

CANADA / JUDGMENT

Joseph Wood Construction Ltd. v. Kolisnyk

2010 BCSC 672

COURT

Supreme Court of British Columbia

DECIDED

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2010 BCSC 672 Vargas v. Berryman

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Joseph Wood Construction Ltd. v. Kolisnyk,

2010 BCSC 672

Date: 20100511

Docket: S052600

Registry: Vancouver

Between:

Joseph Wood Construction Ltd.

Plaintiff

And:

James Edward Kolisnyk doing business as K2 Concrete, and James Edward Kolisnyk

Defendants

Before: The Honourable Madam Justice Boyd

Reasons for Judgment

Appearing on their own behalf:

R. Heading

S. Bailey

Counsel for the Defendants:

J.A. Adelaar

Place and Date of Trial:

Vancouver, B.C.

April 6-9, 2010,

April 12-16, 2010

and April 23, 2010

Place and Date of Judgment:

Vancouver, B.C.

May 11, 2010

Introduction:

- [1] For approximately 70 years the bodies of deceased residents of the Woodlands and Riverview Hospitals were buried in a cemetery adjoining Woodlands Hospital. For the most part those buried there had no surviving relatives, or at least no one prepared to claim the body and arrange for a private burial. Finally a citizens' group formed and lobbied for the refurbishment of the cemetery-for gathering the headstones and memorializing the dead. The efforts of that citizens' group led to the provincial government financing the Woodlands Memorial Gardens project. It is one of the subcontracts to the overall Memorial Gardens construction project which is at the heart of this action.
- [2] The plaintiff claims damages for breach of contract arising from the defendants' alleged abandonment of the concrete works subcontract, as well as the costs incurred as a result of the remedial work performed to correct various alleged deficiencies. The defendants deny any abandonment of the contract and counterclaim seeking damages arising from the plaintiff's alleged wrongful termination of the subcontract.

Background Facts:

- [3] In the fall of 2004, in anticipation of preparing a bid for the Woodlands Memorial Gardens project, Mr. Ralph Heading ("Heading"), one of the principals of Joseph Wood Construction Ltd. ("JWC"), approached Mr. Jim Kolisnyk ("Kolisnyk") of K2 Concrete ("K2"). Heading had met Kolisnyk at a recent Home Show and was impressed with the quality of his concrete work. He asked Kolisnyk whether he would be interested in bidding on the cement work portion of the contract. Kolisnyk was interested and subsequently met a number of occasions with both Heading and the project architect, Mr. Eric Lees ("Lees"). Together with other potential subcontractors, he attended a site visit.

- [4] At trial Heading insisted that he provided Kolisnyk with copies of the relevant excerpts of the construction contract specifications and drawings. Kolisnyk denied he had ever reviewed the specifications and said he had only seen "a couple of drawings".
- [5] I accept Heading's evidence that Kolisnyk did indeed review both the contract specifications and the relevant drawings. However, I note Heading's own comment that Kolisnyk did not seem to understand how to read or interpret those documents. This is consistent with Kolisnyk's own evidence that prior to entering into this contract he had no experience in anything beyond small concrete jobs--that is, the laying of basement floors and, his specialty, stamped concrete driveways and patios. In most cases, the dollar value of his jobs did not exceed \$1,000.
- [6] Kolisnyk consulted with his friend, Mr. Daniel Smith ("Smith"), a landscape contractor who ran his own business, Distinctive Creations. Together they organized a joint bid on the hard and soft landscape elements of the job. While Kolisnyk and Heading had a vague recollection of the actual communication process, I accept Smith's much more detailed recollection that there were a series of faxed communications between himself and JWC, ultimately resulting in a final version of the K2 and Distinctive Creations subcontracting bids.
- [7] K2's and Distinctive Creations' final written bids on their various separate contract line items were reduced to writing and faxed to JWC on a single bid form. K2's bids on the various line items were as follows:

Description

Amount

.

Removal of existing signage

\$200

.

Main path (concrete slab with clay pavers)

\$20,000

.

Garden stroll path

\$50,000

.

Concrete curbs - Feature area

\$2,500

.

Concrete retaining walls

\$3,000

.

Concrete seat walls

\$3,000

.

"Window too High" feature

(not including metal sculpture)

\$5,000

.

Water features (including service vault)

\$10,000

.

Commemorative walls Type A

\$32,000

.

Commemorative walls Type B

\$48,000

.

Entry staircase (steel/concrete)

\$1,200/\$1,200

.

Entry planter with built-in bench

\$2,500

.

Entry sign and wall base

\$20,000

.

