

CANADA / JUDGMENT

Cancedar Log Homes Ltd. v. Hodson

2009 BCSC 222

COURT

Supreme Court of British Columbia

DECIDED

24 February 2009

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cancedar Log Homes Ltd. v. Hodson,

2009 BCSC 222

Date: 20090224

Docket: S99294

Registry: New Westminster

Between:

Cancedar Log Homes Ltd.

Plaintiff

And:

Robert Hodson aka Bob Hodson

Defendant

And:

Cancedar Log Homes Ltd., Cancedar Log Homes (BC) Ltd.

and Gerhard Ronner

Defendants by Counterclaim

Before: The Honourable Madam Justice Allan

Reasons for Judgment

Counsel for the Plaintiff and

Defendants by Counterclaim

Robert J. Cuddeford

Counsel for the Defendant

Robert G. Kuhn

& Ian C. Moes

Date and Place of Trial:

January 12-16, 19, 20 and 22, 2009

in New Westminster, B.C.;

January 23, 2009 in Vancouver, B.C.

- [1] The plaintiff Cancedar Log Homes Ltd. ("Cancedar") manufactures log homes in the Fraser Valley. The logs are hand peeled, cut with a chain saw and fitted together. The home is constructed on special blocks and then taken apart log by log. The logs are numbered and crated, loaded on trailers, and transported to the building site where the log home is reconstructed.
- [2] In September 2004, Cancedar entered into a written contract (the "Contract") with the defendant, Mr. Hodson, to construct a log home shell (the "Log Home") in western red cedar, according to drawings prepared by R.C.M. CAD Design Drafting Ltd. ("R.C.M"). The Contract price was \$200,000. Mr. Hodson intended the Log Home, which was to be shipped to Alaska and reassembled there, to be his dream home.
- [3] Issues arose between the parties during construction of the Log Home and both sides asserted that the other breached the Contract. In May 2006, Cancedar issued a writ, claiming \$128,000 as the balance of the Contract. In June 2006, Cancedar amended that amount to \$127,780.59 and claimed a further sum of \$76,600 in respect of changes to the design plans (the "Changes") requested by Mr. Hodson. Cancedar asserted that the Log Home had been completed and that Mr. Hodson had paid only \$148,819.41. At trial, Cancedar modified its claim for the Changes to \$73,600. In addition, it claimed \$28,968.52 for sanding costs, rental costs, moving costs, insurance expenses, and anti-fungal treatments (the "Expenses"). In fact, Mr. Ronner conceded that many of those expenses were incurred after Cancedar had sold the Log Home to a third party. I find that all of the Expenses were either within the scope of the Contract or incurred because of Cancedar's own delays or after Cancedar sold the Log Home.
- [4] Cancedar concedes that in October 2006, it sold the Log Home to Mr. Tahmazian for \$285,000. Mr. Cuddeford, counsel for Cancedar, suggests that Cancedar should refund the sum of \$130,250.89 to Mr. Hodson. He suggests the following complicated analysis: the amount of the Contract plus the Changes is \$273,600. Subtracting that amount from \$285,000 paid by Mr. Tahmazian, the amount of "mitigation" received by Cancedar was \$11,400.

Subtracting that amount from the Expenses of \$28,968.52 leaves \$17,568.52. Finally, subtracting \$17,568.52 from the amount that Mr. Hodson paid - \$148,819.41 - the balance payable to Mr. Hodson would be \$130,250.89.

- [5] Mr. Hodson filed a counterclaim alleging that Cancedar breached the Contract by failing to deliver the Log Home within the time specified by the Contract, by failing to complete it according to the plans' specifications, and by selling it to another purchaser.
- [6] Mr. Kuhn, counsel for Mr. Hodson, also submits that because Cancedar breached the Contract, it is not entitled to any profit on its sale of the Log Home to Mr. Tahmazian. He argues that Cancedar's profit properly belongs to Mr. Hodson: Mr. Hodson had anticipated that the Log Home would be worth more than \$200,000 when finished, as a result of his design efforts and the "special deal" that Mr. Ronner had given him due to an anticipated business relationship together. That relationship involved Mr. Hodson selling log home shells in Alaska that Cancedar had manufactured.
- [7] Mr. Hodson also seeks remedies sounding in damages for breach of contract, and equitable relief arising from a remedial or constructive trust. He further alleges that Cancedar breached the copyright in the original design of the Log Home and that it breached a commission agreement between them.

The Parties

- [8] At the commencement of trial, Mr. Hodson successfully applied to add Cancedar Log Homes (BC) Ltd. ("Cancedar BC") as a defendant by counterclaim. Cancedar did not oppose that application. Mr. Ronner is the sole director, shareholder and principal of both companies. Apparently, on his lawyer's advice, Mr. Ronner incorporated Cancedar BC for tax purposes in 2005, some time after the Contract was executed. He said that revenue from Cancedar's is split 50-50 between Cancedar and Cancedar BC. Each company has its own separate bank account. He also said that Cancedar owns the equipment and Cancedar does the business. Although the contract with Mr. Hodson was with Cancedar, many of the payments from Mr. Hodson were put into Cancedar BC's bank account.
- [9] I dismissed Mr. Kuhn's initial application to add Mr. Ronner as a defendant by counterclaim but stated that he could renew his application at the end of the trial if there was any evidence that Mr. Ronner personally received or appropriated any of the funds in question. Mr. Kuhn renewed his application at the end of the trial. Mr. Cuddeford takes the position that there is no evidence which would entitle Mr. Hodson "to pierce the corporate veil". He submits that such evidence "must be unequivocal and it generally must amount to active fraud." When Mr. Ronner testified, he was initially unable to say whether the payments from Mr. Tahmazian went into his Cancedar bank account or his Cancedar BC account. It appears that the first payment went into the Cancedar BC overdrawn account and the second into Cancedar's overdrawn account. Mr. Ronner agreed that he takes whatever he needs for his living expenses from both accounts. He said that he does an accounting at the end of the

year to assess how much money he has taken out for personal expenses.

