

CANADA / JUDGMENT

HG Bliss Projects Inc. v. Taylor

2018 BCSC 1581

COURT

Supreme Court of British Columbia

DECIDED

14 September 2018

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2018 BCSC 1581 HG Bliss Projects Inc. v. Taylor IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: HG Bliss Projects Inc. v. Taylor, 2018 BCSC 1581 Date: 20180914 Docket: S1649900 Registry: Prince George Between: HG Bliss Projects Inc. Plaintiff And Marcus Brent Taylor & Janette Susan Taylor Defendants Before: The Honourable Madam Justice Church Reasons for Judgment Representative for the Plaintiff, appearing in person: G. Bliss Counsel for the Defendants: K. Smith C. Flintoff, Articled Student Place and Date of Trial: Prince George, B.C. April 10, 11, 12 & 13, 2018 Place and Date of Judgment: Prince George, B.C. September 14, 2018

Introduction

- [1] The defendants, Marcus and Janette Taylor, live on a remote rural property approximately 45 minutes outside Hudson's Hope in northeastern British Columbia. In November 2014, their home burned to the ground along with virtually all of their possessions. Fortunately, their home was insured and after considering their options with respect to their insurance payout, they decided to rebuild their home using their insurance proceeds of \$729,000.00.
- [2] It proved to be a very difficult task to find a builder to undertake their project for many reasons. The oil and gas sector in northeastern BC was booming and construction crews in nearby Fort St. John were in high demand. They were also aware that once they began drawing their insurance proceeds for the home construction, they were required to complete the construction within nine months. Several months went by and the Taylors were no closer to beginning construction on their new home. They decided to approach a company in Prince George, Winton Global Homes, with a view to purchasing a building envelope to try to shorten the building process. They eventually agreed to purchase a building envelope from Winton Global Homes but were still unable find a local contractor to manage the project and construct the building envelope. On the recommendation of Winton Global Homes, they contacted the plaintiff, H.G. Bliss Projects Inc. In July 2015, they met with the principal of the plaintiff, Gordon Bliss, and liked what they saw. The defendants and the plaintiff eventually agreed to work together to construct the defendant's home to lock-up. What the parties agreed to with respect to this construction project lies at the heart of this litigation.

- [3] The plaintiff completed much of its construction work on the defendant's home by early April 2015, except for some identified deficiencies. By then, the relationship between the plaintiff and the defendants had irretrievably broken down. The defendants blamed the plaintiff for a measurement error that resulted in wrong sized kitchen cabinets and the plaintiff felt the defendants were unreasonable in their demands to change the kitchen layout late in the project. Although the plaintiff hired a contractor in Fort St. John to inspect the home, report on and remedy any deficiencies, the defendants remained unhappy with the number of deficiencies and cost overruns.
- [4] On June 19, 2016, the plaintiff issued its final invoice to the defendants for \$35,834.34. After deducting the remaining deposit monies held by the plaintiff, the balance outstanding on the invoice was \$22,952.46. The defendants refused to pay the outstanding amount and on August 31, 2016, the plaintiff filed this action seeking, amongst other things, a claim of lien under the Builders Lien Act for the outstanding amount and judgement against the defendants for the outstanding amount owed on the final invoice.
- [5] On October 13, 2016, the defendants filed a response to civil claim opposing the plaintiff's Builders Lien Act claim. They also filed a counterclaim seeking damages for breach of contract on the grounds that the plaintiff incurred expenses on the project without their approval, wrongfully invoiced the defendants for costs to which it was not entitled, failed to complete the project by the date required in the contract and failed to remedy the deficiencies. The defendants also claimed that the plaintiff failed to exercise skill and competence in its construction of the home and failed to do its work in a workmanlike manner and with due diligence.

Issues

- [6] The issues to be determined with respect to the plaintiff's claims are:
1. Did the defendants fail to pay the plaintiff an amount that was due and owing in invoice JMT-014 issued June 19, 2016?
 2. Is the plaintiff entitled to a lien under the Builders Lien Act?
- [7] The issues to be determined with respect to the defendants' counterclaim are:
- 1) Did the plaintiff breach the construction agreement by:
 - a) Overcharging with respect to the plaintiff's labour supplied on the project;
 - b) Invoicing the defendants for amounts to which it was not entitled;
 - c) Failing to obtain the approval of the defendants for each expenditure invoiced;
 - d) Failing to construct the house in a proper and workmanlike manner; and
 - e) Failing to complete the construction by January 31, 2016?

- [8] In order to resolve these issues, it is necessary to first determine the terms of parties' agreement with respect to this construction project, and the meaning of the terms used in the construction agreement. The Construction Agreement
- [9] Although the plaintiff and the defendants agree that there was a written agreement with respect to this project, the manner in which that agreement was ultimately concluded means that determining its terms and the interpretation of those terms is by no means straightforward.
- [10] Throughout the trial of this matter, the parties and counsel for the defendants spoke in sweeping terms about the different "versions" of the agreement.
- [11] The first "version" of the agreement that was signed by all parties was dated August 5, 2015 and entered as Exhibit 1 on the trial. That document is a standard form construction agreement endorsed by the Canadian Homebuilders' Association British Columbia. It provided that the plaintiff would construct a new home on the defendants' property and the defendants would pay \$722,508 plus \$23,120.26 GST for a total of \$745,628.26. This price was based on a budget that had been prepared by the plaintiff for all aspects of the project and which was entered as Exhibit 2 on the trial.
- [12] The terms of payment were set out in Appendix A to Exhibit 1 and the parties agreed to a completion date of January 31, 2016 "provided that the Builder does not guarantee the completion or possession of the dwelling house on this date if delays occur which are caused by unfavourable weather, strikes, fires, shortages of material and/or labour, acts of God or any causes beyond the reasonable control of the Builder." The plaintiff agreed to be responsible for utility connection, liability insurance, permits, fire insurance and utility costs.
- [13] All of the parties signed Appendix A to Exhibit 1 on August 7, 2015 and the defendants paid the plaintiff a deposit of \$100,000.00 towards the 25% payment as required by Appendix A.
- [14] Although this was the first version of the construction agreement that was signed by all of the parties, there was an earlier version that had been prepared by the plaintiff after the initial meeting with the defendants in July 2015. The earlier version is dated July 28, 2015 and is only signed by the plaintiff. The price in that version was \$519,707 plus GST of \$25,985.35 for a total of \$545,692.35, subject to the construction drawings from Winton Global Homes. There were numerous costs, services and materials that the defendants wanted to provide themselves that were specifically excluded from the July 28, 2015 contract price. According to the testimony of Janette Taylor, their insurance company required a construction agreement that set out the global price, including any costs, services or materials that were being provided directly by the defendants. The plaintiff agreed to revise the earlier draft agreement to include those items.

- [15] Only days after the parties concluded the construction agreement on August 5, 2015, the parties executed a second "version" of the standard form construction agreement. That version contained an Addendum A, setting out the materials and services to be provided by the defendants and an Addendum B, which set out a revised contract price of \$613,800 plus GST of \$19,641.60 for a total of \$633,441.60. The actual amount of the GST on this contract price was \$30,690 but the plaintiff anticipated that the defendants would be entitled to a 36% rebate of the GST and the payment schedule was calculated based on the net amount of GST after calculation of the rebate.
- [16] All of the parties signed the second version of the construction agreement on August 14, 2015. Addendum A was signed by all of the parties but Addendum B was only signed by the defendants, as they had added some explanatory notes with which the plaintiff did not agree.
- [17] In an email dated August 14, 2015, Janette Taylor confirmed the agreement of the defendants to (a) rent a nearby house to accommodate the plaintiff's crew and sub-trades who were travelling from Prince George; and (b) to supply prepared dinner each night. Breakfast and lunch would be the workers' responsibility.
- [18] After the second version of the construction agreement was signed, construction began on the defendants' home. The plaintiff employed a crew of builders and labourers who worked on site. It also purchased necessary building materials and engaged various sub-trades from Prince George for the project.
- [19] Despite having already entered into a binding construction agreement to complete the project for a fixed price, the defendants then proposed a further and more fundamental change to the agreement. In an email dated September 8, 2015, the defendants advised the plaintiff that: \$900K is much more than we are prepared to put into the house. As we have stated all along, our comfort level and what we can afford is within our insurance settlement budget which is \$729K + \$8K for a total of \$737K. That may not be realistic based on the quotes you have received from your sub-trades, but I believe it's still worth aiming for.
- [20] Later in that email, Janette Taylor noted: We are in favor of moving forward on a cost-plus basis working with you to line up the most cost effective solutions, which could mean we find a more competitive service provider be it painter, roofer etc. who are professionals within our friend base or choosing to take on certain aspects of those roles ourselves. At least with a cost plus structure we can address each task as it comes, within reason, while ensuring we do not delay your schedule.
- [21] Although construction had already begun under the fixed price construction agreement, it appears that the plaintiff agreed to this proposal and prepared an Addendum D to the August 14, 2015 construction agreement. The version of Addendum D that was eventually agreed to and signed by all of the parties contained the following provisions: It is agreed between HG Bliss Projects Inc. and Marcus & Janette Taylor to construct a new home located at 19831 Lahagarte Road on a cost plus 25% basis for materials purchased. Labour will be billed