Pedestrian sidewalk ramp

\$500

- [8] While Kolisnyk insisted at trial that his bid was limited to labour only and did not include the cost of materials, I reject his evidence in that regard. I am satisfied that Heading clearly communicated to him that K2's bid was to include both labour and materials.
- [9] It is significant that Smith, who was called as a defence witness, testified that his bid, which was included in the same bid form as K2, covered both labour and materials, as he said was typically the case on any subcontract bid. Had the K2 bid been limited to the costs of labour only, I expect that that evidence would have been provided by Smith as he was directly involved in the bidding process in this case. Further, had Kolisnyk ever expressed any concern during this period that he could not prepare a proper bid since he was unaware of the amount for either labour or materials required to perform the subcontract (as his counsel submitted was the case), I would expect Smith to have provided some corroborating evidence in that regard. Smith gave no such evidence.
- [10] In addition to the prices for the various line items which formed part of the subcontract bid, Heading and Kolisnyk reached various other agreements. K2 was not to take on any other jobs for a period of six months in order to concentrate on completion of this contract. Since it was understood that K2 had limited financial resources, JWC agreed to advance an initial \$4,000 to K2 to facilitate the purchase of materials. JWC also agreed to advance a further \$2,500 per week to cover K2's ongoing labour costs. It was agreed that the concrete casting work would occur offsite at Kolisnyk's home in Langley.
- [11] The K2 bid was accepted by JWC, which in turn added its own ten percent profit margin and submitted a bid for the entire project to the owner, British Columbia Building Corporation ("BCBC"). That bid was accepted by the owner and the contract was awarded to JWC on September 30, 2004.
- [12] After the contract was awarded it became clear that although Kolisnyk was capable of performing sophisticated concrete work, he lacked the tools, equipment, and (more significantly) the experience necessary to build the forms required to cast the various elements of the memorial walls--that is, the walls themselves, the caps, and the votive shelves.
- [13] Heading approached Mr. Chris Pedersen of Pedersen Enterprises ("Pedersen"), who had previously completed complex woodworking projects for JWC, to see whether he would be able to build the necessary forms for the caps.

- [14] Relying on the fact that his invoice for the work he performed records commencement of work on October 8, 2004, Pedersen testified that Heading approached him sometime before that date. He said that in advance of the work beginning there were a number of meetings attended by both Heading and Kolisnyk during in which the three discussed the project, reviewed the engineering drawings and settled on the best method of designing the casting form beds.
- [15] Kolisnyk insisted that those meetings did not occur until after October 17, 2004, the date he purchased a table saw which he says he intended to use to build the forms. He said that had he realized before October 17 that he would not be building the forms, he would never have purchased the table saw. He conceded that at some point after October 17 he did learn that Heading preferred to use Pedersen to build the forms. He says that he reluctantly attended the meetings at Pedersen's home, privately unhappy but outwardly accepting that Pedersen would be building the forms: the contract was too large to lose over this issue.
- [16] While little turns on this matter, I must note that I prefer Pedersen's evidence over Kolisnyk's evidence on this point. Pedersen was an impressive witness who provided his evidence in a clear, forthright manner. I accept his evidence that it would have been impossible for him to determine how to go about building the forms without the advice and input of Kolisnyk, the concrete expert. I accept that having met with Kolisnyk and received that advice, he began his work as documented on October 8, completing his work by October 26.
- [17] While I reject Kolisnyk's evidence regarding the timing, I do accept that he always understood after these meetings that it was Pedersen who would be building all of the necessary forms-that is, the forms for the walls as well as the caps and votive shelves. However, JWC decided to build the wall forms with the assistance of an in-shop carpentry contractor, Custom Carpentry.
- [18] I accept Kolisnyk's evidence that Heading reassured him the completion of the formwork by others would not substantially reduce the dollar value of his bid on the Commemorative Walls line items. Nonetheless, it is clear that there never was any final discussion between Heading and Kolisnyk, nor any agreement reached, as to the amount of that deduction.
- [19] While the forms were being built, Kolisnyk went to work on the landscaping portions of the subcontract. Following Smith's clearance of blackberry bushes and various trees from the cemetery, it was K2's job to create a garden stroll pathway around the perimeter of the cemetery as well as clear and compact the area at various "pod" locations where the memorial walls were to be erected in accordance with the architect's design.
- [20] Kolisnyk maintains that, to his surprise, the work was never able to proceed as planned. First, he says that although he was able to use his small bobcat to skim the grass off the surface within the pathway areas Heading had marked off, he was unable to proceed into the area at the northern perimeter of the cemetery (between the Lawson and Sequoia pods) because the proper survey elevations had not been settled. Secondly, he says that even where he was able to clear the pathways, the ground was "spongy" and repeatedly collapsed

