

CANADA / JUDGMENT

Great Corner Stone Ltd. v. Vancouver Cabinets Inc.

2020 BCSC 107

COURT

Supreme Court of British Columbia

DECIDED

30 January 2020

Source: bccourts.ca - Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 107 Great Corner Stone Ltd. v. Vancouver Cabinets Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Great Corner Stone Ltd. v. Vancouver Cabinets Inc.,

2020 BCSC 107

Date: 20200130

Docket: S1510628

Registry: Vancouver

Between:

Great Corner Stone Ltd.

Plaintiff

And:

Vancouver Cabinets Inc.

Defendant

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment

Counsel for the Plaintiff:

Song Xue

Counsel for the Defendant:

Mimi C. Wang

Place and Dates of Trial:

Vancouver, B.C.

August 7-10, 13-17, 20-23, 2018

November 7-9, 2018

June 14, 2019

July 16, 2019

Further Written Submissions:

November 20, 2019

January 13, 2020

Place and Date of Judgment:

Vancouver, B.C.

January 30, 2020

Table of Contents

Paragraph Range

1.0 INTRODUCTION

[1] - [2]

2.0 BACKGROUND

[3] - [10]

3.0 THE AGREEMENTS

[11] - [34]

3.1 Overview

[11] - [26]

3.2 The Countertop Agreement

[27] - [29]

3.3 The Sale and Workshop Subletting Agreement

[30] - [30]

3.4 The Business Assignment

[31] - [31]

3.5 The Settlement Agreement

[32] - [34]

4.0 PROBLEMS

[35] - [70]

4.1 Pre-Settlement problems

[35] - [49]

4.2 The 2015 meetings

[50] - [55]

4.3 Post-Settlement problems

[56] - [58]

4.4 The Guo Zhang problem

[59] - [70]

5.0 THE PARTIES' POSITIONS

[71] - [88]

5.1 GCS's position

[71] - [77]

5.2 VCI's position

[78] - [88]

6.0 DISCUSSION

[89] - [179]

6.1 What was the relationship?

[89] - [94]

6.2 Who was responsible for ordering and purchasing stone?

[95] - [107]

6.3 Was the cost of stone to be included in the \$250,000 threshold?

[108] - [114]

6.4 Did either party breach the agreements prior to the Settlement Agreement?

[115] - [125]

6.5 What was the effect of the Settlement Agreement on preceding breaches?

[126] - [131]

6.6 What breaches occurred post-settlement?

[132] - [149]

6.7 What remedies flow?

[150] - [179]

6.7.1 GCS's claim

[150] - [168]

6.7.2 VCI's counterclaim

[169] - [179]

7.0 CONCLUSION

[180] - [184]

1.0 INTRODUCTION

- [1] This is an unfortunate case of a business relationship gone wrong.
- [2] The relationship between the parties, Great Corner Stone Ltd ("GCS") and Vancouver Cabinets Inc ("VCI") is governed by a series of agreements, originally in Chinese with English translations, that the parties prepared themselves, without the benefit of professional legal advice. Discerning just what rights and obligations these documents placed upon the parties is the principal undertaking of these reasons. It is not an easy one. The parties take very different views.

2.0 BACKGROUND

- [3] VCI manufactures, supplies and installs kitchen and bathroom cabinets and countertops primarily for residential premises. Its president, Zong Wei "David" Li, and his wife, Ying "Amanda" Xiao, immigrated to Canada at the end of 2000. Ms. Xiao is the manager of the company. They started the business in 2006, after arriving in Canada with virtually nothing, and built it into a successful enterprise.
- [4] They operated the business from premises they leased in Richmond, BC, that comprised two parts: a warehouse area they used for the cabinets business and offices, and an adjacent warehouse used as a workshop to fabricate stone countertops. From 2007 to 2013, the countertop manufacturing part of the business was handled by Yu Kun Wang. VCI supplied the premises and the equipment.

- [5] Mr. Wang began as an employee, in the position of stonemaster, but later operated as a subcontractor, as he and Mr. Li perceived it. Mr. Wang worked full time producing countertops for VCI, unless there was a job he could not handle. But he changed from full employee status to being paid by the job, and was responsible for hiring labour as necessary. From the customer's point of view, all was carried out by VCI.
- [6] In 2013, Mr. Wang decided to join a different company, and Mr. Li and Ms. Xiao sought a replacement. In March 2013, they placed a classified ad in a Chinese language newspaper that read:

Small Scale Stone Factory for Sale

Small scale stone factory for sale: located in Richmond; steady customers; full set of equipment; reasonable price. Detailed negotiation in person. Prospective buyers please call Mrs. Li at [778-xxx-xxxx].

- [7] That ad attracted the attention of Lingling ("Linny") Ye and her younger sister, Honghong Ye. For convenience, and meaning no disrespect, I shall refer to them as Linny and Honghong respectively. They are the principals of GCS.
- [8] Linny was the first to immigrate to Canada, arriving in 2005. She was a graduate of Shanghai University, and testified that she had worked in the stone business since 1998.
- [9] In 2012, Honghong applied to immigrate to Canada under the BC Provincial Nominee Program ("PNP"). Among other things, this required the proposed immigrant to invest in a business in British Columbia. To this end, the sisters incorporated GCS on November 13, 2012, with a view to setting up a long-term stone business. Hence their interest in VCI's ad.
- [10] Linny responded to the ad, and spoke to Amanda Xiao. As a result, Linny and Honghong went to the Richmond premises and met with Mr. Li and Ms. Xiao. Ultimately, they negotiated the business arrangement that is the subject of this action. As will be seen, the two sides had rather different ideas about what this arrangement meant.

3.0 THE AGREEMENTS

3.1 Overview

- [11] On April 16, 2013, the parties executed a somewhat bewildering series of agreements, some in Chinese, some in English, some in both, although the versions were not quite the same. They signed:
- a "Commercial Lease Agreement", prepared in English by Linny, but which is more properly described as an assignment of lease, given that VCI was itself the lessee of the property in question;

- a "Contract of Countertop Manufacturing and Installation" (the "Countertop Agreement") in two versions: the first in Chinese, prepared by Mr. Li, and the second in a less-than-exact English version prepared by Linny; the parties signed both. The parties also tendered into evidence a third version, being a certified translation of the Chinese original that the parties further modified in their evidence, ultimately yielding a version that differed from both the signed English translation of the signed Chinese original and the certified English translation of the signed Chinese original;
- a "Sale and Workshop Subletting Agreement" prepared in Chinese; and
- a "Business Assignment" initially prepared by Mr. Li in Chinese and translated to English, and signed in an English version that Linny had revised.

[12] In their Agreed Statement of Facts, the parties stipulate their agreement

that the Agreements are consistent with and/or complementary to one another, and that the agreements should be interpreted in relation to one another since they were entered in or around [sic] the same time.

[13] This is more of a submission than a fact. That the agreements are consistent is, frankly, a bit of a stretch. There are a number of apparent inconsistencies, but in resolving those inconsistencies, there is no doubt that the agreements must be interpreted as a whole.

[14] The basic concept was a "sale" of the stone countertop manufacturing and installation business that VCI had previously subcontracted to Mr. Wang, together with all equipment on the premises, for \$60,000.

[15] VCI would sublease the countertop fabricating premises to GCS for three years, to June 30, 2016, renewable by GCS for an additional three-year term. The Commercial Lease Agreement provided that if the "tenant" (GCS) remains in possession with the consent of the "landlord" (VCI) thereafter, the tenancy would convert to a month-to-month tenancy terminable by either party upon one month's notice.

[16] GCS would operate independently, supplying countertop manufacturing services to VCI at set rates, with the ability to sell independently to other customers with any excess capacity. VCI would use GCS exclusively unless GCS could not take on an order, and would provide at least \$250,000 in business annually to GCS.

[17] GCS was to deal with VCI's customers as if employed by VCI.

