
CANADA / JUDGMENT

Jurik v. Callan

2011 BCSC 300

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 300 Jurik v. Callan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jurik v. Callan,

2011 BCSC 300

Date: 20110314

Docket: S087274

Registry: Vancouver

Between:

Peter Jurik and Anne Jurik

Plaintiffs

And

Darryl Callan dba DC'S Landscaping

and dba Pacific Nursery Supply

Defendant

Before: The Honourable Madam Justice Ross

Reasons for Judgment

Counsel for the Plaintiffs:

Jeffrey H. Bryant

Counsel for the Defendant:

Eric Aleksejev

Place and Date of Trial:

Vancouver, B.C.

May 11, 12, 14, October 28, 29, November 12 and 19, 2010

Place and Date of Judgment:

Vancouver, B.C.

March 14, 2011

Introduction

[1] This is an action for breach of contract and negligent provision of services under a contract for landscaping. The plaintiffs are Peter and Anne Jurik. The contract was entered into on April 7, 2008 between Peter Jurik and the defendant, Darryl Callan dba DC's Landscaping and dba Pacific Nursery Supply. The contract was for landscaping services to be provided to the Jurik's property at Dunlewey Place in West Vancouver, British Columbia.

Facts

[2] In the spring of 2008, the Juriks were completing construction of a residence at Dunlewey Place in the British Properties in West Vancouver. Mr. Jurik entered into a written contract with the defendant dated April 7, 2008 to provide landscaping services. The contract provided:

Landscaping

1. Grading
 - Grade property to proper planting levels
 - Remove any extra fill material (one load). Extra loads charged @ \$500/load
2. Topsoil
 - Supply & install topsoil approximately 170 cubic yards
3. Plants
 - Supply & install plant mater, as per drawing some large & some substitutions

Contract to be completed by 2nd week of June

[3] The contract price of \$40,950 + GST was to be paid in instalments. The first was a deposit of \$10,750. A second instalment of \$10,750 was to be paid after the completion of grading. A third instalment of \$10,000 was to be paid after the delivery of topsoil and the balance of \$10,750 was to be paid after the trees were planted and before the planting of the shrubs.

[4] The document contained a term stating that:

All material is guaranteed to be as specified. All work to be completed in a workmanlike manner according to standard practices. Any alteration or deviation from above specifications involving extra costs will be executed only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents or delays beyond our control.

[5] The drawing referred to in the contract was a landscaping plan that had been prepared by DMG Landscape Architects ("DMG"). The plan included a detailed list specifying every plant, its quantity and size as well as the precise location for planting.

[6] The British Properties has established certain standards for landscape design and installation in various subdivisions. There is a two stage review process: first, the landscape design is submitted for approval; second, the completed landscaping is inspected to ensure that the planting corresponds to the guidelines. The inspection includes a determination of whether the installation has met minimum industry standards and whether the plants selected correspond to British Properties standards.

[7] There is no controversy in the present case with respect to the drawing and the plant list supplied by DMG. The Juriks contend that, however, an additional page that was attached to the original drawing and formed part of the contract. This page was headed "General Notes for Streetscape Planting" and includes the following provisions:

1. All materials and execution of landscape works shall conform to the B.C.S.L.A./B.C.N.T.A. Landscape Standard (6th Ed.). Refer to written specifications for complete landscape documentation.
2. The Landscape Contractor shall ensure that the on-site planting medium/soil meets the specification and recommendations of the soil analysis taken at the time of Substantial Completion. All recommendations of the soil analysis shall be executed prior to Final Acceptance of the landscape works by the Consultant and the municipal authorities.
3. Minimum planting medium depths:

Lawn - 6"/150mm

Ground Cover-12"/300mm

Shrubs - 18"/450mm

Trees - 12"/300mm (around and beneath root ball)