beneath the weight of the machine, exposing the shallow coffins below the surface. Each time the machine punched through the surface he says he had to fill the hole with gravel, attempting to create a solid surface for compaction. Thirdly, he says that in the area where the pods were to be formed and the bases for the memorial walls laid, no final excavation or compaction work could be performed because the survey was again unsettled. According to him this made the erection of the memorial walls to a certain consistent height impossible. Kolisnyk complained that the initial \$4,000 float for materials was consumed in the purchase of the many loads of gravel.

- [21] Heading flatly rejected this version of events. He says that the survey was completed from the outset and that the pathways and pod areas were all clearly marked out with pegs. He says that as Kolisnyk worked on the pathways, he was not digging to the requisite depth but rather merely skimming off the grass and then pouring road crush onto the sod (earth mixed with organic material) and then immediately compacting the paths using a manually operated roller. He says that although he never specifically complained to Kolisnyk, he repeatedly expressed his concern that this method might fail to pass the compaction standards set out in the specifications--a prerequisite for the architect's approval of the work and thus approval of the next progress draw.
- [22] I have some difficulty resolving this conflict in the evidence. It is notable that after K2 left the project the design of the entire northern perimeter changed. Rather than the memorial walls being erected at two separate pods, one long low memorial wall was designed to run along the entire length of the pathway between those two pod areas, thus accommodating the headstones which were originally destined for other walls and adding a number of additional headstones which had been found in a creek nearby while the work was underway. In his cross-examination, Heading admitted that when Kolisnyk dug the hole in a pod area to begin building the first base (on which to test an erection of the first memorial wall) it became evident that the architect would have to "revisit the issue of how to support the memorial walls". Thus, Heading obliquely admitted that whatever the survey elevations, the proper preparation of the bases required a redesign. Ultimately, after K2 left the job, the pods and the pathway routes in this area were the subject of a series of change orders to the contract.
- [23] In any case, when work on the pathways and pods reached an impasse, Kolisnyk was directed to return to Langley and focus his efforts on casting the memorial walls. This he did, beginning by preparing the ground for the worksite--an area between his home and his barn, which he eventually covered with tarps under which he installed heaters to maintain a proper temperature while the concrete work was underway. Before the work could begin, K2's workforce spent considerable time cleaning the headstones, including chipping off chunks of mortar and matching up fractured pieces of headstones. A master list of deceaseds' names was updated as new headstones were found or names uncovered and relayed to the architect for new orders regarding the placement of headstones in the memorial walls.

- [24] In light of K2's lack of financial resources, and in order to facilitate the work and avoid delays, JWC arranged to deposit \$50,000 with Rempel Concrete, K2's supplier of choice, against which K2 was free to place orders for concrete as required. Any amounts drawn on the account would be treated as an advance to K2.
- [25] Eventually K2 picked up the forms (both Pedersen's cap and votive shelf forms as well as JWC's wall forms) and returned them to the Kolisnyk home premises. Work on the walls proceeded with some dispatch. At the outset Kolisnyk noted some difficulty with the cap forms, which had been built in such a way as to make it difficult to extract the caps after the concrete had cured. Heading attended, applied some epoxy to reconfigure the interior corners of the forms, and the difficulty was resolved. Kolisnyk also complained that when the walls were first poured, the concrete leaked out of the bottom of the form--something which Heading denied was a problem.
- [26] Within a short period of time, Kolisnyk became frustrated with the work. He complained that the JWC cheques were arriving late, that Heading was not resolving the design situation onsite in sufficient time to allow an early erection of the memorial walls, and that since the job was not progressing in a timely fashion, he was falling behind on his own bills. He complained that Heading was not onsite sufficiently regularly to oversee the work and provide the necessary direction and guidance. At some point during this period Kolisnyk failed to meet mortgage payments on his home and foreclosure proceedings were commenced.
- [27] In cross-examination, a review of the various cheques forwarded by JWC showed that with only one exception, contrary to Kolisnyk's contention, the monies were in fact paid by JWC on time. My sense is that work on the project did indeed proceed slowly because design changes were being considered. As a result, K2 could not bring the contract to a rapid conclusion and be paid out. Clearly, Kolisnyk was under some considerable financial stress. He also testified that there was considerable strain in his marriage.
- [28] It is against this background that on December 3, 2004 Kolisnyk finally refused to continue with his work. He prepared an invoice for the work to date-\$41,000, against which he noted \$19,500 had been paid, leaving a balance owing of \$21,500.
- [29] Heading was astonished by this demand and approached Pedersen, who agreed to attempt to mediate some resolution of the issues. Pedersen met with Kolisnyk and drew up an agreement setting out the terms and conditions upon which the contract could go forward. While I will not summarize the entire agreement here, a few matters are notable:
- Site locations were to be marked and ready for K2 in an expeditious manner while recognizing that there were "engineering details to be worked out" with the property owners;
 - A monument corner was to be temporarily erected for the architect's inspection and approval;
 - K2's Workers Compensation account was to be kept current;