[18] In their Agreed Statement of Facts, the parties summarize the effect of the agreements this way:

9. Amongst other things, the Agreements provide that:

a) The Plaintiff would pay the Defendant \$60,000 as purchase price for the Business;

- b) The Plaintiff would sublease the Premises from the Plaintiff [sic; the Defendant] for a three-year period from July 1, 2013 and June 30, 2016 (the "sublease"), with an option to renew for one term by a written notice of at least 60 days before the expiry of the first term;
 - c) The Plaintiff would pay rent to the Defendant in accordance with the terms of the Agreements;
 - d) The Defendant promised to subcontract all its stone countertop manufacturing and installation business to the plaintiff and provide the sum of at least \$250,000 countertop sales per annum, subject to any conditions as stipulated by the Agreements;
 - e) The parties agreed to a fee schedule as set out in the Agreements.
- [19] Although it was not a requirement of any of the agreements, the Ye sisters advised of their intention to spend a considerable amount of money upgrading the stone cutting equipment. They did so, acquiring a new steel frame stone sawing machine and a straight edge polishing machine from China, at a cost of some U.S. \$110,000. These were installed in the premises, where they were embedded in concrete. They also ordered stone slabs (granite and marble) and miscellaneous equipment at a cost of some U.S. \$115,000.
- [20] GCS commenced operation in September 2013. As time went by, a number of difficulties arose, and these will be discussed in more detail below. But there were a number of basic issues.
- [21] What was going to happen when the lease expired? Linny and Honghong thought they had bought a business that they could continue to operate on the negotiated terms essentially in perpetuity. This included the obligation of VCI to provide at least \$250,000 in business to GCS annually. Mr. Li and Ms. Xiao viewed it all as tied to the lease: it was a three-year deal. Absent an extension, everything would terminate, and GCS would have to dig up its equipment and take it elsewhere. In their mind, they could not possibly be expected to provide \$250,000/year of business in perpetuity.
- [22] Just how independent was GCS to be? Mr. Li and Ms. Xiao said that the entire transaction was intended to offload any concerns about countertop manufacturing to GCS, who would be fully responsible for ordering the stone, measuring for the countertops, manufacturing as required, and following up with quality control. They saw GCS as failing to meet appropriate standards of quality of workmanship and after-sales service, threatening the reputation of their business. Linny and Honghong thought that it was the job of VCI to supply the stone as specified by its clients, supply the measurements, and deal with quality issues that arose from the stone or the measurements.
- [23] Things came to a head in the summer of 2015. Lawyers became involved. There was a mediation, and the parties entered into a Settlement Agreement on November 19, 2015. The intention, it would appear, was to reset the relationship. The problem of duration was specifically addressed: the Countertop Agreement and the Lease Assignment would continue to June 30, 2017, and could be extended to June 30, 2019, if VCI extended its term

under the head lease, which it did. This would achieve the same result as the provisions of the original Commercial Lease Agreement, which provided for a three-year term from July 1, 2013, renewable for an additional three-year term, which would take it to June 30, 2019.

- [24] Otherwise, the parties "reaffirmed" the original agreements. The settlement did not specify how the issues arising under those agreements were resolved, nor did it specify precisely what conflicts were being settled.
- [25] Each party alleges that the other fundamentally breached the contracts in the period that followed.
- [26] I now turn to review specifics of three of the business agreements. In each, "Party A" is VCI, and "Party B" is GCS. In the quoted passages, all errors of grammar, spelling, punctuation and syntax are original. I set out the Settlement Agreement last.

3.2 The Countertop Agreement

- [27] This was the principal operating agreement between the parties. As indicated above, Mr. Li prepared it in Chinese. Both parties signed it in that form. Linny prepared another version of it in English, translating it herself and adding one or two things. Both parties signed that as well. I set out the terms from the two versions side-by-side: the certified English translation of Mr. Li's Chinese version as amended at trial with the agreement of the parties, and Linny's English version. Emphasis in the form of italics is added by me. It will be noted that clause 3 differs markedly between the two versions.

Certified translation from Chinese as amended

Linny's translation

Whereas the quality and timeline for the project is guaranteed by Party B, Party B and Party A have reached an agreement regarding the processing and installation of stone countertops for Party A on a contract basis as follows:

Both parties agree the following agreement between each other about Party B will contract all the counter top manufacturing and installation business of Party A; Party B shall guarantee its products quality and schedule.

Party B contracts all the processing and installation of quartzite and granite countertops for Party A. Only when Party B cannot complete the work with the timeline, quality and quantity specified, Party A can then subcontract the work to others.

Party B will contract all the counter top manufacturing and installation business of Party A. Party A shall not subcontract its counter top business to other company than Party B unless that Party B can not match up the quality or schedule of the project.

Party B will be responsible for materials purchase; processing, producing, installing, based on Party A's orders; and also responsible for after-sales service post installation of the countertop; and sometimes be responsible for collecting the balance of funds when convenient. Party A must make work orders 15 days in advance. The details are as follows:

Party B take responsibility of buying material, manufacturing, installation, and after-sales service according to the order from Party A. The leading time is 15 days.

1. Fee Rates

1. contracting price

A. General standard straight-edged countertop \$30/ft (strip processing, splash and installation included), \$35/ft large piece processing, splash and installation not included);

A. Manufacturing and install only, straight square edge counter top: \$30/ft (from pre fab countertop, include back splashes); \$35/ft (from slabs, back splashes are not included).

B. Additional \$20/ft for specialized edges

B. Special edge finishing \$20/ft extra.

C. Small window ledges and splashes \$5/ft (installation included for processing of larger pieces);

C. Manufacturing and install only, window ceils straight single square edge and back splashes \$5/ft (from slabs). This price only work with counter top together.

D. Undermounted sink cutting and polishing \$50/piece

D. Undermounted sink cut and polish \$50/piece.

E. Sink attachment \$25/piece

E. Sink attached \$25/piece

F. Dismantling older countertops \$100 (to be negotiated separately for special cases)

F. Demolish old counter tops \$100.00 (small and easy one, TBD if it's a special case).

G. Fabrication only \$20/ft.

G. Manufacturing (Fabrication) only \$20/ft.

2. Party B must complete the countertop project following industry standards and the requirements of the client.

2. Party B should achieve the standard of the industrial and requirements of the customers.

3. Party B must, based on the information provided by Party A, complete independently all the work from materials purchasing, measurements, fabrication, transportation, installation and after-sale services, and must offer one year quality assurance, a package service.

3. According to the detail information from Party A, Party B shall process the projects independently by taking measurements, fabricating, transporting, installing, and providing one year guarantee for quality after installed its products. Buying material need to cooperate with Party A, and Party A shall pay the cost of material.
4. Party B is responsible to hiring workers on its own, paying them wages, benefits and purchasing insurance and WorkSafe BC insurance, etc. In order to minimize risk and provide against accidents in the production, transportation or installation processes, Party B shall purchase the relevant insurance. This kind of risk has no association with Party A.
4. Party B as an independent company, will hire employees, pay its bills and insurance by itself. Party A will not take responsibility for Party B's any risk during the project processing. Party B will not be responsible for Party A's any problem when it carry the same business in the same address before the date of July 1st 2013.
5. When undertaking a project, Party B should be known to the customer as an employee under Party A. Party B is not allowed to undertake business or ask the customer to refer ongoing business in the name of the party B. Party B shall not undertake business from Party A's existing customers in party B's own company name.
5. As a subcontractor of Party A, Party B shall not directly deal business with the clients of Party A are the clients introduced by Party A's clients directly.
6. Should there be any special circumstances in the project, Party A and Party B shall consult each other regarding specific rules on fees; for example, projects located at a remote location or projects with special measurements. In the case of excessively small projects, Party A will assist in providing measurements. If Party B is responsible for taking measurements and finds at the job site that there will be extra costs in the project, Party B shall get in touch with Party A immediately to confirm the cost. Otherwise, this cost shall be assumed solely by Party B.
6. Both parties shall negotiate a new price for a special project. For example, a faraway site, or a special design size, a new price shall be decided by both parties discuss. If a project is a very small easy one, Party A will take measurement behalf of Party B. If Party B predict a extra cost when they take the measurement on site, Party B should immediately inform to Party A, a new price shall be confirmed by Party A, otherwise, Party B shall finish the task according to the contract price.
7. If there is any loss caused by Party B in the process of carrying out the work, Party B will be solely liable for the loss, including other losses incurred by the customer (water leakage, floor or wall scratches, damage to appliances and so on).
7. Party B shall take responsibility of all the damages caused by its workers make during the process. (Include water leaking, scratches on the floor, walls or electronic equipments.)

8. Party A will settle the account for processing fees at the end of each month based on the work already completed and fees already collected.
 8. Party A pay all the projects that has finished by Party B by the end of each month.
 9. Any outstanding issues not covered in the above agreement, will be resolved by Party A and Party B through mutual consultation.
 9. Any other issues which are not included in this contract, shall be settled by negotiate between the parties.
- [28] The position of both parties is that both of these versions are binding, and neither was intended to override the other. It will be seen that in creating her own translation, Linny generally followed the Chinese original, but added a stipulation in clause 3 that the parties would cooperate in the buying of material, and that "Party A shell pay the cost of material." In the original Chinese version, Party B was to act independently in all work including materials purchasing.
- [29] Linny also added a proviso to clause 4 that Party B would not be responsible for any liabilities arising before July 1, 2013.

3.3 The Sale and Workshop Subletting Agreement

- [30] This agreement, drafted only in Chinese, reiterated some of the terms of the Countertop Agreement, and also set out specifics about rent and fees relating to the premises. The following is taken from the certified English translation:

For the sale and workshop subletting of Party A's processing place (Workshop) of countertop located at [address], Richmond, the parties have reached an agreement as follows.

Party A agrees to sell and sublet its countertop processing factory as a complete package to Party B who will operate the business independently. After entering into this agreement, Party B will be able to operate the counter top business independently, including the original business of Party A and any new business Party B acquires on its own. As an independent business entity, Party B operates with full autonomy and is responsible for the quality of the projects it contracts, and is solely responsible for funds to operate and develop its business. As an independent entity, the operations, growth, sale and closure of Party B's company is the independent act of Party B. Parties A and Party B will enter into an agreement regarding countertop processing in association with Party A's existing countertop processing business. (Appendix 1) the details are as follows.

1. Selling Price

Under the premise that Party B guarantees the quality and timeline of the project, Party A will provide Party B at least CAD \$250,000 stone countertop processing and installation business annually.