- [10] In his affidavit of February 22, 2007, Mr. Ronner deposed that he was prepared to sign an undertaking on behalf of Cancedar to be responsible for damages and stated that "when this dispute is settled in full, and all of the accounting is complete, I will refund to the defendant what is owed to him".
- [11] In my view, the affairs of Cancedar, Cancedar BC, and Mr. Ronner are so intermingled that they are all properly defendants by counterclaim. Accordingly, Cancedar BC and Mr. Ronner are jointly and severally liable with Cancedar for any damages owing to Mr. Hodson. I have not distinguished between Cancedar and Cancedar BC in this judgment.

The Progress of the Contract

- [12] In February 2004, Mr. Hodson sent Cancedar a request for a proposal to build a custom log home for his personal use. It was understood that Mr. Hodson was responsible for the excavation of the ground in Alaska and the basement. Cancedar sent its first estimate of \$142,000 USD for a log home shell in February and a further estimate of \$220,000 in March. Mr. Ronner estimated that the log package would be ready to be loaded into containers for shipping to Alaska by the end of July 2004. Mr. Hodson also received a quotation from another log home builder, Brian Moore, who subsequently prepared an expert report with respect to the alleged changes and deficiencies in this litigation. Mr. Moore's estimate was about \$56,000 USD higher than Cancedar's estimate. When Mr. Hodson asked for a construction schedule and a payment schedule, Mr. Ronner responded:

1st week: peeling logs, two days later, setting blocks for foundation.

2nd week: start building walls, approx. 4 to 5 weeks up to window and door. header height.

6th week: cutting and installation of headers.

7th week: finishing last round on main floor.

8th week: floor joists are installed.

9th week: starting timber frame work, stairs and railings.

10th week: preparing all posts, about 80 pc.

11th week: starting with roof on the ground, approx. 3 weeks.

14th week: installation of all pre cut roof structure.

15th week: building trusses and [entrance] ways.

16th week: installation of stairs and railings.

17th week: final cutting and sanding of all log ends, and cutting wall connection for interior.

18th week: electrical drilling, and outlets cutting, and sanding of log walls.

19th week: start loading, and drilling for through [bolts].

please note, the construction could take, plus - minus 2 weeks.

payment terms: 25% when signing contract,

25% when contract starts,

25% when window and door header are installed,

20% when loading in container starts, and

5% when log shell is erected on building site.

[13] On June 15, 2004, Mr. Ronner sent a draft contract to Mr. Hodson.

[14] Both parties agree that in mid-July Mr. Hodson paid Cancedar \$24,000 cash as a deposit for the construction of the Log Home. However, Mr. Hodson was adamant that it was \$24,000 in US funds and Mr. Ronner that it was in Canadian funds. Mr. Hodson recalled that he had sold a set of mammoth tusks for that amount in Alaska and, ignorant of Customs regulations at that time, brought the cash into Canada. I prefer the evidence of Mr. Hodson. I will discuss my conclusions regarding the credibility of Mr. Ronner later in these Reasons.

[15] On September 6, 2004, Cancedar and Mr. Hodson signed the Contract for the construction of the Log Home for the price of \$200,000 "as per the R.C.M. Design Drawings". Those drawings are dated September 16, 2004. However, they were revised in October 2004, February 2005, and January 2006 at the behest of Mr. Hodson. Cancedar asserts that the Changes arose from those revisions. In his expert report, Mr. Moore estimated that those Changes would have taken 245 man hours in extra time to complete the Log Home.

[16] Mr. Hodson asserts that between July 15, 2004 and February 7, 2006, he paid Cancedar a total of \$127,150 USD (approximately \$150,000 CAD). Mr. Ronner estimates that Mr. Hodson paid \$148,819.41 CAD. The difference is likely explained by their disagreement as to whether the first payment of \$24,000 was in American or Canadian funds.

[17] The Contract provided that the delivery date would be "18-weeks after first payment arrival." Although he made the first payment in mid-July, Mr. Hodson agreed that he expected the 18-week period to run from September 6, 2004 - when they signed the Contract - to January 15, 2005. In fact, the Log Home was not completed when Mr. Moore inspected it in October 2006.

[18] Among its many specifications, the Contract required that the Log Home would be constructed of western red cedar with logs of superior grade, inspected by a certified wood grader. Diamond notch cuts were to be used in the log corners, and log valley rafters, feature posts and flared butts were specified. Mr. Hodson specifically required a custom log stairway with character wood and curved railings.