- K2 was to make its best efforts to obtain liability insurance;
- Any construction changes to the memorial wall bases would be subject to change orders, and billed as "cost plus".
- While JWC would "actively and positively" support K2's roadway construction, it is acknowledged that the method does not accord with the drawings and would ultimately be subject to the owner's approval and acceptance.
- \$10,000 was to be placed in the account of JWC's legal counsel in trust, pending the completion of the footpaths ready for concrete and the property owner's acceptance of K2's roadway construction technique.
- In the event upgrades to the road base were required, the \$10,000 could apply, in whole or in part, in completing those improvements.
- A proper written contract between JWC and K2 would be prepared and finalized.
- On signature of this agreement, JWC would pay K2 \$11,000 and once again advance the bimonthly advances.

[30] On review of this agreement, Heading insisted that a Supplementary Agreement be prepared, clarifying the paragraph regarding the \$10,000 payment and noting the amount would be paid directly to K2 rather than paid into any lawyer's trust account, "pending the completion of both foot paths ready for concrete and property owner's acceptance of roadway construction technique".

[31] The contract was signed and the work resumed. JWC paid K2 by two separate cheques, thereby bringing the payments of the advances up to date and paying K2 in advance for the future two weeks during the Christmas season. However, within a short time, the situation once again deteriorated.

[32] On January 3, 2005 Kolisnyk forwarded an email to Heading complaining of his recent attendance at his home, complaining about the lack of funds, and advising that the last concrete pour for the walls was scheduled for the upcoming Wednesday.

[33] The following day, Kolisnyk testified he received a telephone call from Rempel Concrete, advising that the JWC account had been closed. Kolisnyk treated this news as tantamount to JWC's termination of the contract.

[34] At trial, Ms. Sandra Bailey ("Bailey"), the president of JWC, insisted it was not until January 9 that the Rempel Concrete account was closed. During submissions, Heading maintained that the JWC account was never closed and technically remains open to today's date. I am satisfied that Ms. Bailey was mistaken regarding the date on which the account was closed. I note that the balance of the funds on deposit in the account (over \$40,000) was refunded to JWC by cheque on January 10, 2005. I accept that the order to close the account and pay out the funds occurred several days earlier.

- [35] Clearly, following Kolisnyk's missive of January 3, both Heading and Bailey had had enough of Kolisnyk's continual demands for payment of funds. The agreement negotiated by Pedersen had failed to resolve any of the outstanding issues. Given the chronic communication problems and Kolisnyk's obvious enmity toward Heading and JWC, I cannot criticize JWC for closing the Rempel Concrete account and seeking a reimbursement of their funds on deposit. In my view, the closure of the account did not amount to unilateral termination of the contract; instead, it was an acknowledgment that any constructive working relationship between the parties had come to an end. Further, and quite understandably, in these circumstances, JWC did not want K2 to be able to freely have access to further materials without JWC's consultation and consent.
- [36] Kolisnyk apparently expected that, despite the tenor of his emails, he would have free rein to order materials on the Rempel Concrete account. On learning that the account had been closed, he responded aggressively and in a manner which had lasting negative consequences for the project as a whole.
- [37] First, Kolisnyk took all of the forms (for the walls, caps and votive shelves) and placed them outside the front gates to his property, exposing them to the elements. He sent an email to Heading informing him that he had until the following morning to pick them up, failing which they would be taken to the dump for disposal. He advised that the walls would remain in storage at a friend's home pending receipt of the payment still outstanding.
- [38] The following day, Heading attended the Kolisnyk property and retrieved the forms which had been left outside the fence. The walls, however, were gone. Heading then attended at the address provided by Kolisnyk (38467 Harris Road, Abbotsford) only to find that no such address existed. A search of other addresses in the vicinity failed. No further information concerning the location of the walls was provided.
- [39] In the interim, given the lack of memorial walls (into which the headstones had been cast), and the absence of the remaining headstones, the work onsite came to a standstill.
- [40] JWC commenced this action on May 10, 2005, seeking a declaration that the commemorative walls are the property of JWC and/or BCBC and claiming damages for K2's wrongful retention of the walls, as well as damages for breach of contract.
- [41] On June 29, 2005, Koenigsberg J. ordered the defendants to immediately advise of the location of the commemorative walls and headstones upon the plaintiff's deposit of \$21,500 (the amount of the counterclaim) in the plaintiff's solicitor's trust account. Those monies were paid into trust and the location disclosed.
- [42] Heading subsequently attended at the property of Mr. Rozenek in Langley to retrieve the headstones and walls. The contract work resumed and was completed within the next several months.

