

CANADA / JUDGMENT

# Bridgewater Tile Ltd. v. Copa Development Corporation

2022 BCSC 310

COURT

Supreme Court of British Columbia

DECIDED

28 February 2022

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2022 BCSC 310 Bridgewater Tile Ltd. v. Copa Development Corporation

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bridgewater Tile Ltd. v. Copa Development Corporation,

2022 BCSC 310

Date: 20220228

Docket: S180796

Registry: Vancouver

Between:

Bridgewater Tile Ltd.

Plaintiff

And:

Copa Development Corporation and

Jing Yu and Steven Han

Defendants

And:

Bridgewater Tile Ltd. and

Copa Development Corporation

**Defendants by Counterclaim**

Corrected Judgment: The front page of the judgment was corrected on March 2, 2022 and the text of the judgment was corrected at paragraphs 236, 252 and 253 on April 27, 2022.

Before: The Honourable Madam Justice Watchuk

Reasons for Judgment

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Place and Dates of Trial:

Port Coquitlam, B.C.

June 7-9, 11, 14-15, 2021

July 20-21, 23, 2021

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Place and Date of Judgment:

Vancouver, B.C.

February 28, 2022

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### I. INTRODUCTION

- [1] This trial dealt with three claims arising from the construction of a house in the Shaughnessy neighbourhood of Vancouver, B.C. from 2014 to 2017. The first claim was brought by the plaintiff Bridgewater Tile Ltd. ("Bridgewater") against Jing Yu and Steven Han (together, the "owners") to recover outstanding amounts for services rendered in installing tiles in the house. Ms. Yu then brought a counterclaim: first, directly against Bridgewater in negligence and breach of contract, arising out of the services performed; and second, against Copa Development Corporation ("Copa"), the project management company, also in breach of contract and negligence. Initially, Bridgewater had also brought a claim against Copa; however, it discontinued that action before trial. Both Bridgewater and Copa defended the counterclaim.
- [2] Bridgewater is a tile installation company that has been operating for approximately 40 years.
- [3] Copa is a project management company specializing in high-end single-family custom homes. Tony Liu, Copa's principal, has been a construction manager since 1985.
- [4] At the outset it is necessary to address the reference noted above to both Mr. Han and Ms. Yu as owners. Mr. Han is a real estate developer with a business in China and his wife, Ms. Yu is a medical doctor with a practice in China. Their usual residence is in Shanghai, China.
- [5] In the Notice of Civil Claim filed by Bridgewater on January 23, 2018, only Ms. Yu, the registered owner of the house, and Copa were named as defendants. Ms. Yu filed the Counterclaim on February 16, 2018. Mr. Han was added as a defendant in the Amended Notice of Civil Claim, filed March 28, 2018, wherein it was pleaded in one alternative that Ms. Yu entered into a contract with Bridgewater, and was invoiced, through her agent Mr. Han. On the basis of the totality of the evidence, including that set out below, I find that, with

regard to the tile work contracted for and completed during the construction of the house, Mr. Han was at all times acting as the agent of Ms. Yu. Thus, I will refer to Ms. Yu and Mr. Han, the registered owner and her agent, jointly as the owners, and together as one of the parties for the purpose of the findings of facts and discussion.

- [6] Bridgewater's claim against the owners is for unpaid invoices for tiling work done at the house pursuant to an agreement. The claim is in the amount of \$69,001.65, plus court ordered interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79, calculated as follows:
- (a) \$26,361.15, for the amount outstanding from the invoice dated February 26, 2016;
  - (b) \$24,061.80, for the amount outstanding from the invoice dated August 31, 2016; and
  - (c) \$18,578.70, for the amount outstanding from the invoice dated September 27, 2016.

Bridgewater also seeks a builder's lien, pursuant to the Builders Lien Act, S.B.C. 1997, c. 45 [BLA].

- [7] In the counterclaim against Bridgewater and Copa, Ms. Yu alleges breach of contract and negligence against both Copa and Bridgewater. It is agreed that there was a contract between Copa and Ms. Yu; the interpretation of its terms is in issue. On the other hand, the owners, both of whom filed responses to the civil claim, deny that they had a contract with Bridgewater. Bridgewater, however, alleges they contracted directly with the owners (through Mr. Han), and had no contract with Copa. Copa supports Bridgewater's position on this issue.
- [8] Both Ms. Yu's claims in negligence and contract are based on the same factual foundation: they allege that the stone in the indoor pool area was seriously stained with grout and that the plaintiff refused to adequately remedy this issue. As against Bridgewater, Ms. Yu alleges that it breached its contract with Copa by failing to provide Ms. Yu with services "above business standard." She also alleges that Bridgewater's conduct negligently "fell below the standard expected of them". As against Copa, she alleges that it failed to perform its contractual obligation to ensure subcontractors rectify deficiencies (in this instance, the grout-stained tiles). She also alleges that this "fell below the standard expected of [Copa]" and was, therefore, negligent.
- [9] In their closing submissions, the owners allege damages of \$808 for an overcharge on a fireplace and \$43,886.80 for the deficiencies caused by the plaintiff. A claim against Copa for overcharges of 10% of the cost of \$4,500,000 was withdrawn. However, the owners in their closing submissions continued to advance suspicions that Copa made under-the-table transactions with the plaintiff (and other contractors) notwithstanding that fraud was not pleaded and when, during the trial, the owners were asked if they sought an adjournment in order to apply to amend their pleadings, they declined. Thus, the claims of fraud and fraud-like actions by the plaintiffs against Copa are not properly before the court and are given no weight.

- [10] The owners, in each of their responses to civil claim, also dispute the validity of the builder's lien registered by Bridgewater, stating that the lien is not valid and that even if it is, the amount claimed of \$69,001.65, is denied.

## II. Issues

- [11] In order to resolve the issues between the parties I will commence with a discussion of the contract between Copa and the owners.
- [12] Secondly, I will review the evidence regarding whether there was a contract between Bridgewater and the owners. The owners submit that it was Copa, not they, that contracted with Bridgewater.
- [13] I will then canvass the progression of Bridgewater's work, their invoices and non-payment by the owners. The owners seek to justify their non-payment on the basis that Bridgewater's work was deficient, having regard to the already-mentioned grout stains. I will review the evidence concerning Bridgewater's performance and these alleged deficiencies.
- [14] Finally, and crucially, there are disputes on the evidence concerning how Bridgewater responded to these alleged deficiencies and whether their response was adequate. The owners assert that the only acceptable form of remediation is removal and replacement of the stained stones. Bridgewater suggests steps short of complete replacement will adequately remedy any staining and that the owners themselves frustrated Bridgewater's attempts to rectify the situation.
- [15] Before proceeding to the legal analysis portion of this judgment, given the submissions of the parties, I find it necessary to address the issue of credibility and reliability of the witnesses at some length. Evidence on certain crucial points in this case is disputed, and making findings concerning the credibility and reliability of the witnesses is necessary before the analysis of those contested points.
- [16] After reviewing the evidence and addressing the credibility of the parties, I will begin the analysis by discussing the owners' claims in negligence. This issue largely turns on the sufficiency of the evidence that would allow the Court to assess the standard of care in the context of tile installation and remediation.
- [17] I will then proceed to deal with the contractual issues. First, I will make findings about whether Bridgewater actually contracted with Copa, as alleged by the owners. Second, I will consider the interpretation and possible breach of the one contract all parties agree actually exists; that is, the project management contract between Copa and the owners. Finally, I will address the question of whether, by virtue of their non-payment of invoices and alleged frustration of Bridgewater's remediation efforts, the owners breached an agreement between Bridgewater and themselves. The Court's findings on that point will then require a consideration of whether the deficiencies alleged by the owners allow them to claim a set-off against the outstanding amount claimed by Bridgewater.

- [18] As a final point, I will briefly address the owners' concerns about the form of the claim of lien and the question of whether these issues invalidate the lien.

### III. The Evidence and the Facts

- [19] Many of the facts are not in issue. The parties each provided, at the request of the Court, a chronology of events which forms the basis of the facts set out below. Where it is necessary to review the evidence in order to arrive at findings of fact in crucial areas, that will be noted, and the discussion will follow.

#### A. Agreement between Copa and Ms. Yu

- [20] Copa and Ms. Yu entered into the Project Management Contract (the "Contract") on January 22, 2014 and a further agreement (the "Supplemental Agreement") on August 24, 2017 with regard to the construction of the house at 1189 Balfour Avenue, Vancouver, B.C. At issue is the interpretation of some of the terms of these contracts, particularly regarding Copa's relationship with Bridgewater.
- [21] Copa prepared the Contract and the Supplemental Agreement. The owners submit that where ambiguity exists in the provisions of the Contract or the Supplemental Agreement, contra proferentem should apply and the interpretation most favourable to the owners should be adopted.
- [22] The Contract was entered as an exhibit in its original form in Chinese, and with two English translations. It is a term of the contract that the language of the contract is Chinese. An interpreter was called as a witness by Copa to provide evidence regarding the correct translation of the contract including the term regarding the guarantee.
- [23] The management fee to be charged by Copa was \$350,000.00 plus GST. The last payment has not yet been invoiced by Copa. It is not making a claim for that or any amount in these proceedings.
- [24] In the May 5, 2021 translation of the contract, the following terms are relevant to the issues between the parties:

##### Clause A-1 Services and Responsibilities

- (1) The Project Manager agrees to provide services stipulated in GC2 in the Appendix.

##### Clause A-3 Status of the Project Manager

- (2) The Owner shall retain the Project Manager to represent him to manage this Project.

##### Construction Phase

Make sure that the subcontractors have enough workers, materials and equipment to do the Project

Review subcontractors' and materials suppliers' monthly invoices and demands for payment and make arrangements for payment by the Owner

Post-Construction Phase

Make sure that the subcontractors complete the deficiencies in the Project

GC-2 Subcontractors

Make arrangements for subcontracting documents as well as obtain and analyze subcontractors' quotation

Make arrangements for subcontractors and the Owner to sign subcontracting contracts

### **GC-11 Guarantee by the Project Manager**

The Project Manager shall protect and preclude the Owner from harms, claims, demands, losses, expenses and damages as well as legal actions or litigations by a third party arising from the Project Manager's implementation of this Contract.

- [25] The word "subcontractor" is not defined in the Contract. Although Copa denied that the plaintiff was a subcontractor, one of the issues arising from the evidence is that Ms. Yu understood that the plaintiff was a subcontractor.
- [26] From the owners' perspective, the provisions dealing with Copa's supervisory obligations are of paramount importance. In the Contract, Copa agreed to "make sure that the subcontractors complete the deficiencies in the Project." In the Supplemental Agreement, Copa agreed to "arrange and supervise Trade Contractors to complete their deficiency works in a timely fashion".
- [27] Regarding Copa's relationship with the plaintiff, the owners submit that Mr. Liu admitted that Copa treated the plaintiff as a subcontractor for its work related to subcontractors under page 6 of the Contract. However, the evidence of Mr. Liu is that Bridgewater was not a subcontractor.

### **B. The Tiling Arrangements**

- [28] The background was given in evidence by John Vani, Bridgewater's principal; Spencer Lawton, Bridgewater's project manager; and Mr. Liu. Bridgewater and Copa had worked together successfully on three earlier projects. Mr. Liu understood that Mr. Han had decided to engage Bridgewater to do the tiling at the house because he and Terry Doyle, the interior designer hired by the owners to design the house, had recommended Bridgewater. On Mr. Han's directions, Mr. Liu asked Bridgewater to prepare a quote for tiling numerous areas of the house.

