

CANADA / JUDGMENT

Highridge Homes Ltd. v. de Boer

2021 BCSC 1112

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 1112 Highridge Homes Ltd. v. de Boer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Highridge Homes Ltd. v. de Boer,

2021 BCSC 1112

Date: 20210609

Docket: S53879

Registry: Vernon

Between:

Highridge Homes Ltd.

Plaintiff

And

Vanessa Marilyn de Boer and Dirk Johannes de Boer

Defendants

And

Highridge Homes Ltd. and Tusk Contracting Ltd.

Defendants by Counterclaim

Before: The Honourable Mr. Justice Wilson

Reasons for Judgment

Counsel for the Plaintiff:

J.C. Boschert

Counsel for the Defendants:

C.T. Hart

Place and Date of Trial/Hearing:

Kelowna, B.C.

April 26, 27 and 29, 2021

Place and Date of Judgment:

Kelowna, B.C.

June 9, 2021

- [1] This is a construction dispute. The defendants retained the plaintiff Highridge Homes Ltd. ("Highridge") to build a custom home at the Predator Ridge Golf Course development in Vernon, BC. The parties entered into a written 'cost-plus' construction contract dated February 27, 2016.
- [2] Work commenced shortly thereafter with the excavation, which cost more than expected. Construction of the house proper then started. The defendant by counterclaim Tusk Contracting Ltd. ("Tusk") was retained to build some rock walls. Tusk has the same owners and directors as the plaintiff, Mr. Ron Glinsbockel and Mr. Mark Wensley.
- [3] The plaintiff's first invoice, in the amount of \$97,800.59, was paid promptly and in full. The defendants took issue with the second invoice, however. The second invoice, dated July 29, 2016, was in the amount of \$262,253.84, and it included an invoice from Tusk in the amount of \$30,095.63. The defendants demanded a face to face meeting to discuss the Tusk invoice. However, they paid the remainder of the second invoice in full, except for the Tusk invoice, before the meeting.
- [4] The meeting took place on August 12, 2016. It was brief. Words were exchanged, voices were raised, tempers flared, doors were slammed, and the relationship ended. The meeting lasted no more than ten minutes.
- [5] Highridge issued a third and final invoice to the defendants on September 8, 2016. The third invoice included work that had been done by subcontractors up to August 12, 2016. It also included a new version of the disputed Tusk invoice, rewritten to add \$15,000 for fill that the plaintiff had previously said would be free, plus an additional Tusk invoice. The defendants take issue with the third Highridge invoice generally, not limited to the Tusk invoices.
- [6] The plaintiff seeks payment of the third invoice, the profit it claims it would have made on the remainder of the job based on the percentage in the cost-plus contract, and contractual interest at 12% pursuant to the terms of the contract.

- [7] The defendants deny liability for the majority of the third invoice. They say the evidence does not support several of the items billed and that the Court should be skeptical about the plaintiff's claims generally, especially given that they caused Tusk to reissue its bill for an additional \$15,000 for the free fill.
- [8] The defendants incurred costs to have another contractor take over the project, and they seek compensation for those expenses.
- [9] The questions that must be answered in this case are:
1. What are the terms of the contract?
 2. Which party terminated the contract?
 3. What are the consequences of the termination of the contract?
 4. How much is owed to the plaintiff?
 5. Do the defendants have a claim for damages or for set-off?
- [10] I will address each of these questions below.

Procedural matters

- [11] Shortly after the third invoice, the plaintiff filed a claim of builders lien against the property. The parties agreed that the defendants would post security in substitution for the claim of lien, and the substitute security remains in place by way of deposit in a solicitor's trust account. No issue is taken with the validity of the claim of lien or with regard to any matters pertaining to it -- if the plaintiff obtains judgment in this matter, it will be paid from the funds in trust.
- [12] This matter was originally set for a ten-day trial. Instead of proceeding by conventional trial, the parties agreed to use what is sometimes referred to as a hybrid trial process. The direct evidence of all witnesses was provided by way of affidavit. Counsel for the plaintiff took the Court through the highlights of the affidavits filed on behalf of the plaintiff, and then each of the witnesses was cross-examined by counsel for the defendants. The defendants' counsel then presented his case in the same manner -- he took the Court through certain aspects of the affidavits, and then the witnesses were called for cross-examination.
- [13] When the parties originally decided to go to a hybrid trial process, the time estimate was reduced from the original ten days to a five-day estimate. However, the trial completed in three days.

- [14] Hybrid trials may not be appropriate in all circumstances. For example, the Court found the hybrid trial process to be somewhat problematic in the context of a relocation claim in a family law proceeding: B.M.G. v. S.J.S., 2018 BCSC 967. However, I found the process to be very efficient in this case. The evidence was focused on the matters in issue, with no time wasted on trivial or inconsequential matters.
- [15] While a hybrid trial will not be suitable in all circumstances, it worked well in this case, likely due to both the nature of the dispute and also the cooperation between counsel which was self-evident, for which both are to be commended.

What are the terms of the Building Contract?

- [16] The parties negotiated a written contract prior to commencing work. The plaintiff provided its standard form of contract to the defendants who reviewed it and made some changes to the wording. Of significance in this dispute is the change made to paragraph 2.4 of the building contract, and the extent to which the phrase "as previously agreed and authorized by the owner" impacts upon the general interpretation of the contract. The building contract was entered into on February 27, 2016 ("Building Contract").
- [17] There were two other documents attached to the Building Contract. First, a document entitled "Construction Specifications List", a six-page document that summarized the responsibilities of the parties, was incorporated by virtue of the following term:

This specifications list is hereby incorporated into and forms part of the building contract dated 27 day of February 2016.

- [18] The third document was a Cost Estimate Sheet, a two-page document that listed the various components of the construction project and assigned a dollar figure to each. The Cost Estimate Sheet is referenced in the Construction Specifications List by the following:

Note: see attached cost estimate sheet for estimated budgets

- [19] I conclude that the Construction Specifications List and the Cost Estimate Sheet are incorporated by reference into the Building Contract.
- [20] The material terms of the Building Contract for the purposes of this litigation are as follow:
2. CONSTRUCTION PRICE
- 2.1 The Owner hereby retains the Builder and the Builder hereby agrees to construct the House on the Lot, in accordance with the Plans and Specifications and to carry out the Work at a price equal to the Builder's Cost plus 10% (the "Price"). The Price does not include GST.
- 2.2 The Owner will pay to the Builder GST in addition to the Price and such GST shall be payable on and at such time as the instalments set out in section 5.1 herein.

...

2.4 Notwithstanding any other provision of this Agreement, the Owner acknowledges and agrees that all costs and expenses, as previously agreed and authorized by the Owner, relating to the Work and the construction of the House shall be for the account of the Owner. The Builder shall not be responsible or liable for any such costs or expenses unless expressly provided for in this Agreement. Without limiting the foregoing, the Owner acknowledges and agrees that it will pay for all permits, utility connections and surveyor's certificates, and will also pay all property taxes and utility charges relating to the Lot during construction of the House, as previously agreed and authorized. [emphasis added]

...

