

CANADA / JUDGMENT

IRL Construction Ltd. v. Guo

2021 BCSC 177

COURT

Supreme Court of British Columbia

DECIDED

4 February 2021

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2021 BCSC 177 IRL Construction Ltd. v. Guo

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

IRL Construction Ltd. v. Guo,

2021 BCSC 177

Date: 20210204

Docket: S177306

Registry: Vancouver

Between:

IRL Construction Ltd.

Plaintiff

And

Hong Guo and Guo Law Corporation

Defendants

- and -

Docket: S1611552

Registry: Vancouver

Between:

Lunniss Developments Ltd.

Plaintiff

And

Guo Law Corporation, and

IRL Consturction Ltd.

Defendants

Corrected Judgment: The text of the judgment was corrected at paragraphs 2, 5, 100-109, 129 and 130 on July 8, 2021

Before: The Honourable Madam Justice Gerow

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

October 26-30, 2020

November 2-5, 2020

Place and Date of Judgment:

Vancouver, B.C.

February 4, 2021

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Introduction

- [1] The plaintiff, IRL Construction Ltd. ("IRL") and the plaintiff, Lunniss Development Ltd. ("Lunniss") have commenced two separate actions against the defendant, Guo Law Corporation ("Guo Law") for the payment of outstanding invoices issued to Guo Law for an office renovation project. IRL was the general contractor for the project and Lunniss was a sub-contractor hired by IRL. In its action, Lunniss sues Guo Law and IRL for the unpaid invoices rendered by Lunniss to IRL.
- [2] The two actions were ordered to be heard at the same time.
- [3] IRL and Guo Law entered into a contract dated May 3, 2016. IRL takes the position that the contract was a cost plus contract (with a 12.8% mark-up). Guo Law takes the position that the contract was a fixed price contract and that IRL did not perform the contract in accordance with the terms.
- [4] For the following reasons, I conclude that the contract between IRL and Guo Law was a cost plus contract, and that Guo Law breached the contract by failing to pay the invoices submitted by IRL and purporting to terminate the contract.

Issues

- [5] The issues raised by the pleadings and the submissions are:
1. Is the contract between IRL and Guo Law a fixed price contract or a cost plus contract?

2. What, if any, amount is owed by Guo Law to IRL for unpaid invoices?
3. What, if any, amount is owed by IRL to Lunniss for unpaid invoices?
4. What if any effect does Guo Law's filing in bankruptcy have on the claims?
5. What, if any, costs should be awarded?

Background

[6] Guo Law and IRL entered into a contract on May 3, 2016. The contract provided that IRL would perform the work required for the renovation of a property located at #200-6061 No. 3 Road, Richmond, B.C. (the "Premises"). The proposed work included the design, materials and labour required to renovate the Premises.

[7] The contract is three pages in length. Page one provides:

The contractor shall:

Perform the work required by Guo Law Corporation for the Proposed Renovations at #200 6061 No. 3 Road, Richmond, B.C.

The contractor shall:

Advise the Owners throughout the Project.

Apply for and obtain city permits.

Supply construction drawings.

Select and supply samples of materials and finishes for their client approval.

Design for architectural changes.

Plan and schedule the work.

Hire contractors and manage the contract payments.

Supply management, site supervisors, carpenters, labours and trades necessary.

Purchase materials for this scope of work and co-ordinate shipments

Provide necessary equipment and tools for this work.

Adherence to safety standards and responsible for ensuring WCB coverage.

Prepare and pass all city inspections to get occupancy permits.

Meet the strata board requirements

Mobilize and demobilize

[8] Page two provides

Budget Allowance

Renovation \$400,000.00 plus GST

Design, drafting and building permit: \$20,000.00 plus GST

[9] Page three provides:

Contract Fee

In Consideration of the performance of the contract, Guo Law Corporation agrees to pay IRL Construction Ltd. a Contract Fee as follows:

A percentage fee of (12.8%) of the Cost of Work, Time, Labour, Materials, Equipment, Subcontractors and Tools

Payment Terms

Payment to be made as follows:

The contractor will issue an invoice for an initial payment of 12% of the budget cost and the contractor will then issue an invoice for payment every two weeks of the project. Guo Law Corporation shall make payment to IRL Construction Ltd. not later than (10) days after the issuance of an application for payment.

The Owner is responsible for the insurance for the Property located at Suite 200, Three West Centre, 6061 No. 3 Rd., Richmond, B.C.

[10] Both William Donnellan for IRL and Hong Guo for Guo Law signed and/or initialed all three pages of the contract.

[11] The contract between IRL and Guo Law ended in August 2016. At that time, the project had not been completed.

