

CANADA / JUDGMENT

Hodson & Hodson Construction Ltd. v. Harrison

2004 BCSC 649

COURT

Supreme Court of British Columbia

DECIDED

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2004 BCSC 649 Hodson v. Harrison et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hodson v. Harrison et al,

2004 BCSC 649

Date: 20040512

Docket: 00 1311

Registry: Victoria

Between:

Hodson & Hodson Construction Ltd.

Plaintiff

And

Robert Alfred Harrison, Amanda Marie Harrison and Surfwood Supply (1964) Ltd.

Defendants

And:

Hodson & Hodson Construction Ltd., Douglas Hodson & William Hodson

Defendants by Counterclaim

Before: The Honourable Mr. Justice Taylor

Reasons for Judgment

Counsel for Hodson & Hodson Construction:

J. Main

Counsel for Robert Alfred Harrison, Amanda Harrison & Surfwood Supply (1964) Ltd.

H.J. Rusk

Date and Place of Trial/Hearing:

July 23,25,26,29-31, 2002 September 30,2002

October 1-4, 2002

December 16-20, 2002

February 24-28, 2003

May 9, 2003

Victoria, B.C.

- [1] This action was begun by the plaintiff company Hodson & Hodson Construction Ltd. ("Hodson Construction"), to recover monies said to be owed to it by the defendant company, Surfwood Supply (1964) Ltd. ("Surfwood"), and the personal defendants for the construction of a commercial building on Station Road in the Colwood area near Victoria.
- [2] After some delay in retaining counsel the trial began on July 23, 2002, at which time Mr. Main, counsel for the Hodson Construction, abandoned that claim.
- [3] The trial then proceeded on the basis of a counterclaim filed by all the defendants, Robert Alfred Harrison ("Mr. Harrison"), Amanda Marie Harrison ("Mrs. Harrison") and Surfwood. The question of costs in respect of this original, and now abandoned claim, was left to be determined at the conclusion of this trial.
- [4] The Hodson Construction and Douglas Hodson ("Doug") and William Hodson ("Bill"), the defendants by way of counterclaim, had not filed a defence to the counterclaim and by agreement of counsel that defence was filed at the outset of the trial.
- [5] Thus, as a consequence of these steps, the original defendants in essence became plaintiffs and the plaintiffs, defendants.
- [6] As this claim and these reasons deal entirely with the defendant's counterclaim against the Hodson Construction and Doug and Bill, I shall henceforth refer to the Harrisons as the "plaintiffs" and the Hodson Construction and Doug and Bill as the "defendants."
- [7] This trial continued off and on for some ten months given that the original trial estimate of four days soon appeared to be inadequate and time had to be found to fit counsels' and the court's calendar. By the end of submissions, the trial had lasted twenty-two days.

- [8] I apologize to the parties that my estimate as to when I would be able to attend to the preparation of these reasons was woefully incorrect.
- [9] An initial issue to be decided is the involvement of the corporate defendant, Surfwood.
- [10] It is clear that although the building was being constructed so that Surfwood could operate out of it, the owners of the building (being the owners of the property upon which it was constructed) were Mr. and Mrs. Harrison. Surfwood plays no role in terms of being a party to the counterclaim. Mr. and Mrs. Harrison are the principals of Surfwood.
- [11] Surfwood had no role in the relationship between the Hodson Construction and its principals, Doug and Bill, other than peripherally providing some initial accommodation for Hodson Construction and for the use of equipment, both at the direction of Mr. Harrison.
- [12] It was not pled that Surfwood has any claim against the defendants. Accordingly, Surfwood has no role in these proceedings and to the extent it may be asserted it has a claim against the defendants, such a claim is dismissed.
- [13] Doug and Bill, to whom I refer by their first names to distinguish them, are the principals of the Hodson Construction.
- [14] The essence of the counterclaim alleges that Mr. and Mrs. Harrison have been defrauded by being deceitfully overcharged with the cost of construction of this building. In his opening statement, counsel estimated that the amount overcharging was somewhere between \$135,000 and \$170,000.
- [15] Though having alleged fraud, Mr. and Mrs. Harrison do not allege they received a finished product which was wanting in quality. They concede that they have been provided with a structure of good quality in terms of its construction. What is at issue is the cost of this building and the reasons for that cost.
- [16] At the outset of these reasons I wish to make it clear that I do not intend to slavishly refer to the plethora of documents filed in this trial.
- [17] I have reviewed and considered the many documents, financial statements and calculations, plans and photographs submitted by each party.
- [18] As the foundation of the plaintiffs' case is a report of Mr. Macdonald, a quantity surveyor, I will use that report as a template for my consideration of the evidence, because the report provides a convenient structure to do so.
- [19] Mr. Harrison testified at trial and Mrs. Harrison did not. It is clear that Mrs. Harrison had no direct role in the construction project and, from the evidence of Mr. Harrison, she let her husband conduct what discussions occurred with Doug and, to a lesser extent, Bill during the course of construction. According to Mr. Harrison's evidence, she was good at accounting and much of the financial summaries testified about by Mr. Harrison admittedly emanated from Mrs. Harrison.

- [20] As I have previously concluded, while Surfwood is not an appropriate party to the counterclaim, the reference to it in this litigation must be understood in the context of the construction of the building that is the center of this litigation.
- [21] Mr. and Mrs. Harrison have been the operating minds of Surfwood for many years. The company sells equipment such as bobcats and excavators as well as pumps, generators and other equipment to the construction industry.
- [22] Surfwood conducts its business from buildings owned by Mr. and Mrs. Harrison. Mr. Harrison has been a key figure in the design and construction of a number of premises both on the Lower Mainland and Vancouver Island from which Surfwood operates.
- [23] Mr. Harrison testified that he has been involved in the construction of up to fifteen structures including industrial buildings and homes. He is conversant with construction and contractors and has played an integral role in the designing of, and overseeing of, the construction of buildings from which Surfwood operates.
- [24] Prior to the construction of this building, which is the subject of this litigation, the Harrison's most recently constructed building was in Nanaimo from which Surfwood operates in Central Vancouver Island. There is no evidence of the contract by which this Nanaimo building was constructed by which any comparison can be made as to the basis of its construction to the construction of the building by Hodson Construction.
- [25] At a time when many consider retiring, Mr. Harrison, who was seventy years of age at the commencement of this trial, was actively engaged in the existing business of Surfwood and sought to expand it both geographically and by volume.
- [26] As a consequence of Mr. Harrison's desire to expand on to Vancouver Island, the building in Nanaimo was constructed. Satisfied with its design, Mr. Harrison sought to replicate such a building on property that he and Mrs. Harrison had purchased in April, 1999, on Station Road in Colwood, near Victoria.
- [27] Mr. Harrison testified that he had been well served by the builder of the Nanaimo building and sought to obtain his services to build the Colwood building, which, while similar, was not the same as the Nanaimo building.
- [28] That contractor, a Mr. Butler, had taken on other work and could not commence construction of the Station Road building for approximately two or three months. This was a time frame unacceptable to Mr. Harrison, who had taken on an equipment franchise and needed a building from which to operate as soon as possible.
- [29] Relying upon his experience in having constructed the Nanaimo building, Mr. Harrison was of the belief that, apart from outside work such as a yard, drainage and loading ramp, construction of the Colwood building should cost between \$220,000 and \$230,000.

- [30] Exhibit 8 sets out the total billed cost of this project. If all invoices had been paid, and upon the assumption of Surfwood doing the outside work, the total costs would have been some \$408,667.94 (a figure subsequently revised by Mr. Harrison to \$406,160.43). Not all of these costs have been paid.
- [31] Additional to these costs were costs for such things as design, engineering, building permits, landscaping and other related costs, including paving and fencing that were said by Mr. Harrison to be \$68,466.33.
- [32] In the construction industry it is trite to say that planning and scheduling are key to a successful building project in terms of costs and completion dates. Planning permits, an orderly acquisition of bids and price estimates and scheduling follows upon selection of appropriate sub contractors so that the construction can flow smoothly.
- [33] In a busy construction period, (such as on the evidence I find 1999 was in the Victoria area) an owner and/or contractor cannot easily acquire quotations or commitments if planning is left too late in the building season.
- [34] As I shall later discuss, a late start in terms of assembling a "construction team" was very much at the core of the difficulties that arose between the plaintiffs and defendants in this case.
- [35] Mr. Harrison, unable to secure the commitment of Mr. Butler, by late May and early June sought out other contractors. It is clear that by this point, experienced and reputable contractors had had their schedules filled and Mr. Harrison was faced with the task of trying to find a contractor able to undertake this project that involved the construction of a 5,400 square-foot shop and show room building to house the business of Surfwood, which at that time Mr. Harrison had been running out of a trailer.
- [36] He was ultimately referred to Hodson Construction Ltd., a company owned by the father of Doug and Bill.
- [37] He contacted Doug by telephone only to be told that he and Bill had their own company and that they had taken over work from their father. Doug functioned as the manager and Bill as the supervisor of construction for Hodson Construction.
- [38] On May 31, 1999, Mr. Harrison sent Doug materials (Exhibit 1) which included drawings and some sub-trade quotations and arranged to meet with him a few days later. Some of this material also consisted of some sub-trade quotations he had obtained from Mr. Butler. Also included was a list of "not included work" which was generally outside work Mr. Harrison was to arrange and organize either on his own or through Surfwood.
- [39] Among other information contained in this package, it was noted that the thickness of the concrete floor was to be a minimum of 6" in the shop and a minimum of 5" in the show area.