- [29] Mr. Lawton explained the process of Bridgewater's preparation of its quote, dated December 3, 2015 (the "Quote"). First, Bridgewater reviewed the drawings and specifications. It then isolated any questions that needed to be answered. In this case, Mr. Lawton requested a site meeting with Mr. Liu and Mr. Doyle, during which he received the answers to his questions. Subsequently, Mr. Lawton contacted various suppliers to inquire about the price for materials. Next, Mr. Lawton prepared a spreadsheet that showed materials and labour required for each area where work would be undertaken. Mr. Lawton then prepared the Quote for the owners.
- [30] Bridgewater's Quote for all of the tile work in the house, less the pool room area and after negotiation of a 2% discount, was accepted by Mr. Han. This was communicated to Mr. Liu by Mr. Han in an email dated December 8, 2015.
- [31] On December 10, 2015 Mr. Liu wrote to Bridgewater to advise them that the offer was accepted by the owner. He also wrote: "The contract you have with Mr. Steven Han is \$99,684 les 2% + \$97,890.32 plus GST."
- [32] With the removal of the pool room tiling and the 2% discount, the price that was agreed to between Bridgewater and the owners was \$97,690.00 plus GST.
- [33] During construction, the scope of Bridgewater's work was expanded twice at the request of the owners.
- [34] First, on about February 26, 2016, Bridgewater and the owners came to an agreement that Bridgewater would supply and install tiles to the pool area for \$66,000.00. Bridgewater's total price for all of the work therefore increased to \$163,690.00 plus GST.
- [35] Second, on about September 22, 2016, when Bridgewater's work was nearly complete, the owners asked Bridgewater for a quote to install floor tiles in the mechanical room. Mr. Liu testified that Mr. Han, while in Vancouver, agreed to the price of \$1,325.00 for Bridgewater to perform the labour of installing owner-supplied tiles in the mechanical room. Bridgewater's total price for all of the work then increased to \$165,015.00 plus GST.
- [36] With regard to the contractual relationship between Bridgewater and the owners, Mr. Liu gave evidence that Bridgewater was not a subcontractor for Copa and that the agreement for tiling work was made between Bridgewater and the owners. Regarding entering into agreements for the various aspects of the construction at the house, Mr. Liu's evidence was that he had no authority to agree on the price of any work or materials and that his role was limited to advising trades that Mr. Han accepted their quotes.

- [37] There was evidence to demonstrate that the owners had a pattern of not paying the invoices provided by trades when nearing substantial completion of their work. Mr. Liu testified to at least five companies, including Bridgewater, not being paid in full for their work at the house. This evidence is relevant only as being demonstrative of the relationship between the owners and various trades. In all instances, the owners, not Copa, determined the amount of the payments or whether there would be a withholding.
- [38] DNH Woodworks ("DNH") supplied the closet system in the master bedroom and entry of the house. Mr. Liu said Mr. Han withheld the last payment from DNH due to his concerns about the quality of work. Mr. Liu asked DNH to rectify any deficiencies, but DNH wanted to be paid before returning to the site.
- [39] BC Hardwood Floor provided hardwood floor to the house. Mr. Liu testified that the choice of hardwood was approved by Mr. Han, and that during the quotation, the owners were advised by BC Hardwood Floor that this hardwood contains knots and character. After installation, Mr. Han complained that the hardwood contained more knots than the sample hardwood did. He therefore withheld approximately \$10,000.00 from BC Hardwood Floor. However, Mr. Han did not direct Mr. Liu to have the floors replaced.
- [40] Western Elevator was hired by Mr. Han to install an elevator in the house. Mr. Liu testified that Mr. Han did not pay the last invoice issued by Western Elevator in the amount of approximately \$4,000.00. Later, in the summer of 2017, after the owners experienced a malfunction of the elevator, Mr. Liu asked Western Elevator to fix the elevator. Western Elevator attended at the house and fixed the problem. Mr. Liu testified that, as far as he knew, the elevator was now working well; he had received no further instructions from the owners with respect to the elevator.
- [41] Modern Automation installed the light control and security in the house. Mr. Liu testified that Mr. Han complained of the quality of the work and refused to pay Modern Automation. Modern Automation was only paid \$20,000.00 in deposit and was not paid the \$60,000.00 to which Mr. Han had agreed. Mr. Liu testified that after Mr. Han and Modern Automation had an argument, Mr. Han barred Modern Automation from finishing its work. According to Mr. Liu, Modern Automation was willing to finish the work and be paid, but they were not allowed to return to the house. Mr. Liu received no further instruction from the owners with respect to the issue.
- [42] In addition to failing to pay trades, the evidence indicates that, with respect to the invoices that actually were paid, Mr. Han was often late in paying. Mr. Vani testified that while it is typical for Bridgewater to receive payment within 30 days of issuing the invoice, the consistent dragging out of payments by the owners in this project was unusual. Mr. Vani also testified that on his three previous projects with Mr. Liu, he had not had trouble with respect to getting paid.

[43] Mr. Liu testified that Mr. Han was sometimes late in paying Copa as well. Sometimes it took time for Mr. Han to transfer funds from China but Mr. Liu trusted him. Copa has not yet invoiced Mr. Han for the last invoice for total completion because of this court case.

#### C. The Invoices from Bridgewater to the Owners for Tiling Work Done and the Payments History of the Owners

[44] I commence these sections regarding the disputes between Bridgewater and the owners by setting out the history of the work done by Bridgewater and its invoices to the owners.

##### 1. The Material Deposit

[45] At the request of Copa, Bridgewater's work at the house began in the early part of 2016. In December 2015, before work commenced, the owners paid Bridgewater a materials deposit in the amount of \$29,196.00.

[46] Mr. Vani and Mr. Lawton gave evidence that the materials deposit was for the purchase of the special-order limestone that was to be used for areas in the lower floor. They both testified that it is common for suppliers to require a material deposit when ordering special materials. This deposit was applied to the owners' account only when the specially ordered material was delivered, as indicated on Bridgewater's invoice dated June 30, 2016.

##### 2. The Invoices

[47] Mr. Lawton gave evidence that he prepares invoices by visiting the site, ascertaining what percentage of labour had been performed and material installed, with reference to an excel sheet that sets out the material and labour. Sometimes he determined the percentage by asking Mr. Vani or the workers at the site.

[48] Bridgewater rendered the following seven invoices to Mr. Han. The amounts and dates of the invoices are not in issue.

(a) The first invoice was dated February 26, 2016, in the amount of \$34,332.00, plus GST. Mr. Lawton gave evidence that this amount represented 21% completion, with reference to the materials and labour for the upstairs bathrooms. The materials deposit was not applied to this invoice as Bridgewater asked for the materials deposit in respect of the special-order limestone which had not yet arrived.

Mr. Liu testified that, on February 28, 2016, he inquired with Mr. Lawton about this progress claim, expressing his uncertainty about whether 21% of progress had been made. Mr. Liu testified that he was satisfied with Mr. Lawton's explanation of the February progress claim in Mr. Lawton's email the next day.

(b) The second invoice was dated March 30, 2016, in the amount of \$11,501.00, plus GST. Mr. Lawton gave evidence that this amount represented for 28% completion, accounting for labour for the upstairs bathrooms.

- (c) The third invoice was dated April 29, 2016, in the amount of \$3,274.00, plus GST. Mr. Vani gave evidence that this amount represented 30% completion, accounting for clean-up of the upstairs bathrooms. Mr. Vani and Mr. Lawton both gave evidence that Bridgewater had finished a significant amount of labour by that point and were waiting for the next batch of areas to become available for Bridgewater to continue work in the house. Mr. Vani gave evidence that lulls are typical in projects, especially high-end jobs, because the sequencing of Bridgewater's work is contingent on the work of other trades.
- (d) There is no invoice for the month of May. Mr. Lawton explained that Bridgewater was in the process of waiting for the special-order pool stones to be delivered before working on the areas in the lower floor. By May, the work in the upper floor areas was complete.
- (e) The fourth invoice was dated June 30, 2016, in the amount of \$49,107.00, plus GST. Mr. Vani gave evidence that this amount represented 60% completion, accounting for the value of the special-order limestone that was delivered to the house. Part of the materials deposit was applied against this amount, and the \$19,911 cash payment represented the balance then owing.
- (f) The fifth invoice was dated July 27, 2016, in the amount of \$19,643.00, plus GST. Mr. Lawton gave evidence that this amount represented 72% completion, accounting for almost exclusively the labour of installing some of the special-order limestones in the pool area.
- (g) The sixth invoice was dated August 31, 2016, in the amount of \$22,916.00, plus GST. Mr. Lawton gave evidence that this amount represented 86% completion and accounted for continued installation of the special-order limestones in and around the pool area. By then, installation of the walls and columns of the pool area were nearly complete.
- (h) The seventh invoice was dated September 27, 2016, in the amount of \$17,694.00, plus GST. Mr. Vani and Mr. Lawton gave evidence that nearly all of the items in the Quote were complete by then and there had been no complaints about Bridgewater's workmanship. The remaining 4% represented the pool deck and coping around the pool deck, as well as remaining touch-ups, grouting and sealing. This invoice also included the additional work of installing tiles to the mechanical room that Bridgewater agreed to do at the request of the owners in September 2016.
- [49] The plaintiff provided the following table showing the invoiced amounts and the amounts paid. The invoices take into account the credits applied which reduced the total price of \$165,015 to \$158,467. A further credit of \$499 is due to the owners, which reduces the total price to \$157,968.

Invoice

Date

Amount

---

GST

Paid

15451

2/26/2016

\$34,332.00

\$1,716.60

\$9,687.45

15489

3/30/2016

\$11,501.00

\$575.05

\$12,076.05

15526

4/29/2016

\$3,274.00

\$163.70

\$3,437.70

15618

6/30/2016

\$49,107.00

\$2,455.35

\$51,562.35

15649

7/27/2016

\$19,643.00

\$982.15

\$20,625.15

15711

8/31/2016

\$22,916.00

\$1,145.80

\$0.00

15736

9/27/2016

\$17,694.00

\$884.70

\$0.00

Total

\$158,467.00

\$7,923.35

\$97,388.70

[50] Mr. Han testified that payment of invoices was entirely Ms. Yu's responsibility. Ms. Yu evaluated the workmanship and decided whether to withhold payment. His evidence was that this remained constant during construction, even when Ms. Yu was in China. He confirmed in cross-examination that this occurred despite the fact that he has experience in China as the general manager of a real estate development company and Ms. Yu is a medical doctor.

[51] Mr. Han's evidence contradicts the evidence given by Ms. Yu, who agreed that Mr. Han was more involved in the construction after September 2015, months before Bridgewater became involved in the project. Ms. Yu testified that she visited Vancouver only twice during 2016, the first being from the end of January to the beginning of February and the second being from the end of June to the end of August. At the various meetings with Bridgewater and Copa Mr. Han represented Ms. Yu.

[52] Mr. Liu testified that his role, and obligation under Copa's contract with Ms. Yu, was to receive the invoices, assess them, and pass them on to the owners for payment to Bridgewater.

### 3. Non-payment of invoices

[53] Bridgewater's February invoice was not paid in full by the owners. Mr. Liu's initial evidence was that the owners demanded that Bridgewater provide Mr. Liu justification for the amount charged on the first invoice.

- [54] Mr. Han then gave Mr. Liu two cheques, totalling the amount of the February invoice -- a cheque dated March 25, 2016 in the amount of \$16,048.60 and April 20, 2016 in the amount of \$20,000.00. These two cheques were the subject of considerable evidence. They are relevant specifically to the amount of Bridgewater's claim, and also illustrate the owners' view that Copa was acting dishonestly.
- [55] Mr. Liu testified that he instructed his staff to mail the two cheques to Bridgewater; he speculated that they may have become lost in the process. Mr. Vani testified that he never received those cheques. Mr. Han testified that his bank records indicate that the cheques were never cashed. Mr. Liu testified that he advised the owners to put a stop payment on the two cheques and to re-issue them. He testified that Ms. Yu told him that the cheques were re-issued. However, the evidence indicates that the cheques were not re-issued by the owners. The owners later made a partial payment of \$9,687.45 to Bridgewater in October of 2016; this was applied to the February invoice, leaving the amount outstanding on the February invoice at \$26,361.15.
- [56] Mr. Han and Ms. Yu gave inconsistent evidence about the two cheques that contradicts Mr. Liu's evidence.
- [57] Mr. Han first asserted that the cheques are evidence of "cheating" by Bridgewater. Then, he claimed that Mr. Liu had directed him and Ms. Yu not to pay the February invoice because Mr. Liu thought that Bridgewater had not completed the work shown in the February invoice. However, those cheques are dated after Mr. Liu's email expressing concerns.
- [58] Ms. Yu's evidence was similar: she testified that Mr. Liu had told her he did not give the cheques to Bridgewater because he did not think Bridgewater did the work.
- [59] Mr. Han and Ms. Yu's evidence contradicts Mr. Liu's evidence that he was satisfied with the February invoice and that he passed the cheques to his staff so that they could be mailed to Bridgewater. The evidence of Mr. Liu is that he told the owners to stop-payment on the lost cheques and re-issue cheques for the February invoice, and that the owners never did that.
- [60] Bridgewater's March invoice was paid on May 13, 2016, approximately six weeks after the issuing of the invoice.
- [61] Bridgewater's April invoice was paid shortly after being rendered.
- [62] Bridgewater's June invoice was paid partially by the application of the materials deposit that the owners had paid in December 2015. The balance owing on the June invoice was paid partially by cash and by cheque in September and October 2016. Mr. Vani's testified that Mr. Han personally handed him an envelope containing \$19,911 in cash for the June invoice when they were in the yard of the house in September 2016.
- [63] Bridgewater's July progress invoice was paid on September 20, 2016.

