limited: para. 62.

[38] The Owners submit that ACI and ADI are privies based on the factors set out in Wolch v. Wilder, 2001 ABCA 310 at para. 14. Those factors include:

- (a) having knowledge of the prior proceeding;
- (b) having a clear interest in the proceeding;
- (c) having the ability to intervene as a participant but choosing to stand by and watch;
- (d) actively participating in the previous proceeding by giving evidence, and being part of the litigation team;
- (e) different parties acting together to circumvent a previous decision;
- (f) having the non-party's counsel present at the earlier proceedings; and

- (g) being affected by the issue determined in the previous proceeding.
- [39] In this case, the Owners say that ACI expressly declined the opportunity to intervene in the previous proceeding and the claim that ACI now advances for work done on behalf of the Owners is the same claim that was advanced by ADI and determined in the prior proceeding.
- [40] They submit that ACI and ADI had the same principals and worked on the same Project. In the Previous Action, ADI took the position that the distinction between the two corporations was not important. ACI had notice of the Previous Action and now claims for the same work that was already litigated.
- [41] I accept that, in some cases, two related companies can be privies. That was the effect of the determinations in *De Morales v. Lafontaine-Rish Medical Group Ltd.*, 2010 ONCA 59; 1196303 Inc. v. Glen Grove Suites Inc., 2015 ONCA 580. However, in the circumstances of this case, I have concluded that the parties should not be considered privies.
- [42] As set out above, during the trial of the Previous Action, Justice Grist raised the question of whether ACI should be added as a party to the proceedings and the pleadings amended. No application was brought until after the evidence was completed and even then, the application was only to amend the pleadings, not to join ACI as a party. In dismissing ADI's action, Justice Grist contemplated the possibility of another action between ACI and the Owners. The result of Justice Grist's decision was that ADI could not claim for work performed by ACI and the Owners could not counterclaim against ADI for deficiencies in the work that had been performed by ACI. The question of whether ACI had a remedy for the work it did after August 2012, based on a quantum meruit assessment, was left open. ADI and ACI were not considered privies in the Previous Action.
- [43] Even if I am wrong with respect to whether the companies are privies, I would not find that the test for issue estoppel has been met because the question at issue in this action is a different question from the one that was ultimately decided in the Previous Action.
- [44] In his preliminary reasons dealing with whether the current action was barred by res judicata, Justice Dley determined that there had been no adjudication on the billing that occurred with respect to the Project after August 2012. He said that it was apparent that there was work done on Project, but whether the work was properly done and whether there should be compensation for it remained an open question that had not been decided: para. 15. Justice Dley said at para. 16:
- [16] At para. 44, Grist J. confirmed that there was a period of time that, regardless of his findings, showed that only [ACI] could pursue a claim by pursuing a remedy independent of the breach of contract claim. He stated:

- [44] If the conclusion that [ADI] no longer managed the project after the August invoice is not correct, the evidence is irrefutable that [ADI] no longer took any part in the invoicing for work done after the December 31 invoices. This would leave [ADI] with a contractual claim for only the two December 31 invoices and the February 2013 holdback invoice. A claim for any subsequent period would have to be made by [ACI] and would have to be advanced by way of a legal vehicle other than the contract.
- [45] Justice Dley concluded that, as a result, it was clear that the same question, now to be considered between different parties, had not been earlier decided and that the Owners had failed to satisfy the first branch of the three-part test in *Danyluk*. All three aspects must be satisfied before a party can succeed to establish issue estoppel or *res judicata*: paras. 17-18. The Owners did not appeal Justice Dley's conclusion and I agree with it.
- [46] I find that ACI's claim is not barred by the doctrine of *res judicata* or issue estoppel.

Quantum Meruit or Unjust Enrichment

- [47] In this case, ACI advances a claim based on restitutionary quantum meruit, which is based on unjust enrichment.
- [48] ACI's claim is not based on contract. It acknowledges that it did not have a contract with the Owners to perform construction management services on the Project. Rather, it relies on quantum meruit as a discrete cause of action.
- [49] In *Consulate Ventures Inc. v. Amico Contracting & Engineering (1992) Inc.*, 2007 ONCA 324, the Ontario Court of Appeal explained at paras. 95 and 99 that a claim to restitutionary relief based on quantum meruit is not dependant on the existence of a valid contract. It is a discrete cause of action, separate and apart from claims in contract or tort, which contemplates a remedy for unjust enrichment or unjust benefit. Mutual agreement to compensate for services rendered is not a prerequisite to recovery. It is sufficient if the services in question were provided at the request, or with the encouragement or acquiescence, of the opposing party in circumstances that render it unjust for the opposing party to retain the benefit conferred by the provision of the services.
- [50] Thus, for a claim in quantum meruit to succeed in this case requires an assessment of: 1) whether the Owners have been enriched by the work done by ACI on their behalf; 2) whether ACI has suffered a corresponding deprivation; and 3) the absence of a juristic reason for the enrichment: *Pettkus v. Becker*, [1980] 2 S.C.R. 834 at 848.
- [51] Justice Smart canvassed the issue of unjust enrichment in the construction context in *Sabihi v. Dr. Mansur Roy Inc.*, 2013 BCSC 1571. In that case, the plaintiff entered into a contract with the defendant for tenant improvements on property the defendant had leased from West Railway Properties Ltd. ("West Railway"). West Railway was not a party to the contract and had no relationship with the plaintiff, but the contract required the plaintiff to coordinate its work with West Railway and to meet West Railway's expectations.