Party A will sell the existing countertop processing factory as a complete package to Party B, including the existing fixed equipment, processing tools, warehouse tools and office furniture as listed in the appendix (List of Equipment). Party A pledges that all the equipment and tools in the sale are free from any charges.

The selling price is CAD \$60,000 (Sixty Thousand Dollars only). Party B shall pay Party A \$10,000 as a deposit on the day of execution of this agreement the balance of the money shall be paid before taking possession of the factory, or at a date no later than June 30, 2013.

2. Rent

9. For any outstanding issues not covered in the above agreement, Party A and Party B will resolve the issue through mutual consultation.

3.4 The Business Assignment

[31] This document was originally prepared in Chinese, but the parties signed an English version prepared by Linny, apparently as a revision to an English translation prepared by Mr. Li. It was chiefly concerned with specifying the equipment included in the "sale", and attached photographs of the equipment in question. It also reiterated the general intent of the parties:

Both parties agree to assign the counter top manufacturing and install business from Party A to Party B with the following terms:

Party B as individual business party to buy countertop manufacturing and install business and Party A. Party B will take all the responsibility for its products quality, installation schedule, and own business development after the business has been assigned. Both parties agree:

1. Party A agree to provide total value no less than CAD \$250,000 counter top manufacturing and install business per year. Party B should guarantee quality and schedule.
2. Party B pay CAD \$60,000.00 for assign the business, equipment and improvement of the factory. Detail as following:

Party A promised that all the following equipment which sold to Party B has no debt or lien on them.

3. Deposit:

Within 24 hours upon the assignment has been signed. Party B will pay Party A \$10,000.00 deposit by Cheque.

4. Balance payment

the balance of the payment \$50,000.00 will be paid by 30th June 2013.

5. Great Corner Stone Ltd will start it's new business on July 1st 2013 in the same place.

6. Lease agreement:

Great Corner Stone Ltd will lease the same place, [address], for new business. Lease term see attached lease agreement between Party A and Party B.

7. Party B will pay all the new equipments it will buy for expanding it's business. Party will take responsibility to apply for it's own business license from the government and pay the apply fee.
8. Both Party A and Party B will hang a sign in front of the building.
9. About other issues which is not include this assignment, both parties shell be settled by negotiation between parties.

3.5 The Settlement Agreement

[32] This agreement, apparently negotiated with the assistance of lawyers and a mediator, is remarkably short of details. It provided, in its entirety:

SETTLEMENT AGREEMENT

1. The Parties reaffirm the three Agreements entered into by them in April, 2013 [in fact, they entered into four agreements].
2. The Parties agree the Contract of Countertop Manufacturing and Installation Agreement ("Countertop Agreement") and Assignment Agreement will continue to June 30, 2017 and will be renewed until June 30 2019 if [VCI] renews its lease.

[The term of the head lease was to expire June 30, 2017, with an option to VCI to renew it for a further two years to June 30, 2019.]

3. [GCS] will pay its share of any increased lease costs.
4. [VCI] agrees to provide a minimum of \$250,000 per annum in countertop manufacturing and installation business, on an exclusive basis as set out in the Countertop Agreement.
5. [GCS] agrees not to sell its business without the consent of [VCI].
6. [GCS] and [VCI] agree that each may back charge the other for deficiencies in workmanship, materials and supply.
7. This Settlement is entered into on November 19, 2015.

[33] Apart from the question of duration, this agreement did not specifically address the disputes between the parties, other than to reaffirm the original agreements. But of course the parties disagreed as to the interpretation of those agreements, and nothing in this document addressed those disagreements. It said nothing, for instance, about who was responsible for ordering stone.

3.6 Some observations

[34] I have no doubt that if the parties had been advised by competent solicitors when they negotiated this transaction, it would have been structured very differently. As it is, it is questionable just what sort of transaction it was. Was it truly the sale of a business? Was it a sale of equipment and transfer of rights with obligations limited to a three year period? Was it a subcontracting agreement with the sale of equipment and the right to use premises for three years? It is not surprising that the parties ran into difficulty.

4.0 PROBLEMS

4.1 Pre-Settlement problems

- [35] GCS occupied the premises in July 2013, and after renovations, commenced operations around September 5, 2013. Honghong was essentially in charge of the accounting side, while Linny dealt with administration. Linny was also a realtor, and neither devoted herself to the business full time. Not surprisingly, neither was hands-on in terms of the fabrication of countertops. For that, they hired a stonemaster. They also hired an office manager.
- [36] The first stonemaster, whom I will call Jack, worked for GCS until he left to return to China in January 2015.
- [37] From GCS's point of view, things went smoothly through 2013 and 2014, except that they did not achieve the threshold of \$250,000 in orders promised by VCI.
- [38] Generally, VCI's office manager would call to say that some orders were ready. Each order would list the material to be used, the specifications, and the drawing. Often the stone to be used was in stock at VCI, and GCS would pick it up. Otherwise, VCI would order the stone and supply it. GCS was new to the business, while VCI had established accounts with suppliers.
- [39] According to Linny, GCS would take the orders, and prepare a coversheet to instruct its workers, and it would go to the premises to measure once VCI had installed the cabinets. She testified that Ms. Xiao told her that this takes too long, so VCI would measure to check against the drawings.
- [40] They would meet every two weeks to go over the accounts and arrange for payment. GCS would invoice in accordance with the rates specified in the Countertop Agreement. Sometimes the invoice amount would be reduced with the balance to be paid in cash. No GST would be billed for the cash portion. Nothing would be invoiced for the stone because that was normally supplied by VCI.
- [41] Linny testified that she first raised the question of orders not reaching the \$250,000 threshold after their first year together, although she put this discussion as taking place before May 2014, when GCS would have been producing for only eight months. Nevertheless, she said that Mr. Li and Ms. Xiao apologized, explaining that business had not been as good as they had expected. They said they would make it up the next year. At the end of that year, Mr. Li and Ms. Xiao invited the GCS people to the VCI company banquet, and

things were looking good. Linny was prepared to give them time to get up to the \$250,000 threshold.

- [42] But the orders did not increase over the following year; in fact they fell off. The parties met to discuss their issues, first in late May 2015, and then again on July 29, 2015. I will deal with these meetings further below.
- [43] From VCI's perspective, things did go smoothly to start with, over what Ms. Xiao described as a "transition period" during which the parties got used to each other. Notwithstanding VCI's stated view that the agreements required GCS to be responsible for purchasing all materials, including stone, Ms. Xiao and Mr. Li were prepared to "cooperate" with GCS (the word added by Linny in her translation of the Countertop Agreement) by supplying stone, which they paid for directly. They testified that this was only to help GCS out while it became established, but GCS never did take over that responsibility.
- [44] Both Ms. Xiao and Mr. Li testified as to what they viewed as a significant divergence in each party's approach to business. Ms. Xiao and Mr. Li built their business from nothing. To them, keeping their clients happy was essential. They viewed the Ye sisters as lacking that sense of professionalism.
- [45] Ms. Xiao and Mr. Li maintained that if they had known that Honghong was a PNP immigrant who was using the business as an investment in order to facilitate immigration, they would never have entered into the agreements with the Ye sisters. But they trusted them because David Li was, like Linny, a graduate of Shanghai University.
- [46] So, they described, they ended up working with people who did not share their devotion to the business. Neither Linny nor Honghong worked at it full time, and they lacked the same concern for customer satisfaction. In particular, if a customer complained about a problem with the countertop, the Ye sisters would blame VCI personnel for not measuring properly or supplying faulty materials. Ms. Xiao felt she always had to resolve the clients' problems on her own without any shared interest in working together to resolve customer issues.
- [47] Measurements were a sore point with Ms. Xiao because if the measuring was not done properly, it would lead to customer complaints. Ms. Xiao testified that she raised this frequently with Linny, explaining that although the cabinet workers could take measurements, it was still GCS's responsibility so that they could be sure that their countertops would fit the cabinets as installed. VCI could measure things under 10 feet which would involve no seam in the stone, but under the contract, VCI had to check measurements to be sure. Therefore any problems with measurement belonged to GCS, not VCI. GCS nevertheless maintained that it was for VCI to address customer complaints arising from ill-fitting countertops.

- [48] Ms. Xiao also found that GCS's stonemaster, Jack, was very slow in providing any post-installation service to customers. It was her impression that this was because GCS paid Jack very little for such service. Ultimately, she testified, VCI had to hire an independent contractor to carry out much of the service.
- [49] In 2015, Jack was succeeded as stonemaster by "Frank", who worked until March 2015, and then by Guo "Andy" Zhang who took over in April. From Ms. Xiao's point of view, Frank lacked even basic stonemaster skills, and the customer complaints increased significantly.