- [40] Mr. Harrison testified that although Doug was young and did not have much by way of references as far as he was aware, he was the son of a reputable builder.
- [41] Mr. Harrison went to view a building that Doug had indicated to him that he and Bill had worked on. He said that he never spoke to the owner of that building but simply viewed it and that it appeared to "look good."
- [42] Mr. Harrison satisfied himself that Doug had the basic tools for construction but assumed that he did not have the heavy equipment needed to construct such a building. He said that Doug told him that he was struggling for money as Hodson Construction was having a problem getting paid for construction of a house that had been recently finished.
- [43] Doug's evidence was similar in that he testified that Hodson Construction was owed some \$31,000 from that project. He said that when he met with Mr. Harrison Hodson Construction had a few small jobs on the go. He told Mr. Harrison that they could begin the project immediately as they had no other large projects that would interfere.
- [44] Doug testified that Mr. Harrison spoke of a similar building having been built in Nanaimo but neither he nor Mr. Harrison testified as to the costs of that building being disclosed to Doug. Doug said he recalled at one point driving by the building in Nanaimo but never went inside it.
- [45] Mr. Harrison testified that Doug said that he could "meet" the price of the Nanaimo building. If no actual cost was ever disclosed to Doug then such a statement could only be taken as nothing more than a statement of bragging and would be meaningless to both speaker and listener.
- [46] I am satisfied that Mr. Harrison's driving motivation in the period of late May and early June, 1999, was to acquire a builder at a time when such were in short supply and, in essence, to be satisfied with "any port in a storm."
- [47] He did not testify as to having any significant discussions with any other builder other than Mr. Butler and the one who referred him to the defendants. It is clear that those he may have spoken to could not fit his need for immediate commencement of construction.
- [48] As is clear from the testimony of Doug and, to a lesser extent, Bill, the defendants, that while they were competent tradesmen, they were neither experienced nor competent as managers of a large project, especially in terms of record keeping. Likewise, they were not experienced in terms of estimating quantities of materials such as concrete, plywood and hardware.
- [49] Doug testified that he had worked construction as a teenager with his father and that at 19 began to work on his own until he was 24 and thereafter worked with his brother. Prior to working with his brother he had been a concrete estimator. On this project that task was left to the concrete suppliers.

- [50] Bill, in addition to his competence as a tradesman (as evident by the admitted final quality of construction), had skills in running a job as a supervisor, but not in keeping paperwork.
- [51] Doug said that prior to meeting with Mr. Harrison he had never prepared a construction contract, although he was familiar with the standard Canadian Builders Construction Contract forms. He also testified that he had never kept a construction diary before meeting Mr. Harrison and took to heart advice given to him by his solicitor to keep a note of everything "including the weather." He did this in addition to his personal diary, in a book called "At-a-Glance".
- [52] Doug agreed that he had never done a "cost-plus" job of any significance and, as I will later discuss, much of what little record keeping was done in this case is evidence of a less than clear understanding of what was meant by a cost-plus contract.
- [53] Mr. Harrison and Doug discussed the costing of the structure. There was an agreement that the work would be done by Hodson Construction on a cost-plus basis, this being cost plus 10%. According to Mr. Harrison, this agreement was premised on the basis of open records, meaning the construction records would be available for his inspection. As is clearly evident in this trial, Doug's record keeping was less than adequate. Mr. Harrison's inspection of any such records, despite his demands for them, can be said to be similar in that, while demands were made for adequate time recording, these were never pursued until after construction was completed when such records were not produced to Mr. Harrison's satisfaction.
- [54] At this point to the retrospective observer of this relationship, two fundamental flaws emerge. The first is that Mr. Harrison was desperate to have his building constructed and was unable to find an experienced commercial contractor. He was prepared to accept a builder with a less than an established track record in such construction matters.
- [55] The second is that the Hodsons were less than experienced in the construction of such a large project and were without adequate finances to fund the construction.
- [56] As became evident throughout the trial, the Hodsons were constantly in financial difficulties, either because of being unpaid for previously completed work, or because of bad investments.
- [57] I return to the formation of the contract, such as it exists, between the plaintiffs and the defendants. There were, according to Mr. Harrison, two or three meetings before it was agreed that the defendants would construct the building. Mr. Harrison had the site cleared and had some rough trenching done for the foundations before engaging the defendants.
- [58] On or about June 17, 1999, the first order of materials was placed through Slegg Brothers, a construction material supply firm in the greater Victoria area, and according to Doug, on June 18, 1999, work began for the construction of the footings. Exhibit 10 contains some 106 invoices from Slegg Brothers.

- [59] In that exhibit there are a number of Slegg Brothers invoices that clearly do not relate to or were for materials not required for this project. As admitted by Doug and Bill in their testimony, these were for materials used for other work on other jobs being done by the Hodson Construction.
- [60] I have earlier referred to the known financial circumstances of the defendants and because of this Mr. Harrison agreed to open an account at Slegg Brothers for the purchase of materials. There is a significant difference between Doug and Mr. Harrison understanding as to the defendants' permitted use of the Slegg Brothers account.
- [61] Doug testified as to the state of their finances and their account with Slegg Brothers. It is clear that the defendants owed a substantial amount to Slegg Brothers and that by May or June, 1999, Slegg Brothers would extend no further credit to them.
- [62] Doug testified that he spoke to Mr. Harrison about using the Slegg Brothers account to acquire materials for other jobs which needed to be completed and understood he would be able to do so, provided there was an accounting after such purchases and that such purchases were noted on the invoices as being for other than the Station Road building. Such an accounting was attempted by Doug at the completion of the building.
- [63] Mr. Harrison denies that occurred and says there was no such agreement other than for one instance when a nail gun was purchased. The evidence of Bill was that he believed he had Mr. Harrison's permission to so acquire other materials, provided that such purchases were identified. Bill testified he did in fact acquire such materials on the basis of that understanding.
- [64] This dichotomy of recollection must be examined in the context of the invoices themselves and the fact that Mr. Harrison, as the account holder, would receive these invoices on a monthly basis from Slegg Brothers for review prior to payment by himself.
- [65] A review of the challenged invoices makes it clear that a number are marked with quotations such "Cadborra Bay" or "Ella" (see Exhibit 10, Tabs 25, 26, 27 and 28). Likewise, there are others that refer to materials that are clearly not for Station Road and which any observer would note were not for this project. Nevertheless, these later invoices do not denote a location other than the Station Road site (see Exhibit 10, Tabs 22 and 23). In respect of Tabs 22 and 23, similar material is recorded as is recorded on Tab 26, where another location is specifically noted.
- [66] All of these invoices were for a period prior to the end of July, 1999.
- [67] A significant event happened in late July or early August and into the Fall of 1999, being that Mr. Harrison fell ill. The consequences of this were that his regular attendance on the project site became less and less.

- [68] Mr. Harrison described his symptoms, which developed in August and September and continued until he saw a specialist in November, as a loss of energy, dizziness, poor mental comprehension and shortness of breath. He also said at one point that he had had pneumonia. Mr. Harrison said that he was ultimately diagnosed as suffering from eurhythmia. Doug testified that when Mr. Harrison reappeared at the project site in the latter part of August he seemed "different."
- [69] It is clear that Mr. Harrison's ability to review invoices and make, for example, a comparison between Exhibit 10, Tabs 26 and 22 so as to realize the use of the account for purposes other than the Station Road project, was compromised by his ill health.
- [70] I am satisfied that Mr. Harrison did agree to permit the plaintiffs to use the Slegg Brothers account for purposes other than the project, but on the understanding that he would receive credit for such items. The limited use of the account is consistent with such an understanding and agreement by Mr. Harrison to let the defendants finish some small projects and to use the account as they did.
- [71] In December, 1999, after this project had been completed, Mr. Harrison became convinced that the defendants were defrauding him. At this juncture the relationship between Mr. Harrison and Doug had reached such a nadir that no explanation or accounting would have been accepted by Mr. Harrison. As I shall later observe, explanations offered by his own employee, Troy Robinson, were not even being accepted by Mr. Harrison.
- [72] He undertook inquiries as to what "Ella" meant only to discover that it was a home on which the defendants had done some minor work in the timeframe of these invoices, i.e. July, 1999. Mr. Harrison did not explain why he did not note these changes in the immediate period following his receipt of the July invoices. In my view, his illness and admitted state of confusion explains why he did not see the obvious and why he did not raise those issues with the defendants earlier, rather than allowing them to fester.
- [73] The completion of the Station Road project in the middle of November, 1999, at a cost exceeding his original estimate explains in a large part why he began to view the defendants with doubt and great suspicion, whereas in the earlier stages of this project he had not raised these concerns with them.
- [74] His suspicions in this respect resulted in his asserting at trial that such invoice items as for duct tape (Exhibit 10, Tab 92), rope (Exhibit 10, Tab 49), three 12 foot lengths of 2" x 12" (Exhibit 10, Tab 3), five feet of 6" flashing (Exhibit 10, Tab 16) and a kryton water plug (Exhibit 10, Tab 25) were not used in this project. He was faced with evidence, which I accept, that the duct tape was used to connect venting pipes; the rope was used to haul trusses in to place; the 2" x 12"s. Twelve-foot lengths were used to build 36" x 36" x 12" foundation forms for concrete columns used to support the showroom roof; the five feet of 6" flashing was used to accurately scribe the cut off of the sono tubes used to form the concrete columns and the kryton water plug was used in a catchments basin.