separately on a biweekly basis at a billable hourly rate plus 25%. Further it is agreed between both parties that all expenditures must have the approval of both HG Bliss Projects Inc. and Marcus and Janette Taylor before being implemented. If there is a disagreement, then all work will cease until the matter is resolved. As the original estimate spread sheet dated July 1, 2015 was based on "estimate prices only" both parties are aware that some costs in the spread sheet will decrease and while others will increase. Additional materials and equipment may also appear as this spread sheet from the beginning was an "estimate sheet only". All other terms in the contract dated August 14, 2015 will remain the same and will be used as the guiding principle to perform said work and any disputes.

- [22] All of the parties signed Addendum D on October 15, 2015.
- [23] Prior to this date, the plaintiff had issued invoice JMT-001 to the defendants for the sum of \$65,022.46 and that invoice had been paid. The invoice included an additional 25% without any further description.
- [24] Counsel for the defendants submitted that the only reasonable interpretation for the inclusion of an additional 25% in invoice JMT-001 is that by the date of that invoice, the proposal to move forward on a "cost plus 25%" basis was in the imminent contemplation of the parties and the parties intended that arrangement to apply to all of their dealings, including all of the invoicing prior to execution of Addendum D.
- [25] While that is one possible interpretation, I note that the original spread sheet dated July 2015 which was Exhibit 2 on the trial included an overhead and markup totalling 25% in the fixed price estimate of \$722,508.00. It appears that from the outset, the parties were aware of and agreed that the plaintiff would receive an additional 25% over the estimated construction costs to compensate it for overhead costs and profit. That percentage was included in the amount calculated in Addendum A. I do not agree that the only reasonable interpretation of JMT-001 is that the parties had already agreed to proceed on a "cost plus" basis. In my view, an equally probable interpretation is that the plaintiff was simply reflecting this previously agreed overhead and mark up in its invoicing to the defendants.
- [26] On October 19, 2015, the plaintiff issued a second invoice, JMT-002, for the sum of \$85,641.42. Although the invoice post-dated the execution of Addendum D, all of the invoices and labour particularized in that invoice occurred prior to October 10, 2015 and thus pre-dated the execution of Addendum D.
- [27] Invoice JMT-002 once again includes 25% that is described as "markup" and the labour is particularised with reference to the specific employee, the number of hours worked during the time period from September 26 - October 10, 2015 and the rate of either \$51.50 or \$75.00 per hour.

- [28] It is not disputed that the labour rates charged to the defendants and reflected in JMT-002 and subsequent invoices are not the same as the amounts paid by the plaintiff to its employees. In paragraph 7 of the notice to admit filed as Exhibit 4, the plaintiff admitted that the hourly rates paid to his employees were significantly lower than the labour rates that were billed to the defendants.
- [29] I note that there was an earlier version of Addendum D provided for the construction to proceed on a "cost plus 25% basis for labour and material". The final version of Addendum D included the provision to which I have already referred, that labour would be billed separately "at a billable hourly rate plus 25%".
- [30] Counsel for the defendants urges me to conclude that the parties intended the construction agreement, as amended by Addendum D, to be a "cost plus" contract with respect to both materials and labour and he submits that the only reasonable interpretation of the words "billable rate" is that it means the actual hourly rate paid by the plaintiff to its employees. He submitted that this interpretation makes more sense in light of the evidence of Janette Taylor that she contacted the plaintiff after receipt of JMT-001 and asked for the labour to be particularized to reflect employee names, hours worked and labour rates. She also testified that after receipt of JMT-002, she telephoned Gordon Bliss and asked him specifically about the labour rates and requested that he confirm her own calculations that the hourly rate paid to the plaintiff's employees was 25% less than the rate reflected on the invoice. The evidence of Janette Taylor was that Gordon Bliss confirmed that he was paying his foreman, Garth Prince, \$60 per hour.
- [31] The evidence of Gordon Bliss was that he could not recall any conversation with Ms. Taylor about the way the crew labour was shown on the invoices and his own recollection was that the plaintiff voluntarily particularized the labour costs after JMT-001 was issued without any prompting from the defendants. He further testified that the reference to "billable rate" in Addendum D was deliberate and he always intended to reflect the rate at which he charged out his employees, rather than the hourly rate paid to his employees. He said that the hourly rate paid to the employees reflects only part of the cost of each employee and the actual cost to the plaintiff was much higher, when employer contributions are included for holiday pay, WCB, CPP etc. He denied that Janette Taylor told him her assumptions about the hourly rates paid to his employees or any suggestion that he confirmed to Ms. Taylor that he was paying Garth Prince \$60 per hour.
- [32] While I accept the evidence of Janette Taylor that she asked Gordon Bliss to particularize the labour costs by employee name, number of hours worked and labour rate, I do not accept her evidence that she told Mr. Bliss about her assumptions regarding the actual hourly rates paid to the plaintiff's employees or that Mr. Bliss confirmed to her that the foreman, Garth Prince was being paid \$60 per hour. I found some of Janette Taylor's evidence with respect to her dealings with Gordon Bliss to be exaggerated and somewhat contrived. For example, in direct examination, Janette Taylor said that she paid the plaintiff's invoices even when she objected to them because Gordon Bliss told her that if she did not pay, he would pull the

plaintiff's crew off the site. She went on to explain that the payments from the insurance company were tied to the draws and she could not risk Mr. Bliss pulling his men off the site. During cross-examination, Ms. Taylor acknowledged that most of the communication between herself and Mr. Bliss was by email and she testified that "at least seven times", Mr. Bliss had threatened to pull the plaintiff's crew off the site if she did not pay outstanding invoices, although she could not recall if those threats were in emails. Later in her cross-examination, Ms. Taylor changed her evidence and suggested that at least seven times, she questioned Mr. Bliss about the invoices and sometimes Mr. Bliss responded to her concerns and other times he threatened to pull his men off the job site. Mr. Bliss denied that he ever threatened to pull him men off the construction site and the email correspondence in evidence at trial contained no such threats.

- [33] I accept the evidence that the defendants were cost conscious throughout this project and wanted clarity as to the costs of the various aspects of the project. I have no doubt that Janette Taylor asked the plaintiff to particularize the labour portion of the invoices as this was consistent with the defendant's efforts to monitor the work that was actually being done on their project and ensure that the project remained within budget.
- [34] A "cost plus" contract has been defined as a contract to perform work for the contractor's cost plus a percentage. This agreement did not begin as a "cost plus" contract but rather developed into one as a result of negotiations and subsequent agreement between the parties. As noted by Mr. Bliss in his trial testimony and acknowledged by the defendants, the parties had a binding construction agreement dated August 14, 2015 based on a fixed price and work had already begun on that basis. Addendum D appears to have been concluded at the insistence of the defendants and despite their existing obligations under the August 14, 2015 construction agreement.
- [35] Although the plaintiff was not obliged to agree to the changes to the fixed price contract in Addendum D, it appears that the Mr. Bliss did so, as he was mindful of the concerns of the defendants about their budget and was attempting to accommodate those concerns by considering some of the proposed amendments to the August 14, 2015 construction agreement. He was aware of the sentiment expressed by Janette Taylor in the email of September 8, 2015 that, while their budget of \$737,000 might not be realistic based on the quotes received from sub-trades, "it's still worth aiming for".
- [36] The discussions between the parties after the first draft of Addendum D prompted several changes to the draft, including the change from an agreement for "cost plus 25% for labour and material" to the final draft of Addendum D which provided for "cost plus 25% for materials purchased with labour to be billed separately at a "billable hourly rate plus 25%". Mr. Bliss drafted the first version of Addendum D and he was the only party to sign that document.