[12] IRL says that as of August 2016, Guo Law had paid \$300,000 to IRL, and there remained approximately \$391,000 of unpaid invoices submitted by IRL.

[13] IRL retained Lunniss as a sub-contractor for the project pursuant to a written contract dated February 26, 2016. The sub-contract was a "cost plus" contract wherein the fee payable to Lunniss by IRL was the cost of material, labour and subtrades plus 12.8%. Lunniss claims that it is owed the amount of \$196,768.98.

[14] Guo Law disputes the amount paid to IRL. Guo Law takes the position that \$370,000 has been paid to IRL for the services it performed on the project. Guo Law takes the position that the contract was a fixed price contract and that IRL did not complete the work, and that there are no additional monies owing to it.

[15] Prior to the contract being entered into the parties engaged in negotiations about the scope of the project.

- [16] On or about February 18, 2016, Will Lunniss of Lunniss construction submitted a budget for \$841,995 (including GST). The budget was based on renovating the entire Premises, or approximately 9,000 square feet.
- [17] The scope of work was reduced following the initial estimates to 4200 square feet or approximately half the Premises. Following the initial meeting at which Mr. Lunniss presented the budget, Jeff Li, who was the contact at Guo Law apparently sent some other estimates for the renovation to IRL.
- [18] In an email dated February 24, 2016, to Mr. Li, Mr. Donnellan indicated he had reviewed the material Mr. Li had sent him, and that the fee proposals were based on 4200 square feet which was less than half of what IRL had judged the original estimate on. A reduced budget allowance of \$400,000 plus a design fee of \$20,000 plus GST was agreed upon based on the reduced scope of work, i.e. the renovation of 4200 square feet of the premises.
- [19] On February 26, 2016, Mr. Donnellan sent an email to Mr. Li which was copied to Ms. Guo which indicated IRL's understanding of the agreement:

We have agreed to take care of the Design, Drafting and Building permits for this renovation for a total sum of \$20,000.

The renovation would be done on a time plus material basis, as per standard renovation procedure with total cost plus 12.8%.

Invoices will be submitted weekly to ensure there are no queries or issues.

Work will commence on Monday May 2, 2016 at the very latest or beforehand. We will possibly work both day and night shifts throughout May/June to ensure completion for the Guo Law Corporation Official Grand Opening on July 1, 2016.

- [20] The May 3, 2016 contract set out the budget price based on the understanding that the renovation would be limited to 4200 square feet of the Premises, or approximately 50% of the space. However, the scope of the proposed project was not finalized as the design and drafting work had not been completed at that time.
- [21] The first permit drawing was generated based on the scope of work for the \$400,000 budget.
- [22] Following the commencement of the work, there were changes to the scope of the work changes requested by Guo Law and requirements by the City. On June 18, 2016, Lunniss sent a list of the additional work that had been undertaken to IRL.
- [23] According to Mr. Lunniss, the changes requested by Guo Law required design changes and new permit drawings had to be submitted to the City. A second permit drawing was generated as a result of change and additions requested by Guo Law. Mr. Lunniss testified that the extras requested by Guo Law, City requirements and site conditions had resulted in an increase of \$234,059.94 to the original budget.

[24] During the course of the project, IRL submitted seven invoices to Guo Law totalling \$741,302.99:

5054 - May 4, 2016 - \$73,500

5055 - May 26, 2017 - \$94,205.44

5056 - June 8, 2016 - \$43,197.27

5057 - June 14, 2016 - \$120,145.33

5058 - June 19, 2016 - \$280,944.42

5059 - July 7, 2016 - \$101,083.30

5060 - July 20, 2016- \$28,177.23.

[25] As stated earlier, there is a dispute as to the amount Guo Law has paid. IRL says that Guo Law has paid \$300,000 towards the invoices billed. Guo Law takes the position that it has paid \$370,000.

[26] On or about July 22, 2016, the project was not complete. The parties had discussions about the completion of the project. Lunniss provided IRL with a budget of \$147,000 (including GST) as the cost of completing the project.

[27] By August, 2016 Lunniss had not been paid since June 24, 2016, and the amount of its outstanding invoices to IRL was \$262,994.07.

[28] Ms. Guo approached Mr. Donnellan with a proposal that IRL fund the project to ensure its completion. Negotiations were entered into but the parties could not reach an agreement.

[29] On August 2, 2016, Mr. Lunniss met with Ms. Guo. In an email, Mr. Lunniss confirmed his understanding from the meeting that Ms. Guo was going to provide a payment schedule that he would forward to IRL in an attempt to reach a resolution about the outstanding invoices. Neither Ms. Guo nor Guo Law provided a schedule.