- [64] The owners did not pay Bridgewater's August progress invoice for \$24,061.80. There is no evidence of any complaints about the quality of Bridgewater's work to that point.
- [65] The owners also did not pay Bridgewater's September progress invoice for \$18,578.70. At this point, the owners had registered a complaint that they did not like the overall look of the tile for the basement powder room. That issue was settled by the owners agreeing to use their own tile. By the end of September, Bridgewater had completed 96% of the work set out in the Quote and 100% of the additional work in the mechanical room.
- [66] Mr. Vani testified that it was in early to mid-September that Bridgewater first registered concerns, over e-mail with Mr. Liu, about outstanding payments for the progress invoices issued for February, June, July, and August.
- [67] According to the evidence of Mr. Vani, it was shortly thereafter that the owners began to make complaints about the quality of Bridgewater's work.
- [68] Mr. Lawton testified that, by the time the complaints began, Bridgewater had completed substantially all of the items in the Quote, without receiving complaints from the owners.
- [69] The exceptions to this were the floor tiling in the entry foyer, about which the owners had a complaint that was remediated by Bridgewater. The plaintiff had also installed the lower level stone flooring with the specially ordered limestone. It was in respect of this stone that the owners raised complaints of "grout haze." Given that the same stone was used in the lower level powder room, Mr. Lawton also acknowledged that they may have raised concerns about grout haze in this area as well.
- [70] Finally, with respect to the pool area tiling, Mr. Lawton testified that all walls of the pool area were 98% complete. The deck and coping had not been done, which was less than 10% of the overall pool work. The owners complained about the grout haze on the limestone.
- [71] In addition to the items in the Quote listed above, the additional work of tiling the mechanical room floor that was requested by the owners was also complete, with no complaints from the owners.

#### **D. The Owners' Alleged Breaches of the Contract with Copa by Bridgewater**

- [72] Both the responses to civil claim filed by the owners, and the counterclaim filed by Ms. Yu, allege that Bridgewater breached its contract with Copa. As noted, whether there was such a contract is in issue in these proceedings. The owners say that Bridgewater's work fell below the standard of care, negligently causing them damage.

- [73] The owners plead only one particular which they allege to constitute both a breach of contract and a negligent deviation from the standard of care: certain stones installed by Bridgewater had grout stains. Although the response to civil claim alleges that Bridgewater refused to remedy the kitchen mosaic and "Wok Kitchen Backsplash", no particulars of any defects are described. No other specific complaints are pled in either the responses to civil claim or counterclaim filed by the owners.
- [74] Throughout their testimony, the owners also made allegations that Bridgewater and Copa "cheated", such as with the two missing cheques, and had taken kickbacks. They proffered no relevant evidence to support their allegations of cheating or kickbacks by Bridgewater, nor have they included those allegations in their pleadings. As noted, there were further references to under-the-table transactions in the owners' closing submissions.
- [75] The owners alleged that they gave Mr. Vani \$19,911.00 for the purchase of "stones for the porch" and that Mr. Vani had misappropriated those funds. However, the Quote does not include porch stones. No evidence was adduced at trial of an agreement between Bridgewater and the owners concerning work on the porch or the purchase of stones for the porch. None of the invoices issued by Bridgewater make any mention of porch stones. In their closing submissions, the owners also allege that the amount of \$19,911.00 was a payment made to Bridgewater by the owners that was not credited to them.
- [76] Mr. Lawton gave evidence about a complaint of the owners with respect to the entry foyer floor, namely that a small corner of the entry foyer floor needed to be brought down. He gave evidence that after Bridgewater remediated the corner, the owners were satisfied. Other than Mr. Lawton's testimony about the entry foyer floor, there is no evidence of any complaints about Bridgewater's workmanship at the house until Bridgewater raised concerns about outstanding payments.
- [77] I conclude that the areas where the tiling work is in issue are the kitchen mosaic, the wok kitchen backsplash, and the indoor pool area stones with the grout haze.
1. Pool area stone tiles / TTMAC Report
- [78] The evidence of Mr. Lawton and Mr. Vani is that Bridgewater became aware of complaints about the pool area tiles and kitchen backsplashes around mid-October 2016 when one of them received a call from Juno, Copa's site supervisor. Juno raised concerns about the pool area tiles and kitchen backsplashes. Contemporaneous emails between Mr. Liu and Mr. Lawton corroborate this evidence.
- [79] The evidence of the owners with respect to the stones in the pool area is that there is grout haze, or the discolouration of the stone due to grout residue being on the surface of the stone. Ms. Yu's testimony was that this is the owners' only issue with the pool area tiles. Ms. Yu articulated her view of the extent of the problem; namely, that grout haze on the stones means that the tile was "unsightly", "damaged", and "destroyed".

- [80] Mr. Lawton acknowledged observing grout haze on the pool stones while on a site visit shortly after Mr. Liu's email dated October 18, 2016. He said the haze was difficult to see without getting very close to the stones, but that there was an issue with the grout on porous stone.
- [81] However, the owners' evidence largely referred to the perceived diminished aesthetic value of the stones. These assertions appear to be entirely subjective. There was no expert evidence that grout haze constitutes damage to the stones.
- [82] The owners rely on the March 18, 2017 report by the Terrazzo Tile & Marble Association of Canada (the "TTMAC Report"). This report was obtained by Mr. Liu at the direction of the owners for an assessment of the pool area tiles. The report states in part:

Material & History as provided to the inspector:

The complaint is that the stone is cloudy and stained with grout. The primary concern is with the pool room, particularly the walls. The floor has the same issue but is less noticeable. The contractor suggested grinding the surface of the limestone and has subsequently performed an on-site test. The homeowner is now requesting the stone be removed and replaced.

Observations:

The workmanship appears to be generally good, including layout, cutting and installation details as illustrated in pictures 1, 2, and 3 (pic 1, 2, & 3). When tap-tested, the installation appears sound. No soft joints or movement joints were incorporated into the installation (pic 4).

The pores of the stone appear to be filled with grout residue, producing a streaky appearance (pic 5, 6, 7, & 8).

The finish on a single piece of the ground test stone appears to be more in keeping with how the stone should look, although it is considerably lighter than the adjacent tiles (pic 9 & 10).

### **Conclusion:**

The stone layout, and installation is acceptable. It would appear that the sealer itself, or its application were deficient in protecting the stone from the intrusion of grout pigments.

The re-polishing of the stone has produced a uniform surface finish without streaks or dark grout stains. The dry grinding procedure will affect the final colour and finish as well as producing considerable dust. To ensure the best possible solution it is suggested that a highly skilled professional marble/stone restoration company with appropriate experience in this type of remedial work should be retained to perform a wet polish on a sample area of both floor and wall tile. If a satisfactory finish is achieved, a gloss meter should be used to verify that the reflectiveness of the installation matches the sample test area. Should the test area not provide a satisfactory finished surface, the stone will need to be removed and replaced. It should be borne in mind that the removal of the stone will cause considerable dust and possible damage to the surrounding surfaces. Appropriate precautions will need to be taken to protect all adjacent

finishes.

## 2. Kitchen Backsplashes

- [83] Mr. Vani gave evidence that in September or October Mr. Han expressed dissatisfaction with the look of the mosaic of the kitchen backsplash. He said that the joints were not consistent in width.
- [84] Both Mr. Vani and Mr. Liu testified that the style of the backsplash mosaic was intended to have an antique appearance. The evidence of Mr. Lawton and Mr. Vani described that this meant that the mosaic was not intended to have even joints. Mr. Vani testified that although this was explained to Mr. Han, Mr. Han was not satisfied. Bridgewater therefore offered to take out the mosaic and re-do it.
- [85] There was no evidence about the quality of Bridgewater's work on the wok kitchen backsplash. There was no photograph of the wok kitchen backsplash in evidence showing Bridgewater's work before the tiles were removed and replaced. Ms. Yu testified that she does not know what the problem with the wok kitchen was and simply that she heard that it was "screwed up."
- [86] The photograph of the main kitchen, which is the only photo that shows a completed kitchen mosaic done by Bridgewater, shows no apparent errors. No expert witness was called to attest to any errors to be spotted in the photos. This issue was not addressed in the TTMAC Report.

## E. Bridgewater's Efforts to Remedy Complaints and the Owners' Responses

### 1. Pool area tiles

- [87] Mr. Vani and Mr. Lawton gave evidence that when grout hazing occurs on tile, Bridgewater's standard procedure is to contact Slate Renew, a company that specializes in tile, stone, and grout maintenance. Mr. Vani gave evidence that Bridgewater has worked with Slate Renew for more than 20 years, and Mr. Lawton gave evidence that Bridgewater has been pleased with Slate Renew's quality of work in the past. Mr. Vani testified that Slate Renew is usually fully successful at removing grout residue but that when Slate Renew is not able to remove 100% of the grout residue, Bridgewater engages Marblelife, a company that provides marble and stone restoration services.
- [88] Shortly after Mr. Liu's email of October 18, 2016, Mr. Lawton contacted Slate Renew. At the end of October, within a week of being contacted by Mr. Lawton, Michael Wingelman, the principal of Slate Renew, attended at the house.

- [89] Mr. Wingelman testified that he observed some grout haze on some tiles, but his testimony echoed that of Mr. Lawton, in that he needed to get right up against the tile to see it. He performed what he described as a standard test for grout haze, which involves sponging off the stone with a detergent-soaked nylon pad and observed that some haze was removed from the tile in the process.
- [90] Mr. Wingelman and Mr. Vani both gave evidence that Mr. Wingelman's recommendations to Mr. Vani at the time was that the cleaning process would require two workers. Working for roughly two days, Mr. Wingelman estimated that the cost would be approximately \$2,000.00. Mr. Wingelman testified that while he typically charges by the square-foot, his quote for this project was time-based, because the grout haze was not on every tile.
- [91] Mr. Vani testified that Bridgewater ordinarily pays for the costs of this remedial work. He told Mr. Liu and Mr. Han that the remedial work would be at no extra cost to the owners.
- [92] Upon inspection of the stones, Mr. Wingelman thought that Slate Renew could remove about 90% of the grout residue in the stone and that the deeper pits with grout might require enlisting a company that provides mechanical polishing services.
- [93] Kent Birkbeck, the president of Marblelife, testified that Marblelife performs the kind of mechanical polishing services described by Mr. Wingelman. He gave evidence that MarbleLife works with Bridgewater frequently and that Marblelife provides the grinding services described in the recommendations section of the TTMAC Report.
- [94] Mr. Birkbeck testified that Marblelife charges \$1.00 to \$2.00 per square-foot for its grinding services. Mr. Doyle's evidence was that the wall area of the pool room covered in limestone was 450 square-feet. In the result, had grinding been required, the cost would have been between \$450.00 to \$900.00, if all of the limestone tile in the pool room required grinding.
- [95] Mr. Birkbeck testified that he has never come across a situation where tiles that had the issues described by the owners would have had to be removed altogether or where he had to grind down tiles down by as much as one centimetre. He also explained that his process of grinding is water-based, which means that no dust is produced. As such, it is a process that can be done with furniture in a room.
- [96] On October 20, 2016, Mr. Lawton informed Mr. Liu via email that Bridgewater would remediate the pool area stones by grinding and would remediate the kitchen backsplashes.
- [97] For the purpose of remediation, Mr. Vani sent Marek Nowicki to the house. Mr. Nowicki has been a tile setter for over 30 years and has worked at Bridgewater for over 20 years, specializing in high-end custom homes. Mr. Lawton described him as the worker that Bridgewater relies on for high-end detailed work that requires special attention, and for remedial work when clients are dissatisfied.