- [37] I tend to agree with the submissions of counsel for the defendants that the variation in the wording used between the first draft and the second draft is more likely to reflect the concerns raised by the defendants about particularizing the labour costs in the invoices, rather than including the labour amount as a single line item.
- [38] The evidence of Gordon Bliss was that although the defendants kept changing the contract and insisting on amendments, there was never any discussion about his billable rate either before or after Addendum D was signed. He said that his intention was to include labour at his "billable rate", that is the rate at which he charged out his employees, rather than his actual cost for each employee per hour. With all due respect, that submission makes no sense in the context of the wording in Addendum D and the testimony of Mr. Bliss. Mr. Bliss admitted that the billable rate he used for the invoices issued after the execution of Addendum D was the same rate that he had previously used in the fixed price contract. He acknowledged at trial that the previous draft of Addendum D that he drafted and signed provided for the project to proceed on a "cost plus 25% basis for labour and material" and he suggested under cross-examination that his 25% markup was included in the billable rate. If the intention of the parties was that the plaintiff would charge the same rate as set out in the fixed price contract, there was simply no need to add the words "plus 25%" because according to Mr. Bliss, the 25% markup was already included in the "billable rate". The addition of those words, in my view, reflected the parties' agreement that from that point on, the rates for the plaintiff's labour would be charged at his actual cost plus 25%.
- [39] I accept the evidence of Mr. Bliss that the parties did not discuss labour rates either prior to or after Addendum D and I also find that the parties' "cost plus" arrangement did not begin until after JMT-002 had been rendered, as all of the labour performed to that date had been completed under the fixed price contract.
- [40] While I agree that the term "billable rate" cannot mean the rate charged by the plaintiff under the previous fixed price contract, I do not agree with the submission of counsel for the defendants that it means the hourly rate actually paid to the plaintiff's employees. I accept the evidence of Mr. Bliss that his actual cost per hour for his employees was much higher than the amount paid to them, largely as a result of various employer obligations which he characterized as costs rather than overhead. It would make no sense for him to agree to charge the defendants for his carpenters and labourers at their base hourly rate plus 25% when that likely would not cover his actual costs, overhead and profit.
- [41] Based on the evidence at trial, while I am not persuaded that the parties intended the words "billable rate" in Addendum D to refer to the hourly rate actually paid to the plaintiff's employees I am satisfied that the proper interpretation of this term is the "loaded cost" per hour for each employee actually incurred by the plaintiff.

- [42] There was very little evidence at trial with respect to the plaintiff's actual loaded costs, beyond his testimony that he has to pay an amount for holiday pay, employer contributions to CPP and EI and WCB premiums. Mr. Bliss gave very limited and somewhat vague evidence as to the percentage of some of those costs.
- [43] I note that similar calculations were made by the court in a decision referred to by the defendants, *Citta Construction v. E. Lane Holdings et al* 2003 BCSC 1929. In determining the actual cost of labour, the court in that case considered various labour costs incurred by the employer over and above the hourly rate paid to the employees and concluded that it would be unfair to require the employer to bear those costs in a "cost plus" contract. While the court had more evidence with respect to those costs in that case, I note that an average of 30% was added to the hourly rates to determine the employer's actual cost.
- [44] In this case, I am of the same view that it would be unfair to require the plaintiff to bear these costs, despite the absence of direct evidence as to precisely what those specific costs were. I have therefore estimated the plaintiff's cost load per hour per employee to be 20%. I will address how this impacts the amounts that were billed by the plaintiff to the defendants later in these reasons in the context of the defendants' counterclaim. What is Included in "Materials Purchased"?
- [45] As I have already noted, the parties agreed in Addendum D to a "cost plus 25% basis for materials purchased." The parties disagree as to the interpretation of the word "materials" in Addendum D.
- [46] The plaintiff takes the position that the term should be interpreted widely and that it was always the intention of the parties that the plaintiff be able to charge 25% on any costs that it incurred in the course of the construction project, including all sub trade invoices, equipment rental and hotel expenses incurred by sub-trades or employees working on the project.
- [47] Counsel for the defendants invites me to take a very narrow view of the word "materials" in Addendum D and to find that the plaintiff was not entitled to charge 25% on equipment rentals, hotel expenses or any of the costs incurred by it that were not specifically approved in advance by the defendants.
- [48] I am inclined to accept the evidence of the plaintiff that it was the intention of the parties that the term "materials" be given a wide interpretation. The agreement between the parties began as a fixed price contract based on budget spreadsheet prepared by Mr. Bliss. When the plaintiff agreed, at the urging of the defendants, to move to a "cost plus" contract, it was on the basis that the defendants would try source materials and services through their own efforts in order to remove such items from the responsibility of the plaintiff in the hope that they might save money, both in terms of securing better pricing on those materials or services and also in saving the 25% charged by the plaintiff. The remaining "costs" incurred by the plaintiff would still be subject to the 25% mark up, including all sub trade invoices and equipment rentals.

- [49] This interpretation is consistent with detailed spread sheet that was prepared by Mr. Bliss and sent to the defendants in support of the fixed price contract. That spreadsheet was entered into evidence at trial as Exhibit 2. That document specifically included provision for equipment rental, delivery of rental equipment, house rental, and temporary toilets, which I have assumed were rentals. All of those rentals are subject to overhead and markup totalling 25% in the calculation that formed the basis for the fixed price contract.
- [50] Even though the defendants sought to lower the cost of construction by moving to a "cost plus" arrangement, it appears from Exhibit 2 that the parties contemplated that rentals and rental accommodation would be included as construction costs that were subject to an additional 25%.
- [51] I will now address the respective claims of the plaintiff and the defendants with respect to the construction agreement. The Plaintiff's Claims
- a) Did the defendants fail to pay the plaintiff an amount that was due and owing in invoice JMT-014 issued June 19, 2016?
- [52] The plaintiff issued invoice JMT-014 to the defendants on June 19, 2016, approximately two months after the plaintiff's crew left the construction site. That invoice included the following amounts: MWatt Electric (2 invoices dated April 14, 2016) \$4,055.63 Western Wood Heat (1 invoice dated April 14, 2016) \$6,800.00 Proficient Plumbing (2 invoices dated April 27 & June 15) \$3,425.00 Extra option #1 Kitchen cabinets \$1,250.00 Chetwynd Landfill \$ 19.80 Hotel (Proficient Plumbing - June 12-13, 2016) \$ 270.00 25% \$ 3,955.11 TOTAL \$19,775.54
- [53] In addition to these amounts, the plaintiff also included charges for use of his vehicle at \$50 per day for a total of 99 days and mileage of 19,457 km at \$0.50 per km, all of which totalled \$14,678.00. These charges appear to have been added to the final invoice in response to an invoice presented to the plaintiff by the defendants for their mileage and time to pick up and deliver their kitchen cabinets from Prince George to their home. That invoice totalled \$840.00 and included mileage charged at \$1 per km, rental of the U-Haul trailer and the time of the defendants billed at \$30 per hour. The plaintiff issued invoice JMT-014 for a total of \$35,834.34, after crediting the defendants with \$840 with respect to their own invoice.
- [54] At the time that invoice JMT-014 was issued, the plaintiff continued to hold the balance of the defendants' deposit which totalled \$12,881.88. The plaintiff credited that amount to invoice JMT-014, leaving a balance owing of \$22,952.46.
- [55] The defendants dispute that they owe anything with respect to the JMT-014 or alternatively, that they owe all of the amounts claimed in JMT-014.
- [56] The defendants' submit that there was no prior agreement with the plaintiff to pay him for vehicle rental for his own vehicle and mileage and the defendants did not approve of this expenditure prior to implementation as required by Addendum D.