[43] I will address the plaintiff's claims as well as the defendants' counterclaims below. I should note, however, that in the course of his cross-examination at trial, Heading admitted that a number of the claims advanced against K2 would be abandoned since those amounts had indeed been paid by BCBC over the course of the completion of the contract. Thus, the majority of the plaintiff's claims were abandoned. The list below addresses the remaining claims.

The Claims and Counterclaim

A. Plaintiff's Claims:

1. Costs to retrieve headstones

[44] Heading and Bailey estimate that JWC spent \$8,248.88 in regaining access to the memorial walls and headstones which Kolisnyk had stored at the Rozenek property. I am satisfied that JWC is entitled to recover damages in connection with the time and money spent travelling to the property, transporting the walls and headstones to the worksite, and reviewing the headstones and wall components on arrival at the worksite. These costs total approximately \$3,800 which I will award under this heading.

[45] I have not allowed any recovery for the hours spent investigating the whereabouts of the wall components. Nor do I accept that the costs of fencing rental to protect against vandalism of the wall components at the worksite, or the costs of pouring a temporary base and arranging for a mock-up of the commemorative walls are for the defendant's account. In my view, these latter costs would have been incurred in any event.

2. Costs to show the architect work performed by K2

[46] JWC also seeks to recover the costs incurred in order to complete the work started by K2. These costs include: (i) costs to set up one set of walls recovered from K2 onto a temporary sand pod at the worksite for the architect's viewing (\$489.54); (ii) trial arrangement for K2 cast walls and extra K2 headstones to check fit onto pod layout from architect (\$290); (iii) computer work to update headstone list to reflect extra headstones recovered from K2 (\$140); and (iv) time spent sorting headstones for Type 2 walls (\$220).

[47] I am not persuaded that the costs of setting up one set of walls on a temporary pod for the architect's viewing or the trial arrangement of K2 cast walls and extra headstones is for K2's account, regardless of whether this was included in the Pedersen agreement. A temporary set-up would have been required in any event, regardless of by whom they had been built.

[48] I am not persuaded that the time spent managing the headstone list or sorting the headstones is for the defendant's account. As I understand it, the organization, cataloguing and listing of headstones was a never-ending task, complicated by the discovery of additional headstones as the job was underway. Further, after K2 left, various commemorative walls were dropped from the plans, and one long low wall added, thus further complicating the reorganization of the headstones. Since I am unable to fairly

determine what portion of these costs are directly attributable to K2's movement of certain headstones offsite, I will make no award under this heading.

3. Costs of concrete diverted to Kolisnyk home improvements

[49] Heading claims that of the total concrete which K2 ordered on account at Rempel Concrete (\$7,134.74), approximately \$2,351.60 worth (including extra truck standing time) is attributable to the concrete which he says Kolisnyk used to construct his home patio.

Heading's figures are based on his own calculation that approximately .94 cubic metres of sand would be used to cast a small commemorative wall and 2.07 cubic metres would be used to cast a large wall. Thus, he calculates that K2's work would have consumed no more than 19 cubic metres of concrete. Since Rempel Concrete billed for 28.5 cubic metres of concrete, he concludes that 9.5 cubic metres of concrete (or \$2,351.60 worth) was diverted from the job.

[50] Quite apart from his calculations, Heading says that while he was onsite he personally witnessed Kolisnyk moving wheelbarrows of excess concrete away from the worksite area onto his home patio. He has produced photographs of the subject patio which he says support his allegation and indicate that as many as a dozen or more concrete pours were undertaken to complete the laying of the patio.