- [19] Mr. Hodson was very unhappy with several aspects of the construction of the Log Home. For example, the logs were never inspected by a certified wood grader. Mr. Ronner took the position that such an inspection was unnecessary. Cheaper saddle notch corners were also used in place of the specified diamond notches. By the time Mr. Hodson realized that the cheaper notches had been changed, it was too late to change them. Mr. Ronner told him "he would make it up to him". Mr. Moore, in his report, stated that the use of saddle notches not only makes a big difference to the visual appearance of the Log Home, but also affects the structure of the home, as diamond notches fit better as the logs shrink. He estimated the difference in value between the notches as approximately \$6,300. I reject Mr. Ronner's evidence that saddle notches are not cheaper and that Mr. Hodson agreed to the change from diamond to saddle notches.
- [20] The Contract originally called for structural valley rafters. Mr. Hodson requested that they be changed to aesthetic valley rafters, which would have been cheaper, but in fact no rafters were installed. I reject Mr. Ronner's evidence that Mr. Hodson agreed to their elimination.
- [21] No custom log stairway with curved railings was ever built. Mr. Ronner testified that Cancedar had constructed a standard set of stairs because Mr. Hodson's request was unrealistic and would have failed to meet safety standards. That decision was made unilaterally without notice to Mr. Hodson. Despite numerous requests for photos over the course of construction, Mr. Ronner did not send any pictures of the staircase until July 27, 2006.
- [22] The engineer-approved drawings called for knife plates to be inserted into the wood for the connection of the trusses, that would be secured by bolts. Initially, Mr. Ronner testified that he had inserted all of the required knife plates for each of the trusses. He later admitted that he did not use knife plates for the construction of some of the trusses. He stated that he did not consider it necessary as they were strong enough without them. He had not discussed that change with Mr. Hodson or the structural engineer. He said the structural engineer was hard to reach but he received some advice from another (unnamed) engineer and decided not to use knife plates because the holes would weaken the structure and the bolts would rust.
- [23] Mr. Hodson has numerous additional complaints, for example, the failure to supply arched dormers, inverted flare posts, and loft railings. Mr. Hodson takes the position that Cancedar did not build the Log Home according to the Contract.
- [24] Cancedar called Mr. Lloyd as an expert witness to give evidence regarding the workmanship of the Log Home. Mr. Lloyd inspected the Log Home in November 2006. He said it was of a higher quality workmanship than is usually seen on log houses, and that it was constructed of premium species with many character feature logs. Mr. Lloyd thought that the workmanship was equal or superior to industry standards. Although the house had weathered in the moist climate, pressure washing and sanding could eliminate all of the weathering problems. In the face of Mr. Kuhn's objections, Mr. Lloyd was not permitted to

testify with respect to numerous matters that were not included in his written report.

[25] The report of Mr. Moore, tendered by Mr. Kuhn, considered the Changes resulting from the nine sets of construction design plans drawn up between April 2004 and January 2006. Mr. Moore determined that the total cost of all of the Changes would be about \$25,616.72 (including a profit margin of 10%) and the total time to completion, as set out below, would be 245 man hours. In his opinion, the planned 18-week construction schedule was reasonable.

[26] Mr. Moore visited the Cancedar site on October 4, 2006 and worked through the last set of plans and the Contract with Mr. Ronner in order to determine whether the house was actually completed and ready to ship. He noted 22 items that were incomplete, missing, not yet done, or that needed to be redone. In Mr. Moore's opinion, at that date, it would have cost more than \$20,000 in labour and material and take a crew of two men 22 days to complete the Log Home and have it ready for shipping. At trial, Mr. Cuddeford was critical of Mr. Moore's report on the basis that, as mentioned earlier, Mr. Moore had also provided an estimate in response to Mr. Hodson's requests for proposals in 2004. However, Mr. Cuddeford failed to give notice that he required Mr. Moore for cross-examination at trial. Mr. Moore was in South America and unavailable at the date of trial.

[27] On July 10, 2005, approximately a year after he had made the first payment on the Log Home, Mr. Hodson sent an e-mail regarding the progress of the work:

I am VERY disappointed at the lack of progress on my home. I see one round in two months and a lot of weathering.

I started to get concerned when it took so long to get new photos. I hope you understand that I am taking our business relationship very seriously and want to get back on track. I was very happy until the photos and now I feel let down.

This is not an easy situation for me to be in. You first delayed the project from the first of June to July and now to the end of August so you could do a "better job". I do not see this at all. I only see that instead of working slowly on my house that you focused on other projects. I am a very easy person to work with but I feel that you are not living up to what I have been told. I understand some of the problems but feel shorted.

I want to also find out if you have recently applied the fungus retardant to my logs. We discussed this on your visit and said it needed to be done.

Did the uprite logs get replaced?

I have reviewed your schedule that you gave to me and you are not even completed with week 8 yet. Out of 18-20. This leaves 10-12 weeks of work left plus shipping. I cannot deal with any delays at all even a week. For my log home to be delivered the end of August it needs to ship in about 6 weeks maximum.

What is the status on my great room [stairs]? This will take a great deal of time even to find the proper logs. Log in family room as well as arched entry logs.

[28] Mr. Hodson noted that he had cancelled arrangements with builders and electricians in Alaska because of the delays and that it was very difficult to hire construction people in the summer and fall. If the Log Home was not delivered to Alaska by August 31, 2005, the house would sit for nine months without any exterior protection. On the same day, Mr. Ronner replied:

I am very sorry, that the [incidents] with the crane, and with Mike being sick for [almost] six weeks, [delayed] your project. I have decided to get the other things out of our way, so we can [focus] 100 percent on your home.

We just like not to be under pressure by doing your home, and we will do everything to make this house as you expected.

The uprite posts we'll replace before loading, the whole house has been sprayed once, before shipping we will sand, and spray every log again.

Our business relationship means a lot to me, and I am taking it very [seriously].