3. CONSTRUCTION STANDARDS/WARRANTY

3.1 The Builder will perform or cause to be performed the Work in a good, substantial, and workmanlike manner according to Building Code Standards and other standards and practices currently in use in the British Columbia construction industry, and in accordance with all conditions specified in any permits issued for the Work.

3.2 The Builder shall employ sub-trades other than the Builder to complete any portion of the Work, in determining the terms under which such part of the Work is to be completed, and in determining the scope of such Work to be completed. The Builder shall not be required to put any portion of the Work out to bid.

...

5. PAYMENT OF PURCHASE PRICE

5.1 The Price will be paid by the Owner to the Builder as follows:

- a) The Owner will make an initial deposit in the amount of \$50,568.00 (5% of total estimated cost plus management fee plus GST) upon the execution of this Agreement.
- b) The Builder will invoice the Owner monthly during the course of the Work, with the invoiced amount being calculated in accordance with section 2.1 in respect of the portion of the Work performed to the invoice cut-off date.
- c) All monies will be paid by bank draft to Davidson Pringle Lawyers in trust. Lawyers will execute a Title Search prior to forwarding any funds to Highridge Homes Ltd. to ensure the property is free of any liens.

5.2 The Owner agrees to pay interest at a rate of 12% per annum on any part of the Price that is not paid within 30 days of the invoice date. The Builder may waive this condition from time to time.

5.3 If the Owner fails to make any payment to the Builder at the times and in the manner provided in this Agreement, or if the Owner defaults in any of the other covenants or agreements herein, the Builder may at its option cease work until such payment is made or such default is remedied. If such payment is not made or such default of the Owner is not remedied within 30

days of the Builder ceasing work, the Builder may terminate this Agreement. If this Agreement is terminated in accordance with this section 5.3, the Owner will be and remain liable to the Builder for all work performed in accordance with section 2.1 of this Agreement to the date of termination, plus the Builder's lost profit together with interest thereon at the rate of 12% per annum, plus GST in accordance with section 2.2. The Builder may retain, as partial payment on account of the amounts owing to it pursuant to this section 5.3, all amounts paid by the Owner to the Builder on account of this Agreement, including but not limited to the Deposit.

...

7. OWNER'S RIGHT TO TERMINATE

7.2 If the Builder neglects to prosecute the Work in a diligent and workmanlike manner or otherwise fails to comply with any of his covenants or obligations herein contained, the Owner may notify the Builder in writing that it is in default of its contractual obligations (the "Default Notice") and instruct the Builder to correct the default within thirty (30) days of receipt of the Default Notice. If the Builder fails to correct the default specified in the Default Notice within the said thirty (30) day period, the Owner may, without prejudice to any other right or remedy he might have, terminate this Agreement by notice in writing to the Builder, such notice to be effective on receipt by the Builder.

[21] The defendants' evidence was that the budget was a concern for them, and they were keen to stay within the \$860,000 that had been estimated for the construction. The proposed changes to paragraph 2.4 in the Building Contract were prepared by Ms. de Boer for that purpose. For the plaintiff's part, it does not dispute that the defendants were concerned about the budget, and Mr. Glinsbockel agreed during cross-examination that if the plaintiff learned in advance that the budget was going to be exceeded, the defendants' approval was required.

[22] On May 29, 2016, Mr. de Boer sent an email to the plaintiff that included the following:

I need to stay on budget, if my cost exceeds my budget, (within the 15%) I will need to be notified.

[23] The defendants argue that the Cost Estimate Sheet has contractual effect. They refer to Patel v. W.G. Housing Ltd. (c.o.b. City Core Developments Ltd.), 2012 ABQB 734. In that case, an estimate that had been provided by the builder was found to have contractual effect and that the actual prices charged were bound by what was reasonable in the circumstances, which the Court considered was a range of plus or minus five percent:

113 Price was important to Patel but was not his reason for selecting City Core. When signing the PMA Patel located the amount of the Estimate he was asked to sign off on. It was less than the earlier quote from Gambell. He signed, therefore I find that he placed a degree of reliance on the Estimate. However, it cannot be said that he relied solely on the Estimate in deciding to contract with City Core. All that can be concluded is that the amount of the final Estimate did not become a reason for Patel to not enter the contract. I do not know whether Patel would still have signed if, for example, the Estimate was higher.

114 Here the PMA provided for City Core's fee to be a percentage of the project, City Core paid for materials and labour and then billed Patel on a regular basis for work done, City Core made it clear it was not assuming risk of cost overruns not contemplated by the Estimate, and City Core provided cost options to Patel then let him choose. Further, cost control and total cost were important to Patel; he communicated that to City Core. Therefore he knew throughout he was at risk for cost overruns and that this is not a fixed price arrangement. When considering these factors together, on balance, the PMA is a cost-plus arrangement.

115 Nevertheless the Estimate is not superfluous to the PMA; the parties agreed to include it in the PMA for a reason. Further, the inclusion of a process for approving extras before they would be constructed and increase the total cost implies that there was to be a degree of certainty around the Estimate. As this court previously said: "[m]erely because a contract is cost plus, the party doing the work is not excused from using due diligence in carrying out the work": Husky Oil Operations Ltd. at para 118. Further, albeit in the context of an oral not written contract, the Ontario court said in Topsiders Construction Ltd., at para 64: "[t]he contractor cannot reasonably assert the position that as long as it is a cost-plus contract then all its costs, as long as they are documented, are legitimate and the customer's budget is really not of much concern."

116 As a cost-plus type of arrangement, these parties agreed that City Core would not be at risk of loss on the project if, for reasons outside its control and all other things being equal, final costs exceeded the Estimate. For example, whatever Patel decided for the interior finishes and design choices, City Core would endeavour to accommodate. But if no changes were made to the scope of the project, and Patel made his design and finishing decisions within the parameters of the PMA (e.g. within its time line and its price allowances in the Specs), then the final cost was to come in at or near the Estimate.

117 That is what the parties agreed to by inclusion of the Estimate in the PMA. Thus, subject to some bounds of reasonableness for the unforeseen and for the uncontrollable, the final costs would come in near the Estimate for the project scope described in the PMA. The Saskatchewan Court of Queen's Bench put it this way in Bornhorst Welding Ltd., at paras 12 and 13:

It is a common practice to provide estimates of future costs when negotiating a variety of commercial transactions. The recipient relies upon the represented cost and it forms the basis of the eventual contract. It is only right that such reliance obtain a degree of enforcement.

However, it must also be recognized that an estimate normally will not be elevated to a guarantee. Rather, it is a reasoned and considered representation of anticipated cost, the exact amount of which remains to be ascertained upon completion of the contract. However, that final price must bear a reasonable relation to that which was estimated. There will be room for error, but the variance must meet a test of reasonableness. [citations omitted]

118 The bounds of reasonableness will be circumstance specific. In this case, I consider a range of plus or minus 5% to be reasonable. This case involved a larger project, not of a unique nature, involving many different cost inputs, where each was reasonably ascertainable. Greater care into estimating accuracy is expected as the amounts at stake increase, militating in favour of a

narrower band of variance. The more unique the subject matter of the project, the less experience the estimator will have from which to expect accuracy, militating in favour of a wider band of variance. For a project comprising numerous input costs, the expected variability in each input offset each other to a degree. In such cases the total variability, or range of reasonableness, is therefore narrower than for a project with only a few or just one cost determiner.