- [75] I find that, in some instances those picking up materials did not ensure that Slegg Brothers noted on invoices that the material was to be used on projects other than Station Road project, or that Slegg Brothers did not do so. Nevertheless, it is clear that on some that in fact did occur. In terms of those so marked, a review of the invoices and the nature of the materials for projects other than Station Road would have clearly identified that those materials were not applicable to the Station Road project.
- [76] Where that failure occurs I am satisfied that the failure to do so was inadvertent either on the part of those picking up the materials, or on the part of Slegg Brothers in failing to note the invoices.
- [77] I do not accept Mr. Harrison's assertions that he had not authorized the defendants to use his Slegg Brothers account for such minor matters.
- [78] I am satisfied that Mr. Harrison did permit the defendants to use the Slegg Brothers account for purposes other than his own project on the basis that he would be credited for such amounts.
- [79] The defendants ultimately did attempt to account for these purchases to Mr. Harrison. Given that it was Mr. Harrison and not the defendants who received these invoices, and given the defendants had no opportunity to review them, it was incumbent upon Mr. Harrison to raise these invoices for credit. As I shall note later in these reasons, the amount of credit for these invoices is not contested by the defendants.
- [80] As I earlier noted the defendants abandoned their claim for any additional payment.
- [81] The formulation of the contract between Mr. and Mrs. Harrison and Hodson Construction (Exhibit 3) in July, 1999, is further evidence that should have tipped Mr. Harrison that he was beginning to develop a relationship with a contractor who simply did not have an abundance of experience.
- [82] Although the actual work of the site commenced on June 18, 1999, it was not until July 5, 1999, that Exhibit 3 was prepared.
- [83] Up to that point, whatever contractual relationship that existed was oral. It encompassed the construction of buildings pursuant to a set of plans. The defendants would do so on a cost-plus basis, but the costs did not include taxes or Doug's time as project manager. A further term was that Doug would get three quotations for each sub trade to be used on the project. These quotations were to be for the benefit of Mr. Harrison and he would make the decisions as to which sub trades to accept or approve.
- [84] During the period prior to July 5, 1999, Doug testified and I accept his testimony that, given their financial situation and their lack of experience with such a project, Hodson Construction, as personified by himself and Bill, would not have considered a fixed-contract price.

- [85] Doug went to see Mr. Harrison on July 5, 1999. He had obtained a standard building contract form but did not think it suitable for the work that would be done.
- [86] Exhibit 3 was prepared by Mr. Harrison at his office. In addition to incorporating what had already been discussed in terms of the building and the manner upon which the defendants would bill for their work, it contains a list of excluded works that substantially relate to outside or yard work.
- [87] The written contract is brief. Although it refers to a 10% fee, there is no definition of the responsibilities. Likewise, while it refers to time being of the essence, no completion date or building schedule is set forth. I find that no completion date was ever agreed to between Mr. Harrison and Doug.
- [88] The contract upon which the plaintiffs and Hodson Construction founded their relationship upon is as follows:

R. & A. Harrison

760 Rochester Ave

Coquitlam, BC V3K 2V8

Dear Mr. Harrison:

Re: Surfwood Supply building at 827 Station Road, Langford

Further to our discussions, we are pleased to present this letter of intent to construct your new building in Langford.

Hodson & Hodson will construct the above building for a fee of 10% of the total agreed construction costs, not including taxes. The extent of work to be done is per your building specification list dated July 5, 1999. Work is to proceed immediately and time is of the essence.

All sublet invoices are to be paid directly by R & A Harrison, less standard holdbacks as per BC Construction Association regulations.

HODSON & HODSON CONSTRUCTION CO.

"Doug Hodson" _____

Signature

"July 5/99" _____

Date

This letter of intent is accepted by:

"R. Harrison"

R. Harrison

"July 5/99" _____ –

Date

Building at 827 Station Road, Langford

for Surfwood Supply Ltd.

July 5, 1999

Building Specifications:

To include:

Building to lock-up stage per plans

Interior and exterior painting - all areas

Electrical room and wiring and lighting

All plumbing

Not included in the contract:

Landscaping, fences, sprinkler system

Blacktop or yard surfaces

Service department or Parts department counters or shelving

Service connections: water, sewer, gas

Security system or bars on doors, windows

Heating system to be agreed on.

Service department - 6" reinforced floor - 500 PSI

Smooth finish and hardner

Showroom floor - 5" minimum, extra smooth finish

Expansion joints sealed and ready for painting

Under-slab conduit for electrical,

Water, phones and computer lines

Building floor level to be 6" above

Road elevation

- [89] As a part of the contractual relationship between the plaintiffs and the defendants, Doug was to be the project manager for which Hodson Construction would be paid on the "costs plus" basis, save for when he actually worked on the site as a tradesman, at which time he would be paid the hourly rate for a tradesman. Bill was to work as the supervisor on the site and as well perform work as a tradesman.
- [90] Mr. Harrison said that he was aware that if he had any disagreement over hourly rates being charged, he would have put such concerns in writing, but he never did. As he candidly testified, "I never refused to pay the hourly rates. I just wanted support for the hourly rate being paid."
- [91] A further adjunct to the defendants' financial situation and Mr. Harrison's awareness of it is that a similar arrangement that Hodson Construction had with Slegg Brothers, in terms of material accounts, was also set up for the rental of equipment. Despite Doug's observation that a comparable rental firm was a five-minute drive from the project site, Mr. Harrison insisted it be set up with G.W.G. Rentals at a location about a half-hour's drive from the building site. Doug's evidence, which I accept, was that Mr. Harrison and this rental firm had some other business relationship that caused Mr. Harrison to prefer to use G.W.G. Rentals rather than the firm closer to the project site.
- [92] The existence of this distance was to later cause problems in terms of returning of rented equipment, which was often left for the rental firm to pick up.
- [93] The project was eventually completed on or about November 5 or 7, 1999. Surfwood was able to move in and continue its business at that point. Mr. Harrison's anticipation had been for September, a period that he says Doug assured him was attainable. Notwithstanding his assurance, I find there was no term in the contract, either orally or in writing that the project would, in fact, be completed by any specific date. Given the defendants' lack of experience in dealing with such a project of this size and the lateness of the season in terms of the commencement of the acquisition of quotations and engagement of sub trades, any assurance of any dates would be meaningless to both plaintiffs and defendants. I find none was given.
- [94] I will now apply Mr. Macdonald's report (Exhibit 30) as a template for a consideration of the plaintiffs' complaints. Mr. Macdonald was tendered as a quantity surveyor, who opined as to the cost of the construction of this project and certain other aspects of this project.
- [95] As foundation for his report, he reviewed the architectural and engineering drawings (Exhibits 41 and 59), correspondence from the engineer (Exhibit 29), the invoices of Slegg Brothers (Exhibit 10) and G.W.G. Rentals (Exhibit 16) as well as invoices tendered by the defendants, some of the quotations for subcontractors, a set of summaries prepared by Mrs. Harrison, and the contract itself (Exhibit 3).

[96] Mr. Macdonald accepts that the total cost of this project, excluding the design permit and other costs referred to in paragraph 29 as set out in Exhibit 8, was some \$406,160.43 assuming all bills were paid. This figure is slightly lower than the one set out in Exhibit 8 at \$408,667.94 as a consequence of adjustments made by Mr. Harrison in the course of his testimony. Mr. Macdonald said that he assessed building costs on the basis of Exhibit 3 as evidence of what the contractor was to do. As I will later observe, I find that it is clear that the outside work was not fulfilled by Mr. Harrison, in large part I find, because of his illness and his inability to deal with these matters. The result was that such work was in fact completed by the defendants.

[97] Fundamental to Mr. Macdonald's conclusion that the building costs were excessive was what he described as being an appalling lack of records. In summary, Mr. Macdonald formed his conclusions as to what he opined as being the reasonable costs of this building if it were constructed according to the plans. This building was not constructed according to its plans or the written contract as a consequence of agreed changes along the way.

Concrete Work

[98] As with all materials, these were billed directly to Mr. Harrison. There were six deliveries of concrete that may be grouped into four separate time periods. Those periods are:

June 28

Footings

July 28

Grade beams and columns

September 30 & October 1

floor slabs

November 2 & 5

Outside concrete work

June 28, 1999

[99] Between the commencement of construction of the forms for the footings on June 18, 1999, and the pour that occurred on June 28, 1999, there were discussions between Mr. Harrison and Doug and/or Bill as to the height of the building in terms of the ambient levels, given the risk of flooding. Mr. Harrison testified that, although he would talk from time to time to Bill, it was never about the project and he only talked to Doug on that subject. That assertion was contradicted by his later testimony that he did talk to Bill about an outside ramp.

- [100] Mr. Harrison testified that, although the plans call for the floor of the building to be at road grade, he subsequently required that the lowest floor level be raised to above the highest spot on Station Road to ensure that water ran away from the building. He said that he was sure that Doug said nothing about flooding and that it was he himself who raised it. Bill testified that, after the footing forms were constructed pursuant to the plans, a decision was made to raise the building. He could not recall if it was Doug or Mr. Harrison who gave him these instructions, but he said he recalled the discussion about the need to raise it as those involved became aware of other businesses in the area experiencing flooding.
- [101] The consequence of this was to elevate the forms rather than to have to construct a higher grade beam. To do otherwise would make the forms too high (four feet as opposed to two feet) to be able to properly trowel to get a proper level for the eventual block work that would be built upon the grade beams to form the walls.
- [102] In doing this, Bill said it was necessary to use 1" x 8" lumber to prevent a "blow out" of the concrete when the footings were poured. The consequence of the lifting of the footings to accommodate the higher floor levels was to use more lumber and concrete for the footings than originally called for by the plans.
- [103] The amount of concrete delivered on these days is confirmed by Mr. Anderson of ICL Concrete, who also testified that he believed that he would have become aware of any diversion of concrete from this site to another site. He said he did not become aware of that, nor was there anything to suggest that this was occurring.
- [104] I am satisfied that, although Mr. Macdonald was correct that the plans called for 16.21 cubic metres of concrete and that 27.2 metres of concrete were delivered to the site on June 28, 1999, for the footings, the difference is accounted for in the increase in height of the footings, something Mr. Macdonald was unaware had occurred.
- [105] As well, nowhere in his opinion did Mr. Macdonald consider the amount of concrete used for the foundations for four canopy columns that were also poured on June 28, 1999, each of which would have consumed slightly more than a third of a cubic metre.