The exact shipping date, I will know within the next two weeks. I do not like to make anymore [promises], if we can't keep them.

[29] On September 15, 2005, Mr. Ronner assured Mr. Hodson that "by end of January, 06, the house will be completed without rushing".

[30] Cancedar likely considered Mr. Hodson to be a difficult client. As noted above, he required R.C.M. to make numerous changes to the plans throughout the construction. The last set of construction plans is dated January 27, 2006. Mr. Hodson, however, maintains that any changes that substantially affected the structure of the Log Home were made to the plans by October 14, 2004.

[31] Mr. Ronner testified that the Changes required at least ten alterations to the scope of the work. However, prior to April 30, 2006, Cancedar had never advised Mr. Hodson that any of the Changes would incur extra costs or cause delays. In fact, Mr. Hodson asserts that many of the Changes involved omitting certain features and log work - a cost savings to Cancedar. In the absence of any indication otherwise, Mr. Hodson assumed that when the Log Home was completed, he would sit down with Mr. Ronner and discuss any costs associated with the various Changes.

[32] By now, the relationship had clearly broken down. By this time, Mr. Hodson had been repeatedly seeking information as to the progress of construction, and photographs of the Log Home for several months.

- [33] The last payment Mr. Hodson made was \$5,000 USD on February 7, 2006. By that time, only \$50,000 remained outstanding according to the Contract. However, on April 30, 2006, Mr. Ronner advised Mr. Hodson that to finish the Log Home, Cancedar needed detailed drawings for all "extras" (the Changes). He said the additional cost to date for "living room extension and extras" was \$28,000. Cancedar required a minimum payment of \$40,000. In response, Mr. Hodson replied that Mr. Ronner had previously advised him that Mr. Hodson did not need to pay Cancedar any more money until the Log Home was set up on Mr. Hodson's lot in Alaska. Furthermore, Mr. Hodson was unwilling to send any more money until Mr. Ronner resolved the problems with the Log Home that he had identified. On May 1, Mr. Ronner wrote that Cancedar's policy was "full payment before loading start at our yard. I have never said anything different".
- [34] On May 15, 2006, Mr. Ronner advised Mr. Hodson that the extra costs above the Contract price were \$76,600 (up from the \$28,000 he had indicated two weeks earlier). Mr. Ronner provided no documentation or detail of that sum. He stated that a total of \$128,800 was owed to Cancedar and that \$60,000 was due immediately, with the rest due before the Log Home was loaded at Cancedar's yard. In response to what he considered "a fictitious bill", Mr. Hodson requested a full refund of the monies he had already paid to Cancedar. At trial, Mr. Ronner said - for the first time - that he had told Mr. Hodson in March that the extra costs would be \$76,600. He had no documentation to support that assertion, which I reject in view of his e-mail of April 30 which stated that the extra costs were \$28,000.
- [35] On July 24, 2006, an e-mail from Mr. Ronner stated that Cancedar had started the work on the Log Home pursuant to the Contract, that they had made the changes Mr. Hodson had wanted, and that they had provided the photographs he had asked for. Mr. Ronner maintained that the Log Home was ready to ship and certain work could be done only on disassembly before shipping - such as sanding, wall flattening and thru bolts. He said Cancedar was ready to proceed if they received payment and a shipping date. Mr. Ronner said that if Mr. Hodson did not complete the purchase of the Log Home, Cancedar would have no choice but to sell it and refund Mr. Hodson's payment. He added: "if and when you are ready to build in the future, we can build the same house for you."
- [36] On July 25, Mr. Hodson replied, asking for specific pictures of certain features, including character logs and the showcase stairs, correspondence or documentation regarding the additional charges, and details of the amount Mr. Ronner believed that Mr. Hodson had paid. He also insisted: "YOU DO NOT HAVE PERMISSION TO SELL MY HOUSE."
- [37] On July 27, Mr. Ronner replied and responded to a number of Mr. Hodson's questions, enclosed some photographs, and demanded payment of \$128,800 CDN. Mr. Ronner said that the Contract had been based on drawings from April 2004 and that there was no new contract for the new plans provided in November 2004. On July 29, 2006, Mr. Hodson advised Mr. Ronner that his law firm would be in touch. On July 31, Mr. Ronner suggested that Mr. Hodson make shipping arrangements for seven to eight loads. Mr. Ronner guaranteed that by the time the last load left Cancedar's yard, the Log Home would be completed. However,

before they could complete the Log Home, Cancedar needed "proper plans" for the final post cuts on the basement level from Mr. Hodson. Mr. Ronner insisted that Mr. Hodson make a final payment by certified cheque before loading started.

[38] In August 2006, Mr. Schwarz, a colleague of Mr. Cuddeford, wrote to Mr. Kuhn asserting that it was Cancedar's position that the Log Home had been completed to the point of being ready for shipping since March 2006 and that Mr. Hodson had refused to pay the balance of the funds due or take delivery of the Log Home. He stated: "To mitigate damages our client is marketing the log home package and will claim any loss or deficiency from your client following a sale, if any."