- [57] Both Janette Taylor and Gordon Bliss testified that they understood the provision regarding prior approval of expenditures in Addendum D to mean that costs that came up outside the scope of the initial spread sheet would be approved by the defendants prior to them being charged for them.
- [58] Mr. Bliss testified that the plaintiff had only charged for its fuel costs to that point. The plaintiff does not dispute that there was no agreement between the parties with respect to vehicle rental and mileage charges prior to those amounts being included on invoice JMT-014.
- [59] Janette Taylor testified that she anticipated receiving a final invoice for the Extra option #1 Kitchen Cabinets and the Chetwynd landfill. She does not dispute that the sub-trades MWatt Electric, Western Wood Heat and Proficient Plumbing rendered services as reflected in JMT-014 but takes issue with the addition of 25% to the hotel bill for Proficient Plumbing, which was not approved in advance. I note that this hotel invoice was for June 12 and 13, 2016 and it was not clear whether the defendants still had possession of the house that had previously been rented for the plaintiff's crew.
- [60] I agree with the submission of counsel for the defendants that there is no evidence of any agreement by the defendants to pay the plaintiff for mileage and private vehicle usage. Mr. Bliss acknowledged this in his testimony when he admitted that there had been no discussion with the defendants about such charges and prior to the date of that invoice, he had simply passed along his fuel charges. Although Mr. Bliss denied the suggestion in cross-examination, it appears that the vehicle use and mileage charges were added to JMT-014 in direct response to receiving the "invoice" for \$840 from the defendants for their time, mileage and trailer rental to transport the kitchen cabinets to their home.
- [61] It is clear from the evidence that the mileage and vehicle rental charges totalling \$14,678.00 were not contemplated or agreed to by the parties in the construction agreement or Addendum D and the plaintiff did not advise the defendants of his intention to charge for those items, prior to issuing JMT-014. Accordingly, those amounts were improperly charged to the defendants and are not amounts owed to the plaintiff.
- [62] The remaining costs detailed on invoice JMT-014 and totalling \$19,775.54 were properly charged to the defendants, including the hotel invoice for \$270.00 which I have concluded was incurred after the rental house was no longer available. After deduction of the remainder of the defendant's deposit, there remained an outstanding balance owing on JMT-014 of \$6,893.66.
- [63] The defendants do not dispute that they did not pay any of the amounts charged on JMT-014 and thus the balance of \$6,893.66 remains owing from the defendants to the plaintiff.
- b) Is the plaintiff entitled to a lien under the Builders Lien Act?

- [64] The Builders Lien Act specifies strict time limits with respect to filing claims of lien. Section 20 of the Builders Lien Act provides that: Time for filing claim of lien 20 (1) If a certificate of completion has been issued with respect to a contract or subcontract, the claims of lien of
- (a) the contractor or subcontractor, and
 - (b) any persons engaged by or under the contractor or subcontractor may be filed no later than 45 days after the date on which the certificate of completion was issued.
- (2) A claim of lien that is not governed by subsection (1) may be filed no later than 45 days after
- (a) the head contract has been completed, abandoned or terminated, if the owner engaged a head contractor, or
 - (b) the improvement has been completed or abandoned, if paragraph (a) does not apply.
- [65] Section 22 of the Builders Lien Act provides that: Lien extinguished if not filed as required by Act 22 A lien in respect of which a claim of lien is not filed in the manner and within the time provided in this Act is extinguished.
- [66] Counsel for the defendants submitted that there was no certificate of completion issued by the plaintiff but there is ample evidence that the plaintiff's contract was either completed, abandoned or terminated or the improvement was completed by April 2016. He submitted that the evidence of Gordon Bliss at trial was that the plaintiff had finished its role in the construction of the defendants' home by April 2016, except for deficiencies.
- [67] Mr. Bliss testified in his direct evidence that this was the last time that his crew were on site was in April 2016. During that time, the plaintiff arranged for an electrician to rewire the wall in the kitchen of the home and later arranged for a plumber to attend to troubleshoot the dishwasher and the boiler. He said that the plaintiff brought the home to lock up and the defendants then took over the interior finishing in order to save costs.
- [68] Counsel for the defendants submitted that the plaintiff was not entitled to a builders' lien in this case because it was filed out of time. He submitted that even if the plaintiff's crew remained on site and working until the end of April 2016, the last day for filing a builders' lien under s. 20 of the Builders Lien Act would have been 45 days later, on June 15, 2016. The plaintiff's builders' lien was not filed at the Land Title Office until July 11, 2016.
- [69] It was clear from the evidence of Mr. Bliss that in his view, by April 2016 the plaintiff had largely completed the construction as agreed "except for deficiencies". It appears that those "deficiencies" included problems with the operation of the Viessman boiler system and the dishwasher installed in the house. The plaintiff arranged for its sub trade, Proficient Plumbing, to do further work on site between June 12-14, 2016 and that work is the subject of Invoice #197 which is attached to JMT-014. Although the plaintiff's own employees did no further work on the house after April 2016, the plaintiff was still engaging sub-trades to do work on the defendants' home as late as June 14, 2016.

[70] In my view, this is evidence that the plaintiff did perform work after April 2016. The work done by Proficient Plumbing from June 12 to 14, 2016 appears to have been the last work undertaken by the plaintiff or any of its sub-trades. I have concluded that the plaintiff's contract was not completed, abandoned or terminated until June 14, 2016 and thus the 45 days under section 20 of the Builders Lien Act did not begin to run until June 14, 2016. Accordingly, the lien claim that was filed on July 11, 2016 was filed in time. The Defendants' Counterclaims

1. Did the plaintiff breach the construction agreement?

[71] The defendants allege in their counterclaim that the plaintiff breached the construction agreement by doing the following:

- a) Overcharging with respect to the plaintiff's labour supplied on the project;
 - b) Invoicing the defendants for amounts to which it was not entitled;
 - c) Failing to obtain the approval of the defendants for each expenditure invoiced;
 - d) Failing to construct the house in a proper and workmanlike manner; and
 - e) Failing to complete the construction by January 31, 2016. I will deal with each of these claims in turn.
- a) Overcharging with respect to the plaintiff's labour supplied on the project.

[72] As noted above, I have concluded that the proper interpretation of the words "billable rate" in Addendum D refers to the loaded cost per hour for each employee actually incurred by the plaintiff. I have also concluded that a reasonable estimate of the loaded cost of the plaintiff is the hourly rate of each employee plus 20%.

[73] Based on the hourly rates which are described in paragraph 7 of the notice to admit (Exhibit 4), this would result in hourly rates for the plaintiff's employees as follows: Employee Name Paid Hourly Rate Loaded Hourly Rate Loaded Hourly Rate + 25% Garth Prince \$30.00 \$36.00 \$45.00 Garth Prince \$31.00 \$36.20 \$45.25 Calvin Antoine \$21.00 \$25.20 \$31.50 Calvin Antoine \$23.00 \$27.60 \$34.50 Willie Pete \$17.00 \$20.40 \$25.50 Merle \$21.50 \$25.80 \$32.25 Shawn \$15.00 \$18.00 \$22.50 Earl \$30.00 \$36.00 \$45.00 Tyler \$30.00 \$36.00 \$45.00

[74] It is clear from the evidence before me that, contrary to the provisions of the construction agreement and specifically Addendum D, the plaintiff charged the defendants for labour at the same rate as in the fixed price contract rather than at the "cost plus 25%" rate to which he had agreed. The defendants have therefore established that the plaintiff breached the construction agreement by overcharging the defendants for labour costs on invoices JMT-003 to JMT-013 inclusive. The amount by which the defendants were overcharged has been calculated with reference to the hours and rates charged in those invoices as follows: Invoice # Description of Labour Plaintiff's cost Defendants' charged Difference 3 Garth 80 hours @ \$45 \$3,600.00 \$6,000.00 \$2,400.00 Tyler 50 hours @ \$45 \$2,250.00 \$3,750.00 \$1,500.00