[98] Mr. Nowicki testified that when he attended at the house, the pool area had been grouted. There were some details around the windows and doors that had not been completed. He testified that Mr. Vani directed him to finish the details and then to look for deficiencies and fix them.

[99] Mr. Nowicki gave evidence that he ground two tiles on the wall of the pool area and re-polished their corners. He testified that while he was working at the pool room, Mr. Han walked by him a few times, saw his work, and expressed no complaints.

## 2. Kitchen backsplashes

[100] Mr. Nowicki testified that, after working at the pool area, he was asked to work on the kitchen backsplash. Mr. Lawton testified that less than 5% of the backsplash tiles had been tagged with tape by Juno, indicating the need for removal. Mr. Nowicki's plan was to remove the tagged tiles and install new tiles.

[101] However, when Mr. Nowicki had removed around eight to ten tiles, his work was interrupted by Mr. Han. Mr. Han began to yell at Mr. Nowicki upon seeing pieces of the drywall being taken off with the removed tiles.

[102] Mr. Nowicki and Mr. Vani both gave evidence that it is normal for pieces of drywall to fall out in the process of removing tiles. Mr. Vani testified that Bridgewater puts in new drywall sometimes or works with the builder to create new drywall. Mr. Vani confirmed that it was standard for Bridgewater to cover the cost of any drywall repairs that may be required.

[103] Mr. Nowicki testified that he explained to Mr. Han that this is normal, and that the drywall will be restored after the tiles are removed. However, Mr. Han continued shouting aggressively at Mr. Nowicki. Mr. Nowicki confirmed that he was unable to understand Mr. Han but that Mr. Han's tone and body language were hostile. Mr. Nowicki testified that in the beginning the confrontation, Mr. Han was aggressively pointing at the drywall, but after some time, Mr. Han's hands were in a fist and Mr. Nowicki was concerned about his personal safety.

[104] Mr. Nowicki explained that he has interacted with many unhappy owners over the years, but that it was the first time that anything like this had happened to him. Mr. Nowicki observed that other trades at the job site were attempting to avoid Mr. Han.

[105] After being advised by Mr. Nowicki about the incident, Mr. Vani's response was that Mr. Nowicki could pack up his tools and leave the site. After the call with Mr. Vani, Mr. Nowicki went back inside the home to gather his tools and found that Mr. Liu had arrived on scene. Mr. Nowicki observed that Mr. Han was yelling loudly at Mr. Liu.

- [106] Mr. Liu confirmed Mr. Nowicki's testimony that Mr. Han was upset during this incident. He testified that Mr. Han's anger on that day was typical of Mr. Han, and that Mr. Han conducted himself in that manner with other trades. Mr. Liu said that Mr. Han's treatment of him was even worse. Mr. Liu testified that when Mr. Han "rages", his communication becomes incomprehensible and that he simply goes "wild".
- [107] Conversely, Mr. Han testified that it is impossible that he treated Mr. Nowicki badly. Mr. Han also contradicted himself on this matter, testifying initially that he did not allow Mr. Nowicki to return upon his observation that Mr. Nowicki's work was "screwed up". In cross-examination, however, Mr. Han claimed that it was not he but Mr. Liu who told Mr. Nowicki to leave. During his cross-examination by the counsel for Copa, Mr. Han claimed that he had no right to ask Bridgewater's employees to leave, as this is Copa's job.
- [108] Mr. Vani testified that by that point, he began feeling uncomfortable sending Bridgewater's workers to the house because of Mr. Han's treatment of them and the outstanding invoices. He said that Mr. Liu told him that he would try to get the owners to pay the outstanding payments. Mr. Vani testified that despite not being paid, Bridgewater continued to do the work at the house because he believed that Mr. Liu could urge the owners to pay.
- [109] Mr. Lawton said that toward the end of the project, Mr. Han was very often on site. Following Mr. Nowicki's confrontation with Mr. Han, Mr. Lawton informed Mr. Liu that Bridgewater would send its workers to the job site only on days that Mr. Han was not present at the site.
- [110] The evidence regarding the period from late October to mid-December is not clear. It appears that there was occasional email correspondence between Copa and Bridgewater but it that little tiling work was done on site.
- [111] It is not clear if Mr. Liu communicated to Bridgewater the dates that Mr. Han would not be on site so that Bridgewater could schedule its work. Mr. Liu testified in his cross examination that Mr. Han may have only asked him about when Bridgewater was coming back to remedy the pool room tiles two or three times between October and the middle of December.
- [112] Bridgewater attempted to schedule the grinding of the tiles. It wrote on November 16, 2016 with a plan of action. On December 14, 2016, Mr. Lawton sent Mr. Liu an email asking for an update on the pool area so that Bridgewater could seal, grout, and refinish the stone surface.
- [113] In her testimony, Ms. Yu claimed that Bridgewater ignored the owners' requests to grind the tiles. There is no evidence of requests by the owners or Mr. Liu, until Mr. Lawton's inquiry into the status of the pool area on December 14, 2016. Ms. Yu also testified that she does not know whether there are any emails from her or Mr. Han telling Mr. Liu that they want Bridgewater to grind the tiles. She also does not know whether there are any emails in which she directed Mr. Liu to find another company to do the grinding work.

- [114] Mr. Liu said that he is not certain whether there is documentary evidence that he asked Bridgewater to do the grinding work before Mr. Lawton's December 14, 2016 email.
- [115] In Mr. Liu's response email, he informed Bridgewater that furniture would be moved in on December 27. This provided a window of less than two weeks, including Christmas Day, for Bridgewater to finish its work and make arrangements for the remediation of the pool room tiles. It was Mr. Wingelman's evidence that it usually takes one to two weeks for Slate Renew to attend and perform its services after it has been retained.
- [116] Bridgewater attended at the house to work in the time frame allowed. In about the third week of December, Bridgewater completed further grouting of the tiles on the pool area walls. This is corroborated by Mr. Liu's email to Mr. Vani on December 23, 2016.
- [117] In Mr. Liu's email dated December 23, 2016, he informed Mr. Vani that there was also grout haze on the tiles grouted that day and that Mr. Han was no longer accepting grinding of the stones as a resolution to the hazing issue.
3. The Owners' Rejection of Bridgewater's Offers to Grind
- [118] In their testimony, Ms. Yu and Mr. Han were adamant that grinding was not an acceptable option to remove the grout residue. They maintained that all the stones in the pool area must be removed and replaced entirely. This is inconsistent with the recommendations of the TTMAC Report and with the recommendations of Mr. Liu who confirmed that removal of all the tiles would be significantly more disruptive than following the recommendations in the TTMAC Report.
- [119] Ms. Yu's reasoning is that the stones would not have the same "character" after grinding. She claimed that grinding would make the stones lose their "function and protective quality". This view is not supported by any expert opinion nor by the findings in the TTMAC Report.
- [120] On the other hand, Mr. Han's reason for rejecting the recommendations of the TTMAC Report is that grinding the tiles would cause the gaps between tiles to "disappear". He said that the purpose of grouting is to provide "gaps" between the stones and that grinding removes the gaps. He said that he told Mr. Liu of his concerns about the gaps disappearing but does not know when. Again, there is no expert opinion supporting this view nor is it referenced in the TTMAC Report.
- [121] Mr. Liu testified that neither Ms. Yu nor Mr. Han complained about the result of the test ground tile. When it was put to Ms. Yu that she was satisfied with the result of the test ground tiles, her answer was that she was "not sure".

- [122] In addition to the absence of any complaints by the owners about the sample grinding done by Bridgewater, the TTMAC Report states, "[t]he finish on a single piece of the ground test stone appears to be more in keeping with how the stone should look, although it is considerably lighter than the adjacent tiles." The TTMAC Report makes no mention of the stones losing their "character", "function" or "protective quality". It makes no mention of "gaps" between the stones disappearing.
- [123] On January 24, 2017, Mr. Liu retained North Sea Contracting Ltd., at the request of Mr. Han, for a quote to remove and replace the pool area tiles. The quote is for \$80,300.00 plus GST. Mr. Liu confirmed that the owners did not direct him to hire North Sea to do the work that it quoted. Instead, Mr. Han told Mr. Liu that he would think about it and did not say anything about it after that.
- [124] About a month after the North Sea quote, Mr. Liu commissioned the TTMAC Report at the request of Mr. Han. Another month later, Mr. Liu received the report dated March 18, 2017, which recommended grinding.
- [125] Mr. Han and Ms. Yu both acknowledged that grinding is the remedial measure recommended by the TTMAC Report. However, both confirmed that they did not direct Mr. Liu to hire another contractor to carry out the recommendations of the TTMAC Report. Ms. Yu testified that she was waiting for the outcome of the trial to make a decision about how to proceed with respect to the pool tiles.
- [126] When asked in cross-examination why the tiles have not been replaced to date after four and one half years, the owners answered that they cannot replace the tiles because they have moved into the house. When questioned about the fact that they have not lived in the house for at least a year and a half, Ms. Yu stated that it is not possible to replace the tiles because the owners are not at the house to oversee the work. She acknowledged that the house was constructed largely in the absence of the owners. Mr. Han said that he plans to replace the tiles after the judgment of this proceeding, because it costs a lot. Ms. Yu said that she is waiting for the litigation to be resolved because she wants to see what happens.
- [127] The evidence of Mr. Liu was that he never recommended that the owners replace the pool room tiles and that grinding was a far less disruptive solution to deal with grout staining of the pool room tiles.

## **F. Credits provided by Bridgewater to Owners / Counterclaim**

- [128] After completing substantially all of its work at the house, Bridgewater adjusted its contract price downward to account for the following complaint items:
- (a) a \$5,112.00 credit on account of all labour, setting materials and crack isolation membrane to the pool deck, which is work that Bridgewater did not complete nor invoice for;
  - (b) a \$509.00 credit on account of the installation of the kitchen backsplash;

- (c) a \$286.00 credit on account of the installation of the wok kitchen backsplash; and
  - (d) a \$1,140.00 credit to delete the installation of the remaining work to the pool area limestone, which is also work that Bridgewater did not complete.
- [129] Mr. Vani testified that the credit constitutes the value of the labour because the material could not be re-used. The price adjustments were prepared by Mr. Lawton with a spreadsheet to calculate the value of the accessory material and labour spent on the areas. The \$1,140.00 credit represents the final 1 to 2% of the wall area that was not completed and constitutes almost all labour. He says that these were areas that Bridgewater could not have completed, because they were around doors, which was affected by sequencing of other trades.
- [130] After deducting the credits provided to the owners from the adjusted price of \$165,015.00, being the original Quote plus the pool room tile plus the \$1,325.00 cost for the mechanical room tile, the total price for Bridgewater's work was \$157,968.00 to complete all of the work. This is \$499.00 less than the \$158,467.00, which the owners were ultimately invoiced by Bridgewater.
- [131] Payments made by the owners were \$97,388.70. I find that this includes the \$19, 911 paid by Mr. Han in cash in September.
- [132] The owners rely on invoices totaling \$10,370.00 plus GST for the following work that they claim is to remedy Bridgewater's deficiencies:
- (a) Installation of pool floor tile and membrane for \$6,000.00, as invoiced by Magnum Opus;
  - (b) Removal/repair and re-installation of both kitchen tiles for \$1,600.00, again by Magnum Opus; and
  - (c) Labour to bullnose and hone edges of limestone tiles for \$2,770.00.
- [133] With regard to the bullnose edge, Mr. Vani, Mr. Lawton, and Mr. Liu all gave evidence that Bridgewater's quote for the pool area provided for a 4-inch mitered coping of the pool edge, not a bullnosed edge. Mr. Doyle, the designer, also confirmed that the original design specification of the pool room did not call for a bullnosed edge, but instead a flat, mitered edge that was to go with the clean, uncomplicated lines that Mr. Doyle had designed for the house. Ms. Yu testified that she does not know whether or not Bridgewater's Quote calls for a bullnosed edge and further testified that she does not know whether Bridgewater did the coping around the pool. I find that there is no merit in the claim for compensation for a bullnose edge as it was not included in the Quote. It will not, therefore, be dealt with further.
- [134] The set-off in issue against the amount owed to Bridgewater is therefore \$1304 plus GST comprised of the following amounts (\$805 and \$499) calculated as follows:

- (a) the difference between the owners' cost for the pool floor tile and membrane and the amount credited by Bridgewater in its pricing summary (\$6,000.00 - (\$5,112 + \$1140) = 0));
- (b) the cost that the owners paid for the kitchen backsplashes was \$1,600.00. The credits were \$509 and \$286. The difference is \$805; and
- (c) the \$499.00 representing the difference between the adjusted price and the invoiced amount.