4.2 The 2015 meetings

- [50] According to Linny, she asked for the first of these two meetings, which took place in late May. She said that Honghong and she met with Mr. Li and Ms. Xiao to discuss the amount of orders they were receiving, and VCI's failure to meet the \$250,000 threshold. Once again, David Li said that he would make it up with further orders.
- [51] Linny testified that it was at this meeting that Ms. Xiao first raised the question of a three-year limit on the sale of the business, indicating that because the sublease was only for three years, the agreements concerning the business were in force for only three years. This was not the understanding of Linny and Honghong, but Mr. Li seemed to agree that the sale was a sale.
- [52] Things improved thereafter, with orders increasing significantly. From Linny's perspective, GCS carried out the jobs, and things went smoothly. But then Mr. Li and Ms. Xiao called the second meeting, which took place on July 29, 2015.
- [53] At this time, to Linny's and Honghong's consternation, Mr. Li took a firm position that their business arrangement would terminate with the sublease when it expired in July 2016. The Ye sisters disagreed, but Mr. Li was unmoved. He indicated that if they did not agree, he would simply stop sending orders. Indeed, that is what he did.
- [54] From the perspective of Mr. Li and Ms. Xiao, the central problem was the lack of quality in the work performed by GCS, with its revolving stonemasters, lack of customer service, and failure to fulfil its contractual responsibilities.
- [55] There followed an exchange of correspondence as the parties staked out their positions, and then, as orders disappeared, GCS retained a lawyer. Ultimately, the parties participated in mediation, leading to the Settlement Agreement discussed in section 3.5 above. Counsel were involved. As noted, it is not clear just what this agreement purported to resolve, except that it did provide that the Countertop Agreement and assignment would continue only to June 30, 2017, subject to being renewed to June 30, 2019 if VCI renewed its head lease.

4.3 Post-Settlement problems

- [56] Things did not go smoothly. David Li took the position that GCS had agreed to be wholly responsible for ordering materials and taking measurements in order to improve installation quality and minimize mistakes, and that henceforth, VCI would expect GCS to provide quotes on all orders, including the cost of the stone.
- [57] GCS objected. It took the position that it remained VCI's obligation to provide quality materials in accordance with its customers' expectations, and that GCS had never agreed to provide quotes. Rather, the amounts to be paid were to be in accordance with the fees set out in clause 1 of the Countertop Agreement. Moreover, VCI orders did not allow for the 15 days' lead-time set out in the Countertop Agreement.
- [58] What GCS did not learn until the end of the year was that its stonemaster, Guo Zhang, was in fact doing work under the table for VCI, and had been doing so for months.

4.4 The Guo Zhang problem

- [59] Mr. Zhang started working for GCS in April 2015, but by the beginning of May decided that he wanted to work as a subcontractor. He would agree to organize the processing, pay the other employees, and charge by the foot. Consequently, his remuneration became calculated by the foot processed, rather than by the hour worked. He was permitted to undertake business on his own for others after ensuring that the business of GCS was looked after. If he did his own work, he would pay a monthly fee to GCS towards operating expenses, depending upon the amount he processed independently.
- [60] A renegotiation in November 2015, resulted in a higher average charge per foot. Mr. Zhang then went to China, returning early March 2016. In the meantime, his crew carried on the work.
- [61] But in December 2015, Linny discovered that Mr. Zhang's employees had been doing work for VCI that GCS knew nothing about. Linny testified that she confronted Mr. Zhang about this when he returned from China, and he acknowledged that he had been carrying out work directly for VCI since September or October 2015. Some of the work had been passed through a company named A-Plus Stone, but was in fact for VCI.
- [62] As a result, Linny negotiated a settlement with Mr. Zhang to cover more of GCS's operating expenses, as the work for VCI had not been declared as independent work. Their settlement agreement refers to a payment of \$6,000. According to Mr. Zhang, the settlement was actually for \$10,000. He paid \$6,000 in cash, over time, and wrote a cheque for \$4,200, representing the balance plus GST at 5%. The cash payment was in order to avoid GST.
- [63] Mr. Zhang testified that he left GCS in April or May 2016, and ultimately bought his own countertop "factory" for \$55,000. Essentially, this gave him the right to use the factory for five years, and ownership of all the equipment in it. No guaranteed business came with it.

- [64] Mr. Zhang made it abundantly clear in his evidence that he was motivated only by money. VCI would pay him \$30-\$32 per foot, whereas under his subcontract with GCS, GCS paid him only \$22 per foot. When he dealt directly with VCI, he would get an order, get in touch with the customer, measure the job, order the material, fabricate and install it, and then collect payment. He would not give quotations to VCI on straightforward matters, because the processing fee was standard. But often there were special aspects to an order, such as the distance to be travelled, or odd shapes, and then Mr. Zhang would give a quotation beforehand.
- [65] Mr. Zhang acknowledged that he tried to hide what he was doing, and therefore involved his friend at A-Plus Stone to help by receiving cheques from VCI and reissuing them to Mr. Zhang.
- [66] Tellingly, Mr. Zhang further acknowledged that he had little interest in performing customer service for GCS when requested to do so as a result of a problem with his installation. The price GCS paid for service was so low that he had "no time to be bothered by stuff like that, so [he] didn't bother to do it". At other times, when he was busy with his own work, he would delay installation for GCS by a few days. He did not care about complaints from GCS customers, because they were not his own customers, and he was not paid enough to serve them "wholeheartedly". As a result, when he received phone calls, he just did not bother to respond.
- [67] Mr. Zhang further indicated that initially, he would not undertake measurements. This changed when he obtained his subcontract with GCS, and it included an amount for measuring.
- [68] Mr. Zhang testified that his surreptitious work for VCI started when he was contacted by Amanda Xiao, who asked him to come next door to discuss matters. He believes that this was in August 2015. She told him that they were having a problem with GCS, and wondered if he could help out. As he was not inclined to turn down work, Mr. Zhang agreed. But it later occurred to him that if Linny or Honghong were aware of what he was doing, they would not allow him to continue to use the factory. He therefore thought up the plan of diverting orders through A-Plus Stone to disguise their origin. I am satisfied that VCI, through Ms. Xiao, was well aware that its payments to A-Plus Stone were in fact going to Mr. Zhang, not A-Plus.
- [69] Ms. Xiao was asked very little about these matters. But the position she took in her evidence appeared to be that after the meeting of July 29, 2015, when they were unable to reach any agreement, she suspended dealings with GCS. She testified that she told them that VCI would be sending its orders elsewhere pending reaching some kind of agreement. From her perspective, there was no agreement between the parties after the July 29 meeting.
- [70] This, of course, fits with Mr. Zhang's evidence that Ms. Xiao contacted him in August to ask for his "help".

5.0 THE PARTIES' POSITIONS

5.1 GCS's position

- [71] GCS characterizes the parties' dispute as contractual, and submits that VCI breached its contractual obligations in three principal ways.
- [72] First, in breach of the 2013 agreements and without any lawful ground, in July or August 2015, VCI "ceased to subcontract to the plaintiff stone countertop orders", and failed to meet the annual threshold of orders to a minimum value of \$250,000.
- [73] Second, in breach of the Settlement Agreement, VCI "purportedly resumed subcontracting to the plaintiff stone countertop orders, but, in breach of the 2015 Agreement, demanded that [GCS] accept obligations that were not imposed in either the 2013 Agreements or the Settlement Agreement". These additional obligations, GCS asserts, were three: that GCS be responsible for ordering all stone materials on its own; that GCS provide quotes to VCI before VCI would confirm an order; and that GCS must finish orders within seven days of receipt, except for special circumstances.
- [74] Third, VCI refused to renew the Commercial Lease Agreement in breach of both the Commercial Lease Agreement and the Settlement Agreement.
- [75] As to the effect of the Settlement Agreement, GCS accepts that it was intended to reset the parties' relationship, but maintains that it was still necessary to look at the original agreements, which were reaffirmed. The Settlement Agreement specifically permitted limited back charges. Although it did not expressly preserve any right of GCS to claim damages by reason of VCI's failure to meet the \$250,000 annual threshold before the settlement, GCS submits that it had a claim arising from the shortfalls before the Settlement Agreement that continued to be available after the settlement.
- [76] In the result, GCS claims loss of gross profits from the shortfall in the value of "subcontracts" from VCI below the \$250,000 threshold (GCS never did earn a net profit). It claims this loss over the period from September 2013 through June 30, 2019, which was the date to which the agreements were to remain in effect according to the Settlement Agreement.
- [77] With respect to the \$250,000 threshold, GCS says that this was always intended to apply to the value of the services provided in fabricating and installing the countertops, and was never understood to include the value of the stone material itself. GCS maintains that it was always the obligation of VCI to purchase and supply the stone, and in any event, it was always supplied at cost.