Calvin 77 hours @ \$31.50 \$2,425.50 \$3,965.50 \$1,540.00 Willie 82.50 hours @ \$25.50 \$2,103.75 \$3,506.25 \$1,402.50 GST @ 5% \$ 518.94 4 Garth 74 hours @ \$45 \$3,330.00 \$5,550.00 \$2,220.00 Tyler 74 hours @ \$45 \$3,330.00 \$5,550.00 \$2,220.00 Calvin 74 hours @ \$31.50 \$2,331.00 \$3,811.00 \$1,480.00 Willie 74 hours @ \$25.50 \$1,887.00 \$3,145.00 \$1,258.00 GST @ 5% \$ 543.90 5 Garth 90.5 hours @ \$45 \$4,072.50 \$6,787.50 \$2,715.00 Tyler 90.5 hours @ \$45 \$4,072.50 \$6,787.50 \$2,715.00 Calvin 90.5 hours @ \$31.50 \$2,850.75 \$4,660.75 \$1,810.00 Willie 90.5 hours @ \$25.50 \$2,307.75 \$3,846.25 \$1,538.50 GST @ 5% \$ 665.09 6 Garth 80 hours @ \$45 \$3,600.00 \$6,000.00 \$2,400.00 Tyler 74.5 hours @ \$45 \$3,352.50 \$5,587.50 \$2,235.00 Calvin 82.5 hours @ \$31.50 \$2,598.75 \$4,248.75 \$1,650.00 Willie 82 hours @ \$25.50 \$2,091.00 \$3,485.00 \$1,394.00 GST @ 5% \$ 582.11 7 Garth 14.5 hours @ \$45 \$ 652.50 \$1,087.50 \$ 435.00 Tyler 30.5 hours @ \$45 \$1,372.50 \$2,287.50 \$ 915.00 Calvin 30.5 hours @ \$31.50 \$ 960.75 \$1,570.75 \$ 610.00 Willie 30.5 hours @ \$25.50 \$ 777.75 \$1,296.75 \$ 519.00 GST @ 5% \$ 188.18 9 Garth 74 hours @ \$45.25 \$3,328.50 \$5,735.00 \$2,406.50 Tyler 82 hours @ \$45 \$3,690.00 \$6,150.00 \$2,460.00 Calvin 82 hours @ \$34.50 \$2,829.00 \$4,715.00 \$1,886.00 Willie 82 hours @ \$25.50 \$2,091.00 \$3,485.00 \$1,394.00 GST @ 5% \$ 596.93 10 Garth 69 hours @ \$45.25 \$3,122.25 \$5,347.50 \$2,225.25 Tyler 59.5 hours @ \$45 \$2,677.50 \$4,462.50 \$1,785.00 Calvin 74 hours @ \$34.50 \$2,553.00 \$4,255.00 \$1,702.00 Willie 35.5 hours @ \$25.50 \$ 905.25 \$1,508.75 \$ 603.50 Merle 20.5 hours @ \$32.25 \$ 661.13 \$1,101.88 \$ 440.75 GST @ 5% \$ 495.96 11 Garth 69 hours \$ 45.25 \$3,122.25 \$5,347.50 \$2,225.25 Tyler 90.5 hours @ \$45 \$4,072.50 \$6,787.50 \$2,715.00 Calvin 122.5 hours @ \$34.50 \$4,226.25 \$7,043.75 \$2,817.50 Willie 37 hours @ \$25.50 \$ 943.50 \$1,572.50 \$ 629.00 GST @ 5% \$ 618.23 12 Tyler 57.5 hours @ \$45 \$2,587.50 \$4,312.50 \$1,725.00 Calvin 57.5 hours @ \$34.50 \$1,983.75 \$3,306.25 \$1,322.50 GST @ 5% \$ 228.56 13 Tyler 29 hours @ \$45 \$1,305.00 \$2,175.00 \$ 870.00 Shawn 29 hours @ \$29 \$ 849.00 \$1,087.50 \$ 238.50 GST @ 5% \$ 107.70 Sub-total \$90,913.88 \$151,316.63 \$60,402.75 GST total \$ 4,555.60 \$ 9,929.86 \$ 5,374.26 GRAND TOTAL \$95,469.48 \$161,246.49 \$65,777.01

[75] Based on these calculations, I am satisfied that the defendants have established that the plaintiff breached the construction agreement by over charging for labour by a total of \$65,777.01.

b) Invoicing the defendants for amounts to which it was not entitled

[76] The defendants claim that the plaintiff invoiced them for amounts to which it was not entitled, which included the following: Misc. purchases of tools retained \$1,630.21 PST \$6,265.98 25% markup on rentals \$ 450.00 Overcharge on JMT-010 \$ 981.75

[77] Some of these claims are accepted by the plaintiff, who admitted that they were charged to the defendants in error. The plaintiff admits that some of the tool purchases should not have been charged to the defendants, including the 10" blade, the tacker/nailer, toques, a power bar and a heater. Those purchases total \$1103.81 which includes PST of \$72.21. The plaintiff concedes that this amount should not have been charged to the defendants. The plaintiff also concedes that it issued a revised invoice JMT-010 to the defendants which reflected a reduction of \$981.75 but deducted payment of the amount of the original invoice from the deposit monies in error. The plaintiff does not dispute that the defendants are entitled to

\$981.75 with respect to this overpayment.

- [78] The plaintiff takes issue with some of the other tool/equipment purchases challenged by the defendants and submits that the remaining items were "single use" purchases that were used in the construction of the defendants' home and then disposed of as they were no longer usable. This evidence was not disputed by the defendants. I accept the evidence of Mr. Bliss on this issue that the remaining tool/equipment purchases were legitimate "materials" purchases on the construction agreement and were properly charged to the defendants.
- [79] The defendants submit that the plaintiff was not entitled to charge PST on the invoices that the plaintiff received from the sub-trades. The defendants rely on the British Columbia Provincial Sales Tax (PST) Bulletin #PST 501 as revised on December 2017. That bulletin provides that a contractor must pay PST on taxable goods acquired to fulfill a contract but does not charge customers PST.
- [80] Mr. Bliss testified that he simply passed along the PST cost that he had incurred on the invoices from the sub-trades. He testified that he broke out the PST portion on his own invoices in order to reflect that the 25% mark up was not being charged on the PST portion of the invoice.
- [81] It is not clear to me on the evidence that the plaintiff was improperly "charging" PST to the defendants. His various invoices to the defendants separated out the PST portion that was reflected on the invoices from suppliers and sub-trades. The invoices show the "PST on invoices" as part of a detailed breakdown of construction costs. There is no evidence that the plaintiff then collected PST on the invoices rendered to the defendants or that it sought to remit to the provincial government any PST collected.
- [82] The invoices received by the plaintiff from suppliers and sub-trades were costs incurred by the plaintiff and the total amounts of those invoices, including the PST, seem to have been passed on to the defendants as a "cost" incurred by the plaintiff rather than a tax added to and collected by the plaintiff. Counsel for the defendants held a different view and submitted that the inclusion of the PST on the invoice showed that plaintiff did indeed charge PST to the defendants contrary to the bulletin. The evidence at trial on this issue is insufficient for me to find on the balance of probabilities that the plaintiff improperly invoiced the defendants with respect to the PST costs, and thus the defendants have failed to discharge their burden of proof with respect to this claim.
- [83] With respect to the 25% mark up on rentals, as previously noted, I have concluded that the word "materials" should be given a wide interpretation and that interpretation is sufficient to encompass the equipment rentals, which were costs incurred by the plaintiff on the construction of the defendants' home. There is no evidence that the plaintiff did not incur this cost and the defendants have failed to establish that this amount was improperly charged to them.
- c) Failing to obtain the prior approval of the defendants for each expenditure invoiced