- [52] The defendant terminated the contract, and the plaintiff filed a lien against West Railway's property. The plaintiff's lien claim was extinguished because it had not filed a certificate of pending litigation as required by the Builders Lien Act, S.B.C. 1997, c. 45. The plaintiff claimed that West Railway had been unjustly enriched by its work.
- [53] At para. 25 and following of *Sabihi*, the Court canvassed cases involving unjust enrichment and set out the three elements that I have set out above that are required for a claim of unjust enrichment to succeed.
- [54] Based on the admitted facts, there is little question that ACI provided services to the project after August 2012 and that the Owners received those services and benefitted from them. As in many unjust enrichment cases, the argument in this case centres on whether there was a juristic reason for the enrichment provided by ACI to the Owners.
- [55] As set out in *Sahibi*, relying on *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at paras. 44-45, the analysis of whether there was a juristic reason for the enrichment has two parts. First, ACI must show that no juristic reason exists to deny recovery. This means that there is no reason in law or justice for the Owners to retain the benefit conferred on them by ACI. If ACI satisfies that burden, the second part of the analysis shifts the burden to the Owners to show there is another reason to deny recovery and why they should retain the benefit they have received.
- [56] The established categories that may constitute juristic reasons for an enrichment include: a contract; a disposition of law; a donative intent; and other valid common law, equitable, or statutory obligations: *Garland* at para. 44. The categories may be expanded as circumstances arise such that recovery will be denied in cases in which allowing it would be inequitable: *Sabihi* at para. 28.
- [57] The absence of a juristic reason and the need for flexibility with respect to the categories was addressed by the Supreme Court of Canada in *Kerr v. Baranow*, 2011 SCC 10, where Justice Cromwell said:
- [41] Juristic reasons to deny recovery may be the intention to make a gift (referred to as a "donative intent"), a contract, or a disposition of law. The latter category generally includes circumstances where the enrichment of the defendant at the plaintiff's expense is required by law, such as where a valid statute denies recovery. However, just as the Court has resisted a purely categorical approach to unjust enrichment claims, it has also refused to limit juristic reasons to a closed list. This third stage of the unjust enrichment analysis provides for due consideration of the autonomy of the parties, including factors such as "the legitimate expectation of the parties, the right of parties to order their affairs by contract".

[Citations omitted.]

- [58] The law is well established in British Columbia that if there is a chain of contracting from an owner to a prime contractor or a subcontractor, the contractual chain can be a juristic reason to deny recovery based on restitutionary or unjust enrichment principles.
- [59] For example, the Owners rely on *Oasis Windows Ltd. v. Coppergate Developments Inc.*, 2015 BCSC 342, in which the Court determined that in construction contracts, where a chain of contracting exists, quantum meruit claims may be unavailable. This is in part because, in addition to a subcontractor's remedies against the prime contractor, a subcontractor also has lien remedies against an owner's land. See also *Elbee Development Corp. v. A & D Masonry Ltd.* (1999), 49 C.L.R. (2d) 214 (B.C.S.C.) at paras. 9-10; *Pacific National Exhibition v. Alpine Stone Ltd.*, 2003 BCSC 852 at paras. 13-14.
- [60] However, the circumstances in this case fall outside the chain of contracting cases. Based on Justice Grist's reasons, there is no contract between ADI and ACI. The corporate reorganization was purely an internal reorganization for purposes unrelated to the Project. ACI was not a subcontractor to ADI; it could not demand payment from ADI based on a contractual arrangement. ADI was found to have no claim against the Owner for the work that ACI did.
- [61] The legal implication of Justice Grist's decision was that, absent a contract between ADI and ACI, ADI could not charge the Owners for ACI's work and ACI was not in a position to demand, on a contractual basis, payment from ADI for the construction management work it did from August 2012 onward. Indeed, if there had been a contract between ACI and ADI, ADI's claim against the Owners could have succeeded.
- [62] Quantum meruit is an equitable remedy leading to consideration of other factors which address the equity between the parties and what is just and fair in the circumstances. Pursuant to the terms of the Contract between ADI and the Owners, the Owners agreed to pay for the work that was performed in managing the construction. If ADI had provided that work, the Owners would have been required to pay for it. Instead, ACI did the work. It incurred the costs of trades and suppliers, and provided work by its directly employed workers. The Owners received the benefit of that work and those supplies, and ACI has not been compensated for it.
- [63] Based on the admissions, the Owners received the benefit--the value of the work and materials provided by ACI to the property--between November 2012 and early 2014. They accepted this benefit and are living in the home that was constructed. Pursuant to the Contract, they expected to pay ADI for such work on a cost-plus basis.
- [64] ACI has suffered a corresponding detriment. It was obliged to pay material suppliers, sub-trades, and workers from its own forces, all of which was in relation to the Project.