[30] On August 9, 2016, Ms. Guo sent an email to Mr. Donnellan terminating the contract between IRL and Guo Law. On August 22, 2016, Ms. Guo sent a letter to Mr. Donnellan confirming that Guo Law was terminating the contract.

[31] On August 18, 2016, Lunniss filed a claim of builder's lien against the property in the amount of \$280,000.

[32] On August 19, 2016, IRL filed a claim of builder's lien against the property in the amount of \$300,000.

[33] Despite ongoing demands, Guo Law has not paid any further monies to IRL.

[34] On December 16, 2016, Lunniss commenced an action against Guo Law and IRL. On June 2, 2020, Guo Law discharged the lien, as well as the corresponding certificate of pending litigation ("CPL") by paying \$280,000 into a trust account.

[35] On August 3, 2017, IRL commenced an action against Ms. Guo and Guo Law. The action was subsequently discontinued against Ms. Guo.

Applicable Law

[36] In *C.J. Smith Contracting Ltd. v. Kazem-Pour*, 2014 BCSC 689 at para. 79, the court adopted the following list of considerations in determining the nature of a construction contract:

In *Strait Construction Ltd. v. Odar*, 2006 BCSC 690 (aff'd 2007 BCCA 737), Madam Justice Dorgan provided a helpful summary of the factors often considered by the courts in determining the nature of a building contract, as follows (at para. 18; citations omitted):

1. Did the agreement provide for a percentage of the project cost as a fee to the contractor?
2. Was price of overriding importance for the owner and was that communicated to the contractor?
3. Was an estimate provided and did the owner rely on the estimate?
4. Did the owner require the contractor to design a project at a specified cost or seek assurances as to what the project would cost?
5. Did the contractor pay for the materials and labour and then bill the owner on a regular basis for the work done?
6. Did the contractor make it clear that it was not assuming any of the risk that the final price would exceed the estimate?
7. Did the contractor provide the owner with information regarding rates for labour and equipment rental etc.?

[37] In *C. J. Smith Contracting Ltd.*, the Court went on to note that invoices delivered by the contractor can provide evidence of the terms of the contract in existence between the parties. A contractor must prove the amounts being claimed are properly owing in either contract or on the basis of contractual quantum meruit.

[38] In *Golder Associates Ltd. v. Mill Creek Developments Ltd. et al.*, 2004 BCSC 665 at paras. 20-29, the Court summarized the law regarding estimates and quantum meruit claims. An estimate or budget for costs of services to be provided is not a guarantee, but may set a limit beyond which fees may not go. Depending on the circumstances, an estimate may not bind a party. Examples where an estimate or budget for costs will not bind a party is when work is done outside the estimate at the request of the client, or the client increases the amount of work, or unforeseen circumstances add new or unexpected work. The court summarized at para. 24:

In sum, the Court must determine if the estimates were made in circumstances which imbue them with contractual effect and, if so, what margin of error may limit the extent to which the estimates are binding.

[39] In *Golder*, the court went on to note that when there is a finding that an estimate is not contractually binding, the question that needs to be addressed is what amount is owing to the party who provided the service. There must be a determination of the value of the services rendered by considering reasonable costs and expenses incurred in performing the services, having regard to all of the circumstances.

Was the contract between IRL and Guo Law a fixed price contract or a cost plus contract?

IRL's Position

[40] IRL says it is clear from the evidence and the documentation that the contract entered into between Guo Law and IRL was a cost plus contract. The fact there was a budget does not mean the contract was a fixed price contract. The contract by its terms indicated that the contract fee was to be the cost of work, time, labour, materials, equipment, subcontractors and tools plus 12.8%.

Guo Law's Position

- [41] Guo Law asserts that the contract was a fixed price contract because it contained a budget amount. Guo Law asserts that there is no reference in the contract to any 12.8% markup fee, or the nature of the percentage as being a "cost plus" to be added to any provided service related to the project.
- [42] Guo Law submits that the fixed price nature of the contract is evidenced by the fact the last sentence on page two of the contract was crossed out by Guo Law during the meeting with IRL, clearly showing that nothing beyond the \$400,000 budget was acceptable. The crossed out sentence provided: "In the event that the above allowances exceed the budget amount we will complete the project for an hourly fee." Guo Law says Mr. Donnellan agreed to removal of the condition as he initialed the change.
- [43] Finally Guo Law relies on the evidence of Randolph Richardson who was present at the meeting where the contract of May 3, 2016 was signed. Guo Law says that in his evidence Mr. Richardson expressly confirmed that the contract entered into between Guo Law and IRL was a fixed price contract. Mr. Richardson testified he entered into a similar fixed-amount contract with Guo Law to provide IT services, such as internet connection, cable, server connection, Wi-Fi connectivity, etc. Guo Law points to Mr. Richardson's evidence that some of the extra costs he incurred were never charged to Guo Law because it was a fixed price contract.