- [24] The plaintiff argues that the nature of the Building Contract did not change from a cost-plus contract notwithstanding the changes in the wording and points to Mr. Glinsbockel's evidence, which was acknowledged by the de Boers, that the defendants could spend as much as they wanted and that purchasing decisions were entirely up to the defendants as the homeowners. It says that the reason to include the revisions to paragraph 2.4 was to ensure that the defendants knew the status of the project from a cost perspective so that they could make appropriate adjustments to arrange for their financing.
- [25] The defendants during cross-examination of Mr. Glinsbockel suggested that the plaintiff could not exceed fifteen percent more than the Cost Estimate Sheet without approval. While Mr. Glinsbockel's evidence was that the owners can always spend more, he did agree that on occasion it would result in them spending less -- an example was provided because the torch-on asphalt roof resulted in a reduction in the cost when compared to the original metal roof design.

Discussion

- [26] I do not accept the plaintiff's argument that its sole obligation was to keep the defendants informed for financial planning purposes. The term "as previously agreed and authorized by the owner" implies something more than simply receiving information. By including that phrase, the parties had agreed that there would be a discussion if costs were going to exceed the budget.
- [27] However, I do not accept that the underlying nature of the cost-plus contract was changed in any material way as a result of the amendment to paragraph 2.4. I accept Mr. Glinsbockel's evidence that the defendants were ostensibly free to spend however much they wanted on their home, but that the Cost Estimate Sheet represented a reasonable approximation or estimate to build the house.
- [28] A cost-plus contract puts the risk of the cost overages on the owner. A fixed-price contract, on the other hand, places more of those risks on the builder. This remained a cost-plus contract.
- [29] The wording of section 2.4 of the Building Contract obligated the plaintiff to engage in a discussion with the defendants if the budget was going to be exceeded to any significant degree, but it did not change the allocation of risk regarding costs. The parties had a cost-plus contract, but the defendants were entitled to be kept informed about costs such that they could make changes if they so chose.

Who terminated the Building Contract?

- [30] The question of which party terminated the Building Contract is important because of the remedies that each seeks. Each party says the Building Contract was terminated by the other.
- [31] The plaintiff seeks damages for the profit, or management fees, it would have made over the remaining duration of the Building Contract but for what it argues was the defendants' wrongful termination.
- [32] The defendants say that the plaintiff terminated the Building Contract and as a result, the defendants are entitled to additional expenses they had to pay to the replacement contractor, Kicking Horse, in order to complete their home.

Law

- [33] Repudiation of contract was described by the Supreme Court of Canada in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 as follows at para. 40:
- [40] Repudiation, by contrast, occurs "by words or conduct evincing an intention not to be bound by the contract. It was held by the Privy Council in *Clausen v. Canada Timber & Lands, Ltd.* [1923 CanLII 430 (UK JCP), [1923] 4 D.L.R. 751], that such an intention may be evinced by a refusal to perform, even though the party refusing mistakenly thinks that he is exercising a contractual right" (S. M. Waddams, *The Law of Contracts* (4th ed. 1999), at para. 620). Contrary to rescission, which allows the rescinding party to treat the contract as if it were void ab initio, the effect of a repudiation depends on the election made by the non-repudiating party. If that party treats the contract as still being in full force and effect, the contract "remains in being for the future on both sides. Each (party) has a right to sue for damages for past or future breaches" (emphasis in original): Cheshire, Fifoot and Furmston's *Law of Contract* (12th ed. 1991), by M. P. Furmston, at p. 541. If, however, the non-repudiating party accepts the repudiation, the contract is terminated, and the parties are discharged from future obligations. Rights and obligations that have already matured are not extinguished. Furmston, *supra*, at pp. 543-44
- [34] The determination of whether a party's conduct amounts to a repudiation involves an analysis of the facts. As the Court of Appeal pointed out in *Poole v. Tomenson Saunders Whitehead Ltd.*, 16 B.C.L.R. (2d) 349 at para. 23 (C.A.):

The common theme, emphasized by every court, when determining whether a breach of contract justifies the innocent party terminating the contract rather than confining his remedy to the damages caused by the breach, is that the breach must be tantamount to the frustration of the contract either as a result of the unequivocal refusal of one party to perform his contractual obligation or as a result of conduct which has destroyed the commercial purpose of the contract -- thereby entitling the innocent party to be relieved from future performance.

[35] The question of who terminated the Building Contract is a factual matter.

Discussion

[36] The meeting of August 12, 2016, is the key event on the issue of termination because the Building Contract was terminated at or following that meeting.

[37] The plaintiff's evidence with regard to the meeting is set out at paragraph five of Mr. Wensley's affidavit:

5. The discussion at the meeting at Highridge's office on August 12, 2016 was as follows:

- a) Mr. de Boer said he had an issue with the excavation bill.
- b) In particular, Mr. De Boer told Mr. Glinsbockel and me that our equipment operator and supervisor didn't work hard enough ... "they only work a small percentage of the time", "watch them through my window when they don't know it", and ... "the rock walls could be built much faster".
- c) Mr. Glinsbockel explained that the equipment operators have to constantly get out of their machine to realign rocks by hand ... they also need to call yard for more fill, arrange dump trucks etc.
- d) I asked Mr. De Boer what he really wanted from his complaint and he demanded a reduction in the invoice by \$10,000.
- e) I then spoke to Mr. Glinsbockel and said we can go ahead and reduce the bill by \$10,000 as long as we can increase it by the amount of free structural material we provided from our own stockpile (an amount in excess of the \$10,000 he was demanding).
- f) Mr. De Boer responded that he "could work with Ron but he couldn't "stand working for" me.
- g) Mr. De Boer grew extremely agitated and angry "I can't work with you people".
- h) Mr. de Boer then said "we're done" and that he "wanted an exit strategy".
- i) I swore at Mr. de Boer in frustration with his abuse and his demand to end our contract as he was leaving our office.
- j) Mr. de Boer then stormed out of our office slamming the door behind him.

[38] Also informative is paragraph four of his affidavit which states the following:

4. Prior to this meeting I had issues with Mr. De Boer speaking abusively to our front end staff.

[39] Mr. de Boer does not contradict the plaintiff's evidence with regard to the meeting -- the only difference between the two versions is that each prefers to highlight the behaviour of the other as opposed to their own.