[39] A string of e-mails between Mr. Ronner and Mr. Hodson placed in evidence indicates that on August 4, 2006, Mr. Ronner sent the following e-mail to Mr. Hodson:

I have now had a chance to read your last e-mail and think about it. Again, you bring up the same old points which we have answered many times fully and completely. I again repeat that we are ready to ship. The only thing that remains to be done is the work for the basement which we are able to do during the process of shipping upon receiving the dimensions from your engineer. As far as we are aware, it is not too late for you to build and that it could be done until October. In any event, as we have said before we are simply going in circles about this whole project and it does seem that the simplest option is to refund your money. What we will do is market the package. Our break even cost is \$282,000.00. If we are able to receive \$282,000.00 we will refund you the \$148,000.00 that you paid. If we are able to sell the package for something greater than \$282,000.00 we will refund you your engineering cost to a maximum of \$6,000.00 to \$7,000.00, which is what I believe you paid. We will make best efforts to sell as soon as possible and put this whole matter behind us. This would be all subject to us having a proper agreement in place so as to ensure that we have no future misunderstandings.

[40] At trial, Mr. Ronner denied sending sent that e-mail. I do not find his denial credible. In fact, Cancedar sold the Log Home to Mr. Tahmazian by contract dated October 31, 2006.

[41] Mr. Ronner testified that in September 2006, he was in Alaska and observed that Mr. Hodson had not done any work on his property in preparation for the delivery of the Log Home. Mr. Hodson's response is that he could easily have done the preparatory work if he had been satisfied that the Log Home was ready for delivery.

[42] In an affidavit sworn February 22, 2007, Mr. Ronner deposed that he had made arrangements to sell the Log Home with the sale to complete in the summer of 2007. He stated, "when this dispute is settled in full, and all of the accounting is complete I will refund to the Defendant what is owed to him."

[43] The contract with Mr. Tahmazian was signed on October 31 2006. Cancedar received a deposit of \$142,500 and a further payment of \$159,600 which was due, according to that contract, on or before August 1, 2007. However, Mr. Hodson was unable to obtain information regarding that sale. After numerous attempts to obtain those particulars from

Mr. Schwarz, Ms. Janzen, a lawyer at Mr. Kuhn's firm, was compelled to make an application to Court. In March 2007, Mr. Justice Singh ordered that Cancedar disclose the purchase price, general site address, closing date, and terms of payment with respect to the sale of the Log Home, including the amount of any payments made prior to closing of the transaction. When Cancedar failed to comply with that order, a contempt application was brought. On April 18, 2007, the eve of the hearing, Cancedar disclosed the details of the sale.

- [44] At trial, Mr. Ronner stated that he did not recall the terms of Singh J.'s order and said that it did not look familiar to him. He denied any knowledge of the letters dated December 21, 2006, January 10, 2007, and January 17, 2007, that Ms. Janzen had sent to Mr. Schwarz requesting details of the transaction and that the proceeds of the sale of the Log Home be placed into trust. Mr. Schwarz did not reply to any of those letters. At trial, Mr. Cuddeford declined to have those letters introduced as exhibits or accept an affidavit of Ms. Janzen. It was necessary for Mr. Kuhn to call Ms. Janzen as a witness to prove them. I have no difficulty concluding that Mr. Schwarz received those letters and either sent them to Mr. Ronner or apprised him of their contents.
- [45] Where the evidence of Mr. Hodson and Mr. Ronner conflicts, I prefer the testimony of Mr. Hodson, whose evidence was direct and not internally inconsistent. I did not find Mr. Ronner to be a credible witness in many respects. When confronted with evidence that contradicted his trial testimony, he frequently denied or forgot having made the earlier statements. On many occasions, he was caught out in contradictory statements. For example, as set out above, he sent an e-mail to Mr. Hodson on April 30, 2006 saying that Cancedar needed detailed drawings "for all extras" to finish the Log Home. At trial, he said "I was wrong. The house was finished then," in order to support his earlier assertion that the Log Home was ready in March 2006. Even then, he claimed the Log Home was finished by March 31 but when it was pointed out to him that the Statement of Claim said it was finished by March 15, he replied that it must have been finished by March 15.
- [46] Also, Mr. Ronner testified that the Log Home was ready to ship by March 31 and all of the extra work (the Changes) had been done by then. When asked why he had told Mr. Hodson in April that the cost of the Changes was \$28,000 instead of the \$76,600 he claimed the following month, he replied "I have no idea." In his e-mail of April 30, 2006, Mr. Ronner had told Mr. Hodson that the amount owing to Cancedar was \$83,000, which included the extra charges of \$28,000 claimed. At trial, however, he said that he did not know how he came up with that figure of \$83,000.
- [47] Mr. Moore's report noted that there were two short log posts missing from the Log Home's basement entry. When asked if they had been stolen, Mr. Ronner replied that he did not know where they were. When he was asked if he had told Mr. Moore that they had been stolen, he replied that he might have. When asked again whether he had said that to Mr. Moore, he replied: "If he says so."

Issues

- [48] Mr. Cuddeford asserts that the Contract price was increased due to the Changes requested by Mr. Hodson. Mr. Cuddeford submits that Mr. Hodson did not pay Cancedar for the finished Log Home, thereby breaching the Contract. Additionally, Cancedar claims a seller's lien upon the Log Home, and asserts that s. 51(3) of the Sale of Goods Act, R.S.B.C. 1996, c. 410 ("the Act") applies in this situation.
- [49] Mr. Kuhn submits that Cancedar breached the Contract by failing to deliver the Log Home within the time specified by the Contract, by failing to complete it according to Mr. Hodson's specifications, and by selling it to a third party. Mr. Kuhn agrees that the Contract price should be adjusted by some amount due to the Changes but submits that an allowance should also be made in relation to deletions to the work and for work that was not done. During the litigation, he claimed a buyer's lien upon the Log Home.
- [50] Mr. Hodson seeks repayment of the \$127,000 USD that he paid to Cancedar or, alternatively, damages for unjust enrichment in that amount; and "restitutionary damages" totalling the \$98,817.22 profit from the sale of the Log Home to Mr. Tahmazian, or alternatively disgorgement of that amount. He also seeks pre-judgment interest on those amounts.
- [51] Mr. Kuhn also asserts that Mr. Hodson's copyright on the original design drawings of the Log Home was infringed by Cancedar, and seeks damages for that infringement.
- [52] Additionally, Mr. Kuhn claims that Mr. Hodson is owed a commission of \$11,250 USD plus pre-judgment interest as a result of Cancedar's sale of a log house for \$112,500 USD on December 6, 2004 following a referral by Mr. Hodson.