[51] Kolisnyk did not deny that he disposed of certain amounts of excess concrete as the job was underway. He says that sometimes that material was wheelbarrowed over to and dumped into the corners of the nearby riding ring. He also admits that other excess concrete was dumped onto the patio which he was constructing. He recalled that on at least three occasions, Heading was present when he dumped the small wheelbarrows of excess material. He had no recollection of Heading ever complaining about his actions. Indeed, Heading admitted at trial that he had voiced no complaints. In any case, Kolisnyk denied dumping anything close to 9-10 cubic metres of concrete. He estimated that no more than 12-15% of the concrete was dumped after each major wall pour.

[52] On a review of both parties' evidence, I am unable to conclude that JWC has proven this claim on a balance of probabilities. I will make no award under this heading.

4. Remedial work: costs to chip and grout commemorative walls

[53] Heading testified that when he attended the Rozenek property to retrieve the commemorative walls, he found one stack of wall components (that is, the four sides to the wall) with a substantial slash out of the concrete on the corners. He theorized that when Kolisnyk moved the walls to the Rozenek property, he had likely applied straps around the walls to lift them without taking appropriate measures to protect the edges. He admitted that this was his theory of how the damage had been caused but that he had no specific evidence as to who had caused the damage or the mechanism by which it had been caused. He insisted that in order to properly lift the walls, K2 ought to have employed an appropriate forklift with timbers between the walls to safeguard the corners and edges.

- [54] Kolisnyk admitted that the towing moving company which handled the load did use straps to move the walls, but he insisted the straps were wrapped around the load with cross-members in place in order to keep the straps away from the edges of the walls. He doubted that the application of the straps had caused any damage. In any case, he was unable to see any damage to any walls which might be attributable to the move, beyond that shown in the one photo.
- [55] In addition to that particular damage, Heading has prepared a long list of work performed by the JWC staff between March 20 and July 3, 2007, essentially grinding, filling and patching holes in the walls themselves, as well as in the caps and bases of the walls. Some of the work involved performing repairs of the corners or grouting seams in the walls.
- [56] I should note that since three large walls were ultimately cast by JWC, Heading had some difficulty distinguishing between the work performed to repair those walls as opposed to the walls cast by K2. He admitted that in some cases, the costs had been covered by BCBC, although he claimed that most of the costs were remedial costs and were covered entirely by JWC.
- [57] I note that JWC claims costs of \$3,553. Heading concedes that some of these costs are for JWC's account and he has left it to the Court to determine an appropriate division as between JWC and K2. I have some difficulty determining any principled basis on which to divide these costs between JWC and K2. That being the case, I will make no award under this heading.
- [58] However, regarding much of the work completed between June 21, 2006 and May 1, 2007 as well as between May 14 and June 5, 2007, Heading claims that all of this was purely remedial work performed by JWC in respect of which no monies were received from BCBC. These costs total approximately \$5,300.
- [59] Kolisnyk denied that any of the grinding, grouting, or other remedial work performed was as a result of any deficient workmanship on his part. Rather, he alleges that much of this work would have been performed in any event, given the manner in which JWC and/or Custom Carpentry had built the casting form beds for the wall components. When he undertook the first pour Kolisnyk says that he noted concrete leaking out from the bottom of the casting bed where the forms were not laying flat against the underlying plywood bed. He says he complained to Heading, but that Heading insisted Kolisnyk move ahead with the pours since they were short on time. He says that this leakage (attributable to JWC's inadequate forms) resulted in some rough and uneven surfaces on the walls and made the remedial work necessary. Heading denied the casting form beds were anything but flat.
- [60] On a review of all of the evidence from both Heading and Kolisnyk on this issue, I am unable to find that JWC has proven on a balance of probabilities that the work was indeed remedial work attributable to K2's poor workmanship or the improper lifting or moving of the wall components. Accordingly, I will make no award under this heading.

5. Costs to retrieve and reattach votive shelves

[61] K2 had cast votive shelves for attachment to the seventeen small walls and one large wall. In the course of the move to the Rozenek property, a number of these shelves had come loose and had to be epoxied back into position. When Heading first attended the Rozenek property, he found both the wall components as well as the caps and votive shelves cast by K2. However, when he returned to the site to retrieve the items the following day, both the votive shelves and the caps were missing.

[62] Although Kolisnyk advised Heading he would return the votive shelves, he never did. He later demanded \$3,000 for the return of the caps.

[63] Heading was forced to reassemble the forms and cast approximately a half dozen votive shelves for two commemorative walls. Fortunately, the votive shelves to be installed on the third wall to be cast by JWC were eliminated from the design. All told, the cost of retrieving and reconditioning the votive shelves forms, epoxying at least some shelves into place, and casting some new shelves was \$862.69. I find that these costs are for K2's account and award this amount under this heading.