- [84] As I have previously noted, Addendum D contained the following provision: Further it is agreed between both parties that all expenditures must have the approval of both HG Bliss Projects Inc. and Marcus and Janette Taylor before being implemented. If there is a disagreement, then all work will cease until the matter is resolved.
- [85] The defendants submit that the following expenditures were not approved prior to being implemented and therefore they should not have been charged for these amounts: Truck & heater rental costs \$3,501.11 Unapproved plumbing costs \$1,300.00 Unapproved electrical expenses \$1,174.81 LED downlights not used \$ 480.00 HVAC 25% mark up on living out Allowance \$ 866.25 Drywallers hotel stay \$3,231.70 Painter costs & hotel stay \$3,396.26 Unapproved grocery expenses \$1,624.45
- [86] As I understand their position, the defendants do not dispute that the plaintiff incurred these expenditures and that they received the benefit of the services or products that were invoiced to them, with the exception of the LED downlights and unapproved grocery expenses. Their submission is simply that they did not specifically pre-approve those expenses.
- [87] It is also not disputed by the defendants that, despite the provision for prior approval in Addendum D, virtually no prior approval was sought for any of the expenditures incurred by the plaintiff and the defendants did not dispute most of those expenses until well after the plaintiff completed, abandoned or terminated the construction project.
- [88] Janette Taylor's evidence was that the requirement for prior approval of expenditures only applied to those expenses outside the initial spread sheet prepared by the plaintiff. I note that the initial spreadsheet which was Exhibit 2 contained only general categories for construction costs, rather than specific details of expenditures. Thus it was not clear to me how the parties would be able to determine which of the specific expenditures fell outside the initial spreadsheet.
- [89] Ms. Taylor's evidence was that even when she objected to invoices, she still paid them because the payments from the insurance company were tied to the draws. She said that she could not risk a disagreement with the plaintiff and having work cease on the construction site. She testified that she paid all of the expenses, including those that were not approved in advance, in order to keep the project going.
- [90] The contract provision on which the defendants seek to rely required that both the plaintiff and the defendants approve of expenditures prior to their implementation. By their own admission, the defendants did not insist on pre-approval of the expenditures that were provided for in Exhibit 2 and they paid the invoices that were submitted to them without objection because they did not want work to cease, which was the remedy provided for in Addendum D if the parties did not agree. The defendants were also concerned with the time frame for completion of the project and the additional costs they were incurring with respect to their house rental. In light of that evidence, it difficult to accept that the defendants would have insisted upon pre-approval for all expenses and run the risk that all

work would cease on the project.

- [91] I note that in the email correspondence leading up to the execution of Addendum D, the plaintiff rejected an amendment proposed by the defendants that they would review and approve any additional expenses prior to them being incurred and that the expenditures would be capped at a total of \$535,000. On September 12, 2015, Janette Taylor emailed the plaintiff and said: Can we just include something in there that states we shall be consulted and have a say regarding expenditures? I believe the same spirit of cooperation and that's the most important thing in the end. We will let you do you (sic.) job and try not to interfere with anyone doing theres (sic.)
- [92] Gordon Bliss responded by email on September 13, 2015 with the following message: Yes we can and I will work on that, as long as we both agree we are not lawyers and wording may not be "legal mumble jumble" but agree in principle.
- [93] Ms. Taylor responded later that same day: Perfect! Agreed, thanks
- [94] From a very early stage in the construction, the plaintiff charged expenses to the defendants that were not approved by the defendants prior to being incurred. While the defendants monitored closely the expenses for which they were being invoiced, there was no objection raised by them to the amounts invoiced on the basis that the plaintiff failed to obtain their pre-approval, with the exception of some of the hotel expenses.
- [95] The defendants permitted the plaintiff to proceed with the project and invoice the defendants for expenses for which prior approval was not sought, without any objection to those invoices at the time they were issued. While they take issue with many of those expenses now, at the time the defendants made a deliberate choice not to object to the expenses because they did not want the construction to cease while the parties attempted to reach an agreement about those expenses, as set out in Addendum D.
- [96] In my view, the defendants are now estopped from challenging those expenditures on the grounds that the plaintiff's failed to obtain their pre-approval. Their failure to object to those expenditures at the time caused the plaintiff to continue to incur expenditures on the construction project that it would not have incurred, had it known of the defendants' objections.
- [97] That does not, however, preclude the defendants from their claims against the plaintiff with respect to the quality of the work, incurring hotel costs when the rental house was available or the failure of the plaintiff to properly account for materials or monies provided by the defendants. I will deal with each of the plaintiff's claims in this regard.
- (i) Painter costs
- [98] There is a dispute between the parties as to whether the painter "back rolled" the ceiling as claimed in invoice JMT-012. The plaintiff relies on the invoice in which the painter, Linda's Showcase by Design Ltd., charged \$1500.00 for "labour to roll the ceiling". The evidence of

Janette Taylor was that she had learned about potential problems with respect to the ceiling finish and she found a product that was recommended to be rolled onto the ceiling rather than sprayed. Ms. Taylor said that she specifically requested that the ceiling finish be rolled and she did not believe the ceiling had been rolled because the ceiling finish was of poor quality. The evidence of Steve Haab was that it was obvious to him that the ceiling had been sprayed rather than rolled.

- [99] I note that Mr. Haab was not qualified as an expert witness and thus his opinion with respect to the ceiling finish was not admissible evidence. It is not clear whether the painter did in fact roll the ceiling but did a poor job or whether she did not roll the ceiling at all. It would have been helpful to hear testimony from the painter herself on this issue.
- [100] I am able to conclude on the evidence before me that the work done by the painter was not adequate and required remediation. This was not included in the deficiencies work completed by Steve Haab at the expense of the plaintiff. This deficiency should have been remediated by the plaintiff. Accordingly the painter charges for labor to roll the ceiling should be reduced by half or \$975.00. (ii) Uncredited electrical down payment and LED downlights
- [101] The defendants allege that the electrical down payment of \$5,386.34 was not properly credited towards the electrical costs for the construction project. They rely on the invoice #1026 from MWatt Electric Inc. that simply shows "down payment as per quote" of \$5,386.34. The defendants also allege that they were improperly charged for LED downlights that were not installed in their home and were returned because they were surplus to requirements. The defendants submit that they themselves had purchased the LED lights that were installed in their home and they should be credited for the LED lights that were not used.
- [102] I accept the evidence of Michael Whitecotton of MWatt Electric Inc. that he received the down payment of \$5,386.34 and he applied that down payment to the cost of materials for the project. While the invoice from MWatt Electric lacks any particularity with respect to how the down payment was allocated, Mr. Whitecotton's evidence was that the down payment amount was credited towards the electrical costs and materials incurred on the project and this evidence was not seriously challenged on cross-examination.
- [103] With respect to the LED downlights, however, I prefer the evidence of Janette Taylor that she purchased the LED downlights and provided them to Mr. Whitecotton. Ms. Taylor sent an email to the plaintiff about this issue at the same time as this occurred, which supports her recollection of events. The evidence of Mr. Whitecotton did not necessarily contradict Ms. Taylor, as he simply said that he could not recall any discussion about returning the lights. The defendants are entitled to \$480.00 with respect to the LED downlights that were purchased but not used in the defendants' home. (iii) Plumbing invoice

- [104] The defendants allege that the invoice #153 from Proficient Plumbing for \$1000, included in the plaintiff's invoice #JMT-010 was an expenditure that should not have been charged to the defendants. The defendants submit that the invoice is not particularized in any way and it is not possible to determine whether it is a proper expense.
- [105] Under cross-examination, Gordon Bliss admitted that it is not possible to tell from the invoice to what work it relates. The plaintiff conceded that this invoice should not have been passed on to the defendants because Proficient Plumbing billed for a job that was not adequately completed. Therefore, the amount of this invoice, \$1000 plus 25% mark up and 5% GST, for a total of \$1300 should be refunded to the defendants. (iv) Hotel expenses
- [106] The question of hotel expenses incurred by the sub-trades and charged to the defendants must be analyzed in the context of the construction agreement. It was an expressed or implied term of the construction agreement that the labourers and sub-trades hired by the plaintiff would travel to Hudson's Hope from Prince George and would have to live out during their work on the project. In order to ensure that the workers were housed close to the building site, the defendants agreed with the plaintiff to rent a house to accommodate anyone who was working on the project. The evidence of Janette Taylor was that she discussed this with Mr. Bliss and the parties all agreed that this would be a cost effective solution to ensure that the workers would be properly housed in close proximity to the construction site during the project. The defendants also proposed that they would cook and provide evening meals to the occupants of the rental house who were working on the construction project but that breakfast and lunch would be the responsibility of the workers.
- [107] The plaintiff does not dispute that the parties agreed that its own crew would stay in the rental house while working on the construction project and there is no dispute that the plaintiff's employees did just that. It is also not disputed that the plaintiff knew that the defendants had taken steps to rent the house and provide evening meals at the time that he engaged the sub-trades to work on this project. Mr. Bliss signed the residential tenancy agreement with respect to the rental house. He acknowledged on cross-examination that it was reasonable to tell the defendants if there was a sub trade who refused to stay at the rental house while working on the project but said that it was difficult to find sub-trades willing to travel to the area to work on the defendants' project unless they were able to stay in a hotel in Hudson's Hope, due to the remoteness of the defendants' property. Mr. Bliss acknowledged that he did not advise the defendants about sub-trades who refused to stay in the rental house when it was vacant because he was focussed on "getting the project done".
- [108] I agree with the submission of counsel for the defendants that the plaintiff should have advised the defendants of its intention to house the sub-trades in a hotel in these circumstances. The plaintiff was fully aware of the defendant's concerns about costs and their specific efforts to minimize costs by providing accommodation. In his email correspondence of September 9, 2015, Mr. Bliss wrote with respect to his employees and the sub-trades signing the addendum to the residential tenancy agreement for the rental