[135] Regarding the counterclaim and remediation of the pool area tiles, the estimate that Mr. Wingelman gave for remediation by Slate Renew was \$2,000.00. Mr. Birkbeck of Marblelife gave an estimate of between \$1.00 and \$2.00 per square foot for the mechanical grinding. Based on Mr. Doyle's evidence of the square area of tiles in the pool room of 450 square feet, the total cost for the grinding would be between \$450.00 and \$900.00. At is highest, this would be \$2,900 plus GST.

#### IV. Credibility and Reliability

##### A. The Law

[136] As there are differences between the evidence of Bridgewater and the owners, as well as the conflicts in the evidence of Mr. Liu and the owners, it is necessary to address the issue of credibility.

[137] In an oft-cited passage, the Court in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186 states:

186 Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet* (Township) (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)) The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* [1926], 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).

[Emphasis added.]

[138] In *Bradshaw*, the Court considered documents created at the time of events to be most helpful for assessing credibility.

[139] The difference between the credibility and reliability of a witness was discussed in *Edwards v. Stroink*, 2015 BCSC 1318 at para. 37:

The credibility of a witness is not the same as reliability of a witness. Credibility has to do with a person's veracity or truthfulness, whereas reliability deals with accuracy of the witness's testimony. Accuracy involves consideration of the witness's ability to accurately observe, recall and recount events in issue. Any witness whose evidence on an issue is not creditable cannot give reliable evidence on the same point. On the other hand, a finding that a witness is credible does not translate automatically into a finding that what that witness says about an event is accurate and reliable. That is, a credible witness may very well give unreliable evidence.

[140] In *Han v. Yan*, 2018 BCSC 1450, Skolrood J. summarized the law on assessing credibility:

61 Numerous authorities have discussed the principles governing the assessment of credibility: see in particular *Faryna v. Chorney*, [1952] 2 D.L.R. 354 (B.C.C.A.) and *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, leave to appeal ref'd [2012] SCCA No. 392. In *Stenner*, Madam Justice Dillon held that conflicting testimony should be assessed in light of the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (at para. 187, citing *Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)).

62 Credibility and reliability are not all or nothing propositions. A trier of fact may believe all, part or none of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See *R. v. R. (D.)*, [1996] 2 S.28.R. 291 at para. 93).

[141] In *Han*, the Court considered the following factors:

- (a) whether the witness was evasive and argumentative on cross examination;
- (b) whether witness's testimony was self-serving;
- (c) whether the witness's testimony was consistent; and
- (d) whether the witness's evidence was believable in the circumstances.

## **B. Credibility and Reliability of Mr. Han and Ms. Yu**

[142] At the outset I note that the testimony of both Mr. Han and Ms. Yu was provided by way of video link from their home in China to the courtroom. At that time, with the COVID-19 pandemic, travel was problematic and inadvisable. I note that the services of the interpreter present in the courtroom were of great assistance. Although there was an independent facilitator for the video link, who was also of great assistance, witnesses' appearance in a courtroom by video creates inherent problems and concerns. Some of those inherent concerns were present in this case, as well as some specific problems.

- [143] With regard to the testimony of Mr. Han and Ms. Yu, I recognise that the time difference resulted in them giving evidence in what was their nighttime. In assessing credibility and demeanour, I have made allowances for the time difference and the more cumbersome nature of video testimony. For example, the normal inter-personal cues between counsel and witness are often lost, and interruptions more frequently result. The one or two second transmission delay also often resulted in a loss of rhythm between question and answer, thus impairing the listener's understanding.
- [144] However, overall, I found Ms. Yu and Mr. Han frequently unwilling or unable to abide by counsel's requests and the Court's direction with regard to the procedures to be followed. For example, Mr. Han spoke to others in the room with him after he was asked to be alone in the room from which he was testifying. He kept his cell phone with him and used it to apparently research a question and send text messages to his counsel during his cross-examination.
- [145] Similarly, it appeared that, for at least some of the time, at least one other person was in the room with Ms. Yu while she was in direct and cross-examination. Ms. Yu vanished from view for more than four minutes, and may have spoken to Mr. Han whilst under direct examination.
- [146] In both their direct examinations and cross-examinations, Mr. Han or Ms. Yu often did not answer questions in a straightforward manner. They frequently added attacks on the integrity and professionalism of both Bridgewater and Mr. Liu.
- [147] Many times during his cross-examination, Mr. Han avoided answering questions by deferring to the knowledge of Ms. Yu, asserting that she was more involved with the management of the construction than he was.
- [148] Ms. Yu's testimony did not evidence the more comprehensive knowledge Mr. Han suggested it would. She frequently answered questions in her cross-examination with the responses "I don't know," "I wasn't there," and "ask Tony". "I don't know" was Ms. Yu's answer to many cross-examination questions, including simple questions about the items in the Quote. She testified that she does not know what "lower level stone flooring" means, whether Bridgewater did the laundry room tiling, which company did the lower bathroom stone floor, which company did the coping around the pool, or whether or not Bridgewater was originally asked to bullnose the edge. She also claimed that she does not know whether there is a stone floor in the sauna room and that she has never been inside the sauna room.
1. Mr. Han
- [149] With regard to the substance of the owners' testimony, Mr. Han often could not remember events. His memory of relevant events could be described as selective. These are examples:
- (a) When asked if he knew the reason why Ms. Yu wanted to pay Bridgewater's invoices in cash, Mr. Han answered, "I can't remember."

- (b) When asked if Ms. Yu was in China when she instructed him to pay for Bridgewater's invoices in cash, Mr. Han answered, "I can't remember. That's too long ago."
- (c) When asked why Ms. Yu's mother gave Ms. Yu \$36,000.00 as a gift, Mr. Han answered "I don't know."
- (d) When asked if he remembered responding to Mr. Liu's email requesting the re-issuance of the two cheques to Bridgewater, Mr. Han answered, "My wife replied it. I can't remember well. It's too long ago."
- (e) Mr. Han testified that Mr. Liu told Ms. Yu not to pay the February invoice but could not remember when he did so.
- (f) Mr. Han testified that he could not remember if Mr. Liu told him that he should have all of the wall stone tile in the pool area replaced.
- (g) Mr. Han testified that he could not remember when he voiced his concern about the gaps of grout between the wall stone tile in the pool area disappearing as a result of grinding the wall stone tile to Mr. Liu.

[150] Mr. Han's answers were often not responsive to the questions in cross-examination. His testimony could often be described as evasive. These are examples:

- (a) When asked if he remembered raising his voice and waving his hands when speaking to Mr. Nowicki, Mr. Han answered, "It is impossible that I treated him badly, I remember while I was working there, I treated him [to] pizza twice. I didn't treat him badly, but after the work was screwed up, I didn't allow him to come back to work."
- (b) When asked about his involvement with the construction of the house, Mr. Han answered, "I bought this property for my wife. My wife was the owner."
- (c) When asked if he had any complaints about the invoices Mr. Liu was requesting payment for, Mr. Han testified, "the issue isn't whether I was satisfied or not. I wasn't a part of this matter. My wife was the one handling this."
- (d) Mr. Han was asked if he knew whether Ms. Yu had seen the work performed in the house before she instructed him to pay for the same in cash, Mr. Han answered, "Copa give us invoices every month and then we pay it."
- (e) When asked if he would agree that the two cheques were dated well after Mr. Liu's email to Bridgewater on February 28, 2016 Mr. Han answered, "This shows that Bridgewater and Copa were cheaters."
- (f) When asked if Mr. Liu's understanding of mitred coping as described in the Quote was incorrect, Mr. Han answered, "I won't interpret about the terms. Let [my lawyer] Mr. Cao do the interpretation. I have communicated this issue with Mr. Cao. Let him communicate."

(g) When asked if he would have allowed Bridgewater to grind the wall stone tiles, Mr. Han answered, "This is Tony's job. He should give us a good job. We communicated with Tony."

[151] Mr. Han's testimony was inconsistent with other credible witnesses on a number of significant points, and it was often not believable in the context of the evidence which was credible. For example:

- (a) Mr. Han testified that Mr. Liu dealt primarily with Ms. Yu during the construction of the house. It is clear from the documentary evidence and Ms. Yu's and Mr. Liu's testimony, that Ms. Yu was in China for most of the house's construction and that Mr. Liu dealt primarily with Mr. Han during the construction of the house.
- (b) Mr. Han testified that Mr. Liu advised Ms. Yu and him not to pay the February invoice. Mr. Liu's testimony, supported by documentary evidence, establishes that Mr. Liu had asked Ms. Yu and Mr. Han to pay Bridgewater for the February invoice.
- (c) Mr. Han testified that he and Ms. Yu moved into the house in March 2017. The documentary evidence and Mr. Liu's and Ms. Yu's testimony, establishes that Mr. Han and Ms. Yu moved into the house in January 2017.

[152] Mr. Han's testimony was internally inconsistent between direct and cross-examination. For example:

- (a) On June 14, Mr. Han testified that he never communicated directly with Bridgewater, that he did not know Mr. Vani and did not know if he gave Mr. Vani cash. Mr. Han then testified to having met and given Mr. Vani cash to pay an outstanding invoice and having told Bridgewater's employee, Mr. Nowicki, to stop working on the house's kitchen backsplash tiles.
- (b) On June 15, when asked about the two cheques, Mr. Han first testified that the cheques are evidence of Mr. Liu and Bridgewater "cheating". Then, he claimed that Mr. Liu had told him and Ms. Yu not to pay the February invoice because Mr. Liu thought that Bridgewater had not completed the work shown in the February invoice. Mr. Han also did not have an answer when asked why he wrote the two cheques if Mr. Liu had told him not to pay the February invoice.

[153] Mr. Han's demeanour was also problematic. He often interrupted counsel during questioning, was argumentative, and would direct counsel to other documents instead of answering the questions asked of him.

[154] Many leading questions were also asked of Mr. Han in direct examination. However, they were not on areas in issue.

## 2. Ms. Yu

- [155] Throughout her testimony, Ms. Yu demonstrated that she did not have the ability and opportunity to observe events. It is not in issue that she was not present in Vancouver for most of the construction of the house. For example:
- (a) when asked if she had seen the alleged deficiencies in the kitchen backsplash tile, Ms. Yu testified that she had not seen the deficiencies because she was in China.
  - (b) Ms. Yu gave evidence that she was not in Vancouver when the pool area tiles were installed and grouted.
- [156] Ms. Yu was evasive in cross-examination by answering many questions with "I don't know" or "ask Tony".
- [157] Ms. Yu's testimony often was inconsistent with that of other credible witnesses and, as a result, was not believable. For example, again with regard to the February invoice, Ms. Yu testified that Mr. Liu had told her and Mr. Han not to pay the February invoice. However, it is clear from the documentary evidence that Mr. Liu asked Ms. Yu to pay the February invoice and that Mr. Han issued cheques to Bridgewater to pay.
- [158] Ms. Yu's demeanour was problematic. She also interrupted counsel during questioning. She was often argumentative. In making these assessments, I am mindful of the time difference and the inherent difficulties with video testimony, and also conclude that her evidence lacked some of the indicia of credibility.
- [159] Portions of Ms. Yu's evidence were adduced by way of leading questions. However, these too were not on areas now relevant to the issues.