5.2 VCI's position

- [78] VCI agrees that the parties' obligations are governed by the contracts they signed. It maintains that GCS opportunistically took advantage of VCI's principals, and submits that the inference should be drawn that the Ye sisters started GCS and went into these agreements with a view to fulfilling investment requirements to support immigration, rather than entering into a mutually beneficial and professional business arrangement.
- [79] The result, VCI contends, was a business model that did not work, and required VCI to engage in too much hand-holding and support. All of that was intended to come to an end with the Settlement Agreement.
- [80] VCI acknowledges that the contracts are unsophisticated and contain gaps. It submits that they are not ambiguous, but do require terms to be implied to make things workable, in a manner that is consistent with common sense inferences and the standards of the industry.
- [81] On the stone issue, VCI submits that the contracts are quite clear: GCS was responsible for the purchase of all materials. VCI agreed to help them out at the beginning, but that did not relieve them of the obligation, which was re-set and reaffirmed in the Settlement Agreement.
- [82] VCI further asserts that in July 2015, the parties agreed that countertop production business would be suspended pending further negotiations, as opposed to VCI taking that step unilaterally. Accordingly, there was no breach.
- [83] VCI agrees that the Settlement Agreement was intended to "re-set the clock for the parties", with GCS being obliged to perform its contractual obligations in accordance with the explicit terms of the agreements, as originally intended. That included being responsible for ordering all materials. There were no "additional obligations".
- [84] In VCI's submission, the only aspect of past disagreements that the Settlement Agreement left open was the ability of each party to back-charge for deficiencies in workmanship, materials and supply. In any practical sense, this was for the benefit of VCI. But the Settlement Agreement eliminated any basis for claiming a shortfall from the \$250,000 threshold before the date of the agreement. Instead, the agreement applied that threshold going forward.
- [85] But in any event, VCI says, its obligation to provide orders meeting the threshold was tied to GCS performing its obligations under the agreements, which it failed to do. It did not produce quality work in a timely and workmanlike manner.
- [86] But even if it did, VCI contends, VCI met that threshold in the years prior to the agreement (September 2013-July 2015) because the \$250,000 figure was intended to include the cost of the stone, as well as the fabrication and installation charges.

- [87] The real problem, maintains VCI, is that GCS simply did not perform its obligations. Its concern was fulfilling immigration requirements, and later, selling the business. It was unable to sell it, and therefore required more time, which was allowed under the Settlement Agreement. That agreement specifically required VCI's consent to any sale.
- [88] After the settlement, GCS fundamentally breached the contracts by refusing to accept orders. As such it has been, and remains, an overholding tenant and is liable for double the lease payments it has been making.

6.0 DISCUSSION

6.1 What was the relationship?

- [89] What sort of relationship did the agreements create? Determining this is complicated by the difference in nuances between Mandarin and English. But it was not a straightforward sale of a business.
- [90] The key transaction was, I conclude, a subcontracting agreement. Even the plaintiff, in its submissions, consistently used the terms "subcontract" and "subcontracting". Thus, I find, what the plaintiff acquired for its \$60,000 was some aging equipment, and the exclusive right to produce countertops for the defendant's business in the defendant's name, with an annual guarantee of orders with a minimum value of \$250,000. The plaintiff was to produce and install these countertops, and provide after-sale service, in a timely fashion with appropriate standards of quality.
- [91] All of this was, as Mr. Li testified, tied to the sublease. This is clear from the Sale and Workshop Subletting Agreement, which provided that VCI "agrees to sell and sublet its countertop processing factory as a complete package to party B" [emphasis added]. Obviously, taking the agreements as a whole, there was no intention to sell the processing factory, but it was to be sublet, in conjunction with the processing business being transferred, as a complete package.
- [92] Nevertheless, although the business agreements refer to the sublease, the sublease stands on its own; it does not refer to the business agreements.
- [93] It follows, in my view, that the exclusive subcontracting right was intended to last for three years, renewable by GCS for one further three-year term, as set out in the Commercial Lease Agreement. The same result was ultimately confirmed in the Settlement Agreement, which provided for an end date of June 30, 2019. Thereafter, the plaintiff had no rights vis-à-vis the defendant, other than to take its equipment wherever it wished to take it. But regardless of the business, the plaintiff's rights under the sublease were extendable to June 30, 2019.

[94] To suggest, as Linny testified, that this was a true sale of a business with the rights extending in perpetuity makes no sense. This was not a partnership that brought GCS directly into VCI's business as co-owners. Nothing in the agreements suggested any promise of extension beyond what was set out in the lease. Instead, the parties were in essence tied together for a limited time, with the plaintiff supplying the defendant's customers in the defendant's names, operating on the defendant's premises pursuant to a lease with a limited duration.

6.2 Who was responsible for ordering and purchasing stone?

[95] The Countertop Agreement is the only document that expressly addresses this issue.

[96] In her evidence, Linny suggested that the reference to "buying material" or "materials purchase" (depending on translation) in the recitals to the Countertop Agreement was, in the original Chinese, subtly different from the later reference to "buying material" or "materials purchasing" in clause 3: the former notionally comprising tools and other sundry items, while the latter referred to stone. But that is not how she translated it, nor is it how the certified interpreter translated it. Both used the same words in each instance.

[97] If one looks only to clause 3 in the original Chinese version of the Countertop Agreement (via the certified translation), the matter would seem to be clear. GCS agreed that, based on information provided by VCI, it would "complete independently all the work from materials purchasing, measurements, fabrication, transportation, installation and after-sale service".

[98] But Linny inserted words of her own into clause 3 of the Countertop Agreement, and the parties signed that version too. She removed the reference to "materials purchasing" from the list of GCS's obligations, and moved it to a separate sentence with important additional words: "Buying material need cooperate with [VCI], and [VCI] shell pay the cost of material".

[99] What effect did these changes have? They cannot be viewed as supplanting the previous provision, as the parties signed both agreements, and contextually, both agreements refer to GCS having the responsibility for "materials purchase" or "buying material". Moreover, while Linny added the concept of cooperation, she did not state that the responsibility for "materials purchase" or "buying material" was to be VCI's, rather than GCS's. Had she intended a complete transfer of responsibility from that set out in the original Chinese agreement, she could have clearly said so. She did not.

[100] I do not view Linny's reference to VCI paying the cost of material to mean anything more than confirmation that material cost was not to be part of GCS's cost of sales. VCI was to pay the cost of the stone in addition to the fee rates set out in clause 1.

[101] Both agreements put the responsibility for purchasing materials on GCS. But, while one agreement requires GCS to complete all materials purchasing independently, the other requires VCI not to buy materials, but to cooperate in buying materials.

- [102] VCI argues that its agreement to "cooperate" was intended to be simply a temporary accommodation while GCS gained experience and established appropriate accounts with suppliers. But no time limit is placed upon it. GCS points out that for nearly two years, essentially from business startup in September 2013 to the cessation of business in August 2015 pending the settlement in November of that year, all of the stone was provided by VCI. In GCS's submission, this is a much longer time, and a far more consistent practice, than could reasonably be explained as a temporary accommodation. But can I take into account evidence of subsequent conduct as an aid to interpretation?
- [103] There is no question that courts are entitled to consider surrounding circumstances in interpreting the written terms of the contract: see, for instance, *Wade v Duck*, 2018 BCCA 176 at para 26. But, as the Supreme Court of Canada held in *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 57, the surrounding circumstances must never be allowed to overwhelm the words. While they may be relied upon in the interpretive process, they cannot be used to deviate from the text effectively to create a new agreement.
- [104] Subsequent conduct/course of dealing becomes relevant only where, after considering the agreement itself, including the particular words used in their immediate context and in the context of the agreement(s) as a whole, there remain two or more reasonable alternative interpretations, leading to a true ambiguity: *Wade* at para 28; *Re Canadian National Railways and Canadian Pacific Ltd* (1978), 95 DLR (3d) 242 at 262 (BCCA), *aff'd* [1979] 2 SCR 668.
- [105] The difficulty here is that the problem is not one of two reasonable alternative interpretations. There is a seeming inconsistency, in that one agreement requires GCS to complete the work including purchasing independently, while the other obliges VCI to cooperate in the buying of material, but neither puts the responsibility for material purchase on VCI. On the contrary, as I read the documents, the Countertop Agreement squarely puts the responsibility on GCS to buy all material, including stone. There is really no other way to interpret them. GCS was "responsible for materials purchase" and was to "complete independently all the work from materials purchasing, measurements, fabrication, transportation, installation and after-sale services, a package service".
- [106] Where the difficulty arises is in attempting to understand what the parties meant when it comes to VCI's agreement to cooperate with GCS in buying material. As I see it, that is not a problem of ambiguity, but rather one of inexpert drafting and lack of clarity. Given the surrounding circumstances, including the lack of experience in the local business of Linny and Honghong, the considerable experience of David Li and Amanda Xiao, and the extent of VCI's inventory, I am satisfied that the parties intended that VCI, as the party dealing with clients, and designing the cabinets, would cooperate with GCS in fulfilling GCS's responsibility to provide the stone. How they would do so might range from supplying the stone directly, particularly when it had the stone in its own inventory next door to GCS's workshop, to facilitating GCS's acquisition of the right type of product from specialty suppliers. As it turned out, for nearly two years, VCI provided the stone from its own

inventory at its own cost, or ordered the stone itself. But nothing in the contract obliged it to do so.

[107] In the exchanges of correspondence between the parties as matters fell apart in July and August 2015, VCI made no mention of this particular concern. What it raised were concerns about quality and service. Consequently, it is perhaps not surprising that the Settlement Agreement did not specifically address this issue. Instead, it reaffirmed the 2013 agreements, with the same references to GCS's responsibility, and cooperation by VCI. The fact remains that those agreements put the responsibility for supplying materials, which I cannot interpret otherwise than as including stone, squarely on GCS. The Settlement Agreement did not incorporate any other practice.

6.3 Was the cost of stone to be included in the \$250,000 threshold?

[108] I find that it was not, either before or after the Settlement Agreement.