6. Costs for extra sand and gravel ordered by K2 and not used on the job

[64] While these costs were not listed in JWC's summary of claims, in closing submissions Bailey also sought recovery of \$1,453.53, which she stated represented the cost of the sand and gravel used and remaining on Kolisnyk's property after he moved. Further, she claimed \$560 to remove gravel which K2 left on the site. I have some difficulty with both claims.

[65] Heading's position was that a large amount of gravel had been ordered for Kolisnyk's residential property which was unconnected with the concrete pour. Further, he complains that an excess amount of gravel had been ordered for the worksite.

[66] Kolisnyk testified that, regarding the residential site, he ordered the gravel to fill a large hole (originally destined for a hot tub) and then prepare the area over which he built his outdoor workshop for the concrete pours. He says that Heading was well aware of the work required to prepare the workshop area and supported the work being performed at a secure home site rather than the worksite. In addition, he says he ordered sand in order to create a large pile into which he could dump the votive shelf forms once they cured in the caps.

[67] As for the worksite, he says that he was forced to order more gravel than originally expected given the challenges posed at the worksite as he attempted to prepare the pathway (when the bobcat was sinking through holes in the earth). Large amounts of gravel were used to fill the holes. Smith provided evidence corroborating the challenges posed as the pathways were prepared. On the whole of the evidence, I am unable to find that either claim is recoverable by JWC.

7. Costs of building gun safe

[68] Kolisnyk admits both that he requested and that JWC provided him with a custom-made gun safe for which he had agreed to pay \$1,500. This amount remains outstanding. I therefore award this amount under this heading.

8. Costs awarded by Koenigsberg J.

[69] Koenigsberg J. awarded costs to the plaintiff in connection with the Chambers motion it brought to obtain an order for disclosure of the location of the commemorative walls. The costs total \$3,163.60 and must also be included in the amounts now recoverable by JWC.

B. Defendant's (Plaintiff by Counterclaim) Claims:

[70] K2's counterclaim is largely a direct reflection of the invoice it delivered to JWC in January 2005. The claims are as follows:

1. Graded site walkways and pods with three-quarters crush and road base (materials and labour): \$16,000

[71] K2 says that it completed all of the walkway and stroll path areas, with the exception of the stretch between the Maple Commemoration walls pod and the Sequoia Commemoration walls pod, due to the elevation and survey issues which arose during the course of the work. K2 says that as for the remaining areas, it cleared the designated paths by skimming off the grass, removing that sod, and then laying down 3/4 road crush which was compacted as required.

[72] Heading says that even as this work was underway he specifically warned Kolisnyk that his chosen method of work was not likely to meet with the approval of the owners because the work was not in accordance with the contract specifications. The specifications called for "earth bottoms of excavations to be undisturbed soil, level, free from loose, soft, or organic matter". He says that although K2 had removed the top layer of grass, the underlying soil still included organic material. He complains that K2's laying of road crush overtop this improperly excavated pathway was inappropriate and not in accordance with the specifications, which called for certain layers of road base in accordance with a strict formula.

[73] Kolisnyk insisted that he had no access to the specifications, that Heading was well aware of his method of work and that no complaints were ever made. I do not accept this evidence. I am satisfied that Kolisnyk did have access to the specifications and that he was well aware of Heading's complaints. Indeed, the issue of K2's method of pathway construction and the serious doubt that it would be approved by the owner was addressed in the Pedersen agreement.

[74] In the interim, however, the architect was apparently prepared to approve the work (without compaction testing) at least for the purposes of a progress draw. Prior to K2's departure from the job, \$42,500 was paid to K2, portions of which were in respect of the pathway work.