July 8, 1999

- [106] In respect of the July 8, 1999, pour for the grade beams, given the evidence of Mr. Anderson and Bill which I accept, I am satisfied that there was no divergence of any material. If an excess of concrete was ordered, that was as a consequence of an estimate by the ICL estimator, who calculated the amounts needed, rather than because of either of Bill or Doug.
- [107] There is simply no evidence upon which it can be said that the concrete ordered was used elsewhere on either date.

September 30, and October 1, 1999

- [108] The original requirements of Mr. Harrison were that the showroom floor was to be a minimum of five inches and the shop floor a minimum of six inches.
- [109] Mr. Harrison testified that he "did not recall telling Doug to raise the thickness of the shop floor" and then said that he denied telling them about raising to a depth of eight inches.
- [110] The evidence on behalf of the defendants is that this was requested by Mr. Harrison because of an expressed concern that heavy equipment would be worked on in the shop.
- [111] Core samples taken, which are part of Exhibit 76, show that the depths of the floor at certain drill sites range from 5.75 to 6.75 inches in depth. No core samples were taken for the showroom floor. Unfortunately, no drill-core samples were taken in the centre of the shop floor where the greatest weight of equipment would be located and for which the greater depth was sought.
- [112] The evidence of Bill was that the showroom floor was poured to a thickness of 5.5 to 6 inches, but the shop was increased to 8 inches. He also testified that wire mesh was used in the showroom and rebar was used for the shop.
- [113] In terms of the thickness of the pour in the shop, Exhibit 75 was filed which gave the measurements of four samples drilled at various portions near the rear wall area of the shop. These do not span the whole floor but rather only a portion of it away from the centre area and these measurements range from 5.75 to 6.75 inches. Core samples 3 and 4, which are the furthest toward the centre of the floor, thicken in comparison to core samples 1 and 2, which were along the perimeter or edge, of the shop wall, thus showing an increasing thickness as one moves from the outer to the centre areas of the shop.
- [114] I do not accept Mr. Macdonald's opinion as to a delivery of 91.2 cubic metres as evidence by ICL invoices, but a need for only 68.00 cubic metres as per the plans. It is clear that this building was not constructed according to plans. This was as a consequence of specific changes made during the course of its construction.
- [115] Bill testified that, in terms of the pouring of concrete, a pumper truck was used for the shop floor pour on the October 1, 1999, as barrows could not be used except for a final portion of the pour when he sent the pumper truck on its way in order to save costs. In respect of the showroom, a pumper was not necessary since barrows could be used as wire mesh, as opposed to rebar, was used as reinforcement.
- [116] Mr. Macdonald agreed that the use of barrows for such a pour (on wire mesh) was appropriate. He said it would be more efficient to use a pumper truck on the rebar floor than on the mesh floor.

- [117] Thus, Mr. Macdonald can offer "no rational explanation" for the lack of pumping invoices for the concrete placed on September 30, 1999, (when the shop floor was poured) or for the fact that the "pumping invoice on the 1st of October, was only for 47.2 metres whereas 54.2 were billed to the project." I, however, find that the reasons given by Bill for the use of the pumper on October 1, 1999, and not on September 30, 1999, and for the difference of the amount delivered and pumped on October 4, 1999, are in fact, a "rational" explanation.
- [118] I am satisfied that rebar was used for the shop as opposed to wire mesh given the fact that on September 30, 1999, a quantity of wire mesh was purchased sufficient to cover the showroom floor (approximately 2400 square feet) and no further rebar was acquired at that time. This was consistent with the use of the remainder of the rebar which had been acquired earlier in June when the defendants had thought they could place the rebar, but in the end did not. The rebar installer, AAA Rebar Only Ltd. ("AAA"), then provided its own rebar for the foundations.
- [119] The showroom area was 2400 square feet. The shop area was 3000 square feet. The invoices show that for October 1, 1999, pour 54.2 cubic metres of concrete were delivered. The pumper invoice records 47.2 cubic metres of concrete being pumped with the balance being hand delivered. The total concrete for both September 30, 1999, and October 1, 1999, was 91.2 metres, leaving 37 cubic metres in the showroom floor.
- [120] Thus, approximately 41% of the total concrete went to the showroom floor and 59% to the shop floor (52% being pumped and 7% hand delivered).
- [121] The showroom occupies 44% of the total floor area, whilst the shop room occupies 56% of the total floor area.
- [122] I find that the percentages of 41% of the total concrete to 44% showroom floor, and 59% of the total concrete and 56% of the shop floor to be of such a relationship that, accepting the pumper truck figures to be correct and that some of the shop floor concrete was hand delivered, I am satisfied that the 91.2 cubic metres were in fact delivered to this site subject to minor wastages which, according to Mr. Anderson, may be expected.
- [123] Accepting, as I do, Bill's evidence that barrows were used for the final portion of the shop which did not need a pumper so as to save pumper costs, then these amounts, in my opinion, are consistent with a conclusion that what was delivered was in fact used. It would be unrealistic to accept Mr. Macdonald's opinion that only 47.2 metres were pumped on the shop floor, leaving consequently only 20.8 cubic metres available to be used for the showroom floor. Equally unrealistic is a ratio of 30% of the concrete for the showroom floor and 70% for the shop floor, given the ratio of 2400 feet to 3000 feet (44 to 56%), even with the increased thickness of the shop floor taken into account. I am satisfied that on September 30, 1999, and October 1, 1999, 91.2 cubic metres of concrete were delivered by ICL and installed by the defendants.

- [124] Mr. Macdonald opined that increasing the amount of concrete called for in the plans would have constituted "a gross wastage of concrete" but he was unaware of the corresponding ordered increase in thickness so as to accommodate heavier equipment on the shop floor. I do not regard Exhibit 75 as being demonstrative of such a wastage, or of the fact the depth was not increased in the more central area of the shop floor.
- [125] Thus, Mr. Macdonald's opinion is also contradicted by the evidence of the amount pumped and by Mr. Anderson's evidence as to the amounts delivered. I find there was no diversion on September 30 and October 1, 1999, pours.
- [126] Likewise I do not regard the ordering of four 2000-foot rolls of "poly" to be "waste" as asserted by Mr. Macdonald, given its use on some 5400 square feet of flooring, and its subsequent outside use for pours for the ramps and sidewalks. Rather, I conclude such a purchase as prudent in order to ensure materials were on hand, given the absence of any further ordering of such poly as evidenced by the Slegg Brothers invoices.
- [127] Additionally, as was testified to by Bill, some of the "poly" was used to protect the stuccoing of the exterior portions of the building from rain.

November 2 and 5, 1999, Pours

- [128] Mr. Macdonald expressed no knowledge of how thick the loading aprons were or how the sidewalls were poured. There are no drill-core samples upon which some overall calculations for those depths could be made. He opined that the slabs in the front of the shop and the showroom may be different. He suggested a range of 100 millimetres to 75 millimetres (4 - 3 inches) for these slabs. Why that would be the case is not clear to me, given that the requirements stated on the plans of 5 and 6 inches respectively for the showroom and shop. Mr. Macdonald suggests that only 14.87 cubic metres would be required as opposed to the 16.6 delivered. Common sense would suggest that in the absence of some other evidence, the aprons would be consistent to the floors in thickness.

Quality of Concrete

- [129] Given Mr. Harrison's assertions that he has no complaint as to the quality of this building, I find no basis for the assertion by Mr. Macdonald that the concrete was in any way inferior to that specified by the plans or delivered by ICL Concrete.
- [130] In conclusion, on the evidence of Mr. Anderson and Bill, I am satisfied that the concrete that was delivered, subject to minimal wastage, was poured and that no concrete was diverted.

Foundation Labour

- [131] I agree with the opinion of Mr. Macdonald that Doug's recordkeeping was appalling. Although initially, as evidenced by Exhibit 2, time records were maintained, it is clear that Doug lacked the ability to maintain them either in terms of having his crew record and report time, or in terms of his own recording and reporting of time to Mr. Harrison. There is no question that as this job progressed time records were less and less well kept. Equally so, Mr. Harrison, for his own reasons, was prepared to tolerate this lack of record keeping in the interests of having his building constructed as soon as possible. Mr. Harrison, by his own evidence, agreed that he had on earlier occasions fired contractors from building sites and that he was not unfamiliar with the technique of doing so in the interests of obtaining that which he wished. Mr. Harrison was far more experienced in project management than Doug.
- [132] In the period up to August, 1999, before Mr. Harrison's illness affected his ability to oversee this project, at no time did he seek to effectively demand such records. He, it became obvious, was clearly more experienced in terms of construction and contracting than was Doug. Yet, despite the complaints, which he says he raised, he did not do anything to effect any better reporting. Indeed, as he testified, there were good reasons not to send the defendants packing from the building site. He was, I find, prepared to tolerate this record keeping in the interests of keeping the defendants on the job given the dearth of other contractors being available.
- [133] The only real criticism Mr. Harrison raised was in questioning the 10% charged to some portion of the labour bills. These were agreed by Doug to be inappropriate and were later adjusted on the accounting of Mrs. Harrison.
- [134] Mr. Macdonald seems to be unaware of the decision to raise the footings and thus elevate the structure to avoid flooding. He attributed what he regards as excessive labour costs to a "deliberate overbooking of labour hours or a gross incompetence."
- [135] In cross examination, Mr. Macdonald agreed that to raise the foundation forms, as was done here, would add to the amount of hours worked and thus increase the labour bill. He offered no opinion as to the amount of time necessary to do that, apart from applying a formulaic cost per square foot for the construction of such foundations. Such a formula clearly would be inappropriate where foundations are altered from the plans to accomplish a purpose such as that which was sought here.
- [136] In terms of the grade beams, Mr. Macdonald draws a similar conclusion as to the cause of the amount of time applied to the foundation footings.
- [137] The time sheets found in Exhibit 2 are those for all labour used on both of these stages. Mr. Macdonald asserts the use of some third-party time but the time sheets, in my view, contradict that as they are inclusive of all labour used to form and pour, other than the ICL driver who delivered the concrete.