[109] The Countertop Agreement is silent on the subject of the threshold. It is, however, referred to in both the Sale and Workshop Subletting Agreement and the Business Assignment Agreement.

[110] In the Sale and Workshop Subletting Agreement, the reference is under the heading "Selling Price" and refers to "at least CAD \$250,000 stone countertop processing and installation business annually". The Business Assignment Agreement refers to "total value no less than CAD \$250,000 counter top manufacturing and install business per year".

[111] Are these provisions ambiguous? In my view, they are not. The structure of the transaction, with a sale price of \$60,000 for a 3-6 year term, together with the reference to the threshold amount being placed in the same clause, emphasizes that this was the principal value that GCS was getting for its money: \$250,000 per year in orders. The value of this would be considerably reduced were it to include stone (by close to 40%), and would make no economic sense. Moreover, both agreements refer to processing/manufacturing and installation. They do not refer to materials.

[112] This is consistent with the provision in the Countertop Agreement concerning the "contracting price", which goes on to refer to "manufacturing and install only" with specific charges set out. All of these refer to manufacturing and installation, not to materials. These are the services that attracted profit, whereas the materials were to be at cost. The obligation to pay the cost of the material was separate.

[113] If the provisions were to be considered ambiguous, contrary to my findings, then I would look at the parties' subsequent conduct. On the evidence, I find that VCI's initial response to the complaint that it had not met the threshold, was that its business was less than expected, and the shortfall would be made up. Later in 2015, when the parties fell out and exchanged correspondence setting out their conflicting positions, VCI never took the position that it now takes, that the \$250,000 threshold was inclusive of the cost of stone, and therefore had been met. On the contrary, its position was that its obligation to provide

\$250,000 in business was conditional on GCS maintaining quality and meeting its schedule. VCI maintained that its own business had declined because of the poor quality and service provided by GCS. Implicitly, its failure to meet the threshold was acknowledged.

[114] All of this fully supports the conclusion that the cost of stone was not intended by the parties to be included in the promised value of "no less than \$250,000 in countertop manufacturing and install business per year".

6.4 Did either party breach the agreements prior to the Settlement Agreement?

[115] As we have seen, GCS submits that VCI breached the 2013 agreements in July or August 2015, when it "ceased to subcontract to the plaintiff stone countertop orders", and by failing to meet or make up its promise to provide orders with an annual minimum value of \$250,000.

[116] As discussed above, the parties' relationship broke down at the end of July 2015. I find that two factors contributed to that breakdown. One was GCS's dissatisfaction with the failure of VCI to meet the \$250,000 threshold. This was raised by Linny in the meeting of May 2015. The other was VCI's dissatisfaction with GCS's quality control and after-sales service.

[117] Then a third issue arose: to GCS's dismay, VCI purported to terminate the lease as of June 30, 2016, based on the expiry of the lease's base term at that time. This would, of course, terminate the entire relationship. Mr. Li's letter to Honghong providing notice of termination, dated August 10, 2015, referred to the provision in the lease for expiry. It did not purport to be based on any conduct by GCS.

[118] The lease did not, however, allow VCI to proceed in that way. While it did provide for a term ending on June 30, 2016, it also provided for renewal by the tenant:

19. Upon giving written notice no later than 60 days before the expiration of the term of this Lease, the Tenant may renew this Lease for an additional term. All terms of the renewed lease will be the same except for this renewal clause.

[119] It follows that VCI was in breach of the agreements when it purported to terminate the lease.

[120] It is also clear, I find, that VCI was in breach of the agreements by failing to meet the annual threshold of sales of \$250,000. As I found above, that amount did not include the cost of stone. That VCI failed to meet that threshold cannot be doubted. VCI's argument that it did meet the threshold was based solely on the proposition that the cost of stone was included.

[121] I turn to the question of whether VCI was in breach of the agreements by ceasing to subcontract the countertop work to GCS, as alleged. According to Ms. Xiao, during this period of impasse, the parties agreed that they would not be doing further business until matters had been resolved, by mediation or negotiation. While I am sure that Ms. Xiao and Mr. Li were of the view that business would be suspended in the meantime, I do not accept that Linny and Honghong agreed with that. Rather, they were faced with having to negotiate

their way out of what, for them, was a serious problem. In their correspondence, they continued to press Mr. Li to resume business "under the same contract". The cessation of dealing, I find, was unilateral on the part of VCI; GCS wished to affirm the contract. By withholding further orders, VCI was in breach of the contract.

- [122] At the same time, GCS denied any problems regarding quality control and after-sales service. I accept, however, that there were at least periods when this was problematic. In part, this was due to the business model GCS followed. The owners were not directly involved in fabrication, installation or service. Instead, they hired stonemasters, who in turn brought in factory assistants, to take care of these aspects under the supervision of an office administrator. All of this reduced the economic inducement for quality work and service on the part of those tasked with effecting it. This became particularly problematic under the regime of Frank in the first quarter of 2015, and continued under Guo Zhang, who was a competent stonemaster, but who, for the money GCS paid him, was uninterested in after-sales service or customer relations. I am satisfied that, as Mr. Li and Ms. Xiao testified, this is what led them to take the position they did in July 2015.
- [123] It is nevertheless noteworthy that VCI did not purport to terminate the business relationship at this time for failure in quality and service, though it certainly complained of it. Rather, it purported to terminate the lease, which it had no right to do.
- [124] In all of the circumstances, I am unable to find that GCS's level of workmanship and after-sales service fell to a level that would constitute a breach of contract. While VCI was clearly dissatisfied with it, no expert evidence was adduced that would assist me in comparing the workmanship and service to accepted industry standards. It follows that VCI was in breach of the agreements when it unilaterally decided to stop sending any further orders to GCS after July 29, 2015.
- [125] Nevertheless, given the evidence of Guo Zhang concerning his indifference to the needs of customers other than his own, it seems to me that VCI had reason to be concerned about the quality of service provided by GCS. No doubt that is why, when the Settlement Agreement was negotiated, it preserved its rights to back-charge for deficiencies.

6.5 What was the effect of the Settlement Agreement on preceding breaches?

- [126] Both parties acknowledged that the Settlement Agreement effected a "reset" of their relationship.
- [127] In VCI's submission, all issues prior to the mediation were resolved by the settlement except those specifically preserved in the agreement: the right of each party to "back charge the other for deficiencies in workmanship, materials and supply". Any claim for failure to meet the threshold prior to November 19, 2015, was therefore extinguished.

- [128] GCS maintains that its pre-mediation claim for breach by VCI of its obligation to provide at least \$250,000 in orders annually survived the Settlement Agreement, as it was not specifically extinguished, nor was VCI released from it. Rather, the parties reaffirmed their existing obligations by agreeing to "reaffirm the three Agreements entered into by them in April, 2013."
- [129] In this context of mutual shortcomings and impasse, the parties attended mediation and entered into the Settlement Agreement. The agreement itself is poorly drafted. It incorrectly describes Great Corner Stone Ltd as "Greater Vancouver Stone Ltd (GVS)". It does not offer much guidance. It does, however, address the three principal areas of disagreement: as to the term of the lease, the lease and Countertop Agreement would continue to June 30, 2017, and would be renewed until June 30, 2019, if VCI renewed its lease; as to the minimum threshold for orders, VCI would provide a minimum \$250,000 per annum in countertop manufacturing and installation business ongoing; and, as to quality concerns, the parties preserved the right to back charge each other for deficiencies in workmanship, materials and supply.
- [130] I find that it was indeed intended to be a reset, to restart the parties going forward, and was not intended to preserve any pre-existing claims for contractual breach other than what was specifically preserved in the agreement. It is inconceivable to me that, in the absence of an express declaration, VCI would have intended to be retroactively responsible for the \$250,000 threshold after having ceased doing business with GCS in the period from July through November 2015. If GCS intended that VCI should have that retroactive liability, it should have specified it in the agreement, as was the case with back charges for deficiencies. GCS's claim in that regard had certainly been in the contemplation of both parties before the settlement was negotiated.
- [131] I conclude that the Settlement Agreement eliminated the right of either party to claim against the other in relation to alleged breaches occurring before the settlement, with the exception of back charges for deficiencies in workmanship, materials and supply.

6.6 What breaches occurred post-settlement?

- [132] After the settlement, as we have seen, things broke down quite quickly. The position taken by VCI immediately following the mediation was that GCS would take care of ordering materials and undertaking measurements in order to improve installation quality and minimize mistakes. VCI went on to state this [all sic]:

Vancouver cabinets would also like to acquire quotations from Great corner stone before confirm sales to Vancouver cabinets' customers to avoid argument in the future, which is also standard practice in the countertop assignment business. From now on Vancouver cabinets will send all potential inquiries from its customers to great corner, and expect to receive quotations from great corner in a timely matter.