- [65] If ACI had performed these services pursuant to a subcontract with ADI, based on the established BC cases, there would have been a rational juristic reason to deny ACI recovery as ADI could have claimed compensation against the Owners for the services. However, as a result of Justice Grist's decision, ADI is unable to recover from the Owners under the Contract for work that was done by ACI.
- [66] ACI has demonstrated that there is no juristic reason to deny them a recovery and the burden of proof falls on the Owners to assert another reason to do so. The Owners have not asserted another reason in this case. In my view, the circumstances of this case are among the circumstances which quantum meruit was intended to address. It would be unjust for the Owners to retain the benefit of ACI's construction management without paying for it.

The Calculation of the Value of the Benefit Received by the Owners

- [67] In *Pure v. BC-Alta*, 2019 BCSC 390, the court determined that a contract had never been agreed to between the parties but the plaintiff was entitled to remuneration for engineering services it had provided on a quantum meruit basis. Citing *Infinity Steel Inc. v. B&C Steel Erectors Inc.*, 2011 BCCA 215 at paras. 20-22, the Court said that there were various ways of assessing the value of the benefit provided, including the cost to the plaintiff of providing the service, the market value of the benefit, or even the value placed on the benefit by the recipient.
- [68] In *Infinity Steel*, the Court said that there is broad discretion in determining the appropriate method for calculating a quantum meruit claim. It outlined the various ways in which judges in other cases described the appropriate measure of the remedy for unjust enrichment. Those descriptions included: the amount the claimant deserved; what the job was worth; the value of the benefit obtained by the defendant; the reasonable market value of the services; and the fair value of the services rendered. The Court said, at para. 22, that the "appropriate measure for restitutionary quantum meruit is to be selected to meet the circumstances of the particular case." The factors to be considered include: the course of dealings between the parties, any estimates obtained, the costs incurred, the scope of work, the actual work done, and the market value of the services provided.
- [69] In *Aerovac Systems Ltd. v. Darwin Construction (Western) Ltd.*, 2010 BCSC 654 at para. 49, Justice Savage, when a member of this Court, said that:
- [49] Estimates, reasonable costs and expenses, quoted rates, abortive negotiations on price, and expert opinions are all methods which a court can utilize in determining a fair value for the services rendered. This is not a closed list. The appropriate method or methods to use in any individual case will depend on the evidence before the court.
- [70] In the circumstances of this case, I conclude that the best method for determining the benefit conferred by ACI on the Owners is with reference to the Contract it had earlier signed with ADI. There, through negotiations, ADI and the Owners had agreed to a cost-plus arrangement. ADI would charge the Owners for contract management services based on the

invoices it received from sub-trades, professionals, and material suppliers, plus a 15% premium. ADI would also charge for its own trades at costs. The invoices prepared by ACI followed the same format as those previously prepared by ADI, including the 15% premium.

- [71] As a result, based on the admissions, and calculated based on the terms of the Contract, the Owners paid in full all of the invoices issued by ADI to November 2012. From August 13, 2012 to December 25, 2013, ACI issued the Owners a series of invoices with respect to the Project. Of those invoices, as of June 2015 the sum of \$262,283.70 had not been paid to ACI. As of June 2015, the Owners paid \$112,574.37 directly to material suppliers and trades of ACI. Those are appropriately deducted from ACI's claim, leaving an outstanding balance of \$149,709.33.
- [72] Pursuant to the parties' suggestion, I have not dealt with the Owners' counterclaim. I urge the parties to try to resolve that claim without the need for further litigation. The impact on the parties of this prolonged dispute has been considerable in both financial and other terms. They should attempt to put it behind them.
- [73] In the interests of efficiency, I will remain seized with determining the quantum of the Owners' counterclaim if the parties are unable to resolve matters.
- [74] Further, if the parties are unable to agree on an appropriate order for costs, given the history of this matter, and ACI's success, they may contact the Scheduling for the purpose of appearing to speak to costs.

"MacNaughton J."

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