### C. Credibility and Reliability of Mr. Tony Liu

- [160] Mr. Liu testified throughout in a calm and balanced manner. He was first called as a witness by Bridgewater and then testified for Copa. In both instances his testimony demonstrated that his memory is clear, reliable and, I find, accurate. Mr. Liu was able to recount specific details about the construction of the house and the work each trade contractor undertook during construction. His testimony was consistent with the documentary evidence and with the testimony of the witnesses called by Bridgewater.
- [161] Mr. Liu was fair and admitted facts which were not to his benefit. For example where mistakes were made by Mr. Liu and/or Copa's employees, Mr. Liu admitted the errors. Where the status of deficiencies were outside the scope of Mr. Liu's knowledge, Mr. Liu admitted the limits of his knowledge.
- [162] Importantly, in my view, although faced with suggestions by the owners that he had cheated them and engaged in disreputable business practices, Mr. Liu did not respond with emotion but rather calmly, and by sticking to the facts.

## D. The witnesses called by Bridgewater

[163] All of the witnesses called by Bridgewater were entirely credible and reliable. I accept the evidence of Mr. Vani, Mr. Lawton, Mr. Nowicki, Mr. Doyle, Mr. Wingleman and Mr. Burbek. Their evidence was consistent with the documentary evidence, and with that of Mr. Liu, whose evidence I also accept. The testimony of the Bridgewater owner, manager and employees was consistent with that of the independent contractors, and on the issue of the grout haze, with the TTMAC Report.

[164] With regard to the consistencies between the Bridgewater witnesses and Mr. Liu, I note that, at the outset of the litigation, Bridgewater and Copa were parties with competing interests. Their consistencies at trial thus held for the Court the enhanced weight of a thorough understanding of their claims and their shared history of the construction of the house.

## E. Conclusions on credibility

[165] I have no hesitation in concluding that where the evidence of the owners is inconsistent with that of Mr. Liu or the Bridgewater witnesses, I prefer the evidence of Mr. Liu and the Bridgewater witnesses.

[166] In other words, for the reasons set out above, the testimony of Mr. Han and Ms. Yu is given little weight where it contradicts the evidence of the other credible witnesses.

## V. Negligence

### A. The Law

[167] In the counterclaim Ms. Yu alleges that both Copa and Bridgewater were negligent.

[168] Where negligence is alleged in the construction context, the ordinary elements of duty of care, breach of the standard of care, causation and damage must still be made out. There are, however, special considerations when determining how to establish the standard and whether or not expert evidence is required. The Court in *Digg'n 4U Contracting Ltd. v. Kharwar*, 2021 BCSC 1027 at para. 54, reviews the law as it applies in this context, noting that courts will be reluctant to find a contractor negligent in cases where no expert evidence is led, citing *Zettl v. Roger Garside Construction Ltd.*, 2016 BCSC 2307:

The defendants rely on *Zettl* for the proposition that non-technical negligent construction does not require expert evidence. However, the evidence before me is that the plaintiff constructed the Retaining Wall following Mr. Lay's engineered drawings. Mr. Lay approved the construction. Further *Zettl* confirms that for the defendants to succeed in a claim of negligence, they must prove, firstly, that there was a duty of care; secondly, that the plaintiff breached the standard of care; and thirdly, that the proximate cause of alleged damage was due to the impugned breach. *Zettl* also states that courts will be reluctant to find a contractor negligent in cases where no expert evidence is led. At paras. 121-127, the Court stated:

[121] It is trite law that to establish negligence, a party must prove the existence of a duty of care, a standard of care, a breach, causation and damages: *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para. 96.

[122] The duty is admitted. However, without evidence of a standard of care, I cannot determine whether any breach occurred. As I have noted above, in the absence of evidence to inform me of the way in which a reasonable contractor would have done the work RGC has done, I have no ability to assess the quality of the work performed.

[123] This is not a case where a roof blew off after being hit for the first time by a serious wind. That obviously faulty construction would not require expert evidence to support a contention that the roof was not properly underpinned.

[124] The general rule is that expert evidence is required when assessing the quality of a professional's work unless the work is of a non-technical nature. Specifically, as noted by the Court in *Roy v. British Columbia (Attorney General)*, 2005 BCCA 88 at para. 36:

4. Where, as here, at issue is the standard of a competent member of a trade or profession ... evidence of those carrying on that profession is necessary unless ... the matter is one of "non-technical matters" or those of which an ordinary person may be expected to have knowledge.

[125] More recently, the Court of Appeal summarized the law in this area as follows:

Thus, where the conduct of a professional person is in question, expert evidence may be necessary to establish that the conduct conformed to the standard of care for the particular profession, at least where scientific or technical considerations arise that are beyond common understanding. Even then, however, it remains open to [a] judge and jury to determine that the standard of the profession is inadequate where, for example, it is apparent, that obvious precautions are not taken.

*Burbank v. R.T.B.*, 2007 BCCA 215 at para. 72, leave to appeal to the SCC refused, [2007] S.C.C.A. No. 316.

[126] Similarly, in *Tristram Hodgkinson & Mark James, Expert Evidence: Law and Practice*, 4th ed. (London: Sweet & Maxwell, 2015) at 569:

Certainly, in a construction case it is almost inconceivable that a party would prove such an allegation [negligence] in the absence of expert evidence in the courts, though an arbitrator might on occasion consider himself able so to find unassisted.

- [127] The courts in British Columbia have demonstrated reluctance to find that a contractor was negligent in cases where no expert evidence was led. Where an absolute rule requiring expert evidence in every negligence case against a contractor cannot be stated for obvious reasons, the need for an understanding of technical evidence and for a comparison to an established standard of care is patent: *Malhotra v. Water Front Homes Ltd.*, 2015 BCSC 1068 at para. 37 [Malhotra]; *Commercial Electronics Ltd. v. Savics*, 2011 BCSC 1275 at para. 214.
- [169] The issue of the necessity of expert evidence addressing professional standards was also addressed in *Integrated Contractors Ltd. v. Leduc Development Ltd.*, 2016 BCSC 1984 at para. 23:
- [23] In addition to failing to prove a material fact, Leduc's case has another major evidentiary deficiency. It led no expert evidence about the duty or standard of care for engineers, project managers or construction managers. These are matters beyond the ordinary knowledge possessed by a trial judge. Thus even if I had made a finding that L&M became the project manager (which I have not), Leduc did not adduce expert evidence to establish what the standard of care was and how it was breached in this case; its claim in negligence would have failed on that ground alone: *International Culinary Institute of Canada Inc. v. Grant Thornton LLP*, 2010 BCSC 541 and *Bergen v. Gerald Guliker*, 2015 BCCA 283 at para. 106.
- [170] From these authorities, I take it that there is no absolute rule that expert evidence is required to establish a claim of negligence against a contractor or tradesperson. Where the matter is non-technical or one about which an ordinary person can be expected to have knowledge, expert evidence will not necessarily be required.
- [171] I find that the question of how to properly install tiles and remediate issues arising from that installation is not something about which the ordinary person would have knowledge. It is not "non-technical". Failure to adduce expert evidence concerning the appropriate standard to which tilers must adhere is fatal to the owners' counterclaim. Even if the TTMAC Report were taken to establish such a standard, the evidence supports the position that Bridgewater did what was required of them. I will discuss this further below.

## B. Discussion

### 1. Bridgewater

- [172] There is no evidence, either lay or expert, that Bridgewater failed to meet its standard of care in its tile work at the house. There is evidence of subjective complaints of the pool area tile, all of which Bridgewater addressed or was prepared to address until its remedial work was stopped by the owners.

- [173] Ms. Yu alleged that Bridgewater used the wrong method in grouting the tiles, which caused the grout haze. However, Ms. Yu was not in Canada during the months of September and October, which is when, according to Mr. Lawton and Mr. Liu, most of the grouting was done. Ms. Yu testified that by looking at the finished result of the tile installation, she was able to tell that Bridgewater used the wrong method. There was no expert evidence led by the owners that attests to any errors in the process used by Bridgewater.
- [174] The consistent testimony from Mr. Vani, Mr. Lawton, Mr. Wingelman, and Mr. Liu all of which I accept, was that discoloration of stones from grout haze is due to the porous nature of the limestone. This limestone was chosen by the owners for the pool area.
- [175] The evidence establishes that Bridgewater followed accepted practices in installing the pool stones. Mr. Vani also gave evidence that Bridgewater had pre-sealed the stone prior to grouting. Mr. Liu gave evidence that Bridgewater's work was done according to specification.
- [176] The TTMAC Report, which is not an expert opinion but which is of assistance, does not support the owners' position. It concluded that "the workmanship appears to be generally good, including layout, cutting and installation details "
- [177] The claim of negligence against Bridgewater is therefore dismissed.

## 2. Copa

- [178] The negligence claim against Copa fails on similar grounds to the claim against Bridgewater. Ms. Yu's claim is essentially that Copa failed to adequately ensure that Bridgewater remedied the perceived defects.
- [179] Ms. Yu has led no evidence regarding the duty or content of the standard of care for construction managers. Copa submits that the standard of care required of a construction manager in British Columbia is a key element that Ms. Yu has failed to prove and without this evidence the Court cannot assess Ms. Yu's negligence action against Copa.
- [180] I agree with Copa in this regard. There was no evidence against which to compare the response of Copa to the owners' issues with the tiles.
- [181] Even if the matter was a non-technical one which the Court would be capable of assessing without expert evidence, I find it difficult to impugn Copa's response to the owners' complaints. The evidence of Mr. Liu, all of which I accept, was that, in response to the owners' dissatisfaction with the tiling, he proposed a viable resolution. Juno raised the concern directly with Bridgewater and Mr. Liu sent an email to Bridgewater on October 18, 2016. As a result, Bridgewater took steps to remedy the issue. The owners then rejected Bridgewater's proposal to grind the haze out of the stones. When asked to get a quote for the removal and re-installation of the pool stones, Mr. Liu did so. The owners also declined to move forward with this option. It is unclear what further steps Copa might have taken to rectify the perceived issue and how a failure to take these steps departed from the standard

of care expected of a reasonable construction manager.

[182] The claim by the owners against Copa in negligence is therefore dismissed.

## VI. BREACH OF CONTRACT

[183] As mentioned, there are a number of contracts at issue in these proceedings. It is not in dispute that Copa and Ms. Yu entered into the Contract for services for the construction of the house on January 22, 2014, and the Supplemental Agreement dated August 24, 2017.

[184] The existence of the two other alleged contracts is in dispute.

[185] First, the plaintiff, Bridgewater, submits that it contracted directly with the owners for the provision of tiles and labour. Bridgewater alleges the owners breached this contract by failing to pay their invoices for services rendered. Copa supports the plaintiff's contention that Bridgewater contracted directly with the owners. Ms. Yu denies that she and Mr. Han had a direct contractual relationship with Bridgewater.

[186] Second, despite asserting a lack of a contractual relationship with the plaintiff, Ms. Yu appears to maintain that Bridgewater is liable to her for breaching another contract, being an alleged contract between Bridgewater and Copa. She alleges that Bridgewater had a contract with Copa to provide services, and it breached that contract by failing to provide services to Ms. Yu above a requisite "business standard", resulting in compensable damage to the owners.

[187] I will address the existence, and possible breaches of, each of the contracts below.

### A. Did Bridgewater Contract with Copa?

[188] I find that there was no contract between Bridgewater and Copa; rather the agreement for the tiling work at the house was between Bridgewater and the owners directly.

[189] In arriving at that conclusion I have considered the submissions of the owners.

[190] In the notice of civil claim, Bridgewater makes multiple references to an agreement with Copa. It references that agreement, asserting that "Copa was the head contractor engaged by the Defendant, Yu" and that "On or about December 10, 2015, Bridgewater entered into an agreement with Copa." Further it suggests that, pursuant to this agreement, Copa made payments to Bridgewater, or that Copa refused to pay, and so on. The plaintiff later amended its notice of civil claim to include alternative positions, alleging either a contract formed with Ms. Yu, Mr. Han or both of them. The owners rely on the fact of this change in position to support their contention that they had no contract with Bridgewater.

[191] Notwithstanding the plaintiff's position when filing the notice of civil claim, being that it contracted with Copa rather than the owners, this is not determinative of the issue of the parties to the contract. As the litigation progressed, further evidence clarified the issue.