- [133] Then, in its email to GCS of November 23, 2015, VCI referred to six jobs being ready for quotation, stating "I need all the quotations before 5:30 p.m. tomorrow". This kind of request had never been made before.
- [134] GCS complains that in this way, VCI added "additional obligations" to which GCS never agreed, being the responsibility to order all stone materials, the provision of quotes before orders were confirmed, and the need to finish orders in less than the 15 days noted in the Countertop Agreement.
- [135] GCS responded by insisting that all orders be sent by email (instead of picking them up directly from VCI's office) and by involving its lawyer. Direct communication seemed to come to an end. On November 30, 2015, GCS's lawyer took the position that VCI's attempt to change their well-established practice was a breach of their agreements, which, if not remedied, GCS would consider repudiated and would bring action. But by December 11, 2015, the lawyer said this in a letter to VCI's counsel:

As of today Great Corner Stone has one substantial issue with respect to Vancouver Cabinets' obligations under the business assignment, the mediation agreement, common-law principles and equity. It is the purchase of natural and man-made raw materials for countertops.

It has always been Vancouver Cabinet's pre-existing contractual obligation to provide raw materials to Great Corner Stone together with orders to manufacture and install countertops. On or around November 20, 2015, Vancouver Cabinets unilaterally changed this contractual arrangement.

- [136] Honghong testified that GCS was unwilling to comply with these "additional obligations" of ordering stone and providing quotes. She and Linny viewed these demands as contrary to their agreements, and, it would appear, they treated VCI as having repudiated those agreements. In any event, they ceased responding to any requests for orders. Shortly after their lawyer's letter of December 11, 2015, GCS commenced this action.
- [137] On the evidence, I find that GCS took the position, following the mediation, that VCI had fundamentally breached the Countertop Agreement they had just reaffirmed by attempting to impose what it has described as the "additional obligations", particularly the obligation to purchase the stone, and the request to provide quotes. GCS accordingly treated the Countertop Agreement as being at an end, and commenced an action for damages. It did not reaffirm the contract.
- [138] Where a contracting party has committed a fundamental breach of the contract, the other party is entitled to accept that as a repudiation of the contract, and treat the contract as terminated. It may then proceed to sue for damages immediately, rather than waiting for the time for performance to come to an end. That is what GCS purported to do.
- [139] A fundamental breach is one that is so serious that it goes to the root of the contract, in the sense that the foundation of the contract has been undermined. It amounts to a substantial failure of contract performance, sufficient to relieve a party from future obligations. For

breaches of a lesser degree, the other party is not entitled to treat the contract as at an end, but is limited to a remedy in damages (such as, for instance, reduced profit in carrying out the contract). See, for instance, *Dosanjh v Liang*, 2015 BCCA 18 at para 33; and *Contura Building Corporation v 0772551 BC Ltd*, 2018 BCSC 466 at paras 97-98.

- [140] But, I find, what GCS describes as the "additional obligations" were not of that calibre. They did not go to the root of the contract.
- [141] I have already found that the responsibility to order all stone materials was properly that of GCS under the agreements. It follows that VCI cannot be viewed as having fundamentally breached the contract by insisting that GCS abide by its responsibilities. GCS did not argue that VCI was estopped by its previous conduct from relying on the responsibility placed by the Countertop Agreement on GCS to purchase materials. VCI was still obliged to "cooperate" in the buying of stone, but its duties in this regard were undefined and did not oblige it to take over a responsibility that the agreements placed on GCS. At most, VCI was insisting on a change in practice in accordance with the terms of the contract. Arguably, GCS might have a basis for claiming damages as a result of that change, but could not in law use it as a ground for terminating the Countertop Agreement.
- [142] But what about VCI's request for quotes before confirming orders? Nothing in the agreements specifically addressed the question of quotes. Nothing obliged GCS to provide quotes, and nothing prohibited VCI from requesting them. VCI submits that its entitlement to request quotes must be inferred from the obligation of GCS under the agreements to purchase the stone. But that obligation was, at least notionally, always present, and never had VCI requested quotes before the settlement. After all, stone was to be supplied at cost. VCI was unable to adduce evidence of any standard industry practice in that regard. Sometimes, its other suppliers had provided quotes that included the cost of stone; in many other instances, they did not.
- [143] Nevertheless, we are again dealing with a question of change in practice. Nothing in the evidence supports the contention that VCI's decision to request quotes was a breach of the agreements, let alone a fundamental breach. Moreover, VCI backed away from a demand for quotes for every order, as the letter from GCS's lawyer of December 11, 2015, appears to acknowledge.
- [144] Again, it might have been open to GCS to claim damages for increased cost in performing the contract, but that is a different matter from terminating the contract for fundamental breach.
- [145] In my view, the same analysis applies to the third "additional obligation" relating to lead time. There was nothing to stop VCI from requesting production with a shorter lead time. That is the sort of thing one might well expect to arise in an ongoing relationship. If satisfying the request led to a loss by GCS, then again, it could claim damages. But it would not, in my view, be entitled to terminate the contract.

- [146] Accordingly, the grounds upon which GCS purported to terminate the agreements (other than the lease) did not, in law, constitute fundamental breaches justifying the termination.
- [147] I find, however, that VCI did commit a fundamental breach of the contract, even though it was one unknown to GCS at the time it purported to terminate, being December 2015. That fundamental breach was going behind GCS's back by dealing surreptitiously with Guo Zhang to produce orders that ought to have been produced by GCS in accordance with the reaffirmed terms of the Countertop Agreement following the settlement. Then, after Guo Zhang parted ways with GCS once his perfidy was discovered, VCI continued to deal with him to satisfy its need for countertops. In the context of the general organizing principle of good faith contractual performance recognized by the Supreme Court of Canada in *Bhasin v Hrynew*, 2014 SCC 71, together with the exclusive subcontracting right that was fundamental to the agreements, it cannot be doubted that this conduct on the part of VCI went to the root of the contract.
- [148] It was not, however, a breach of which GCS gave notice to VCI when it purported to terminate the contract: see the discussion in *Contura Building Corporation* at paras 99-107. Must GCS's termination therefore be considered wrongful?
- [149] Unlike the situation considered in the *Contura Building Corporation* case, the contract documents here contained no specific provision concerning notice. At the time that GCS purported to accept VCI's repudiation, it was unaware of VCI's conduct thanks to the steps taken by Mr. Zhang and VCI to hide it. In these circumstances, I find that it would be unconscionable, and contrary to the organizing principle of good faith, to permit VCI to escape the consequences of its conduct on the basis that GCS failed to give notice of a particular fundamental breach that VCI had concealed. VCI, in short, cannot be heard to say, "Your termination was wrongful because you failed to base it upon our most serious breach, thanks to our success in hiding it from you"; see, by way of analogy, *Roy v. Kretschmer*, 2014 BCCA 429.

6.7 What remedies flow?

6.7.1 GCS's claim

- [150] Based upon the proposition that VCI was in breach of contract virtually from the beginning, GCS claims damages based upon the shortfall in the contractually-promised threshold of \$250,000 in orders from October 1, 2013, through to the commencement of trial in August 2018.
- [151] Two issues fall to be determined. What is the proper period of claim, and how is GCS's loss to be calculated?

- [152] As to the proper period of claim, I have already determined that the parties reset their relationship in November 2015. But, as I have found, VCI repudiated that contract by continuing to deal with Guo Zhang notwithstanding the resumption of its obligations to GCS, with GCS accepting the repudiation and treating the contract as terminated.
- [153] Thereafter, GCS was left as lessee of the countertop facility with few orders to fill pursuant to its agreements with VCI. The Settlement Agreement provided that the relationship should continue (if VCI renewed its head lease, which it did) to June 30, 2019, the same date that would follow from GCS's renewal of the lease under the original terms of the Commercial Lease Agreement. Accordingly, GCS seeks damages to the date of trial.
- [154] VCI submits that, given the state of conflict between the parties (bearing in mind the commencement of this action in December 2015), a duty to mitigate arose. I accept that submission. As the Court of Appeal stated in *Ueland v Lynch*, 2019 BCCA 431:
- [1] It is a well-known principle of the law of damages that a wronged plaintiff may not recover losses that he or she could have reasonably avoided. In the words of Viscount Haldane in the seminal English case, *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd.* [1912] A.C. 673 (H.L.):
- The fundamental basis [of damage assessment] is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming in respect of any part of the damage which is due to his neglect to take such steps. [At 689.]
- See also *Southcott Estates Inc v Toronto Catholic District School Board*, 2012 SCC 51 at para 23.
- [155] As I see it, having accepted VCI's repudiation of the contract, and having commenced action as a result, it was not open to GCS to do little or nothing pending trial to mitigate its loss in the expectation of claiming on the basis of an ongoing failure to meet the \$250,000 annual threshold.
- [156] On the evidence, as time passed into 2016 and beyond, Linny and Honghong did little to build a business that would replace the orders from VCI. Ultimately, they simply leased the premises out to somebody else to use for the purposes of countertop manufacturing.
- [157] I accept that it would have taken them some time to achieve anything like the kind of work that VCI had promised them under the contract. Guo Zhang left to set up his own factory in the spring of 2016, leaving GCS in a position where it had to reorganize its operation, find workers and develop new customers.
- [158] Nevertheless, by November 2015, GCS had been in business well over two years, and the Ye sisters were well acquainted with it. Honghong testified about her own experience in the field before 2015, and about her contacts. On the evidence as a whole, a threshold of \$250,000 per year in orders was not extraordinary. It was typical of subcontractors before

GCS. Linny testified that she felt unable to build a new business because of uncertainty about the lease. The fact remains that GCS continued in possession of the premises well beyond the original lease period, and indeed, beyond the extended lease period. The evidence, in my view, supports VCI's contention that GCS failed to take all reasonable steps to find alternative customers in a timely fashion.