Floor Slabs

[138] Mr. Macdonald again asserts that these pourers for the floor and the external slabs were subcontracted third parties but the evidence is that the defendants engaged labour necessary for this pour and those times were billed to Mr. Harrison.

Saw Cutting

[139] Mr. Macdonald based his opinion in this regard on the premise that the labour costs attributed to saw cutting were to be solely used for the saw cuts. But this was not the evidence of Bill, who was in charge of that process and who testified that before and after the cuts were made, the surfaces were power washed and that a sealant was applied to the surface of the floor afterwards.

[140] Mr. Macdonald appeared to acknowledge the competence of the saw cutting given his observations that there were no cracks in the floor. Further evidence which supports the strengthening of the shop room slab is found in the fact that there were no structural faults or cracks discovered from the completion of construction in November, 1999, to the commencement of this trial in July, 2002.

Lumber Purchases

[141] Mr. Macdonald suggested that "having previously reviewed the usage of lumber" and taken into account some "additional information" he was still of the view that the lumber usage was excessive. Unfortunately, whatever he previously reviewed in terms of lumber usage is not before me and I have no idea from his report as to what additional information he was provided with beyond that which was referred to earlier in these reasons.

[142] In expressing these opinions of lumber usage, Mr. Macdonald did not do anything more than assert excessive purchases without providing a basis for that assertion.

[143] If, as I assume, it was on the basis of his reviewing the material to which I have referred, he appears to have failed to take into account changes that occurred along the way, including the raising of the footings with attendant bracing for the additional weight of concrete, the use, in particular, of the twelve-foot 2" x 12"s used in part to form the footings for the foundations of the columns and the construction of a ramp for a forklift or other equipment to enter the building without damaging the thresholds. Likewise the revision of the way in which the front canopy was to be completed as testified by Bill by the sheathing of the walls above the trusses whereas the plans called only for a sheathing to the inside of the block wall.

- [144] Mr. Macdonald also referred to "many questionable purchases" and specifically refers to the purchase of a 2" x 2" clear spruce and casing nails. Mr. Macdonald is referring to Exhibit 10, Tab 27. There is no question this material was used on the defendants' Ella project as the date of this is at the same timeframe as Exhibit 10, Tab 28. It in fact was not marked "Station Road," as were others, and would clearly be identified as not pertaining to this project.
- [145] Mr. Macdonald also noted what he refers to as "79 sheets of plywood or OSB sheathing" unaccounted for in his calculations of what was purchased and what was used.
- [146] Mr. Macdonald was not aware of the evidence of Troy Robinson, who testified that in mid-November, 1999, after the defendants were off the project, Mr. Harrison began to complain to him about the defendants, accusing them of taking things off site and wrong billings to the Slegg Brothers account.
- [147] Mr. Robinson testified that Mr. Harrison told him plywood had been taken off site. When Mr. Robinson, told Mr. Harrison that was not in fact true and that he himself had used a bobcat to move a quantity of it to another location on site, Mr. Harrison would not believe him.
- [148] Mr. Robinson also testified that Mr. Harrison complained to him about slathing, which he described as tapered lumber 6 to 8 feet in length. Again Mr. Harrison did not believe Mr. Robinson when he told him that he had seen such slathing used on the building to divert water.
- [149] Mr. Robinson said that Mr. Harrison appeared not to listen to any explanations provided to him with respect to the allegations of missing materials.
- [150] Mr. Robinson, in my view, was an impartial witness whose evidence I accept.
- [151] Likewise, Mr. Macdonald did not seem to have taken into account thirteen sheets of three-quarter plywood returned to Slegg Brothers on November 22, 1999, as evidenced by Exhibit 10, Tab 105.
- [152] A significant feature of this trial was the amount of time spent on the issue of the number of anchor bolts used to secure the roof and canopy.
- [153] These anchor bolts were used in two places. The first and major area in which they were used was to hold 2" x 8"s in place along the building-block walls to which the roof trusses would be affixed, and secondly, and to a lesser extent, they were used to secure the canopy on the front and outside of the showroom.
- [154] Mr. Macdonald opined the number of bolts that he would expect, according to the plans, to be used was 981 but allowed that "this number may have varied as . . . the roof was not constructed in accordance with the engineer's drawings." He does not appear to have attempted any actual count as did Mr. Harrison and Bill.
- [155] He determined from the invoices that a total of 1,238 of such bolts were purchased.

- [156] Mr. Harrison did a calculation based upon a multiplication of a specific number of these bolts for each 24 inch portion of the wall space. He calculated 788 had been used.
- [157] Bill testified that approximately 1,200 three-quarter inch bolts and approximately 100 half-inch bolts were purchased for the roof and canopy respectively and that subject to some wastage, all were used in the project. The invoices show that 1238 bolts were purchased in total.
- [158] Bill did not recall if he used bolts or nails for the capping which consisted of 2" x 8"s being secured to the top of the masonry walls, which were in turn covered by flashing.
- [159] Clearly, from examinations done later by Mr. Harrison, bolts were not used on this capping of the masonry walls.
- [160] Bill calculated the pattern of bolts used upon the need to alter the positioning of the bolts because of the structure of the concrete building blocks. He testified that 490 bolts were used in the showroom and 572 in the shop to secure the beams to the trusses and a further 60 bolts were used for the canopy for a total some 1,122 used of the 1,238 purchased.
- [161] Given Mr. Macdonald's acknowledgement as to construction varying from the plans, I am not prepared on the face of Bill's testimony, which I accept, to conclude that the bolts acquired were used for purposes other than on this project. I do not find the difference between the amount of bolts placed and the amount purchased to be excessive in terms of wastage or left-over bolts.

Masonry

- [162] A part of the contractual relationship in terms of oral agreements was that Doug was to give Mr. Harrison three quotations for each sub trade. Mr. Harrison was to determine which sub trade he wished to use. As well, it was to be up to Mr. Harrison to negotiate prices with the sub trades. Clearly, that term was honoured more in its breach than its observation.
- [163] From the evidence a number of reasons for this appear. The first reason is that given the late timing of this project, it was difficult to get three quotations for each sub trade from those who were able to work in a timely manner on the project or were even prepared to quote. The second was Doug's preference for various sub trades that he knew and which he recommended to Mr. Harrison. A third reason was that reasonable pricing could not always be obtained given the timing of this project.
- [164] Mr. Harrison did not insist on three such sub trade quotations on each occasion and was content, as appears from his selection or agreement with recommended sub trades, to rely upon Doug's recommendation in terms of the sub trades throughout this project. It was he and he alone who had the authority to determine which, if any, sub trades should be accepted or whether further quotations should be obtained.

- [165] Mr. Harrison has provided as part of Exhibit 1, (being the information first sent to Doug) a quotation from A.A. Boogaars Construction Ltd. ("Boogaars") for the masonry or block work in the amount of some \$68,165. A second quotation was also obtained from another bricklayer, Amcorp Masonry, for \$57,000. Mr. Macdonald opines that without the defendants providing Mr. Harrison an explanation as to why the higher quotation should be accepted in preference to the lower, there was an entitlement to a reimbursement of \$7,165, the difference between the two quotations.
- [166] Mr. Harrison asserts that he was never aware of the Amcorp bid, yet Exhibit 23, the Amcorp bid, according to its face, was delivered by hand to "Bob Harrison" on June 22, 1999. As I have alluded to earlier in these reasons, I do not find any security in his recollections of conversations or events past, given what occurred in terms of his health, in particular in the period of time from July, 1999, onward.
- [167] In this respect, I find that he received this quotation and was provided with a reason for not accepting it.
- [168] That reason, as testified to by Bill, was that he had learned from the supplier of building blocks that Amcorp had not been paying its trade accounts. Bill did not recall if he spoke to either Mr. Harrison about that or to both Mr. Harrison and his brother.
- [169] Doug's evidence was that he told Mr. Harrison of this concern and consequently Amcorp was dropped from further considerations. Doug testified that he had subsequently learned that before he became involved with Mr. Harrison, Mr. Harrison had wanted a masonry layer by the name of Nielsen to do the job, but that that subcontractor could not do the job in the time frame needed. The result was that Boogaars was selected by Mr. Harrison to do the masonry work.
- [170] I conclude, in terms of his acceptance from time to time of singular quotations, that Mr. Harrison was more concerned with the timely completion of this project rather than with obtaining various quotations, and as a consequence he did not strictly insist on the requirements for three quotations per sub trade.
- [171] Mr. Macdonald noted that there were two quotations for the stucco work: Tudor Stucco at \$4,850 and DeCicco at \$6,499 (both net GST) and that there is no explanation as to why the lower one was not accepted.
- [172] However, because the four columns holding up the showroom canopy were so well poured they did not need stucco work as painting was a satisfactory finish.
- [173] DiCicco also quoted on the basis of both the front and underside of the canopy being stuccoed whereas Tudor's quotation was only based on the front of the canopy being stuccoed.
- [174] Mr. Macdonald, relying on the plans, opined that \$5,400 would be reasonable for the work being done and in fact the final bill, as recorded on Exhibit 8, was \$5,699.40.

[175] Accordingly, Mr. Macdonald's suggestion of reimbursement of some \$1,269 "after taking the columns into account" is simply untenable.