- [44] Guo Law says that IRL drafted the contract and was expressly obligated to advise it throughout the project and IRL failed to do so. Further, the evidence establishes there is no official document to confirm changes to the scope of the construction work approved by Guo Law. Guo Law relies on IRL's expert's evidence that changes to the scope of work should be communicated and approved in writing and signed by the owner. If not approved and signed then payment is disallowed.

Analysis

- [45] The parties gave differing evidence regarding the original cost estimates that were provided and the negotiations between the parties.
- [46] Ms. Guo testified that the original negotiations between Guo Law and IRL were done by Mr. Li. Ms. Guo testified that IRL had originally quoted \$400,000 for the work but that another contract had said it was worth \$200,000 to \$240,000. Ms. Guo testified that at the end of March 2016, Guo Law had an agreement with IRL to do the work for \$200,000.
- [47] According to Ms. Guo, Mr. Li stole some money from her and she pursued him to China. When she returned from China on May 3, 2016, she met with Mr. Donnellan who said he had to increase the price. Ms. Guo testified that she told Mr. Donnellan the price for the renovation should be \$400,000 and no more.
- [48] Both Mr. Lunniss and Mr. Donnellan testified that they met with Ms. Guo on a number of occasions prior to the signing of the contract. Mr. Lunniss' evidence is that he prepared an original budget based on renovating the entire Premises. The original estimate he presented to Ms. Guo was in excess of \$800,000. When Ms. Guo decided to downscale the renovation to \$400,000, the scope of work to be undertaken changed to half of what had originally been quoted, or 4200 square feet. As well, no carpets or vinyl were included in the budget estimate of \$400,000.
- [49] Mr. Lunniss' evidence is that the scope of work expanded as a result of requests by Ms. Guo, either during site visits or meetings in her office. Eventually the entirety of the Premises was included in the renovation.
- [50] Mr. Donnellan denies ever having an agreement with Guo Law or Ms. Guo wherein IRL agreed to do the work for \$200,000. Mr. Donnellan's evidence is that the original estimate for renovating the entire Premises, was in excess of \$800,000 which was communicated to Ms. Guo. Mr. Donnellan's evidence is that the \$400,000 budget price was based on renovating less than half of the original area being proposed, or 4200 square feet.
- [51] Mr. Lunniss and Dianne Lunniss both testified regarding the original budget price. Ms. Lunniss testified that there were no design drawings when the original budget price of \$800,000 was prepared. Ms. Lunniss testified that when Lunniss was advised by IRL that Ms. Guo wanted a budget of \$400,000 the scope of work was slashed in half.

- [52] According to Ms. Lunniss, Guo Law added the areas that had been removed from the renovation back in. On June 18, 2016, a letter was prepared by Lunniss setting out the changes requested by Guo Law, and the changes required by the City as a result of the increased scope of work. Ms. Lunniss testified that new drawings had to be submitted to the City showing the changes.
- [53] Although Guo Law asserts this was a fixed price contract, it is apparent from the documentation that this was a cost plus contract. As stated earlier, there were no specifications or drawings at the time the contract was entered into and the scope of the work was not fully known.
- [54] Ms. Guo's evidence that there was an original agreement with IRL to do the work for \$200,000, is inconsistent with the documentary evidence and not credible. There is no evidence of any earlier agreement whereby IRL agreed to perform the renovation for \$200,000, and then increased the price.
- [55] The documentary evidence is to the contrary. The original budget price prepared by Mr. Lunniss was in excess of \$800,000 based on renovating the entire Premises. Mr. Lunniss testified that there were no drawings or specifications prepared prior to the budget being developed, and that the \$800,000 budget was for renovating approximately 9,000 square feet. I accept Mr. Lunniss' evidence that he presented the budget of \$841,995.00 to Ms. Guo at a meeting on or about February 18, 2016.
- [56] A series of emails were produced that clearly set out that Guo Law wanted to pay less than the original budget prepared by Lunniss, and do not support Ms. Guo's evidence that there was an earlier agreement for \$200,000.
- [57] On February 23, 2016, Mr. Donnellan sent an email to Mr. Li, which was copied to Ms. Guo, outlining that based on the minimal information he had, he anticipated that the costs for design, drafting and building permits would be between \$40,000 to \$60,000.
- [58] In an email dated February 24, 2016, Mr. Donnellan responded to Ms. Guo and Mr. Li's inquiries based on budgets from other contractors. In the email, Mr. Donnellan points out that the fee proposals Guo Law had sent him were based on 4200 square feet which was less than half of what IRL was quoting on.
- [59] In an email dated February 26, 2016, Mr. Donnellan confirmed that IRL would take care of the design, drafting and building permits for the renovation for a total sum of \$20,000. As well, the email confirmed that the renovation would be done on a time plus material basis, as per standard renovation procedure with total cost plus 12.8%, and that invoices would be submitted weekly for clarity and to ensure there were no queries or issues.
- [60] In an email dated March 4, 2016 sent to Mr. Li, which was copied to Ms. Guo, Mr. Donnellan confirmed that 12.8% management/services fee would be applied to all expenses, i.e. materials, services and equipment for the Project, and noted that IRL usually charged 15%.