[40] Mr. de Boer's evidence is set out in paragraphs 23 and 24 of his affidavit:

23. As a result, on or around August 12, 2016, I had a meeting with Mark Wensley and Ron Glinsbockel at the offices of Highridge Homes. The meeting was very short (about five to ten minutes long), and I was told by Mr. Wensley that if Vanessa and I did not pay the Tusk Contracting Ltd. invoice, then Highridge Homes would charge us for the costs of fill that Highridge Homes had previously told Vanessa they would not charge to Vanessa and I, and which Highridge Homes had not previously charged us.
24. When I heard that Highridge Homes was going to arbitrarily increase another part of our bill, if we didn't pay another part of a bill where Highridge Homes had not obtained our approval for costs, or kept us informed, I was greatly concerned. I told Mark and Ron that if that was the way it was going to be, then we should look into an exit strategy. Mr. Wensley stated: "I'll give you an exit strategy, fuck off", and stated something to the effect of "get a good lawyer". I therefore left the office.
- [41] I conclude that both Mr. Wensley and Mr. de Boer approached the meeting looking for an argument rather than a solution.
- [42] For his part, Mr. de Boer started the meeting by essentially calling Tusk's employees lazy by saying they were only working at twelve percent and forty percent of capacity. This insult, predictably, invoked a hostile response, which I assume was Mr. de Boer's intention as it would seem to be an unusually confrontational approach if he were seeking a mutually agreeable resolution.
- [43] While Mr. de Boer was the first person to raise the possibility of an "exit strategy", this was in response to Mr. Wensley's suggestion that the plaintiff could reduce the Tusk bill by \$10,000 but would then bill for the structural fill that was already agreed was free. There was no intention or attempt on the part of Mr. Wensley to resolve any outstanding matters. In response to Mr. de Boer's comment of "we're done" and his reference to an exit strategy, Mr. Wensley swore and the meeting ended.
- [44] Following the meeting, Mr. Wensley sent an email to the defendants, which included the following:
- This is to confirm your request to commence "exit strategy" from our contract to construct your new home at Predator Ridge. We are in full agreement with your wishes and will gather remaining invoices as soon as possible and forward these to you for payment (we expect to have these within 30 days).
- [45] The de Boers then instructed their lawyer to write a letter to the plaintiff's lawyer, which letter included the following paragraph:

We confirm that the Building Contract between Highridge Homes Ltd. and Dirk and Vanessa De Boer, dated February 27, 2016, was terminated by the parties on August 12, 2016. We also confirm that any other contracts between Dirk and Vanessa De Boer in Highridge Homes Ltd., or associated companies (such as Tusk Contracting Ltd.), were also terminated on August 12, 2016. [emphasis added]

[46] The letter goes on to confirm that the de Boers intended to hire a new contractor.

[47] There was nothing in the rather heated meeting that would have been clearly sufficient to constitute a repudiation of the Building Contract by either party. Disagreements happen, and it does not necessarily follow that the contract is at an end. However, neither party made any effort to restore a working relationship. I conclude that both sides were content to treat their relationship at an end, and I am satisfied that there was a mutual termination of the Building Contract on August 12, 2016.

The consequences of a mutual termination

[48] Because the parties agreed to end their Building Contract, the plaintiff was neither required nor permitted to undertake any further work on behalf of the defendants. For their part, the defendants were free to complete their home as they saw fit. In *Canadian Metropolitan Properties Corp. v. 601008 B.C. Ltd.*, 2007 BCCA 146, the trial judge had found that the termination of the business relationship, which was in the context of a lease, was mutual. The Court of Appeal stated the following at para. 16:

[16] Finally, the appellants argue that the obligation to pay the \$70,000 expired when the settlement agreement was mutually terminated in March 2001. The simple answer to this argument is that there had been a settlement between the parties of the amount owing under the lease. That had been a compromise of the greater claim against Mr. Neilson and his company by CMPC for amounts due under lease according to its terms, including damages. The settlement agreement also provided PPC and Mr. Neilson a means by which it was expected that the debt over time could be paid off. The trial judge found that the termination of the business relationship was mutual and there is no basis for disturbing that finding. He also found that nothing was said at that time about the settled amount. Mr. Neilson did not testify that he thought termination would affect the obligation to pay the established debt. There was nothing in the evidence from which it could be concluded that there was an agreement by CMPC to forgive the debt. An agreement to end a business relationship is an agreement to not do business together in the future. Absent a specific agreement to the opposite effect, it does not carry with it forgiveness of debt that has already accrued during the relationship. [emphasis added]

[49] The defendants were obligated to pay those legitimate and proper expenses that had been incurred up to and including the date of termination, which I conclude was August 12, 2016.

- [50] It follows that the plaintiff cannot claim for loss of profit arising from the remainder of the work because it was a party to the decision to bring the arrangement to an end. Similarly, the defendants cannot pass on the extra expenses they incurred as a result of having to hire a new builder.

Can the plaintiff recover for the bills covered by the third invoice?

- [51] The plaintiff concedes that the third invoice included not only the additional \$15,000 that was added to the Tusk invoice following the termination of the Building Contract, but also included the entirety of that revised Tusk invoice when the initial version was already covered by the second invoice. The plaintiff concedes that an adjustment should be made for the double counting and concedes also that the defendants are not liable to pay for the fill that the plaintiff had previously said would be supplied for free. However, it says that the remainder of the invoices are properly payable.
- [52] The defendants dispute the third invoice, both in general terms and with regard to certain specific items.
- [53] The defendants say that the invoices that form part of the plaintiff's third invoice should be viewed with scepticism and suspicion. They argue that Highridge's approach to billing, including the altered invoice of Tusk Contracting, suggests that the plaintiff has elected to try to inflate the costs for the defendants.
- [54] I do not accept the defendants' argument that the plaintiff's witnesses were not credible and that their evidence should not be believed. While Highridge's decision to inflate the second Tusk invoice by charging for the free fill was clearly improper, its witnesses readily admitted that they had done so. Nor does the fact that Mr. Glinsbockel had imprecise recollections of some of the events or discussions render his evidence inherently unreliable. The events took place five years ago. It would be surprising if he remembered everything perfectly given the passage of time. He acknowledged if he did not remember when events or discussions were put to him, but he did not deny that they occurred unless he was certain.
- [55] I find that all of the witnesses who testified, on both sides, were endeavouring to be forthright with the Court, and while their recollections were imperfect, no one was attempting to mislead.
- [56] The parties entered into a document agreement which was made an exhibit at the trial. The document agreement included the following terms:
3. For the purposes of this action a copy of a document that is listed on the List of Documents of any party may be entered in evidence in the trial of this action by any party by filing such copy as an exhibit. Unless any party notifies the other in writing by March 30, 2021 to the contrary (the "Notice"), such entry by filing the copy of the document as an exhibit shall, without further evidence, be prima facie proof that:
 - a. a copy of a document is a true copy of the original document,