[53] I will consider each of these issues in turn:

Was the Contract price increased by the Changes?

[54] Cancedar asserts that it performed the following Changes as directed by Mr. Hodson:

November 2004 House extended by 12'.

January 2005 Two more roof trusses added.

March 2005 One more round of logs added on to Log Home.

April 2005 Five more roof beams @ 23.6" added.

August 2005 Covering roof beams 2' longer.

November 2005 Whole roof log diameter changed from 16" to 20" and 22".

December 2005 Main entry way changed on basement floor.

January 2006 Deck support posts extended through deck.

February 2006 Two more posts in basement.

- [55] During his testimony, Mr. Ronner asserted that Cancedar had spent close to \$350,000 on the Log Home and that he had documents to support that assertion. Such documents were never disclosed and no formal claim in that amount has ever been advanced.
- [56] Mr. Hodson does not deny requesting the Changes but says that many of the alterations to the plans eliminated or reduced the scope of the work to be done.
- [57] The Contract was in writing. The onus is on Cancedar to establish that there were changes to the work required under the Contract that increased the Contract's cost. There were no written change orders and no indication of any increased costs until Mr. Ronner's e-mail of April 30, 2006 demanding that Mr. Hodson pay an extra \$28,000 in relation to the living room extension and "extras", and a further e-mail of May 2006 flatly describing the cost of the extra work as \$76,600.
- [58] Mr. Kuhn concedes that the reasonable price of the Changes, as determined by Mr. Moore's report, allowing a 10% profit and 20% overhead, would be \$28,982.28. From an amended Contract price of \$228,982.28, I find that there should be a deduction of \$20,000 which Mr. Moore estimated as the cost of Cancedar's work that was either not done or was non-compliant with the specifications set out in the Contract or the Changes. I make no allowance for the cost of the alleged changes and deletions that would reduce the price of the Contract. No reason was given as to why Mr. Moore was not asked to estimate any cost-saving changes.
- [59] I find that if Cancedar had delivered the Log Home to Mr. Hodson at the time Mr. Moore inspected it in October 2006, the adjusted Contract price would have been \$208,982.28.

Was the Contract breached by Mr. Hodson or Cancedar?

- [60] I find that Cancedar breached the Contract by its excessive delays and inability to deliver the Log Home to Mr. Hodson within a reasonable time, and its failure to build the Log Home according to specifications set out in the Contract and the Changes. While Mr. Hodson contributed in part to the delays by making a number of alterations to the design plans, Mr. Ronner never indicated that those Changes caused any delay or would incur extra cost. While Mr. Ronner's e-mail of July 10, 2005 acknowledged that there had been a lengthy delay as a result of a crane mishap and an employee who had pneumonia, there was never any mention of delay caused by, or related to, the Changes. Mr. Ronner did not request any additional time as a result of the Changes. Neither did he indicate that any of the Extras would be a cost to Mr. Hodson.
- [61] Mr. Cuddeford submits that s. 54 of the Act permitted Cancedar to sell the Log Home. That section provides:
- [62] Section 51(3) of the Act provides:

51(3) If the goods are of a perishable nature, or if the unpaid seller gives notice to the buyer of the seller's intention to resell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by the buyer's breach of contract.

[63] That section is inapplicable in the present case. Prior to the sale, Cancedar had breached the Contract by failing to deliver the Log Home to Mr. Hodson according to the specifications and in a timely manner.

[64] Moreover, Cancedar fundamentally breached the Contract, and lost any opportunity to enforce its terms, by selling the Log Home to a third party. Mr. Hodson accepted that repudiation.

What remedy flows from Cancedar's Breach of Contract?

[65] Counsel spent a good deal of time asserting that their respective clients had a buyer's lien or a seller's lien upon the Log Home. On March 12, 2007, Mr. Justice Singh pronounced an order by consent, declaring that Mr. Hodson had a buyer's lien in the amount of \$163,000 pursuant to s. 75 of the Act.

[66] On August 3, 2007, in *Cancedar v. Hodson*, 2007 BCSC 1967, Crawford J. described the buyer's lien as "a super floating charge." He stated at para. 37:

Is there an actual or specific fund? I would only say that the fund or monies that have been paid by the third party purchaser are the subject of this dispute because in the general sense they are falling in the rubric or umbrella of that floating charge as we are calling it because the lien is on all goods that are in or come into possession of the seller or in its account in a savings institution in which the seller usually deposits the proceeds of sale.

[67] In my view, any lien was extinguished when Cancedar sold the Log Home to Mr. Tahmazian. In any event, a seller's lien is irrelevant as Cancedar is not owed any monies; a buyer's lien is unnecessary in view of Mr. Hodson's entitlement to damages.