- [61] In emails dated March 11 and 12, 2016 to Mr. Li, which was copied to Ms. Guo, Mr. Donnellan set out the agreed upon reduced scope of work, with an estimated cost for the renovation of \$400,000.
- [62] The emails are consistent with the contract of May 3, 2016, which sets out a budget allowance of \$400,000 (plus GST) plus a budget of \$20,000 (plus GST) for design drafting and building permits. The contract fee that Guo Law agreed to pay IRL was the cost of work, time, labour, materials, equipment, subcontractors, and tools plus 12.8%. The payment provisions are signed by Ms. Guo on behalf of Guo Law. It is apparent from the documents that the \$400,000 was a budget amount based on the agreed upon scope of work at the time.
- [63] As set out earlier, Guo Law asserts the parties agreed to a fixed price contract as evidenced by the fact the last sentence on page two of the contract. The sentence reads: "In the event that the above allowances exceed the budget amount we will complete the project for an hourly basis." The sentence is crossed out and initialled by Mr. Donnellan. Mr. Donnellan testified that he crossed out the sentence because it did not make sense as the parties had agreed that Guo Law would pay all of the costs of the work plus 12.8%.
- [64] It is clear from the reading the contract that the budget of \$400,000 is an allowance. Page three of the contract clearly sets out that Guo Law agrees to pay the costs of the work plus 12.8%.
- [65] The scope of work on which the budget allowance is based is the reduced scope of work set out in the emails. The original building permit drawings are consistent with the agreement that 4200 square feet, or less than half of the Premises would be renovated.
- [66] Guo Law asserts that Mr. Richardson was in attendance during the meeting at which the contract of May 3, 2016 was signed, and confirmed that IRL and Guo Law agreed the contract was a fixed price contract. However, that was not Mr. Richardson's evidence. Mr. Richardson testified that his company installed the computer and telephone systems in the project. Mr. Richardson testified that he was present when the contract between Guo Law and IRL was signed, but did not testify that the parties agreed it was a fixed price contract. Mr. Richardson was not a witness to the contract or involved in negotiating the contract between IRL and Guo Law. Since working with IRL on the project, Mr. Richardson has recommended IRL to other people.
- [67] During the course of the project, IRL rendered invoices to Guo Law on a regular basis that Guo Law did not pay in accordance with the terms of the contract.
- [68] According to both Mr. Donnellan and Mr. Lunniss, the scope of work was increased to include the entire Premises of over 9,000 square feet, and the stairs and stairwell leading up to the Premises. More offices were added to the original scope of work, and more extensive detailing was done. A server was moved to a different location and heating, ventilation and air conditions was added. Revised permit drawings had to be submitted to the City, and some of the areas that were renovated had to be brought up to the current building code

requirements.

- [69] Both Mr. Donnellan and Mr. Lunniss testified that the increased scope of work was at the request of the client.
- [70] Ms. Guo's evidence that she did not request the increased work to be done is not credible. Guo Law was invoiced regularly for the amount of work that was being undertaken. The evidence is that Guo Law's office was across the street from the Premises and that Ms. Guo and other representatives of Guo Law attended the site on a regular basis. Guo Law did not raise any concerns about the invoices, or the work being done, until IRL became insistent about payment. Although Ms. Guo denied requesting additional work, during her testimony she provided an example of a request she made which IRL could not accommodate to install a chandelier in her office.
- [71] I accept the evidence of Mr. Donnellan that IRL would not have undertaken the work on a fixed price basis for a renovation project as there are too many unknowns in a renovation project. I also accept the evidence of Mr. Donnellan and Mr. Lunniss that the increased scope of work was done at the request of Guo Law. I do not find Guo Law's assertions that IRL and Lunniss undertook the additional work on their own accord in an area that had been removed from the scope of work credible.
- [72] As noted in the case law, an estimate will not bind a party when work is done outside the estimate at the request of the client, if the client increases the amount of work, or if unforeseen circumstances add new or unexpected work. In this case the original scope of work was for renovating 4200 square feet. The scope of work increased to include the entire Premises or approximately 9000 square feet.
- [73] From the wording of the contract it is apparent the contract was a cost plus contract, not a fixed price contract. Accordingly, the budget allowance set out in the contract did not bind IRL.