- b. it was written or created or is effective from the date it bears on its face,
 - c. if an author is indicated, the document was prepared by or on behalf of that person who had knowledge of its contents at the time;
 - d. purported signatures appearing on a document are authentic;
 - e. where on its face or by its content or nature it was intended to be delivered to another person (e.g., a transmittal slip) that it was so delivered in the normal course of business, whether by post, fax, telex, or physical delivery,
 - f. where on its face, it purports to have been written or created by or under the instructions of the person who signed it, or purported to authorize its creation that it was so written created or authorized, and
 - g. where it purports on its face to have been received on a particular date or at a particular time that it was so received.
- 4. The Notice shall enumerate for which of the documents listed in the List of Documents formal proof will be required at trial.
 - 5. Copies of documents, rather than originals, may be tendered as evidence at trial unless any party prefers the original.
 - 6. Any party may lead evidence to contradict any document filed in accordance with this Agreement or prove that a document was not written by or under the instructions of the party whose signature appears on it or the date or dates that appear on the face of the document are incorrect, or prove that the document was not sent or received on a particular date or at a particular time.
- [57] Mr. Glinsbockel's affidavit included the invoices from third-party contractors that made up the plaintiff's third invoice, and confirmation that the plaintiff paid all of those invoices. Based on Mr. Glinsbockel's affidavit and the document agreement, I conclude that while the defendants are at liberty to contest the legitimacy and validity of the invoices, it would be inappropriate to dismiss them collectively due to any overarching concerns pertaining to the plaintiff's conduct relating primarily to the Tusk invoices. The burden to prove the invoice remains with the plaintiff, but the affidavit from Mr. Glinsbockel is nonetheless evidence for the Court to consider.
- [58] The parties had a cost-plus contract, and the defendants agreed to pay those invoices incurred in the construction of their home. The plaintiff was obligated to consult with the defendants if costs were expected to be much greater than had been estimated on the Cost Estimate Sheet. The defendants had accepted and paid the charges up to and including the plaintiff's second invoice, except for the Tusk invoice.

- [59] When a construction contract is terminated prior to completion it is difficult to evaluate whether or not the project was on or close to budget, absent evidence as to the value of the partially completed work. On the whole and with some exceptions, the evidence does not establish that the defendant paid others for work that was not done, or that it incurred costs for the plaintiff's account on the third invoice that were improper or inflated. Subject to my comments below, the amounts claimed by the plaintiff under its third invoice are allowed.

Tusk bills

- [60] I have already indicated that there are concerns with the Tusk invoices. The first Tusk invoice was in the amount of \$28,662.50 plus GST for a total of \$30,095.63. After the August 12 meeting, Tusk redrafted the same invoice and added \$15,000 under the heading "Structural fill - priced per load". The revised invoice was for \$43,662.50 plus GST for total invoice amount of \$45,845.63.
- [61] Tusk had agreed previously it would not charge for the structural fill, but would charge for the trucking. Whether the defendants' complaint about the first Tusk invoice was well-founded or not, the plaintiff was not at liberty to simply rewrite Tusk's invoice to charge for the fill that it had agreed would be provided at no charge.
- [62] Following the termination of the Building Contract, Tusk then issued a third invoice. The invoice was in the total of \$9,050 plus GST for a total of \$9,502.51 ("Tusk Invoice #41"). This Tusk Invoice #41 forms a part of the plaintiff's third invoice.
- [63] The difficulty with Tusk Invoice #41 is that it includes dates that were already invoiced as part of both versions of the earlier invoice. The date range covered by Tusk Invoice #41 is May 8 to June 1, 2016. The date range on the earlier Tusk invoice is May 10 to June 24. Given that Tusk is an affiliated company of the plaintiff, it would seem improbable that they forgot to bill for some of the work. Absent an explanation, I infer that Tusk Invoice #41, much like the addition of the structural fill to the first Tusk invoice, was an afterthought designed to increase the plaintiff's claim. I reject the claim for payment of Tusk Invoice #41.
- [64] I will now turn to the issue of the work performed by Tusk, and the defendants' argument that they should not have to pay Tusk's bills because the walls were not built in accordance with the Building Contract.

Retaining walls

- [65] There are two sets of rock walls on the property. First, there is, or at least was at the time of the termination of the Building Contract, three small walls that run from the front of the property and down the side of the home adjacent to the neighbour's property. The lower of the three walls was already in place when Highridge was engaged. The lower wall was extended and two additional levels were constructed.

- [66] The second area is towards the rear of the property as the natural grade slopes away. The initial wall built by Tusk was close to 12-feet high at the rear.
- [67] The plaintiff utilized the services of a geotechnical engineer, Mr. Jerry Lay. Mr. Lay provided an affidavit, an expert report, and was also cross-examined at trial.
- [68] In keeping with standard practice relating to retaining walls, Mr. Lay prepared and provided to the City of Vernon a Schedule B - Assurance of Professional Design and Commitment for Field Review, relating to geotechnical matters, and subsequently prepared and provided to the City of Vernon his Schedule C-B - Assurance of Professional Field Review and Compliance, which is submitted after completion of the work. Mr. Lay explained that walls of greater than 1.2 metres in height must be engineered, but those that are lower do not.
- [69] Towards the end of July 2016, it became apparent that the rock wall towards the rear of the property and adjacent to the neighbour's property was too high. As a result, it was reconfigured or realigned to reduce the height, ostensibly to break it down into two parts.
- [70] The Schedule C-B, certifying completion, was prepared and delivered to the City of Vernon some time after the realignment was done.
- [71] The City of Vernon building inspector, Tom Clerke, reviewed the Schedule B and Schedule C-B relating to the retaining walls, and he also inspected the retaining walls. He was satisfied that they were in substantial compliance with the City of Vernon's Building and Plumbing Bylaw. At paragraph 13 of his affidavit, Mr. Clerke deposes to the following:
13. The City requires substantial compliance with the Bylaw for retaining walls. Retaining walls which are slightly over the height stated in the Bylaw at spots in are considered in substantial compliance and are acceptable to the City as long as the retaining walls are approved by a geo-technical engineer.
- [72] Mr. Clerke also confirmed that the walls were part of the landscaping and were not actually required for structural support of the home.
- [73] The defendants subsequently removed the upper two levels of the walls that run along the side of the home. However, the defendants did not apply for or receive a building permit, nor has the City been requested to inspect any subsequent work.
- [74] The defendants argue that notwithstanding the fact that the retaining walls had been certified by the engineer and passed by the City of Vernon, they were nonetheless constructed in violation of the Building Contract because the Building Contract required that the work be done in accordance with building code standards. They refer to the following clauses in the Building Bylaw:

City of Vernon Building and Plumbing Bylaw #4900

1.1 . . . retaining wall:

- (a) a wall or structure exceeding 1.2 metres in height constructed for the purpose of supporting or confining earth, water or other material and restraining it from moving;
- (b) in the case of a series of walls, if any of the walls extends above a line commencing 1.2 metres above grade at the base of the lowest wall and projected at an angle of one linear unit vertically to 1.5 units horizontally.

. . . stacked rock walls or armoured slopes:

means any non-mortared or non-reinforced wall consisting of rock, boulder or other units arrangement or stacked at an angle exceeding one unit vertically to 1.5 units horizontally and exceeding 1.2metres in height.

. . .

2.3 The provisions of this Bylaw apply to retaining walls, to stacked rock walls, and to retaining structures that in the opinion of a Building Official require a plan certified by a registered professional due to siting conditions.

. . .

22.1 A registered professional must undertake the design and conduct field reviews of the construction and repair of a retaining wall or stacked rock wall retaining in aggregate greater than 1.2 metres in height or a retaining structure used to support or protect a building or structure. Sealed copies of the design plans and accompanying Letters of Assurance as referred to in Section 2.6 of the Building Code shall be prepared by the Registered Professional and delivered to a Building Official by the owner prior to issuance of a permit for the work. All site reports and final completion records (Schedule C-B forming part of the Building Code) shall be submitted by the Registered Professional not later than 21 days after completion of the wall.