[68] As set out above, Mr. Hodson claims repayment of the sum of \$127,000 USD he paid to Cancedar and restitutionary damages in the amount of \$94,817.22. Alternatively, he claims damages for unjust enrichment against Cancedar, Cancedar BC, and Mr. Ronner in respect of the money paid (\$127,000 USD), and disgorgement of the profit made by Cancedar on the sale of the Log Home to Mr. Tahmazian (\$94,817.22). Mr. Hodson also seeks pre-judgment interest on those amounts. Mr. Kuhn submits that Cancedar was unjustly enriched by selling the Log Home to Mr. Tahmazian for \$285,000 and that there is a remedial constructive trust over the Sale Proceeds. Alternatively, he says that because one or more of the defendants by counterclaim were in a fiduciary role, there is a substantive constructive trust over the Sale Proceeds. I agree with Mr. Cuddeford that Mr. Kuhn's submission that there was a fiduciary relationship between Mr. Ronner (and/or Cancedar) and Mr. Hodson must fail. This was never more than a commercial relationship.

Damages for Breach of Contract

[69] Mr. Hodson is entitled to repayment of the sum of \$127,000 USD he paid to Cancedar and pre-judgment interest from the dates of the various payments. Those payments should be calculated in Canadian dollars by converting each payment in US funds into Canadian funds on the date that each payment was made.

[70] I find that Cancedar, Cancedar BC, and Mr. Ronner all participated in Cancedar's breach of the Contract.

Is Mr. Hodson entitled to the profit that Cancedar made on the Log Home?

[71] I conclude that Mr. Hodson can recover the Sale Proceeds from Mr. Tahmazian under this head either as damages under ss. 54 and 57 of the Act or alternatively because Cancedar was unjustly enriched.

[72] The applicable sections of the Act provide:

Damages for nondelivery

54 (1) If the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for nondelivery.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3) If there is an available market for the goods in question, the measure of damages is to be ascertained, unless there is evidence to the contrary, by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was set, then at the time of the refusal to deliver.
(emphasis added)

Interest and special damages

57 This Act does not affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid if the consideration for the payment of it has failed.

[73] The sale to Mr. Tahmazian sets the market price of the Log Home at \$285,000. Hence, the measure of damages is the difference between the adjusted Contract price and the Sale Proceeds.

[74] Alternatively, I agree that Mr. Hodson is entitled to disgorgement of the profits made on the sale of the Log Home to Mr. Tahmazian on the basis of an unjust enrichment. Both Mr. Hodson and Cancedar expected that Mr. Hodson would receive a Log Home that was worth substantially more than the specified \$200,000 Contract price, as a result of Mr. Hodson's own design input and the anticipation of a future business relationship. If Cancedar had not

breached the Contract, Mr. Hodson would have owned a chattel that he could have sold for \$285,000 had he wished to do so.

- [75] Accordingly, I conclude that Cancedar was unjustly enriched by the profit it made on the sale; Mr. Hodson was correspondingly deprived; and there was no juristic reason to justify that enrichment. As a result, Cancedar was a constructive trustee of the monies paid by Mr. Hodson. I reject Mr. Cuddeford's suggestion that a juristic reason arises from the fact that Cancedar had commenced litigation prior to the sale and no monies would be transferred before settlement or judgment. The presence or absence of a juristic reason relates to the enrichment and corresponding deprivation, not to the payment.
- [76] Because Mr. Ronner operated his companies Cancedar and Cancedar BC interchangeably and used company funds for his own purposes from time to time, I would find that all three entities were unjustly enriched and stand as constructive trustees.
- [77] I agree that the profit is \$94,817.22, calculated as the difference between the selling price to Mr. Tahmazian of \$285,000 less \$190,182.28, being the adjusted Contract price of \$208,982.28 with further deductions for the sum of \$6,000 for reassembly which was included in the Contract and \$12,800 which Mr. Hodson paid R.C.M. for the plans. Cancedar did not charge those amounts to Mr. Tahmazian as part of its contract with him.
- [78] Mr. Hodson is entitled to pre-judgment interest from October 30, 2006, the date of the sale to Mr. Tahmazian.

Mr. Hodson's claim for rent

- [79] Mr. Hodson also claims \$32,500 USD for the rental of a home between February 1, 2006 and August 1, 2007, which he incurred in substitution for living in the Log Home. He also seeks interest on that amount from June 2, 2006 when the Writ was filed. Mr. Kuhn characterizes this claim as damages for delay which may be recoverable where they are a foreseeable consequence of the breach of contract. Mr. Hodson paid \$1,695 USD a month; however, there were no particulars of the rental market in or around Anchorage or any comparison between the rental home and the Log Home.
- [80] I would allow not allow Mr. Hodson any sum under this heading. First, the relevant period for any relief would be much shorter than that claimed. If the Log Home had been delivered to Mr. Hodson in Alaska on February 1, 2006, he could not have completed the work necessary to make the home liveable until weather permitted some months later. He subsequently accepted Cancedar's repudiation of the Contract by selling the Log Home to Mr. Tahmazian in October 2006. Mr. Hodson is receiving both the profit Cancedar received on that sale, as well as the return of the money he paid to Cancedar. He is entitled to pre-judgment interest to compensate him for being out of pocket in those amounts from the relevant dates to the trial. Any additional amount would constitute double recovery.

Is Mr. Hodson entitled to Damages for Breach of Copyright?