What, if any, amounts are owed by Guo Law to IRL for unpaid invoices?

- [74] As set out earlier, during the course of the project, IRL rendered seven invoices, totalling \$741,302.99. Mr. Donnellan testified that IRL received payment in the amount of \$300,000. Ms. Guo testified that Guo Law paid \$370,000.
- [75] Joanne Henson, an expert in quantity surveying, prepared a report and testified at trial. In her report, Ms. Henson answers the following question:

Are the sums claimed by IRL reasonable, based on the cost of labour and materials used or supplied plus a reasonable amount for markup?

- [76] Ms. Henson reviewed the invoices and the supporting documentation, and made adjustments. Ms. Henson provided an opinion that the allowable costs from the IRL invoices was the amount of \$611,651.26, a reduction of \$129,651.73 from the total set out on the invoices. In determining allowable costs, Ms. Henson relied on the supporting

documentation for the invoices provided, and assumed that the invoices and proof of payment were accurate. As well, Ms. Henson did not include the deposit of \$50,000 from invoice 5054 because it does not reflect actual costs incurred. It is an allowable mobilisation payment for cash flow purposes.

[77] Jack Chen, a quantity surveyor testified at the trial. Mr. Chen was retained by Guo Law in or about August 10, 2016. Mr. Chen was not advised of the changes to the original scope of work or provided with the revised drawings outlining the changes.

[78] However, in his evidence, Mr. Chen confirmed that the entire Premises had been renovated. At the time Mr. Chen inspected the Premises, some areas had not been completed, but many of the areas of the renovation had been completed, including the installation of flooring and painting on the north side had been completed, and most of the south side had been painted. Although Mr. Chen provided some estimates for the amount of drywall used in the renovation, he admitted that he was unable to tell if drywall had been added in other areas because he had not seen the drawings with changes, and the walls were painted so he could not see where drywall was installed. It is clear from Mr. Chen's evidence and the photographs that the entire Premises, not the 4,200 square feet agreed upon originally.

[79] As stated earlier, I do not find Ms. Guo's evidence that she or other representatives of Guo Law did not request the changes credible.

[80] Tadgh Egan is a lawyer who worked for Guo Law and now rents office space from Guo Law. Mr. Egan testified that he introduced Mr. Donnellan and Ms. Guo, and was involved in some of the meetings between them. Mr. Egan confirmed that some work to the Premises had to be undertaken as a result of City requirements. Mr. Egan testified that on occasion he heard Ms. Guo express the opinion that thing weren't grand enough and she wanted to avoid a small office look. In an email dated June 12, 2016, Mr. Egan wrote to Mr. Donnellan:

One more item Ms. Guo wants amending is the door into the proposed law office area in the office.

She says the wooden door entrance is too narrow and not as grand as she would like. Perhaps a frosted glass door might work.

[81] As stated earlier, I accept the evidence of Mr. Donnellan and Mr. Lunniss that they would not have renovated the areas of the Premises that had to been excluded from the original scope of work without instructions from Guo Law, i.e. they would not have renovated the entire Premises without instructions from the owner. I also accept their evidence that there were requirements from the City to bring the building up to the current building code.

[82] Ms. Guo's evidence that Guo Law paid \$370,000 towards the renovation costs is not supported by the documents. Ms. Guo has not produced any cancelled cheques or bank statements to support her claim that Guo Law paid more than \$300,000. I do not accept Ms. Guo's evidence that she has had insufficient time to locate the cheques showing proof of payment. At Ms. Guo's examination for discovery held on July 23, 2019, Ms. Guo stated she

had paid more than \$350,000 or \$380,000 and the payments had been made by cheques. A request was made for Ms. Guo to produce proof of all payments she had made to IRL.

- [83] Qing (Cathy) Zhang testified that she became involved in the project around July or August 2016 at the request of Ms. Guo. Ms. Zhang has a background in finance and she worked in a bank in the United States for 17 or 18 years. Despite that, Ms. Zhang testified through an interpreter. Ms. Zhang was evasive when asked questions about her ability to communicate in English and whether she was able to communicate with Mr. Donnellan in English. Ms. Zhang was very evasive and reluctant to answer questions about her role in the negotiations with IRL, hiring a new contractor to complete the work and obtaining a new building permit. I did not find much of Ms. Zhang's evidence credible.
- [84] Although Ms. Zhang denied negotiating with IRL to complete the project while at the same time negotiating with a new contractor to take over the project to complete the work, she made notes comparing the two options. One page of Ms. Zhang's notes shows two columns, one with the name Jeff on one side and William on the other side. Jeff referred to Jeff Jiang, the contractor who completed the project. William referred to Mr. Donnellan.
- [85] The calculations show that it would cost \$450,000 to have Jeff finish the contract. The side showing William shows that \$300,000 had been paid, and that another \$300,000 needed to be paid for a total of \$624,000. In another page of her notes, Ms. Zhang sets out the following calculations
1. \$300,000 paid

\$300,000 to pay right away

+GST \$30,000

\$630,000 After lump sum payment pull out

After payment of 1.