[75] The defendants argue that:

- a) Mr. Lay did not supervise the construction of the walls;
- b) Mr. Lay has no records of his site visits;
- c) Mr. Lay did not create design plans or drawings in advance of the construction of the wall;
- d) his only drawings were prepared in July 2019, some three years later; and
- e) even based upon the drawings, some portions of the wall exceeded the maximum height permitted.

[76] The defendants say the Building Contract required that the plaintiff's work be done in accordance with the Building Code and Bylaws. They argue that "substantial compliance" is not good enough for the purposes of the plaintiff's obligations under the Building Contract, even if approved by the inspecting authority.

- [77] The defendants refer to *Drager v. Lojstrup*, 2016 BCSC 1447 at paras. 44 to 46, in support of their argument:
- [44] The CSRD reports put into evidence by consent do not expressly identify the possible ambiguity perceived by the municipality's solicitors and which gave pause to enforcement proceedings against the defendants. The municipality ultimately elected to amend the bylaw to expressly address the concept of retaining walls and to ensure that only landscape retaining walls of a certain (relatively small) size are permitted within setback areas provided they are not structurally connected to a building. There is no doubt that both the retaining wall on the defendants' property and their house are non-compliant with the amended CSRD bylaw as it presently exists insofar as both location and height restrictions are concerned.
- [45] The various board reports in evidence correctly note that retaining walls over 1.2 metres (4 feet) in height are required by the B.C. Building Code to be designed and constructed in accordance with specifications prepared by a "qualified professional" such as a structural engineer. As well, the Code also requires that guardrails be installed on the top of any retaining wall higher than 1.2 metres (4 feet) so as to avoid risk of injury from falling off the wall.
- [46] While it appears Mr. Book is a "qualified professional" who was retained by the defendants to assist with the design and construction of the replacement retaining wall, no formal design drawings or specifications were prepared in that regard. The retaining wall first installed on the plaintiffs' property does not appear to have been designed and constructed in accordance with any structural engineer's specifications.
- [78] *Drager* does not assist the defendants in this case. *Drager* was a dispute between neighbours involving claims for trespass and nuisance. The plaintiff was seeking to enforce the building code which was incorporated by reference into a statutory building scheme; the underlying concern was that the defendants had built a structure that was both aesthetically unpleasing and also blocked their view. The case was not about whether builder had constructed the retaining wall properly and was entitled to be paid.
- [79] The defendants argue that the retaining wall, especially at its higher points towards the back of the property was unsafe. However, Ms. de Boer's conversations with her neighbour regarding what the neighbour observed, and the neighbour's apparent concerns are not admissible as proof of anything, and especially in the face of the engineer Mr. Lay's certification.
- [80] In this case, the defendants had the benefit of the engineered retaining walls, whether engineering was required or not, and the walls were satisfactory from both an engineering perspective and the City of Vernon's perspective. There is no evidence that the walls as built were unsound or defective.

- [81] Contrary to the affidavit of Mr. de Boer, Mr. Lay denies that he ever said that the wall was unsafe. I accept Mr. Lay's evidence. He confirmed that it was pointed out to him that one of the rocks in the wall appeared as if it may be unstable, but this issue was addressed when the wall was realigned. I also accept that Mr. Lay was on site from time to time as the walls were being built.
- [82] I do not accept that the walls were flawed. The inspector confirms that substantial compliance is adequate from the City's perspective, and in the absence of any engineering evidence that says there was anything wrong with the walls, Mr. Lay's opinion and the City's inspection is sufficient. The walls were also satisfactory to Predator Ridge.
- [83] The defendants subsequently removed some of the walls, although no permit was obtained, but there is no evidence that establishes that it was necessary for them to do so, nor is there evidence to prove that remedial work was required.
- [84] Of course it would have been open to the defendants to try to prove that the walls had been improperly designed or improperly built, by way of engineering evidence, but they did not do so.
- [85] The defendants' arguments regarding whether they should have to pay for the retaining walls, and their claim for amounts paid to Se'mant Construction Ltd. to remove them, are rejected.
- [86] While retaining walls are included in the Cost Estimate Sheet, it is significant to note that landscaping is not included in the definition of 'Work'.
1. g) "Work" means all labour and materials required to carry out or cause to be carried out the construction of the House in accordance with the provisions of this Contract, but shall exclude landscaping of the Lot, unless specifically set out in the Plans and Specifications. Unless otherwise agreed between the Builder and the Owner, the Builder will make application for and obtain, as agent for and on behalf of the Owner, building and other permits as may be required to complete the Work. [emphasis added]
- [87] I allow the plaintiff's claim for the first version of the first Tusk invoice that accompanied the plaintiff's second invoice to the defendants in the amount of \$28,662.50, plus GST.
- [88] The remainder of the amounts claimed through Tusk's invoices are denied.

Other disputed amounts in the Plaintiff's third invoice

- [89] The defendants argue that the third invoice contains a number of items that were never received before the Building Contract was terminated.
- [90] However, that no product was received does not necessarily mean that no costs were incurred. For example, the defendants dispute a bill from CK Design Kitchen and Bath Cabinetry Ltd. in the amount of \$2,500 plus GST. It is common ground that the Building Contract was terminated before any of the interior finishing work was done. However, a

review of the invoice from CK Design indicates that a bill was received for "design & layout 4513 Vardon Lane". A review of the bottom of the invoice shows the payment terms, assuming that a kitchen is ordered:

All orders are custom & will require a 50% deposit prior to any confirmation. Payment terms: 50% deposit upon ordering - 45% due upon delivery & 5% due upon completion.

- [91] As such, CK Design billed the plaintiff for design work for the proposed kitchen, not for delivery of kitchen cabinetry. The fact that the defendants subsequently chose to purchase their kitchen from elsewhere does not render the invoice unrecoverable by the plaintiff.
- [92] Similarly, the defendants dispute an invoice from Stonecast Indoor Outdoor Impressions Ltd. related to a fireplace because they argue that no fireplace was ever delivered to the home. However, the invoice, which is dated July 27, 2016, over two weeks before the termination of the Building Contract, is for a deposit for a fireplace. Again, the fact that the defendants chose to get a fireplace from elsewhere does not mean they are not liable to pay the invoice.
- [93] A number of the items contested by the defendants from the third invoice focus on the precise wording of the invoice. For example, the framing contractor, JCB Contracting Ltd. ("JCB"), in its invoice dated July 31, 2016, indicates "Final Draw on Contract". The defendants argue that the framing was not completed and therefore the invoice for a 'Final Draw' was inappropriate and is therefore unrecoverable.
- [94] The defendants' argument is predicated on the word 'final'. However, it is not apparent as to whether JCB's portion of the work was done in its entirety, or whether the word "final" refers to the fact that JCB would not be issuing any more invoices because the plaintiff's Building Contract with the defendants had been terminated.
- [95] Similarly, the defendants dispute the invoice from the roofing contractor because it says "supply and install two-ply SBS torch on roofing system to new construction". The defendants argue that there is evidence that only a one-ply roofing system was installed, and therefore the bill should be reduced in half.
- [96] However, it does not necessarily follow that the price would be one-half given the installation component of the bill, nor is it certain firstly what "two-ply" refers to in this context.
- [97] It is important to keep in mind that the invoices provided by the various subcontractors are documents generated by those subcontractors and presented to the plaintiff for payment. They were not drafted for court purposes in anticipation of being subjected to the level of scrutiny they received at the trial.
- [98] The plaintiff's evidence supports its position that the invoices were received, and that they were paid.