house and indicated that his sub-trades usually rented motel rooms but he was not worried as he had previously worked out of town with those sub-trades and knew that it would "not be a problem". If there was a concern that a particular sub trade would not work on the project unless permitted to stay in a hotel, the defendants should have been advised of that concern in advance and given the option of approving the hotel expense or asking the plaintiff to find a different sub trade to work on the project.

- [109] Having said that, I also accept the evidence that the plaintiff experienced difficulties finding sub-trades willing to travel to Hudson's Hope in the winter months to work on the defendants' project and he was concerned with getting the project completed in a timely fashion, particularly given the defendants' concerns with the pace of construction and the need for work to continue on the project without interruption.
- [110] There is no suggestion that the hotel costs were not in fact incurred by the sub-trades for the purpose of working on the defendants' home or that those costs are otherwise unreasonable. In these circumstances, the hotel expenses invoiced to the defendants in JMT-006, 010, 011, 012, and 013 are costs properly billed to the defendants by the plaintiff.
- [111] However, it is not reasonable for it to charge the 25% mark up on those hotel expenses or living out expenses for the HVAC crew, plumber, or painter, given his prior assurances regarding use of the rental house by the sub-trades. It is also not reasonable for the plaintiff to charge the defendants for additional grocery expenses contrary to terms of the construction agreement. The defendants are therefore entitled to the following amounts that were improperly charged to them: HVAC/Boiler System crew 25% mark up on hotel stays \$866.25 Drywall crew 25% mark up on hotel costs \$807.93 Painter 25% mark up on hotel costs \$262.58 Unapproved grocery expenses \$1,624.45 TOTAL \$3,561.21
- (v) Unapproved use of deposit monies
- [112] The defendants allege that the plaintiff failed to obtain their consent to apply remaining deposit monies to the final invoice. The plaintiff submits that, although Janette Taylor gave permission on at least one occasion to deduct amounts outstanding on the invoices from the deposit monies, typically the plaintiff did not ask for permission to make such deductions. The plaintiff applied deposit monies to invoices JMT 008, 009, 010, 012, 013 and 014.
- [113] I note that the defendants primarily take issue with the application of deposit monies to the final disputed invoice of the plaintiff, JMT-014. At Tab E-24 of Exhibit 6, there is an email message from Janette Taylor to Mr. Bliss dated April 13, 2016 which says: Therefore I would like to ask you to take payment for the remaining invoices from the balance of the deposit which I believe to be 29,388.65, plus the \$5,396.24 deposit made to the electrician.

- [114] At the date of this email, the defendants had already received JMT-013 dated March 31, 2016 and only one other invoice was issued after this date. Ms. Taylor's use of the words "remaining invoices" gives rise to the inference that the defendants were directing the plaintiff to apply the remaining balance of the deposit to whatever invoices remained, including JMT-013 and any other invoices issued by the plaintiff.
- [115] The "deposit" paid to the plaintiff at the commencement of the construction was actually a payment on account of work to be completed by the plaintiff and in accordance with the payment schedule in Appendix A to the construction agreement. It is not clear that the plaintiff required permission from the defendants to apply the deposit monies to the plaintiff's outstanding invoices.
- [116] Even if that were the case, on the basis of this evidence it would appear that the defendants did in fact give permission to the plaintiffs to deduct monies from the deposit to apply to the plaintiff's invoices.
- d) Failing to construct the house in a proper and workmanlike manner
- [117] The defendants claim that the plaintiff failed to construct the house in a proper and workmanlike manner and Mr. Bliss failed to act as a proper project manager by failing to spend sufficient time on site and failing to complete the project. The defendants also claim that the plaintiff failed to obtain a building permit from the regional district. The defendants claim that these breaches disentitle the plaintiff to claim the project management fee of \$37,800.00 and they seek return of this amount.
- [118] The plaintiff's evidence was that the project for which it was hired for was largely completed except for further electrical work related to moving the kitchen wall and further plumbing work related to the boiler and dishwasher installation. There were also some deficiencies identified and, after the relationship with the defendants broke down, the plaintiff hired another builder, Steven Haab of Haab Homes in Fort St. John, to remedy those deficiencies at the plaintiff's cost. Mr. Bliss testified that he managed the project from beginning to end, hired sub-trades, and was personally on site at least once per week initially and then later, every two weeks.
- [119] The testimony of Ms. Taylor with respect to this aspect of the counterclaim was that the defendants paid the project management fee to the plaintiff for Mr. Bliss to be on site and supervising the project but that he was on site very little. She described her view that the project management fee was for the plaintiff to schedule its building crew and sub-trades, review documents thoroughly and that Mr. Bliss was to be a resource for the defendants. Ms. Taylor also took issue with the plaintiff's failure to obtain a voluntary building permit and the impact of that omission on the defendant's ability to obtain a construction mortgage.

- [120] The plaintiff admitted that he did not obtain a building permit because none was required by the regional district but he denied that the defendants requested that he obtain a voluntary building permit.
- [121] With respect to the defendants' claim that the plaintiff failed to properly manage the project by being on site and supervising his crew and the sub-trades, in an email message to the plaintiff on September 8, 2015, the defendant Janette Taylor wrote to Mr. Bliss that: We want you to make a reasonable profit, understand your circumstances, and appreciate your expertise and contacts, yet we realize that you are not always going to be able to be on site to ensure work is being effectively and efficiently done or to prevent mishaps before they occur.
- [122] The defendants indicated that that Marcus Taylor would be on site for the five months during the construction "to ensure the build proceeds successfully".
- [123] It appears from this evidence that the defendants were fully aware that Mr. Bliss would not be on site all the time and they agreed to proceeding on that basis and arranged for Marcus Taylor to be on site to ensure day-to-day site supervision. Although the plaintiff acknowledges that there was an error with respect to measurements for the kitchen cabinets, the evidence fell short of establishing that this error occurred due to the plaintiff's failure to properly manage the project. There is insufficient evidence to support the defendants' claim that the plaintiff failed to properly manage the construction project because the plaintiff's principal, Gordon Bliss, was not present at the construction site more often.
- [124] I have also concluded that the evidence does not establish that the plaintiff failed to construct the house in a proper and workmanlike manner.
- [125] On the contrary, the evidence suggests that the defendants were generally happy with the quality of the construction work performed by the plaintiff. In an email message dated April 15, 2016 from Janette Taylor to the Peace River Regional District at Tab E-28 of Exhibit 6, Ms. Taylor said that: We believe that the builder we hired, HG Bliss Projects, is a reputable builder who hired only certified sub-trades who warranty their work. Furthermore, I believe that HG Bliss has, at every stage, built this house according to the building codes which I'm confident can be confirmed through pictures, plans, and a visit to the property. I have many picture (having trouble attaching them) that demonstrates the quality of workmanship at various stages
- [126] While there were some construction deficiencies at the conclusion of the plaintiff's work, the plaintiff retained the services of Haab Homes to inspect the home and remedy those deficiencies at its own expense. According to the evidence of Mr. Haab, those identified deficiencies were remedied by him. While Mr. Haab went on to identify approximately 5 or 6 other deficiencies, there was no evidence that those additional deficiencies were sufficient to suggest that the home was not constructed in a proper and workmanlike manner.