Painting

[176] Three quotations were not obtained. All that Doug did was to introduce the painter, Wellburn, to Mr. Harrison. There is no question that Wellburn was a friend of Doug's and that fact was known to Mr. Harrison. Doug had confidence in Mr. Wellburn's workmanship.

[177] Doug said he did not participate in the financial discussions between Mr. Harrison and Mr. Wellburn as he felt that Mr. Harrison had much more experience in construction generally and particularly in projects such as this.

[178] Mr. Harrison agrees that he was so introduced to Wellburn and was told by Doug that Wellburn was a good painter. He agreed he did not demand two additional quotations.

[179] Mr. Harrison said he hired the painter on an hourly basis and insisted to Doug the timecards be kept for which he said he was assured by Doug this would occur.

[180] The painter, as a subcontractor, as with other trades, was to send his bills to Mr. Harrison and thus be paid by Mr. Harrison directly.

[181] Mr. Macdonald opined that the "value" of the work done in terms of painting was some \$9,500 and records a bill of some \$21,317.22 tendered for labour with a further \$4,341.07 for material. There is no evidence that Doug ever saw these invoices. Mr. Macdonald, in his opinion, had no quarrel with the material costs but opined that the labour component of the painting was excessive. He did agree that brush painting would be more costly in terms of time than spray painting.

[182] There was an auto body shop nearby and that caused a concern about spray paint affecting cars located there; accordingly paint was applied by means of brushwork rather than by spraying.

[183] Mr. Macdonald opined that \$42.50 and \$35 an hour for labour for painting was above the then current rates of \$32 to \$34 for a lead hand and \$25 for an apprentice painter.

[184] There was no evidence that Mr. Harrison questioned those rates or made inquiries as to their appropriateness before agreeing to pay them.

[185] Mr. Macdonald opined that 210 hours for such spray painting would be appropriate and that the billed amount of 595 hours far exceeded what might be appropriate.

[186] Mr. Harrison refused to pay some \$5,892.08 of that account. There is no evidence of any proceedings for recovery being taken by the painter.

Scaffolding

- [187] A twenty-four foot, gas-powered, scissor lift was rented for the period of September 13, to November 22, 1999, and a second twenty-foot lift for the period of October 14, to November 24, 1999.
- [188] Mr. Macdonald observed that these rentals coincided with the painting of the building and that there was no indication of them being used for any other purpose. Accordingly, he questions the need for these lifts in terms of the amount of time they were on site and their use in preference to conventional rolling or frame scaffolding.
- [189] In his cross examination, Mr. Macdonald testified that it would have been better to pour the floors and then use rolling scaffolding. He acknowledged the Workers' Compensation Board has regulations as to the maximum height that rolling or frame scaffolding may be used, but was unable to say what that was. He nevertheless agreed that the regulations would come into play, particularly at the top end of the walls being constructed and worked upon if conventional scaffolding had been used.
- [190] He agreed that scissor lifts are more convenient and thus more efficient than rolling or frame scaffolding.
- [191] I accept Bill's testimony that the scissor lifts were not only used by the painters but also by the electricians, the dry wallers and the plumber. A feature of this building is that the roof drains run down through the interior of the structure. The lower side of the trusses were some twenty feet above the shop floor and the upper side of the wall was over twenty-three feet from the floor level.
- [192] Mr. Robinson said that, in addition to the sub trades testified to by Bill, he also noted that the roofer used the scissor lifts when installing the roofing.
- [193] While the use of rolling or frame scaffolding, subject to the Workers' Compensation Board height restrictions, may have been used on a poured concrete floor, the simple fact was that the floor was not poured until the end of September. While rolling or frame scaffolding could have been used inside after that occurred, it could not have been used outside without considerable labour in erecting and dismantling the scaffolding as it was moved along the outside of the wall as required.
- [194] Mr. Robinson testified that at one point he suggested to the rental firm that an idle scissor lift be returned only to be told by the rental firm employee to leave it where it was. There was no evidence as to when that conversation occurred.
- [195] Frame scaffolding was rented during the period of time between August 6, 1999, and early October, 1999, when it was finally returned. The commencement of this rental is consistent with the wall construction by Boogaars. Its return overlaps the use of the scissor lifts that began in mid-September. I find no basis to conclude that these rentals were either individually, as pertaining to the scissor lift or the rolling or frame scaffolding, or

collectively excessive, given the use of both of them and the limitations placed upon the use of rolling or frame scaffolding.

Rebar Material

- [196] Rebar material was used in the footings, the grade beams, columns, inside the building blocks of the walls and for the slab floor in the shop. On June 17, 1999, the defendants purchased from Slegg Brothers some 3,000 feet of rebar to be used in the footings and grade beam since the original plans called for some 2,835 lineal feet of this material.
- [197] Doug initially believed they could do the bending of the rebar in time, but realized that this was not feasible and was beyond their competence. They engaged AAA. As noted by Mr. Macdonald, it is unusual for a small contractor like the defendants to do such work if for no other reasons than the fact that they often do not have the needed equipment to bend rebar.
- [198] AAA did the foundation grade-beam rebar and invoiced Mr. Harrison for their work. Mr. Macdonald, in reviewing AAA's account observed that the amount of rebar was invoiced by weight rather than by lengths, but opined that such a weight is not questioned as being required or called for by these plans. The raising of the footings would perforce requiring rebar additional to that which was calculable from the plans.
- [199] Mr. Macdonald did not consider the rebar and mesh used in the floors "as they were purchased and subcontracted separately." In respect to the shop floor that is not correct.
- [200] Mr. Macdonald in accepting that the AAA invoices are reasonable, then opined in respect of the Slegg Brothers purchase of rebar by the defendants on June 17, 1999, as:
- The amount charged was an unnecessary and incorrect charge to this project. We can offer no explanation for the requirement to purchase this deal other than it was used for an unauthorized purpose beyond the requirements of the contract at the expense of the owner.
- [201] A review of Exhibit 10 shows that the only rebar purchased by the defendants throughout the project was on June 17, 1999, as set forth in Tab 2 and that the only steel mesh was purchased on September 30, 1999, as set out in Tab 68.
- [202] Rebar was used in the shop floor. The evidence of Bill was that some of this rebar purchased on June 17, 1999, was used by AAA, but the balance of it was used in the shop floor.
- [203] Given that no other rebar was purchased after June 17, 1999, this use of the rebar provides an explanation for the use of the earlier purchased rebar in addition to that which was used by AAA.

- [204] As a part of the slab pouring, poly was used as a vapour barrier underneath the concrete. Four rolls of 2,000 square foot each were purchased. It is clear that at least three were used in the slab pouring. The acquisition of the fourth roll was questioned by Mr. Macdonald as being unnecessary.
- [205] I find the explanation for its use, as testified to by Bill, in covering stucco work from inclement weather, to be reasonable. Anyone familiar with such a building project would recognize the multiple uses of such poly such as to account for the fourth roll being used in part or whole for this purpose or others.
- [206] Mr. Macdonald, at pages 13 to 15 of his report, listed twenty-three items (which are part of Exhibit 10) which he regarded as superfluous to this project. I consider each of them in sequence.
1. Tab 3

[207] Two rolls of wire were purchased when the defendants believed they would do the rebar installation. Tie wire would have been used to do the shop floor rebar as it was done by the defendants. No further purchase of wire was made according to the Slegg Brothers invoices. I am satisfied that these rolls were used in part or in whole on the shop floor.

 2. Tab 11

[208] Bill's evidence was that additional to the rented forms, additional forming material was used. There is nothing in the evidence to suggest that is not correct.

 3. Tab 13

[209] A 16-inch Sono tube was ordered in addition to four 24-inch Sono Tubes. These four Sono tubes were used in the construction of the columns. The 16-inch tube was, according to the plans (Exhibit 41), to be used as a short footing beneath each of the 24-inch columns, but as observed by Mr. Macdonald, the defendants wisely decided to eliminate this narrow footing between the foundations and the bottom of the 24-inch columns. Bill's evidence was that the tube, whilst on site, was damaged by a truck running over it and could not be returned for a credit. Mr. Macdonald's criticism of the defendants' purchase was not well founded.

 5. Tab 22

[210] The defendants acknowledged that these items were misbilled to the project. I have already reviewed how that occurred and I am satisfied with the explanations made in terms of misdescription of the destination of this material.

 6. Tab 23

[211] The same applies as discussed above in sub paragraph 5.

 7. Tab 25

- [212] Although Mr. Macdonald referred to a price of \$9.62, the invoice refers to a price of \$8.99 and taxes for a total of \$10.25. The invoice clearly denotes that the water plug was used for a project other than Mr. Harrison's.
8. Tab 26
- [213] The same applies as was discussed above in sub paragraph 5.
9. Tab 28
- [214] This invoice is clearly marked for something other than the project as was testified to by Bill and the same applies as discussed in sub paragraph 5.
10. Tab 39
- [215] The defendants do not quarrel that a hammer should not have been charged to the plaintiffs but was purchased when a carpenter's hammer broke.
11. Tab 53
- [216] Mr. Harrison testified that he agreed that this air nailer could be purchased on his account at Slegg Brothers.
12. Tab 73
- [217] Mr. Macdonald referred to this invoice as being \$28.83, when in fact it is for \$22.27 plus taxes for a total of \$25.39. Mr. Macdonald testified he could find no evidence of the use of a preservative described on the invoice as green copper sulphate.
- [218] Bill's evidence was that this preservative was used to paint the underside of the 2" x 4"s placed upon the concrete. The only area where this was done was in the area of the washroom and lunch areas. These areas would be constructed after the slab was poured.
- [219] Mr. Macdonald at page 4 of his report, Exhibit 77, filed in rebuttal, conceded that there was not enough exposure to determine whether the copper sulphate was, or was not, used.
- [220] In light of such an admission, I am satisfied by Bill's evidence as to its use. In particular I accept that this preservative was used in an area such as a washroom, where water on the floor might be expected.
13. Tab 75
- [221] Mr. Macdonald relied on assertions made to him (presumably by Mr. Harrison) that "any landscape fabric used in the project was contracted and supplied by others."
- [222] Although the original contract was that the defendants were not to do any "outside" or "yard" work, the reality is that in fact they did. A cause of this, I have no doubt, was Mr. Harrison's inability to deal with "outside" matters that needed attending to as the project progressed, particularly during the periods of time between July and November. These included two rock pits, the largest of which was used as a drain for water; the smaller of

which was to be used for a drain from an oil separator, but its use was not permitted to occur by the municipal authorities. It also included the defendants having to level the lot as testified by Troy Robinson.