- [99] Some of the defendants' arguments regarding the bills that were paid depend on the Court's conclusion with regard to termination of the Building Contract. The bill from Four Sons Electric is disputed by the defendants because Kicking Horse decided to replace most of the electrical work done by Four Sons. However, there is no evidence that the Four Sons' bill was inappropriate, nor that their work was not done properly. As such, the invoice is for the account of the defendants.
- [100] The plaintiff is not entitled to claim for loss of profit from the remainder of the Building Contract because I have concluded that the Building Contract was terminated mutually by the parties.

Deductions from the Plaintiff's third invoice

- [101] I accept the defendants' arguments that certain of the invoices that make up the third invoice should be excluded or adjusted.
- [102] I have already addressed the Tusk invoices.
- [103] The other adjustments I find are appropriate are set out below.

DJ Contracting Invoice

- [104] The plaintiff's third invoice includes as one of the itemized expenses on the ledger an invoice from DJ Contracting Ltd. in the amount of \$3,500 plus GST. DJ Contracting Ltd. is a company owned by Derek King, who is the plaintiff's site superintendent. His invoice contains no detail and refers simply to "maintenance service".
- [105] The question is whether the site superintendent constitutes a separate charge to be passed on to the owner, or whether site supervision is covered by the ten percent cost-plus charge. The terms of the Building Contract govern the appropriate charges.
- [106] There is no specific reference in the Building Contract to charging for a site superintendent, albeit the definition section includes the definition of "work" at paragraph 1.1(g) which is as follows:
1. g) "Work" means all labour and materials required to carry out or cause to be carried out the construction of the House in accordance with the provisions of this Contract, but shall exclude landscaping of the Lot, unless specifically set out in the Plans and Specifications. Unless otherwise agreed between the Builder and the Owner, the Builder will make application for and obtain, as agent for and on behalf of the Owner, building and other permits as may be required to complete the Work. [emphasis added]
- [107] Neither the Construction Specifications List nor the Cost Estimate Sheet include a budget for charges for a site superintendent, and the amount charged by DJ Contracting Ltd. exceeds the amount of some of the line items that are particularized on the Cost Estimate Sheet.

[108] It is interesting to note that there is no equivalent charge for Mr. King or DJ Contracting on either of the earlier invoices.

[109] I conclude that the cost of the site superintendent is covered by the ten percent fee charged by the plaintiff under the Building Contract and is not recoverable.

Drywall

[110] There is reference in the third invoice to an invoice dated July 16, 2016, relating to drywall. It is apparent that the home was not close to being at the drywall stage in July. This claim for \$211.84 plus GST is not allowed.

Paint

[111] There is also reference in the third invoice to an invoice dated July 16, 2016, relating to exterior painting. It is clear that painting had not commenced, and this claim for \$15.35 plus GST is also not allowed.

Rock

[112] One of the invoices passed on to the defendants was from IMS Group for eight loads of wall rock. The evidence was that there appeared to be ample rock from the blasting to build the walls. However, this invoice was included with the plaintiff's second invoice, which was approved by the defendants and paid in August 2016, before the meeting where the Building Contract was terminated. I make no adjustment for this item.

New Home Warranty refund

[113] The charge for the warranty for the home was included in the first invoice. The evidence shows the plaintiff obtained a refund of \$1,250 when the warranty was subsequently cancelled.

[114] The defendants are entitled to credit for this amount.

[115] I conclude that the plaintiff is entitled to reimbursement for the remainder of the items included in its third invoice, except as specifically noted in these reasons, and its ten percent fee on the amount due after adjustment.

Excavation costs

[116] The defendants argue that they were overcharged for the excavation for the home and claim a set-off. They claim that the excavation work was unnecessarily expensive because the plaintiff made a mistake as to whether blasting was permitted.

[117] A representative from Predator Ridge, Brad Pelletier, had informed Mr. Glinsbockel that there was to be no blasting used for excavation. Mr. Glinsbockel elected to use expanding grout since blasting was not allowed and the cost to jackhammer to excavate the foundation would have exceeded the cost of using expanding grout. Unfortunately, the expanding grout was not effective.

[118] Mr. Glinsbockel met with the defendants at the lot and explained the difficulty, and Mr. de Boer called Mr. Pelletier from the site. Mr. Pelletier provided authorization to switch to blasting in order to excavate the property. Mr. Glinsbockel then arranged for blasting.

[119] The de Boers are concerned with regard to the plaintiff's use of expanding grout instead of blasting in order to create the construction platform because:

- a) expanding grout was expensive, much more so than blasting;
- b) there was no discussion with regard to alternatives to blasting;
- c) the expanding grout did not work;
- d) the plaintiff's understanding that there was a moratorium on blasting was incorrect, as established by a quick telephone call from Mr. de Boer to Mr. Pelletier; and
- e) blasting then proceeded and at a much more reasonable price within what was contemplated in the cost estimate.

[120] The plaintiff initially inquired about blasting on the property on March 17, 2016:

Thanks Brad,

I do have a question in regards to the Lot 4 Vardon Lane site. We will need to Blast various areas for the Foundation is their any other regulations that I need to be aware of other than our normal protocol for securing and insuring the Blast Site?

Regards Ron

[121] Mr. Pelletier responded as follows:

Ron,

When are you looking at starting the site work? We have had some real challenges blasting with some of the builds and I would suggest rock hammering if possible as the residents of Falcon Point are on edge. We confronted some real challenges from residents and Mike from TnT took all the measures possible and we were still on defensive. Edgcombe rock hammered and there seemed to be little opposition.

Will have plans ready for p/u today.

Thanks,

B

Brad Pelletier

Vice President, Okanagan

Wesbild

250-503-3582 x 2000

[122] Mr. Glinsbockel's interpretation of Mr. Pelletier's email was that the plaintiff was not permitted to blast on the defendants' lot. He therefore proceeded with excavation using expanding grout.

[123] Mr. Pelletier's evidence was that blasting was not prohibited by Predator Ridge, but it was discouraged. Blasting was only approved later, following a phone call from Mr. de Boer to Mr. Pelletier, because by that time the parties had tried the expanding grout alternative, but without success.

[124] The defendants' complaint is that because of the failed attempts using the expanding grout, the costs significantly exceeded the budget on the Cost Estimate Sheet. However, the difficulty with the argument that excavation could not exceed the Cost Estimate Sheet without the homeowner's permission is troublesome because the cost of the site preparation work will depend entirely on the site conditions the builder discovers once the excavation commences. It is the least predictable cost in the new construction process.