- [192] The owners acknowledge that there is no written contract for the tiling work. The parties, then, must adduce evidence of the requisite elements of contract formation to establish the existence of an oral contract. The owners, as noted, relied on Bridgewater's apparent admission in its initial pleadings to support its position. Pleadings, however, are not evidence.
- [193] On the other hand, Copa and Bridgewater relied on documentary and oral evidence to establish that they were not in a contractual relationship with one another. In his evidence, which I accept, Mr. Liu denied that Copa had any contractual relationship with Bridgewater in relation to the house construction. The evidence supports his position. Copa was acting in accordance with the Contract in fulfilling its duties and obligations to Ms. Yu.
- [194] Copa further submits that, in breach of the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.), the owners did not put to Mr. Vani or Mr. Lawton the allegation that Bridgewater had contracted with Copa, rather than the owners, for the supply and installation of tiling at the house and, therefore, should not be allowed to contradict the evidence given by Mr. Vani and Mr. Lawton on this issue in the owners' closing submissions.
- [195] As a final point, I would note that there is a more fundamental issue with this aspect of the owners' claim than the evidentiary one: if the plaintiff and Copa were the contracting parties, the owners would have no action in contract against Bridgewater because of lack of privity. The law is well-settled that there is no privity of contract between an owner and a subcontractor: *Thunder Mountain Drilling v. Denmar Equipment Rentals Ltd.*, 1993 CanLII 2689 (B.C.S.C.); *MacDonald v. CWMM Consulting Engineers Ltd.*, 2008 BCSC 910 at para. 25. It necessarily follows that no damages could flow to the owners if Bridgewater had a contract with Copa and breached that contract.
- [196] However, because I have found no contract between Bridgewater and Copa, the former is not a subcontractor of the latter. Although the owners could have maintained an action in contract directly against Bridgewater, they chose not to plead this in the alternative. As a result, their claims for deficiencies will be dealt with as set-offs against Bridgewater's potential damages.

#### B. Did Copa Breach its Contract with Ms. Yu?

- [197] The owners allege that Copa breached its obligations under the Contract and the Supplemental Agreement. Their principal argument is that, because the Contract stipulated that Copa would ensure sub-trades completed their deficiencies, part of the blame for the fact that the grout haze was never remediated rests with Copa.
- [198] Copa submits there is no evidence adduced by the owners to support any breach of the Contract by Copa.
- [199] The ordinary web of legal relations in the construction context involves a prime contractor or project manager, who is in a direct contractual relationship with the owner, and subcontractors who perform discrete tasks as part of the construction. The prime

contractor then stands in the position of the owner as it relates to the subcontractors. The circumstances of this case are distinct in that Bridgewater, a sub-trade, is in a direct legal relationship with the owners. Construction managers that have not contracted directly with trade contractors and have not warranted the work of trade contractors generally are not found by Canadian courts to be liable in contract to an owner for the deficiencies in the work of trade contractors.

- [200] The circumstances bear some resemblance to those in *University of Manitoba v. Smith Carter Architects & Engineers Inc.*, [1996] 4 W.W.R. 515 (Man. Q.B.) [Smith]. In Smith, the defendant project manager brought an application to dismiss the plaintiff University of Manitoba's (the "University") claim against it for damages resulting from serious defects in a construction project. The University contracted with the manager for services "directed towards accomplishing the objectives of the University relative to timing, budgets, functions and aesthetics": at para. 27. Nine years after the completion of the project, serious defects in the project were brought to the attention of the University. The University alleged, inter alia, that the manager was liable for breach of contract for engaging the services of the subcontractors and warranting their work, and for failing to ensure that the work was done to specifications: at para. 26.
- [201] The University's claim for breach of contract was dismissed by the Manitoba Court of Queen's Bench because it found (a) the agreement between the University and the manager confirmed that the manager was not warranting the work of the subcontractors and (b) that, contrary to the allegations of the University, the manager was not a party to the contracts between the University and the subcontractors: Smith at para. 31.
- [202] Similarly, Copa was not a party to the contract between Bridgewater and the owners and it did not guarantee the quality of the work performed by Bridgewater. Consequently, it is not liable in contract to Ms. Yu for any deficiencies in the work of Bridgewater.
- [203] Analogies to case law are helpful in this context, but far from determinative. No general rule of law supersedes the language in the project management contract in these cases. Indeed, the owners assert that the issue is one of contractual interpretation. The principles that apply to contractual interpretation are summarized by Rothstein J. in the following well-known passage from *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53:
- [47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, per LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, per Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration

of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

(Reardon Smith Line, at p. 574, per Lord Wilberforce)

[48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, per Hamilton J.A.; see also *Hall*, at p. 22; and *McCamus*, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):

The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

[204] In the context of this concise statement of the law, reading the contract as a whole is determinative; nothing in the surrounding circumstances, which I have considered, nor the application of the doctrine of *contra proferentem* changes that.

[205] The owners allege that Copa provided a guarantee in the Contract, which fully indemnifies them, including as it relates to this litigation. However, the language of the contract is clear that Copa did not warrant Bridgewater's work. The alleged guarantee, Clause GC-11, is an indemnity by Copa for claims "arising from" Copa's "implementation of the contract." Bridgewater's claim is for non-payment of invoices by the owners; it does not "arise from" any actions or omissions of Copa in implementing the management Contract.

[206] The owners also allege in their submissions that Copa breached the Management Contract by failing to review subcontractors' and material suppliers' monthly invoices. However, there is no evidence demonstrating any failure by Copa to review subcontractors' and material suppliers' monthly invoices. On the evidence I accept, Copa never failed to review the monthly invoices issued to Mr. Han or Ms. Yu by the trade contractors and suppliers involved in the construction of the home. Rather, the evidence is and I find that, each month, Copa sent the owners a list of invoices which it had reviewed. When Copa had questions about the invoices from Bridgewater (as it did, for example, with the February invoice) it queried Bridgewater for an explanation or justification before sending the invoice to the owners for payment.

- [207] In the owners' submissions, Copa is alleged to have failed to "make sure that the subcontractors complete the deficiencies in the Project" and "to arrange Trade Contractors to complete their deficiency works in a timely fashion" as required by the Contract and Supplemental Agreement, respectively.
- [208] Aside from the discolouration of the pool area tiles, Mr. Liu has testified to having no knowledge of any other deficiencies left to be corrected in the house. The owners' closing submissions do not allege any other deficiencies left to be corrected in the house.
- [209] With respect to the remediation of the pool area tiles, Copa submits and the evidence establishes that Mr. Liu had arranged for Bridgewater to correct the deficiencies in the pool area tiles by the December 27, 2016 deadline set by Mr. Han.
- [210] However, before Bridgewater could attempt to remediate the discoloration of the tiles by grinding away the haze, Mr. Han decided he wanted Bridgewater to remove and replace the pool area tiles rather than have them remediated through the grinding solution proposed by Bridgewater.
- [211] When Bridgewater failed to agree to remove and replace the pool tiles, Mr. Liu was instructed by Mr. Han to obtain a quotation from another tile installer for the supply and re-installation of the pool area tiles.
- [212] In accordance with Mr. Han's instructions, Mr. Liu sought out and received a quotation for over \$80,300 plus GST dated January 24, 2017 from North Sea Contracting Ltd. Following their receipt of the quotation, the owners did not instruct Mr. Liu to arrange for North Sea Contracting Ltd. to replace the stone tiles in the pool area.
- [213] In the result I find that the deficiencies in the pool area tiles were left uncorrected because Mr. Han did not want Bridgewater to grind the tiles notwithstanding that Bridgewater was in the process of remediating the issue of the grout haze. Copa did not breach its obligation to "make sure that the subcontractors complete the deficiencies in the Project."
- [214] With regard to the owners' closing submissions regarding the \$808 additional cost of the fireplace, Mr. Liu provided two quotations for the installation of two differently priced fireplaces. It was Ms. Yu and Mr. Han who selected the higher priced quotation of \$2,399.00. I accept the evidence of Mr. Liu that the price set for fireplaces by fireplace suppliers is not within Copa's control.
- [215] The claim by the owners against Copa for breach of contract is therefore dismissed.
- [216] Ms. Yu has failed to adduce evidence to prove that any breach of contract or negligence on the part of Copa caused any of the damages she has claimed against Copa (\$808.00 for the fireplace and \$43,886.80 for the deficiencies allegedly caused by the plaintiff).

C. Did Bridgewater Contract with the Owners? If so, was the Contract Breached?

- [217] Having found that Bridgewater did not contract with Copa (and that, even if they had, the owners would not have been entitled to recover under it), the owners' counterclaim in contract is dismissed. However, the question of whether Bridgewater entered into contractual relations with the owners is still relevant for two reasons: first, it will determine the question of whether Bridgewater is entitled to payment of the outstanding invoices; second, if the first question is answered in the affirmative, it will be necessary to consider whether the owners are entitled to a set-off for deficiencies. These questions will be addressed in sequence.
- [218] It is the position of both Copa and Bridgewater that the other party to the agreement with Bridgewater was the owners. Copa submits that the documentary evidence together with the testimony of Messrs. Liu, Vani, and Lawton establishes that Mr. Han had, by actions including accepting Bridgewater's offer of a 2% discount on the total price of the Quote, entered into a contract with Bridgewater for the supply and installation of tile in various areas of the house. Bridgewater submits that Mr. Han, in so doing, was acting as agent for Ms. Yu. I agree.
- [219] Having found that the owners contracted with Bridgewater for the tile work, the issue is whether the owners breached the agreement. I find that they did.
- [220] In Thomas G. Heintzman, Bryan G. West & Immanuel Goldsmith, Heintzman and Goldsmith on Canadian Building Contracts, 5th ed. (Toronto: Carswell, 2014) at 7§6, the authors refer to a number of ways in which an owner can breach a construction contract:

Once the building contract is entered into, the owner may fail to abide by three basic obligations of the owner under that contract: to pay the contractor on a timely basis, to make the site available and in a condition so that the contractor can perform the work, and to not interfere with or delay the contractor's performance of that work.

- [221] At issue here are the first and third of those obligations. With respect to non-payment, Bridgewater raised concerns in mid-September 2016 about a number of unpaid invoices, dating back to February of that same year. At this time, and as recounted above, there had been substantial completion of the work specified in the Quote. Some of those invoices remain outstanding and have been the subject of demands for payment. I find the owners breached their obligation to make payments on a timely basis.
- [222] As for the obligation not to interfere with performance, the plaintiff analogizes its situation to that of the contractor in *Jozsa v. Charlwood-Sebazco*, 2016 BCSC 78. In *Jozsa* at para. 65, citing the decision *Penvidic Contracting Co. v. International Nickel Co. of Canada*, [1976] 1 S.C.R. 267 at 276, Steeves J. confirmed that "[c]onstruction contracts contain an implied term that the owner will not prevent the contractor from accessing the worksite".
- [223] I agree with the plaintiff's submission that the combination of Mr. Han's outburst at Mr. Nowicki, the failure to invite Bridgewater back on site and the ultimate dismissal of grinding as a viable remediation technique constitute a breach of this obligation.