- [75] I accept Heading's evidence that after K2's departure, it was determined that the pathways (as completed) did not meet the compaction testing standards set out in the specifications and that all of the pathway work had to be redone by GB Bobcat. These costs were covered by BCBC.
- [76] Accordingly, on the whole of the evidence, I find that no monies are owed to K2 in respect of the pathway work.
2. Machine time for digging trench: \$450
- [77] JWC agrees these monies are owing to K2 for work not included in the subcontract. Accordingly, this amount is awarded.
3. Picking up and cleaning headstones - labour: \$3,200
- [78] K2 claims it spent that a great deal of time and labour picking up, cleaning and matching headstones, and chipping out the mortar-which work could not have been anticipated when the subcontract bid was made. Further, in the course of the work, a number of additional headstones were found and retrieved from a nearby creek (which also added to K2's work).
- [79] In cross-examination, Heading acknowledged that K2 spent good deal of time doing this work. While the work was technically included in the value of K2's bid to build the commemorative walls, Heading conceded at trial that this was indeed additional work which could not have been anticipated and for which K2 should have been entitled to charge extra. He said that had K2 made a request he would have approached the architect with a request to approve a change order. However, because K2 left the job this never occurred.
- [80] Since Kolisnyk had never before worked on a job of this size, it is not surprising that he did not initiate any request for a change order. Nevertheless, I am satisfied that this work was indeed extra work, outside the labour which would have been contemplated for the pouring and assembly of the commemorative walls. I will allow recovery of \$3,200 under this heading.
4. Materials for pouring walls - rebar: \$3,000
- [81] As I noted at the outset, I am satisfied that Kolisnyk was well aware his bid for the work included both labour and materials. Given the size and general dimensions of the commemorative walls, he would know that concrete and rebar would be used. I will not allow recovery under this heading.
5. Pouring small walls: 17 x \$2,000 = \$34,000
- [82] K2 did indeed pour seventeen small walls. Heading agreed that the K2 bid included costs of \$2,000 for each of the small walls. Thus, \$34,000 will be awarded under this heading, with a deduction to follow to reflect the payments made by JWC during the course of the work.
6. Pouring large walls: 1 x \$4,800 = \$4,800

- [83] Again, Heading agreed that K2's original bid included \$4,800 for each of the large walls. K2 did pour one large wall. Thus, \$4,800 will be awarded under this heading, against which must be deducted the monies paid over the course of the contract.
7. Cost of sand: \$4,322.99
- [84] During submissions, K2's counsel sought reimbursement for several invoices from Mainland Sand and Gravel Ltd. totalling \$4,322.90. Of this amount, \$2,869.46 reflects the cost of $\frac{3}{4}$ crush limestone and gravel delivered to the worksite for the pathway and pod work. As I have noted earlier this method of construction was inappropriate and ultimately rebuilt. It is not for JWC's account.
- [85] The balance of \$1,453.44 reflects the cost of sand and gravel delivery to Kolisnyk's home workshop area--both to create a workshop space and create a surface to dump the caps and shelves. Since Heading approved and encouraged the creation of the workspace, this will be for JWC's account. I award this amount under this heading.
8. CAN-AM Auctions Invoice-Excavator: \$7,542.00
- [86] K2 also seeks recovery of the cost of an excavator purchased at auction to perform the landscaping work at the cemetery. This is a hard asset which remains part of K2's inventory of equipment and is thus not an item the cost of which is recoverable under this subcontract. I will make no award under this heading.
9. KMS Tools & Equipment - Saw: \$1,411.78
- [87] K2 seeks recovery of the cost of purchasing the table saw which Kolisnyk says he intended to use to build the formwork for this job. As I noted earlier, this saw was purchased as late as October 17, days after the decision was made for Pedersen as well as the JWC forces to undertake this work. In any case, such costs are not recoverable under this subcontract.
10. Loss of Profit: \$68,939.42
- [88] While this was not raised in evidence, in the course of submissions K2's counsel raised a claim for loss of profits. Specifically, K2 claims that as a result of JWC's wrongful termination of the contract, it lost an opportunity to earn a profit on the work it had performed (20% x \$49,100) as well as a profit on the work commenced but not completed (20% x \$125,000), for a total claim of \$68,939.42. I have already found that JWC did not wrongfully terminate the K2 contract. This subcontract imploded largely as a result of K2's lack of experience and the necessary resources to undertake such a complex job. The situation was further exacerbated by the design changes which occurred during the course of the project, through no fault of JWC. Ultimately, it was K2's actions-ceasing work and hiding the walls-that breached the contract. I will make no award under this heading.

Conclusion:

- [89] By my calculation, K2 was entitled to payment in the sum of \$43,903.44. Against that amount must be deducted the \$40,500 which JWC advanced to K2 over the course of the contract, leaving a balance owing to K2 of \$3,403.44.
- [90] Earlier, I found that JWC was entitled to recovery of damages totalling \$6,162.69, plus the earlier costs awarded by the Court in the amount of \$3,163.60, for a total of \$9,326.29.
- [91] Thus, K2 is liable to pay JWC the difference: \$5,922.85.
- [92] JWC is entitled to payment out of its solicitor's trust account the sum of \$21,500 plus any accrued interest, which monies were paid into Court pursuant to the Order of Koenigsberg J. dated June 29, 2005.
- [93] In the circumstances of this case, given the mixed results on both sides and JWC's abandonment of many of its claims at trial, I will not award costs to either party.

"The Honourable Madam Justice Boyd"

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