[223] Bill testified that there had to be a re-excavation of the rock pit in order to put up the drain lines. In the course of doing so, the original landscape fabric that had been laid down was ripped and had to be replaced.

[224] I find that to be a reasonable explanation.

14. Tab 79

[225] There is no issue that this lubricant was used by the plumber for his gas fittings. Assuming that to be the case, it would have been charged to the plaintiffs regardless of who acquired it.

[226] I accept Bill's evidence that one of his crew picked it up for the plumber in order to save time. The invoice has noted on it in writing "other than that of Mr. Harrison's quotation for plumber re gas work."

15. Tab 81

[227] These materials, the defendants acknowledged, were not for the plaintiffs' project. It is clear that from the description of what was purchased that anyone would recognize these materials could not have been for the plaintiffs' project. The same comments apply as with sub paragraph 5.

[228] Bill's evidence was that they were for another job and thus the invoices are similar to those discussed under sub paragraph 5.

16. Tab 82

[229] The same observation applies as in sub paragraph 5.

17. Tab 84

[230] The same observation applies to this as to sub paragraph 5 except that these items were returned for a credit.

18. Tab 88

[231] Mr. Macdonald referred to a hinge at a cost of \$4.32. The invoice is referred to as a cost of \$5.12 plus taxes. There are other lumber-type items on this invoice. Bill testified he could not tell what all the material on this invoice was used for as the items were picked up by another employee. He surmised that the hinge could have been used for a temporary electrical box.

19. Tab 89

[232] Again, Mr. Macdonald referred to a \$4.32 gate hook which on the tab charged out at \$3.68. Bill had no recollection as to its usage but denied it was used elsewhere. I accept his evidence that such an item was not used elsewhere.

20. Tab 90

[233] Mr. Macdonald opined no use to be found for this ten-foot, 4-inch PVC pipe. An inquiry as to its use (as testified to by Bill) showed it being use to run sprinkler lines under the driveway. I am satisfied as to its usage.

21. Tab 92

[234] Mr. Macdonald referred to a \$98.33 purchase of concrete accessories and a four-inch aluminium flex duct which are recorded on this tab at a total of \$104.06. Mr. Macdonald opined that none of these items were used in this project.

[235] A closer examination of the project as it was constructed and as was depicted in photographs, Exhibits 28, 29, 40 and 82 and other photographs, reveals the use of such materials in the bathroom. The aluminium flex duct pipe is clearly evident as a venting duct.

[236] Neither Mr. Harrison nor Bill was questioned as to the purpose for the use of the nails set forth in this tab. It is impossible to ascertain the correctness of Mr. Macdonald's opinion that "there would appear to be no use for these on this project."

22. Tab 98

[237] This is an invoice for nine concrete patio slabs, none of which Mr. Macdonald opined were used on this project. Bill testified that he could not recall what they were used for and they may have been used at another job.

23. Tab 59

[238] This invoice, dated November 10, 1999, is for a return of a box of two-inch bright common nails in exchange for a box of two-inch galvanized nails. It relates to Tab 58 which records the purchase of the two-inch bright common nails. I find these were used only on the building project.

[239] The result of these transactions was a net charge of \$28.46 and taxes for a total of \$32.44.

Nails, Spikes and Hilty Fixings

[240] Mr. Macdonald opined that the amount of nails used in this project was excessive but does so without providing any basis for that opinion. A portion, however, of his opinion was based on the criticism that there were three boxes of three-inch nails that were obtained through Pacific Trusses that were required for use on the structure of the trusses. These nails were part of a special order made through Pacific Trusses for use on the roofing trusses. It was determined by the defendants, with the approval of the engineer, that the

use of a nail gun as opposed to a hammer, was a more efficient way of construction. These nails had to be specially manufactured by a supplier to Pacific Trusses.

- [241] Upon completion of this work, three boxes were left over. Because of them having been a specially manufactured order delivered to the defendants through Pacific Trusses, these items could not be returned for a refund despite, what I accept to be, the efforts of Bill to do so.
- [242] Bill acknowledged that he ordered the nails in two lots because he could not, with any precision, estimate the amount needed and the engineer could not tell him. He said that he ordered more than he felt would be needed on the second order so that he would not run out and have to wait for the specialty order to be re-filled if he fell short after the second order.
- [243] The first order was placed on August 26, 1999, and the second was received on or about September 21, 1999. Both dates being within the period of time the roof construction was underway. There was a delay in invoicing after their receipt.
- [244] What was not known to Mr. Macdonald was that whilst billing occurred from Pacific Trusses with respect to the specialty nails, the nails were in fact ordered from and received directly by the defendants from their manufacturer and then billed through Pacific Trusses, thus accounting for the delay in actual billing.
- [245] The final item opined about in Mr. Macdonald's report is the use of the roto hammer in a period after the completion of the construction of the walls and the truss installation which he opined occurred on or about August 12, 1999.
- [246] A roto hammer is used to drill through concrete. Doug's evidence was that Boogaars' invoice of August 12, 1999, was in fact rendered before the work was actually completed.
- [247] The use of such a hammer, according to the invoices from GWG Rentals, was from the period from August 9, 1999, through to November 8, 1999.
- [248] Mr. Macdonald opined that there would be no use for such a hammer after the block walls had been completed and the bolts securing the trusses were installed. Bill's evidence was that this hammer was used for a variety of purposes in addition to the setting of the bolts in the masonry walls. These other uses included drilling through concrete walls to provide overflow holes for drainage, the installation of electrical conduit piping (see Exhibit 16, Tab 8) and drilling for rebar on the loading ramp (Exhibit 16, Tab 19) for the period of October 22, 1999, to November 8, 1999.
- [249] This completes my reference to Mr. Macdonald's report as a template.
- [250] Counsel for the plaintiffs argued that there should be an adverse inference drawn against the defendants because they did not call a quantity surveyor whom they consulted when they received the report of Mr. Macdonald.

- [251] The defendants, from the outset of this trial, have had financial difficulties. It was apparent that Mr. Main's initial engagement was tentative and was problematic due to those financial reasons. In part, the difficulties arose because the personal defendants suffered a significant loss as a result of a fire prior to the commencement of the trial.
- [252] I am satisfied that they simply did not have the resources to continue with the quantity surveyor and in these circumstances, I would not draw such an adverse inference.
- [253] In addition to Mr. Macdonald's report, Mr. Harrison raised other complaints.

Trailer Rental

- [254] Although Mr. Harrison offered a portion of the trailer used as Surfwood's base of operation for use as a construction trailer/office, I am satisfied on the evidence, that very early on in the course of the construction of the building the common use became inappropriate to both Mr. Harrison's purposes and to the defendants' and by June 21, 1999, a trailer was rented and was kept until the end of construction.
- [255] Mr. Harrison testified that he never agreed to the rental of this trailer, yet he raised no complaint during the project when he would receive invoices from GWG Rentals, the first of which appears to have been sent to him on or about July 1, 1999. As well, he would have seen the trailer on site and at no time during construction did he raise an issue as to his paying for it. I find that there was a mutual agreement for the use of this trailer and payment for it by the plaintiff. I am reinforced in this opinion by the testimony of Mr. Robinson who said that it would have been very difficult for both Surfwood and the defendants to operate out of the Surfwood trailer.

The At-A-Glance Note Book

- [256] The plaintiffs argued that the neatness of this book (Exhibit 11) is inconsistent with other journals kept by Doug (Exhibit 12) and as such is evidence of its recent manufacture. It is argued that this "At-a-Glance" journal was created for the purposes of justifying the claims of the defendants at a time when they had initially issued their writ.
- [257] Mr. Harrison relied on the fact that he has seen other such job records over time from other contractors and says they are not so neat and tidy as Exhibit 11. Mr. Harrison said at one point in his evidence that the original At-a-Glance notebook had in fact been given to him for examination but Doug would not let him take it to copy.
- [258] Doug's evidence was that he had followed the advice of his solicitor to maintain such a journal and that he did so, recording items of importance in addition to other records such as his personal diary, (Exhibit 12) and whatever time sheets he maintained.

[259] I accept Doug's evidence that after the original notebook had been copied it was destroyed in a fire set by others at a premises where Doug kept his office and that the copy that survived was at his solicitor's office from whence it was produced once this litigation was commenced. I do not regard the state of this journal as in any way sinister, but rather consistent with the advice he had received before the defendants began this project. With that advice in mind, he kept the notebook in a "tidy" state.

Securing the 2" x 8" Capping

[260] During the course of the trial, an examination was done of the capping of the masonry walls. This examination was done by Mr. Macdonald. These walls have on top of them a 2" x 8" plank which is covered with roofing material. Mr. Macdonald found the planks were not secured by bolts but by nails. He said that the securing of the capping with bolts was not called for in the plans and to do so would not be usual.