- [224] But the question remains as to whether the alleged deficiencies can ground a claim for a set-off. It is a firmly established principle that, even where an owner breaches a construction contract, they can still counterclaim for defective work; that said, where the contractor is prevented from remediating the alleged defects, this may adversely impact the owner's set-off claim: *Jozsa v. Charlwood-Sebazco*, 2016 BCSC 78 at para. 73.
- [225] The main deficiency alleged is the grout haze. The owners claim that tearing out all the pool area tiles and replacing them is the only acceptable solution to address the grout residue on the surface of the tiles. This is an unduly narrow view of what constitutes remediation in the circumstances. The TTMAC Report suggests that "[t]he finish on a single piece of the ground test stone appears to be more in keeping with how the stone should look, although it is considerably lighter than the adjacent tiles." The TTMAC Report goes on to suggest that the owners employ a "highly skilled professional marble/stone restoration company to perform a wet polish." Only if that did not produce a satisfactory result was removal and replacement of the stone suggested. However, the evidence of Mr. Wingelman and Mr. Birkbeck was that the tile could likely be remediated. The owners did not allow Bridgewater to take those first steps toward remediation by engaging the services of Slate Renew and Marblelife.
- [226] In her testimony, Ms. Yu claimed repeatedly that Bridgewater ignored the requests for grinding. However, the evidence demonstrates that Bridgewater continued to work at the house toward the end of December and continued its efforts to schedule the completion of its work and the remediation of the surface of the stones.
- [227] The evidence establishes that Bridgewater was prepared to remediate, at no expense to the owners, both the pool stones and the backsplash but were prevented from doing so by the owners themselves. In accordance with the principle in *Jozsa*, this negatively impacts the owner's right to a set-off.
- [228] Even if their effective prevention of Bridgewater's remediation efforts did not impact the owners' entitlement to a set-off, their proposed method of calculating the value of the set-off is inappropriate in the circumstances. This is because the cost of repairs to the existing material will be the appropriate measure of damages where the cost of demolishing and rebuilding is out proportion to the benefit to be obtained: *514953 B.C. Ltd. dba Gold Key Construction and Chiu v. Leung*, 2007 BCCA 114 at paras. 11-20 [Gold Key].
- [229] In *Gold Key*, the deficiency alleged by the owner was a missing column. There was general agreement that this item was missing from the completed house. Nevertheless, the Court of Appeal found that the costs of demolition and reconstruction would not have been reasonable in the circumstances. There was also little evidence that the issue complained of had much effect on the quality or character of the house.

- [230] At para. 24, the Court further stated that "[i]n cases of this sort, the cost of repairs may well be an appropriate measure to adopt if a breach of contract is established but there has to be well-defined evidence of cost on which to found an award of damages." Justice Hall also found that it was material that the homeowner had done little, if anything, to remedy deficiencies in the intervening years.
- [231] To the extent that there is evidence of any damages caused by the grout hazing, it is the cost of repairs and not the cost of replacing the pool room tiles that is the more appropriate measure of damages. The evidence establishes that combined work of Slate Renew and Marblelife would have cost a maximum of \$2900. The quote for removal and replacement of the pool stones totalled \$80,300.
- [232] The owners have proffered no evidence that the grout haze has compromised the integrity of the pool area tiles. The owners offered no evidence, expert or otherwise, with respect to any diminished value caused by Bridgewater's work, and they have taken no steps to remedy the issue.
- [233] The grout haze falls into the category of a defect "of trivial or inappreciable importance" and is non-compensable. The deficiencies that the owners assert against Bridgewater have little effect on the quality and character of the house. Whatever effect it did have could have been remedied by Bridgewater had it been allowed to complete its work at the house. In the alternative, there is clear evidence of what the true and reasonable measure of damages is; the cost of the grinding that was recommended in the TTMAC Report and endorsed by Mr. Burbek and Mr. Wingleman. The claim for replacement pool tiles is dismissed.
- [234] Further, more than four and a half years have passed since Bridgewater installed the tiles in the pool area. The owners have taken no steps to replace the tiles or to remedy the tiles by retaining someone to carry out the recommendations set out in the TTMAC Report. Ultimately, to the extent that there are issues with the tiles in the pool room, the owners have a duty to mitigate their damages opting for the least disruptive and costly remedial solution.
- [235] In the result, Bridgewater is entitled to judgment in the amount claimed after credits with set offs in respect of the work that it did not complete in full, and the cost of remediating the pool room tile. As set out above in paras. 134 and 135, the amount of the set-off is \$1,304 plus GST. The counterclaim is limited to the cost of remediation. The highest estimate of \$2,900 plus GST is allowed.
- [236] The total owing to Bridgewater is \$158,467 plus GST of \$7,923.35, less payments of \$97,388.70, less the total of \$1,304 plus GST and \$2,900 plus GST, which equals \$64,587.45. All amounts have had GST added.

## VII. IS THE LIEN VALID?

[237] Bridgewater registered a lien against the house on January 30, 2017. It was in the amount of \$69,001.65, and named "Tony Han and Copa Development Corporation (Inc. No. BC0267094)".

[238] The owners submit that the lien is invalid because it was filed after the limitation period had expired. The legislation relevant to determining the limitation period is s. 20(2) of the BLA:

#### Time for filing claim of lien

20 (2) A claim of lien that is not governed by subsection (1) may be filed no later than 45 days after

- (a) the head contract has been completed, abandoned or terminated, if the owner engaged a head contractor, or
- (b) the improvement has been completed or abandoned, if paragraph (a) does not apply.

[239] The term "abandoned" is defined at s. 1(5):

- (5) For the purposes of this Act, a contract or improvement is deemed to be abandoned on the expiry of a period of 30 days during which no work has been done in connection with the contract or improvement, unless the cause for the cessation of work was and continued to be a strike, lockout, sickness, weather conditions, holidays, a court order, shortage of material or other similar cause.

[240] The owners also rely on s. 22 which states:

#### Lien extinguished if not filed as required by Act

22 A lien in respect of which a claim of lien is not filed in the manner and within the time provided in this Act is extinguished.

[241] The owners say that Bridgewater abandoned the improvement no later than mid-October 2016 and communicated such abandonment to Copa. They rely on the events that occurred in about mid-October when Mr. Nowicki left the house due to the angry outburst of Mr. Han and did not return to complete the tile work in the kitchens. They say the improvement should be deemed abandoned in no later than mid-November.

[242] The evidence, however, is clear that Bridgewater was on site at the house continuing the remedial work on the pool area tiles on December 23, 2016. Mr. Liu's email of that date informed Bridgewater that the grouting they had done that day developed the same problems, and that Mr. Han now wanted all the stone tiles replaced. It was on November 16 that Bridgewater emailed Mr. Liu to advise him of the plan of action for remediating the pool area and kitchen backsplashes.

[243] I therefore find that, pursuant to s. 20(2)(b) of the BLA, the date on which the improvement was abandoned by Bridgewater was December 23, 2016. Thus, the lien registered by Bridgewater on January 30, 2017 was within the requisite 45 days.

- [244] In the event that I am incorrect that the tiling contract was between Bridgewater and the owners, and if Bridgewater was a subcontractor under the head contract of Copa, s. 20(2)(a) would apply. The date that the head Contract was completed or terminated is not known, and there is no evidence that the owners' Contract with Copa was abandoned. The date of termination or completion would be at least subsequent to the Supplemental Agreement dated August 24, 2017. Therefore, the lien would also have been registered in time even if Bridgewater was a subcontractor.
- [245] The owners also assert that the manner in which the parties are named in the lien should affect its validity. In that regard they cite *Nita Lake Lodge Corp. v. Compact Systems (2004) Ltd.*, 2006 BCSC 885.
- [246] In the claim of lien, para. 3 states: "The person who engaged the lien claimant, or to whom the lien claimant supplied material, and who is or will become indebted to the lien claimant is: TONY HAN and COPA DEVELOPMENT CORPORATION (INC. NO. BC0267094)".
- [247] Bridgewater submits that the reference to "Tony Han" was a typographical error, and should have been to "Steven Han", who it says was acting either as agent for Ms. Yu (as I have found above) or as head contractor in dealings with Bridgewater. The inclusion of Copa was, it says, as a result of some confusion regarding the parties to the tiling contract, which is indicated by the position of the owners in this trial as they continue to maintain that that contract was between Bridgewater and Copa.
- [248] Bridgewater relies on the recent case of *A.W. Kennedy Construction Inc. v. Wan*, 2021 BCCA 175 at paras. 20-24:
- [20] Implicit in that observation is the view that the jurisprudence describing what amounts to strict compliance with the Builders Lien Act does not address and is not concerned with immaterial deviations from the prescribed form. That is correct, in my opinion. In cases where the courts have defined the obligation to strictly comply with the Builders Lien Act, there is recognition that some errors in the completion of the form are immaterial and do not invalidate the claim of lien. Most of the cases cited as authority for the proposition that there must be strict compliance with the Act involve deficiencies that are clearly substantive.
- [21] *Nita Lake; Habib; Framing Aces Inc. v. 0733961 B.C. Ltd. dba Omni Pacific*, 2009 BCSC 389; and *Yongfeng Holdings Inc. v Zheng*, 2019 BCSC 1534, all involved significant errors in the completion of the notice of lien. In *Nita Lake*, a construction manager was mistakenly described as the debtor instead of the owner. In *Habib*, the contractor was identified in the claim of lien by a trade name rather than the contractor's correct corporate name. In *Framing Aces*, the claimant was not a legal entity. In *Yongfeng Holdings*, the lien claimant's address was wrong, potentially giving rise to problems with service.

- [22] The jurisprudence, however, does not describe a scheme that brooks no error. Typographical errors, deviations of the sort contemplated by Justice Rogers in *Habib*, have not invalidated claims: see, for example, *Bellamy (c.o.b. K.G.B. Enterprises) v. Babicz* (1996), 31 C.L.R. (2d) 49, and *Toska Woodworking Inc. v. Balazadeh-Nayeri*, 2020 BCSC 1378.
- [23] The requirement that there be strict compliance with the Act and Regulations does not impose a standard of perfection upon a claimant. In other words, neither the words of the enactment nor the context in which it was enacted evinces a contrary intention to that expressed in s. 28 of the Interpretation Act.
- [24] This Court has expressed some reservations with respect to the interpretative approach taken in *Nita Lake*. In its Report on the Builders Lien Act (July 2020), B.C.L.I. Report no. 89 July 2020 at p. 32, fn. 65 the Law Institute observed that *Nita Lake* may now be limited in value as an interpretative precedent:
- ... In *Q West Van Homes Inc. v. Fran-Car Aluminum Inc.*, 2008 BCCA 366, the Court of Appeal referred to the liberal, purpose approach to interpretation approved by the Supreme Court of Canada in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, at para. 26, with respect to the effect of a change introduced by the 1997 Builders Lien Act. More recently, the Court of Appeal expressly endorsed the *Bell ExpressVu* approach to the interpretation of the Act generally in *Iberdrola Energy Projects Canada Corporation v. Factory Sales & Engineering Inc. d.b.a. FES Energy*, 2018 BCCA 272. This places in some doubt the statements in *Nita Lake* and other cases that the formal requirements of a claim of lien must be strictly applied. See also *Primex Industries Inc. v. The Owners, Strata Plan LMS 1751*, 2016 BCSC 2092, at para. 45. ...
- [249] At para. 24, the Court of Appeal references its reservations with respect to the strict compliance interpretative approach taken in *Nita Lake*. At paras. 21 and 22 the Court discusses the types of error in the completion of the form which are substantive, or those which are immaterial and do not invalidate the claim of lien.
- [250] I find that in completing the claim of lien Bridgewater made a typographical error in referring to Mr. Han by an incorrect first name, the first name of Mr. Liu. This error was immaterial and does not invalidate the claim of lien: *A.W. Kennedy Construction Inc.* at para. 22. Similarly, the inclusion of the name of Copa does not invalidate the claim of lien.
- [251] In the result, the lien registered by Bridgewater on January 30, 2017 is valid.

## VIII. CONCLUSION

- [252] With regard to the personal liability of Mr. Han as agent for Ms. Yu, I decline to make that order. Where the objective intentions of the parties indicate that both the agent and the disclosed principal are to be personally bound by the contract, both are liable: *Barnett v. Rademaker*, 2004 BCSC 1060 at paras. 43-44; *1196303 Inc. v. Glen Grove Suites Inc.*, 2015 ONCA 580 at para. 81. However, this issue was not argued by the parties. As a result, the plaintiff's claim against Jing Yu in the amount of \$64,587.45 plus court ordered interest,

pursuant to the Court Order Interest Act is granted. The claim against Mr. Han is dismissed.

[253] The plaintiff is granted a declaration that it is entitled to a lien in the amount of \$64,587.45 against the house pursuant to the provisions of the BLA.

[254] The counterclaim against the plaintiff by Ms. Yu is dismissed in its entirety.

[255] The counterclaim against Copa by Ms. Yu is dismissed in its entirety.

[256] Bridgewater and Copa as the substantially successful parties are entitled to an award of costs at Scale B against Ms. Yu. If any party seeks to make further submissions in respect of costs, written submissions may be filed within 30 days of the date of these Reasons with reply submissions within 21 days thereafter.

"The Honourable Madam Justice Watchuk"

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