- [127] With respect to the allegation that the plaintiff failed to obtain a building permit despite being asked to do so, I prefer the evidence of Mr. Bliss that he told the defendants that a building permit was not required and there was never any discussion with the defendants about their wish to obtain a voluntary permit. Despite the extensive email communication between the plaintiff and the defendants prior to the start of construction, there is no mention by the defendants in any of the emails in evidence a trial of their wish to obtain a voluntary building permit. After construction began, the defendants were actively involved in supervising the site and thus should have been aware that there were no visits by building inspectors at any stage of the construction. It was only after the defendants discovered in April 2016 that the absence of a building permit would impact their ability to obtain financing that they raised this issue with the plaintiff. I am not satisfied that the evidence establishes on the balance of probabilities that the defendants requested that the plaintiff obtain a voluntary building permit.
- [128] The defendants have failed to establish that the plaintiff failed to construct the home in a proper and workmanlike manner.
- e) Failing to complete the construction by January 31, 2016
- [129] The defendants claim that the plaintiff breached the construction agreement by failing to complete the construction by January 31, 2016. As a result of this breach, the defendants claim that they have suffered loss due to continued payment for a rental house from February to June 2016, for a total of \$7000.
- [130] Paragraph 8 of the construction agreement provides that: the Builder agrees to construct the dwelling house and to have the said dwelling house completed on or about 31 January 2016 provided that the Builder does not guarantee the completion or possession of the dwelling house on this date if delays occur which are caused by unfavourable weather, strikes, fires, shortages of materials and/or labour, acts of God or any causes beyond the reasonable control of the Builder.
- [131] The evidence of Gordon Bliss was that the completion date in paragraph 8 of the construction agreement was simply an estimate, rather than a guaranteed completion date. I note that on the construction agreement executed on August 5, 2015 which was Exhibit "1" at trial, the word "Est." has been handwritten next to the completion date in paragraph 8, which I infer means "Estimated". That word does not appear in paragraph 8 of the August 14, 2015 construction agreement.
- [132] Gordon Bliss further testified that the building project had challenges due to the weather, including extreme cold and wind that made it difficult to work on the site. He testified that the weather conditions considerably slowed the pace of construction. Mr. Bliss also testified that the roof presented considerable challenges that became evident in December 2015 and those challenges were compounded by the unfavourable weather.

- [133] The defendant Janette Taylor denied that there were any of the exceptions referenced in paragraph 8, including delays caused by weather.
- [134] Given the location of the project and the time frame during which construction occurred, I am more inclined to accept the evidence of Gordon Bliss that unfavourable weather conditions caused or contributed to delays in completing the project. It is also clear from the first version of the construction agreement that it was in the contemplation of the parties that the January 31, 2016 completion date was only an estimate.
- [135] I also note that the construction agreement (as amended) contemplated that much of the finishing work would be completed by the defendants themselves, presumably after the plaintiff's work on the project had concluded. In an email message from the defendant Janette Taylor on March 27, 2016 at Tab E-17, the defendants made it clear that they were not prepared to move into the home until "the kitchen is built according to the plan we approved." It was not clear from the evidence how long it took to complete the defendant's finishing work or to what extent their finishing work or their decision not to move into the home while the kitchen cabinet dispute was being resolved may have impacted or added to their additional costs on their rental house.
- [136] In my view, the defendants have failed to establish on the balance of probabilities that the plaintiff breached paragraph 8 of the construction agreement by failing to complete the construction by January 31, 2016.
- f) GST Rebate
- [137] The defendants submit that they relied on the skills and expertise of the plaintiff that they would qualify for a 36% GST rebate and it was only after the fact that they discovered that they were not eligible to receive the rebate because the value of the construction was in excess of \$450,000. The defendants claim that they relied on the assurances of the plaintiff regarding the GST rebate in choosing the plaintiff as their contractor and as a result they suffered a detriment and the plaintiff was unjustly enriched. The defendants claim damages of \$10,121.59, which is the amount of the GST rebate.
- [138] The plaintiff does not dispute that he told the defendants that he believed that they would be eligible for the GST rebate. The plaintiff had previously built spec homes on lots that it owned, none of which were over \$450,000 and Mr. Bliss testified that he was unaware that there was an upper limit for qualification for the GST rebate.
- [139] I am not satisfied on the evidence that the defendants relied on representations of the plaintiff regarding the GST rebate in choosing the plaintiff as the contractor. In an email dated September 11, 2015, the defendant Janette Taylor wrote: Actually at the same time we were initially talking with you there was another builder Northern Homecraft who was also very interested, but do (sic.) to your enthusiasm, and position as past President and current Vice President, as well as your initial interest in working with us to do much of the work ourselves to keep us within our budget we felt you were the man for the job

- [140] Even if I were satisfied that the defendants relied on a representation by the plaintiff regarding the GST rebate in choosing the plaintiff as a contractor, there is no evidence that any such representation was relied on to their detriment. As counsel for the defendants pointed out in his submissions, the total cost of the construction was such that the defendants would not have been entitled to the GST rebate in any event, regardless of which contractor they chose.
- [141] While it is arguable that the representation made by plaintiff was negligent, there was no evidence at trial that the defendants suffered any loss arising from such negligence.
- [142] The defendants' claim for damages of \$10,121.29 for unjust enrichment must therefore fail.

Conclusion

- [143] The plaintiff is entitled to judgment against the defendants in the amount of \$6,893.66 with respect to the Builders Lien Act claim. The plaintiff is also entitled to interest on the judgment amount pursuant to the Court Order Interest Act.
- [144] On the counterclaim, the defendants are entitled to judgment against the plaintiff in the amount of \$74,178.78 which comprises the following amounts: Over charging for labour \$65,777.01 Tool purchases \$ 1,103.81 Overcharge on JMT-010 \$ 981.75 Painter costs \$ 975.00 LED down lights \$ 480.00 Plumbing invoice \$ 1,300.00 Markup on hotel stays \$ 1,936.76 Unapproved groceries \$ 1,624.45 TOTAL \$74,178.78 The defendants are also entitled to interest on the judgment amount pursuant to the Court Order Interest Act.
- [145] With respect to costs, the plaintiff has successfully advanced a claim for damages relating its Builders Lien Act claim and the defendants have been successful in relation to their counterclaim. The BC Court of Appeal noted in *Litt v. Gill* 2016 BCCA 288 at para. 55 that: Ordinarily, the action should be treated as if it stood alone, and the counterclaim should bear the amounts by which it increases the costs of proceedings: *Trinh v. Chan*, [1998] B.C.J. No. 720 at para. 5 (S.C.). Where a defendant successfully defends an action, but a plaintiff successfully defends a counterclaim, the usual practice is to award the defendant the costs of the action and the plaintiff the costs of the counterclaim, to be set off against each other.
- [146] In *M.A. Concrete Ltd. v. Truter*, 2016 BCCA 138 at para. 37, the court held that the trial judge erred in principle in failing to craft a costs award that took into account the defendants' success on a counterclaim. The plaintiffs had successfully advanced claims for damages relating to a breach of fiduciary duty, while the defendants successfully advanced a counterclaim. The trial judge considered the case to be an appropriate one for apportionment of costs under Rule 14-1(15), awarding the corporate plaintiff 75% of its costs in the main action, and no costs to the defendants on the counterclaim. The Court of Appeal left the costs award in the main action intact, but awarded the defendants 75% of their costs on the counterclaim.

- [147] Subject to the parties making further submissions on the issues of costs, it is my view that this is an appropriate case in which to apportion costs pursuant to Rule 14-1(15) of the Supreme Court Civil Rules.
- [148] The parties may schedule a further hearing before me on the issue of costs within 30 days of this judgment, failing which the plaintiff shall have 65% of its costs in the main action and the defendants shall have 75% of their costs on the counterclaim. In each case, costs shall be at Scale B. "The Honourable Madam Justice Church"

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Prepared on 27 October 2026 · Esheria