- [81] Mr. Hodson also pleads that he is an owner of the copyright in an artistic work consisting of the original design drawings of the Log Home. He alleges that Cancedar, Cancedar BC, or Mr. Ronner has infringed that copyright by the reproduction and sale of the original design drawings to Mr. Tahmazian and/or the construction of a second log home that is substantially similar and/or based on those plans. He suggests that an appropriate amount of damages would be \$10,800 which he paid for the R.C.M. plans and received no benefit.
- [82] Mr. Courtois, the principal of R.C.M., testified that his company designs log homes and timber frame houses. He said that Mr. Hodson contributed detailed floor plans with room layout and detailed elevations for the Log Home. Mr. Hodson was very concerned that his design not be repeated again.
- [83] Mr. Courtois said that his firm does custom designs and has a few stock plans that sell from \$500 - \$1200. He said that if Mr. Hodson wanted to build more houses with the same plans they would charge him the stock plan price but that he could not sell the plans to anyone else.
- [84] The contract that the parties executed on February 18, 2004, contained the following term:
- COPYRIGHTS: The client understands that the copyright of the design belongs to R.C.M. CAD Design Drafting Ltd. Velum plots are provided for blueprinting solely for the property which it was designed for. The set of plans cannot be reproduced for construction on any other property or building site without the permission of R.C.M. CAD Design Drafting Ltd.
- [85] Mr. Courtois said that Mr. Hodson was not happy with that term and that after some discussion they agreed that the copyright would be shared. Mr. Hodson wrote on the contract "no website use" and Mr. Courtois agreed to that amendment.
- [86] Mr. Courtois testified that in July 2007, he dropped off some plans at Cancedar and Mr. Ronner and another employee told him that they were building an exact replica of the Hodson Log Home.
- [87] Mr. Hodson asserts that Cancedar was aware that he contributed to the design of the Log Home.
- [88] It is clear that the contract in question was between R.C.M. and Mr. Hodson. Cancedar is not a party to it. The modified contract prohibits only R.C.M. from website use of the design. It does not purport to give Mr. Hodson a remedy if a third party breaches R.C.M.'s copyright.
- [89] I conclude that Mr. Hodson's claim for breach of copyright cannot succeed.
- [90] Mr. Hodson complained that Mr. Ronner had put a photograph of the Log Home on Cancedar's website. At the end of the trial, Mr. Cuddeford advised the Court that Mr. Hodson had given instructions to remove it from the website.

Mr. Hodson's claim for commission

- [91] In 2004, Mr. Hodson and Mr. Ronner discussed a project whereby Mr. Hodson would develop subdivisions in Anchorage and Girdwood, Alaska, with log homes built by Cancedar. They envisaged using the Log Home as a display home for that purpose, as well as for Mr. Hodson's residence. Both hoped the construction of the Log Home would be the beginning of a long relationship.
- [92] Mr. Hodson referred Tim Cabana and Mike Kenny to Cancedar and they entered into a contract on December 6, 2004, pursuant to which Cancedar built a log home for them for \$112,500 USD. Accordingly, Mr. Hodson seeks a commission of \$11,250 USD and interest from June 2, 2006.
- [93] Mr. Hodson testified that he and Mr. Ronner agreed that Mr. Hodson would receive a commission of 10% on the sale price of log homes he referred to Cancedar and which Cancedar constructed. However, he said that he understood that he would receive the Cabana commission by way of a 10% reduction applied to the cost of the Log Home.
- [94] Mr. Ronner agreed that Cancedar got the Cabana contract as a result of Mr. Hodson's referral and that they had agreed a commission would be payable on referrals. He agreed that Mr. Hodson should get "something" but said they had not agreed to anything.
- [95] Mr. Hodson says that he brought Mr. Cabana, who owned the same subdivision that included Mr. Hodson's property, to British Columbia to meet Mr. Ronner. Mr. Hodson interviewed a number of log workers, he advised Mr. Cabana about the different species of woods, and he helped him negotiate freight rates.
- [96] I conclude that the parties did agree that Mr. Hodson would receive a 10% commission on any successful referrals to Cancedar. He is entitled to \$11,250 USD as 10% of the Cabana contract. That amount should be converted to Canadian funds as at the date the Cabana contract was signed, and pre-judgment interest will run from that date.

Summary

[97] Mr. Hodson is entitled to the following:

- \$127,000 USD for damages for breach of the Contract;
- \$94,817.22, being the profit taken by Cancedar on the sale of the Log Home to Mr. Tahmazian;
- \$11,250 USD as commission; and
- pre-judgment interest on those amounts as indicated above.

Costs

- [98] If necessary, the parties may set down a hearing at a date convenient to counsel and the court with respect to costs.

"M.J. Allan J."

The Honourable Madam Justice Allan

April 9, 2009 - Revised Judgment

Corrigendum to Reasons for Judgment issued advising of amendments in paragraphs 52, 92, 96 and 97, which will read as follows:

1. Paragraph 52: \$11,200 USD should read as \$11,250 and \$112,000 USD should read as \$112,500 USD;
2. Paragraph 92: \$125,000 USD should read as \$112,500 USD;
3. Paragraph 96: \$12,500 USD should read as \$11,250 USD; and
4. Paragraph 97: \$12,500 USD should read as \$11,250 USD.

(amendments underlined)

The Reasons for Judgment are amended accordingly. In all other aspects, the Reasons stand.

"M.J. Allan J."

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Prepared on 27 October 2026 · Esheria