2. Work commences but need to pay \$147,000 plus tax later

Total \$300,000

\$300,000

\$147,000

+ GST

\$747,000 + 5% GST
 2. Work Completed
 3. Go to court

- [86] Ms. Zhang's evidence that she was not sure if this indicated that Guo Law was evaluating the options of going with Jeff or going with William is not credible.
- [87] Ms. Zhang's note supports Mr. Donnellan's evidence that the amount Guo Law paid to IRL was \$300,000.
- [88] As indicated earlier, I find that Ms. Guo or other representatives of Guo Law requested the increased scope of work. Although Ms. Guo suggests that IRL did not follow procedure by obtaining signatures for extras and/or change orders, there is no contractual requirement to do so. As noted earlier, IRL is not bound by the original budget estimate as the scope of work was increased by the owner, and the corresponding City requirements.
- [89] I find the evidence supports the conclusion that Guo Law breached the contract with IRL by failing to pay IRL in accordance with the payment terms, and then wrongfully terminating them.
- [90] As well, the evidence supports the conclusion that the amount Guo Law paid to IRL was \$300,000. IRL claims \$391,302.99 on its invoices. However, that includes \$66,225.09 that is no longer being claimed by Lunniss as a result of credits for returned or unused materials. After the credit plus markup is deducted, the remaining claim by IRL is \$316,601.09.
- [91] Ms. Henson made significant deductions to IRL's invoices in determining allowable expenses, concluding that \$311,000 remained owing after the \$300,000 paid was deducted.
- [92] IRL's ledger sets out it has paid out \$465,902.92 in expenses. Lunniss is owed an additional \$196,768.08 for a total expense for IRL of \$662,671 or \$362,671. IRL says this is without markup of any kind. IRL submits that an award of \$350,000 is appropriate taking into account all of the quantum factors.
- [93] In my opinion, the amount owing by Guo Law to IRL should be based upon the allowable expenses determined by Ms. Henson. There is no evidence supporting Guo Law's assertion that some of the materials charged to the site were for other projects. Part of Ms. Henson's invoice review included whether the materials invoiced for were delivered to the site.
- [94] Accordingly, I find that the amount owing to IRL by Guo Law for breach of contract is \$311,000 plus pre-judgment interest.

What, if any, amount is owed by IRL to Lunniss for unpaid invoices?

- [95] There is no dispute about the sums owing by IRL to Lunniss. IRL concedes that it owes Lunniss for unpaid invoices.
- [96] IRL hired Lunniss as a subcontractor for the project. The subcontract provided that IRL would pay Lunniss for the cost of work, which included time, labour, materials, equipment, sub-contractors and tools, plus a percentage fee of 12.8%.

- [97] Lunniss issued invoices to IRL approximately every two weeks from April 27, 2016 to August 19, 2016. The amount invoiced was \$592,955.73. IRL paid Lunniss \$329,961.66. The balance owing based on the invoices is \$262,994.07.
- [98] The balance owing was reduced as a result of Lunniss' efforts to cancel orders, have deposits returned, and reselling carpets and tiles. Lunniss has applied a credit of \$66,225.99 for a remaining balance owing of \$196,768.08.
- [99] I find that IRL breached the contract with Lunniss by failing to pay it the amount owed of \$196,768.08. Lunniss is entitled to an award against IRL for breach of contract in the amount of \$196,768.08.

What if any effect does Guo Law's filing in bankruptcy have on the claims?

- [100] During oral submissions, Guo Law asserted that this matter should not have proceeded as Guo Law made a proposal in bankruptcy in early 2017.
- [101] The evidence is that the proposal only affected unsecured creditors, and that IRL and Lunniss were both listed as secured creditors in Guo Law's statement of affairs. Under Guo Law's bankruptcy proposal "Unaffected Creditors" were defined as "Post-Filing Creditors and Secured Creditors".
- [102] As a result, there was no stay of proceeding barring the commencement or continuation of either IRLs or Lunniss' claims.

What, if any, Costs Should be Awarded?