[261] If the import of this evidence was to assail the suggestion that bolts had been used to secure the 2" x 8" planks, in my view, such evidence was of no value given Bill's evidence that he could not recall if he used nails or bolts to secure the capping to the wall. I do not conclude from Bill's evidence that there was an assertion by the defendants that these planks were secured by bolts as opposed to nails.

[262] I wish to observe at this juncture that in terms of witnesses, I was generally impressed by the testimony of both Bill and Doug. While I have observed that the record keeping of Doug was less than what one might expect of an experienced contractor, that conclusion does not detract from the veracity of his testimony. While because of Doug's disorganization, it appeared at times that he struggled to recall details, I did not find that his testimony suffered in terms of his credibility or in terms of his recollection.

[263] With respect to Bill, I found him to be a forthright, straight-forward witness who had a good grasp and recollection of the work done by himself on this project and where perplexed by the tenor of examination regarding the construction, he, on occasion, returned to the building to refresh his memory.

[264] Having just said this about the two individual defendants, I do not hold a dissimilar view with regard to Mr. Harrison. I find, however, that he had a lesser recollection of the events of the construction, caused in large part by his illness during a period of time in which much responsibility was placed upon the defendants' shoulders to continue with the construction in the absence of specific instructions from Mr. Harrison, particularly in regard to the outside work.

- [265] Clearly, his "discovery" of the various unrelated Slegg Brothers invoices precipitated in the absence of recollection or explanation (if such had been sought by him) and caused him to see evil where I conclude none existed. Sadly, such a view coloured his general impression of the defendants and in particular, Doug, especially when faced with Doug's managerial inexactitude. Mr. Harrison thus formed the basis for his belief that the personal defendants had somehow done him wrong.
- [266] In this respect, Mr. Harrison's view of what occurred was tainted, in my opinion, by his perception of the defendants. The tenor and depth of that perception is exemplified by the evidence of Mr. Robinson who said that when Mr. Harrison expressed the view that he had been "ripped off" in respect of the number of sheets of plywood billed for, he simply would not accept Mr. Robinson's explanation that it was he, Mr. Robinson, who had moved those sheets of plywood to another area on the site.
- [267] The plaintiffs alleged that the defendants behaved in a fraudulent manner by acting with deceit and misrepresentation.
- [268] The allegation of fraud is a direct allegation of a criminal act. Where such an allegation is made then it must be carefully examined.
- [269] The plaintiffs joined Hodson Construction and Doug and Bill as defendants. I agree with counsel for the plaintiffs that where fraud is alleged and established, the corporate veil may be drawn aside and liability of the principals concluded (see: *Littlewoods Mail Order Stores Ltd. v. McGregor* (inspector of taxes) [1969] 3 ALL ER 855 (C.A.). Where no such acts are established, there is no basis to do so and the appropriate parties remain the parties to the contractual relationship. Here those parties are Mr. and Mrs. Harrison represented by Mr. Harrison, and the Hodson Construction as represented by Doug.
- [270] As observed by Richie, J. in *Hanes v. Wawanesa Mutual Insurance Company* [1963] SCR 154 at page 162.
- . . .when a right or defence rests upon the suggestion that conduct is criminal or quasi criminal the court must be satisfied not only that the circumstances are consistent with the commission of the criminal act but that the facts are such as to make it reasonably probable, having due regard to the gravity of the suggestion, that the act was in fact committed.
- [271] Thus, while in cases where fraud is alleged the civil standard of proof remains a balance of probabilities, in the process of determining whether that standard has been met, great scrutiny and care must be applied in the examination of the evidence which alleges conduct that is criminal in nature. The allegation of fraud is a direct allegation of a criminal act.
- [272] I have earlier expressed the view that Doug was a less than experienced contractor for such a project and his record keeping was quite properly described by Mr. Macdonald as appalling. But such conduct, in my view, does not in the circumstances of this project provide evidence of fraud or misrepresentation.

[273] I have spent some time in reviewing the complaints enunciated by Mr. Macdonald which are, in essence, the complaints of the plaintiffs and my conclusions with respect to them are that:

1. They are non-existent in terms of the fraudulent misrepresentation and conduct alleged.
2. They are unsubstantiated in terms of the wrongful conduct alleged.

[274] Counsel for the defendant, in my view, correctly asserts in his written submission that none of the allegations enunciated below in sub paragraphs (a) to (l) are in and of themselves fraudulent:

- a) yard work or other work not agreed to in the written or verbal contract;
- b) charging high or excessive hourly rates - especially if those were agreed to or if not agreed to if the Defendant did not express his disagreement;
- c) failure to obtain competitive bids;
- d) failure to supervise or properly supervise sub-contractors;
- e) failure to return scissor lifts as soon as possible, and/or renting fewer lifts;
- f) digging two rock pits;
- g) wasting concrete;
- h) failing to keep complete clear records or, keeping few and very poor records;
- i) failing to provide records without or upon request to do so;
- j) failing to account properly;
- k) failing to credit the Defendant for items purchased on his account for use elsewhere, especially if there might have been agreement for those accounts in the name of the Defendant to be used for other projects; or
- l) failing to comply with ordinary implied terms of a cost plus contract.

[275] While such a list may provide evidence tending to establish fraud, it is necessary for there to be a basis established on a balance of probabilities that in doing or not doing any or all of such acts, there was an intent to deceive.

[276] Likewise, such acts or omissions must be consistent with an act of fraud and inconsistent with any other rational conclusion.

[277] It will be apparent from these reasons that I am not satisfied to the degree I must be that any intent to deceive accompanied what the defendants did. Furthermore, I find what was done was consistent with another rational conclusion, being that of innocent conduct, albeit through inexperience, which the plaintiff knew or should have known about when they engaged Hodson Construction.

- [278] Mr. Harrison engaged builders whom he knew, or should have known, had little or no experience in the construction of such a large project. He, on his own evidence, made minimal inquiries as to the competence of Doug to manage such a project and was satisfied that the defendants had the ability to construct such a project within his given timeframe. In this latter respect he had no complaint with regard to the quality of the structure constructed for him and Mrs. Harrison. Mr. Harrison needed a builder. He was under time constraints and was prepared to risk the use of an inexperienced contractor against his need to have a building constructed as soon as possible.
- [279] The confluence of an experienced builder and an experienced contractor in terms of managerial skills do not always flow together. In this case it is clear that this did not occur.
- [280] Mr. Harrison was a sophisticated and experienced person in the field of construction and its management. By his own admission, he was not unprepared to discharge a builder for not performing well. In this case, it is clear that he was satisfied with the results of the work both during its progress and its completion only to find that its costs far exceeded that which he had anticipated.
- [281] Throughout this project, from its inception without a contract in writing until after the defendants were gone from the site, and apart from some adjustments to the costs on the "cost-plus" basis in respect of labour billings to which the defendant agreed, not a complaint of the sort raised at trial was heard from him during the construction. To the extent that he did complain, Mr. Harrison was apparently prepared to accept the defendants continuing without any further demands.
- [282] This project cost much more than Mr. Harrison expected. In the end, however, the cost was not a function of deceit or falsehood, but rather of the inexperience of the builders he chose to manage and build the project. It was also a direct result of the pressures of time during which it was not always possible to obtain the three quotations for every sub trade. On occasion, Mr. Harrison was presented with a single sub trade with whom he directly negotiated the terms of engagement of that sub trade. Mr. Harrison was likewise content to let the defendants do what was otherwise contractually excluded "outside" work. There is nothing to suggest that he, being aware that such work was in fact being done by the defendants, instructed the defendants to cease. I find he was content they continue.
- [283] In my view, the plaintiffs have failed to establish that the defendants behaved in any fraudulent way or made any misrepresentations that were false.
- [284] Equally, I conclude that Hodson Construction performed its obligations under its terms of engagement as set out in Exhibit 3 as it was modified by the agreement of Mr. Harrison and Doug throughout its tenure. The plaintiffs' claims against Hodson Construction based on alleged breaches are dismissed save as subsequently set forth.

[285] In the course of my reasons I have referred to a number of items acquired from Slegg Brothers on Mr. Harrison's account which were used on other projects. I have concluded that Mr. Harrison agreed to this occurring, but on the basis the plaintiffs be given credit for those items.

[286] The defendants abandoned their original claim and accordingly, given the defendants' admission that these were not items used on the project, I conclude that the plaintiffs are entitled to recompense for those items. The personal defendants made no distinction between themselves and the Hodson Construction. Therefore their liability shall be joint and several.

[287] Those purchases admitted by the defendants as not being applicable to the Station Road building are to be found at:

Exhibit 10:

Tab

Invoice

Amount

8

45186

\$ 946.13

22

43442

618.52

23

44293

90.16

25

429396

10.25

26

45649

15.80

27

45826

85.70

28

45992

57.11

80

73826

39.59

81

74189

407.77

82

74286

28.13

83

74503

62.38

84

74637

-71.66

Credit Note

87

75029

111.16

88

75711

99.48

98

77948

76.85

Sub total

\$2,577.37

Additionally, the defendants agreed to reimburse the plaintiffs for tools purchased for use on this project (air nailer and hammer):

53

60773

478.80

39

54606

108.27

Sub Total

587.07

Total

\$3,164.44

[288] The plaintiffs shall recover from the defendants the total of these purchases \$3,164.44 plus the 10% charged to the plaintiff on the cost-plus basis on the materials so acquired for a total of \$3,480.88.

[289] The plaintiffs are entitled to interest on this amount from December 1, 1999, the date of which such accounting and reimbursement should have occurred.

[290] Counsel did not address the matter of costs including those of the abandoned claim and may arrange, if they wish to do so, by contacting the trial coordinator in Victoria or they may make submissions in writing by informing the trial coordinator, who will determine a schedule for filing such submissions.

"J.D. Taylor, J."

The Honourable Mr. Justice J.D. Taylor

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