- [159] In all of the circumstances, I consider that GCS ought to have been in a position to replace the orders lost through VCI's breach within 15 months (five fiscal quarters) of November 30, 2015--that is, by the end of February 2017.
- [160] The question then becomes how to measure the loss. GCS maintains that it is entitled to damages based upon its loss of gross profit from the shortfall in orders, reasoning that the expenses (as opposed to the cost of sales) would be essentially the same, so that a restoration of contribution to gross profit would at least reduce the net loss suffered by GCS.
- [161] VCI submits that as GCS never made a net profit, it is entitled to nothing. But the only expert evidence was submitted by VCI, from Gordon R. Milne, CPA, CA, who was qualified, at VCI's request, as an expert in investigative and forensic accounting. VCI sought, and obtained, my leave to tender the report into evidence notwithstanding that it had been served late.
- [162] Mr. Milne presented his analysis based upon the proposition that the appropriate measure of loss was the loss of contribution to GCS's gross profit arising from the failure of VCI to meet the contractual threshold amount of \$250,000 per year. Mr. Milne made different calculations depending upon whether that threshold amount did or did not include the cost of stone. I have already found that it did not.
- [163] Notwithstanding that it tendered Mr. Milne as an expert, VCI sought to resile from his evidence insofar as he used a loss of contribution to gross profit as the appropriate measure of loss. VCI maintained that he prepared his report in that way only as a counter to the evidence of Honghong and Linny, which put forward loss calculations based upon their loss of gross profit. But Mr. Milne did not suggest that GCS's conceptual approach was misguided, and no other expert evidence was tendered to suggest that some other method of assessment was appropriate. I was therefore left with only Mr. Milne's opinion, and have been given no evidentiary reason to reject it.
- [164] Accordingly I accept Mr. Milne's opinion concerning the appropriate basis of assessment, being the loss of contribution to GCS's gross profit over the period in question as a result of the failure of VCI to provide orders in the amount of \$250,000 per year.
- [165] GCS took issue with Mr. Milne's method of calculation. In GCS's submission, Mr. Milne should have adjusted labour costs further than he did to take into account wages for administrative staff not incurred directly to perform the physical work, and should have accounted automobile costs as direct costs. While there is some merit to this position, I am unable to find that all of the cost of administrative staff was unrelated to the performance

of physical work. On the evidence, as with so many other aspects to this case, the dividing line is imprecise.

- [166] GCS further maintained that the loss should not be assessed just on the basis of the shortfall from the threshold of \$250,000, because VCI gave orders totaling some \$410,000 to Guo Zhang. Accordingly, GCS submitted, GCS's loss of gross profit contribution from what should have flowed from the contract was much greater.
- [167] I reject this last contention. The figure of \$410,000 in relation to orders VCI gave to Guo Zhang included the cost of stone. The evidence did not disclose what portion of that \$410,000 should be attributed to the cost of stone, but there was evidence that it could be in the range of 40%. I have already concluded that the threshold of \$250,000 did not include the cost of stone, and I cannot say that there was a substantial possibility that, had VCI lived up to its contractual obligations, the orders flowing to GCS would have exceeded the minimum threshold of \$250,000 per year.
- [168] Tracking Mr. Milne's approach, but taking a higher profit contribution margin ratio to take into account GCS's concerns about automotive expenses and administrative staff, but also bearing in mind that he did not take into account cash receipts, I assess GCS's loss over the 15 months in question to be in the amount of \$125,000 (based on an annual loss of contribution to gross profit of \$100,000).

6.7.2 VCI's counterclaim

- [169] In argument, VCI asserted three types of loss flowing from the conduct of GCS. The first is loss of additional rent payments payable under the Commercial Lease Agreement by reason of GCS's overholding the premises beyond the term of the lease. The second is damages for loss of business, referrals, goodwill and reputation due to what VCI contended was GCS's fundamental breach of the contract in failing to accept job orders after the settlement. The third is "actual out-of-pocket expenses as a result of GCS' conduct", referring to expenses incurred by VCI to fulfil post-installation customer service obligations neglected by GCS.
- [170] Turning to the first, the Commercial Lease Agreement provided for a "Gross Rent" for the premises. That gross rent was in the amount of \$4,500 per month from July 1, 2014 through June 30, 2016. By the terms of the Settlement Agreement, GCS was to pay its share of any increased lease costs given the renewal to June 30, 2019. I understand that the amount of the rent changed from the \$4,500 stated in the lease, but it is not clear to me on the evidence when or by how much.
- [171] By clause 18 of the Commercial Lease Agreement,

If the Tenant continues to occupy the Premises without the written consent of the Landlord after the expiration or other termination of the term, then, without any further written agreement, the tenant will be a month-to-month tenant at a minimum monthly rental equal to twice the Base Rent and subject always to all of the other provisions of this Lease in so far as the same are applicable to a month-to-month tenancy and a tenancy from year to year will not be created by implication of law.

[172] The term "Base Rent", although capitalized, is not defined in the agreement. Reading the agreement as a whole, and taking into account how the Gross Rent is structured, with the landlord being responsible for all other service charges related to the premises and the operation, I am satisfied that the parties intended "Base Rent" to mean the same as "Gross Rent". It follows, I find, that GCS agreed to pay double the Gross Rent if it continued in occupation beyond the term of the lease.

[173] VCI maintains that GCS has been overholding since the termination events at the end of 2015, or alternatively, from the end of the initial lease term on June 30, 2016. But, by the terms of both the Commercial Lease Agreement and the Settlement Agreement, the term was extended to June 30, 2019. Although Mr. Li purported to give written notice of termination on April 11, 2016, there was, as I found above, nothing in the lease that permitted him to do so in the face of GCS's notice to renew. Also as I discussed above, in relation to term, the lease stands on its own. Nothing in it ties occupation, or the term, to the countertop or any other agreement. Accordingly, I find that GCS has been overholding only since June 30, 2019.

[174] On this basis, VCI is entitled to payment from GCS of an additional sum per month equal to the Gross Rent, for each month it continues in occupation after June 30, 2019.

[175] Turning to the second type of claimed loss, VCI adduced no evidence of any loss of business, referrals, goodwill or reputation, and in any event, is not entitled to claim on this basis because of its own fundamental breach of the contract.

[176] Turning to the third type of loss, I accept that VCI is entitled to claim out-of-pocket expenses that it establishes flowed from failures on the part of GCS to perform proper after-sales service prior to the settlement. This right was preserved in the Settlement Agreement. During final argument, counsel was unable to direct me to evidence of actual expenses that would support a claim in this regard. I gave leave to VCI to file further submissions, which were sent to the registry on November 20, 2019, and which I permitted to be filed (after explanation) on December 30, 2019. GCS responded on January 13, 2020.

[177] In those submissions, VCI suggested that a sum in the range of \$25,000 would be "reasonably representative of the amount of damages in accordance with the factual matrix presented by the parties to arrive at a final amount".

- [178] With respect to the factual matrix, it is true that both Mr. Li and Ms. Xiao testified about the need to hire outside contractors to take care of post-installation work that should have been undertaken by GCS, but which GCS refused or neglected to perform. There was support for this proposition in the evidence of Guo Zhang, who demonstrated a complete lack of interest in responding to any customer complaints on behalf of GCS, and in documentation of a number of such customer complaints.
- [179] But this is a claim for actual expenses incurred, and with two exceptions, the documentary evidence does not provide information from which any calculation of such expenses can be made. The exceptions are two work orders, one for \$4,400, and the other for \$961.56, that I am prepared to find, on a balance of probabilities, represent expenses incurred by VCI to remedy problems arising from the work of GCS. Accordingly, I award damages of \$5,361.56 to VCI for expenses it incurred as a result of failure on the part of GCS to fulfil customer service obligations.

7.0 CONCLUSION

- [180] I award damages to GCS arising from VCI's fundamental breach of their contractual agreements in the total of \$125,000.
- [181] On its counterclaim, VCI is entitled to recover out-of-pocket expenses in the total of \$5,361.56, and additional rent owing for GCS's overholding of the leased premises, from and including July 2019 until GCS returns vacant possession to VCI. If the parties are unable to agree on the amount of additional rent owing, there will be a reference to the registrar.
- [182] VCI may offset the amount of \$5,361.56 owing to it on its counterclaim from the damages I have awarded to GCS, and may further withhold the sum of \$36,000 pending the resolution of the amount of additional rent owing.
- [183] Both parties are entitled to interest in accordance with the Court Order Interest Act, RSBC 1996, c 79.
- [184] Ordinarily, I would award GCS 75% of its ordinary costs of the trial, in order to reflect its success on its claim in relation to the lesser success of VCI on its counterclaim. There may, however, be additional factors of which I am not aware. In that event, if the parties are unable to agree, they are at liberty to apply.

"GRAUER, J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/01/2020BCSC0107.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/great-corner-stone-ltd-v-vancouver-cabinets-inc-2020>

Prepared on 26 October 2026 · Esheria