- [103] Both IRL and Lunniss seek special costs from Guo Law in the event they are successful. IRL and Lunniss submit they are entitled to special costs because of the conduct of Guo Law during the course of the litigation.
- [104] IRL asserts that special costs should be awarded because IRL and Lunniss were "dragged through" the civil litigation process, including numerous pre-trial motions and a two week trial, in a "shameful exercise and a dire burden on the judicial system". IRL says the litigation has been a crippling expense. IRL says that this together with reprehensible conduct shown by Guo Law's:
- refusal to produce documents;
 - wholly inadequate production of documents; and
 - providing the Court with knowingly untrue and misleading evidence warrants an award of special costs.
- [105] In the alternative, IRL submits costs should be awarded on Scale C as the procedural history of the case shows it was especially difficult and complicated.

- [106] Lunniss submits that the strategy, positions taken and overall involvement by Guo Law in these proceedings is reprehensible, unreasonable, unnecessary, and deserving of rebuke. Lunniss argues that Guo Law's actions in these proceedings justify an award for special costs, and include attempts to delay, drive up costs, and using trial by ambush tactics.
- [107] Guo Law submits that it was entitled to defend the claims. Guo Law submits it did not intentionally seek to delay the proceedings. Ms. Guo was busy dealing with other matters, and understood there was a stay of proceedings as a result of the bankruptcy.

Applicable Law

- [108] Rule 14-1(1)(b) of the Supreme Court Civil Rules provides that costs must be assessed in accordance with Appendix B unless the court orders that the costs of the proceedings or of a step in the proceedings be assessed as special costs.
- [109] In *Rana v. Nagra*, 2013 BCSC 184, the Court discussed the law regarding special costs as follows:
- [11] Special costs are punitive in nature and encompass an element of deterrence. They are ordered to chastise or punish a litigant who has engaged in reprehensible conduct. The concept of reprehensible conduct has been given a relatively broad definition, as explained by Lambert J.A. in *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A) at 249:
- [17] ...it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all-encompassing expression of the applicable standard for the award of special costs.
- [110] The Court went on to note that special costs have been made on the basis that a party's claim lacked legal merit, usually in cases where there is some allegation of fraud, deceit, dishonesty or some type of behaviour that warrants judicial rebuke. As well, awards of special costs have been made when there has been non-disclosure of relevant documents. An example was given of a case where special costs were ordered when documents, including investigative reports, employment records, and written policies that went to the core of the allegations against the party were first learned about during the trial of the matter when a witness mentioned them.
- [111] The Court in *Rana* referred to another case, *Skadberg Construction Ltd. v. Buchholz*, 2010 BCSC 869, in which special costs were awarded when the defendant failed to disclose documents relevant to her counterclaims, and provided absolutely no evidentiary basis to prove her counterclaim in fraud.

Analysis

- [112] IRL and Lunniss submit that there were delays on the part of Guo Law and failures to produce documents, and therefore an award of special costs is warranted. As well, they submit the Guo Law persisted in defending the claims against it despite knowing that there was no merit in the defence.
- [113] However, the examples IRL and Lunniss point to are not of the type referred to in the case law that have resulted in an award of special costs.
- [114] There was late document disclosure complained of by both sides. Guo Law points to the fact that Lunniss provided a further amended list of documents on October 20, 2020, just prior to the trial commencing. IRL and Lunniss complain that Guo Law produced documents late in the day.
- [115] Lunniss points to the fact that Guo Law sought to adjourn the trial as evidence of attempts at delay. However, that application was unsuccessful.
- [116] Guo Law took the position that there should be a stay of proceedings as a result of the bankruptcy. Although there were certainly delays, and applications during the course of the proceedings, including Guo Law changing counsel, it is my opinion that there is nothing that either IRL or Lunniss have pointed to that raises to the level of reprehensible conduct.
- [117] Accordingly, I conclude that this is not an appropriate case in which to award special costs. As well, I am not satisfied that this case is of more than ordinary difficulty. There is nothing exceptional in the number of documents produced, or the number of applications which made this case more difficult than an ordinary case for breach of contract that IRL has pointed to.
- [118] IRL and Lunniss are both entitled to an award of costs against Guo Law on Scale B.

Conclusion

[119] For the reasons set out, I conclude the following:

- That Guo Law breached its contract with IRL by not paying the invoices as agreed. IRL is entitled to damages for breach of contract against Guo Law for unpaid work and services in the amount of \$311,000 plus pre-judgment interest.
- That IRL breached its contract with Lunniss by not paying the invoices as agreed. Lunniss is entitled to the amount of \$196,768.08 plus pre-judgment interest against IRL for breach of contract.

[120] IRL is awarded costs of its action against Guo Law at Scale B, subject to submissions.

"Gerow J."

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