[125] The defendants paid both of the plaintiff's first two invoices without complaint, except for the Tusk invoice. The second invoice included several line items for 'Excavating'. All of the excavation work was billed on the first two invoices. I accept that the defendants were concerned about the cost of the expanding grout, but they nonetheless paid those bills. When the defendants received the plaintiff's second invoice, Mr. de Boer sent an email in which he wrote:

I wnet through all the invoices, all are good, thanks Sylvia for the separation in LEMS. There is one invoice that I would like to address on Friday with you, that's the Tusk invoice. . .

[126] The defendants then paid the invoice in full except for the amount of the Tusk invoice.

[127] I find that the excavation bills were proper and appropriate, and the defendants accepted them. The claim for set-off for some portion of those bills is denied.

The Defendants' costs with Kicking Horse Construction Ltd.

[128] Mr. Ed Hoffort gave evidence on behalf of the defendants. Mr. Hoffort is the principal of Kicking Horse Construction Ltd., the company hired by the defendants to complete construction of the home. Mr. Hoffort had done work with the defendants before, but he was not one of the authorized builders in Predator Ridge.

[129] Kicking Horse is a licensed builder and authorized to construct new homes. It is registered with the New Home Warranty Program.

- [130] Because the home had been partially built by another builder, Mr. Hoffort was concerned about taking over the project. He therefore required that certain steps be taken before he was prepared to assume the risk and responsibility. This included retaining a structural engineer to investigate the work to date.
- [131] Ultimately, Kicking Horse took over the project and completed it to the point where the defendants could finish the home on their own.
- [132] Because I have concluded that the parties terminated the Building Contract by mutual agreement, the fees and expenses charged by Kicking Horse are not recoverable by the defendants, unless those expenses were the consequence of a breach by the plaintiff in its performance of the Building Contract.
- [133] The defendants take issue with the manner of construction of the foundation slab by the plaintiff, and seek to recover the sum of \$23,343.60 paid to Kicking Horse to remove and replace the slab installed by the plaintiff.

Slab

- [134] The original design of the home called for a crawlspace. According to the plaintiff, the foundation slab was poured without rebar because a foundation slab is not considered a structural component - the foundation itself requires rebar, but the slab itself is not structural and therefore no rebar is required.
- [135] Early in the process, the parties agreed to change the plans to provide for a nine-foot high area below the main floor of the house, as opposed to the originally contemplated crawlspace. The defendants agreed to pay an additional \$5,000 to create the additional height.
- [136] While Mr. Hoffort was deciding whether or not to take over the project, he noticed that there was a large crack in the foundation slab. While Mr. Hoffort acknowledged that a crack could be fixed or repaired, he was concerned that if the defendants finished the basement and converted it into living space, the cost of any repair would be substantially higher. As a result, he advised the defendants that he was only prepared to take on the project if the foundation slab was removed and replaced with a slab containing rebar.
- [137] The defendants' position is that the slab ought to have been constructed with rebar in the first instance and therefore they seek reimbursement of the cost paid to Kicking Horse to replace it. They say the plaintiff's failure to use rebar in the slab is contrary to the terms of the Building Contract. The relevant provision of the Building Contract is paragraph 3.1, which states the following:

3.1 The Builder will perform or cause to be performed the Work in a good, substantial, and workmanlike manner according to Building Code Standards and other standards and practices currently in use in the British Columbia construction industry, and in accordance with all conditions specified in any permits issued for the Work.

[138] The plaintiff says that the foundation slab is not a structural component, that it can be repaired, and that the slab was therefore constructed in conformity with the terms of the Building Contract.

Discussion

[139] Both the plaintiff and Mr. Hoffort agree that the foundation slab is not a structural component, and therefore rebar is not required by the Building Code. The question is then whether "other standards and practices currently in use" in the province would have required the plaintiff to use rebar in the foundation slab.

[140] Although Mr. Hoffort stated that it is his practice to always put rebar in a foundation slab, he also later acknowledged that he would not consider it necessary to do so if the foundation slab was for a crawlspace as opposed to for living space.

[141] There is no evidence as to what constitutes standard practice, and although the defendants agreed to pay \$5,000 to increase the height of the crawl space, there is no evidence that they were intending to finish the basement at any particular time, or indeed at all.

[142] The defendants have not established that the construction of the foundation slab without rebar is contrary to standard practice, and therefore they have not proven that the slab was constructed contrary to the terms of the Building Contract.

[143] The defendants' claim for reimbursement of Kicking Horse's invoice relating to replacement of the basement slab is therefore dismissed.

Interest

[144] The plaintiff relies on the term of the Building Contract that provides for interest to accrue on unpaid accounts at the rate of 12% per annum.

[145] The defendants deny that they are liable for interest as set out in the Building Contract. They argue that because the Building Contract was at an end as of August 12, 2016, the contractual term that provides for interest is no longer enforceable. The defendants draw a distinction between the third-party contractor invoices that formed part of the third invoice but relate to work that was performed prior to termination, with the obligation to pay interest that could only arise 30 days after the third invoice was provided to them, which was on September 8, 2016.

[146] I do not accept this argument. I fail to see any principled distinction between the obligation to pay an invoice that is received after the contract ends for work done prior to the termination of the contract, and the obligation to pay interest if that invoice is not paid.

[147] The obligation to pay interest is set out in the Building Contract as follows:

5.2 The Owner agrees to pay interest at a rate of 12% per annum on any part of the Price that is not paid within 30 days of the invoice date. The Builder may waive this condition from time to time.

[148] The defendants paid the plaintiff's invoice, after some adjustments as agreed, into trust on November 9, 2016. Although the plaintiff had not received funds, the defendants were out the full amount of the third invoice.

[149] The Building Contract does not stipulate that "part of the Price" be "paid" to the builder. The Building Contract is silent on whether the parties intended "paid" to mean that the plaintiff had actually received the funds invoiced.

[150] It follows that the defendants had paid the full amount of the third invoice as contemplated in para. 5.2 by their payment of November 9, 2016. In the words of the Building Contract, there was no 'part of the Price' that had not been paid by the defendants, and therefore the plaintiff is not entitled to interest under para. 5.2 after November 9, 2016. It follows that the defendants owe interest calculated at 12% per annum from October 8, being 30 days after the third invoice was issued, until November 9, 2016. From November 9, 2016, to the date of judgment, the plaintiff is entitled to pre-judgment interest under the Court Order Interest Act, R.S.B.C. 1996, c. 79.

Disposition

[151] The plaintiff is entitled to judgment against the defendants. The amount properly due and payable under the third invoice will need to be recalculated in accordance with adjustments made as set out in these reasons.

[152] The defendants' counterclaim is dismissed because I have concluded that the defendants are indebted to the plaintiff. I assume that counsel will not have any difficulty in determining the amount due, but should issues arise, they may contact Supreme Court Scheduling to arrange for a further hearing for any clarifications.

[153] The plaintiff would ordinarily be entitled to its costs at Scale B, but if counsel wish to speak to the matter, they may do so by contacting Supreme Court Scheduling within 21 days of these reasons.

"Wilson J."

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