4. All plant material shall meet minimum size requirements as indicated in plant list. Quality of plant material and grading of size to conform to the B.C.N.T.A. standard for container grown stock.
- [8] The provisions reflect the requirements of the British Properties guidelines for landscaping.
- [9] Mr. Callan denies that this page was attached to the drawing that he received and denied that this term formed part of the contract. I find that the page was attached to the drawing that was reviewed with and provided to Mr. Callan and did form part of the contract. It is to my mind unlikely that Mr. Jurik, knowing of the requirements of the British Properties and of the necessity that the landscaping pass an inspection, would not have included these provisions in the contract. Moreover, I accept that the page was attached to the plans provided to the Juriks by DMG. There would be no reason for them to remove the page before providing it to Mr. Callan.
- [10] Mr. Callan stated that he would never have guaranteed that his work would correspond to British Properties guidelines because those guidelines include things that are unrelated to landscaping. I accept, in so far as the guidelines do not pertain to landscaping standards, they are not applicable to the contract. However, the provisions that do pertain to the landscaping contract, such as those relating to the size of the plants and the nature of planting, are contractual provisions and were part of the contract in the next case.
- [11] The Juriks testified that the term relating to completion was very important to them as they were ready to move into the home by mid-June and needed the landscaping to be completed. Mr. Callan acknowledged that the need for the timeliness of completion had been brought home to him at the outset. Somewhat inexplicably, however, he took the view that the completion date was something that both he and Mr. Jurik knew was the date that they were "shooting for", but that it was not fixed. I find that at the time the contract was entered into the completion date was a contractual term.
- [12] The payments that were made were:

Date (2008)

Amount

April 18

\$10,700

May 17

\$ 5,000

June 2

\$ 5,000 + \$1,000

June 27

\$ 9,000

July 18

\$ 5,000

Total:

\$35,700

- [13] It is clear that the contract was not completed by the second week of June. While the evidence is to the last date worked on the site is unclear, it appears that the defendant was working on the site until close to the end of August.
- [14] It is clear that the May 17 payment was not for the contractually stipulated amount. Mr. Callan testified that the parties had agreed that the payments could be made through VISA. He testified that in early May he had completed the grading and put in approximately half of the topsoil. Thus he had completed the work required for the second installment and he was seeking payment. He stated that Mr. Jurik advised that he couldn't process the full amount on his VISA. In the result, Mr. Callan was only able to put through \$5,000 on the Visa. He stated that he didn't stop work because he had received partial payment. It was his evidence that he did 'slow down'.
- [15] He testified that he tried for another draw in early June and was only able to process \$5,000 again on the credit card. It was his evidence that he did not recall a conversation with Mr. Jurik about the problems he was having with the payments. His evidence was that he did not want to make a big deal of it. He thought they would pay him. He stated that he did stop work for a time, toward the end of May and that he resumed work when he received another partial payment in early June. It was his evidence that up to this point there had been no complaints from the owners.
- [16] It was Mr. Jurik's evidence that in May he started panicking because the job was not progressing. It was his evidence that when the \$5,000 was paid in May the grading had not been completed. He stated that he paid the \$5,000 because Mr. Callan asked for it and he agreed to make an advance and to pay the balance when the grading was completed. Mr. Jurik agreed that the June 2 payment was for the balance of the grading.
- [17] The evidence with respect to the situation as at mid-May was that each party alleged that the other was in breach. It is, I think, of some relevance that Mr. Jurik, by trade, is a building contractor who has experience dealing with contractual matters in relation to construction projects. On balance, I think it unlikely that Mr. Jurik would have made even a partial payment of the second instalment in the circumstances if the work required to be completed as provided by the contract had not been done. With regard to his evidence that

he withheld payment because the job was not progressing to his satisfaction, I note that while there was a time specified for final completion, there was no contractual term regarding the timing of the completion of the grading and topsoil.

- [18] On the other hand, Mr. Callan emphasized that the financial end is crucial in his business and that in general when the money stops the job stops. I think it is more likely that he would have demanded payment of the second draw as soon as he was entitled to it; that is, when he had completed the grading, but before he had commenced dealing with the topsoil. It seems less likely that he would have demanded payment of the second instalment if the grading was not completed.
- [19] I find that the grading was completed by May 17, but that the payment for the second instalment was not provided until June 2. In any event, as at May 17 the defendant was not in breach of the contract. The defendant was entitled to stop work until the second instalment was paid in full. Accordingly, it follows in my view, the Juriks were thereafter no longer entitled to insist upon completion by mid-June. Instead, given that Mr. Callan had elected to continue, completion would be in a reasonable time, assuming payment of the contractual instalments as due.
- [20] The third instalment was due when the topsoil was completed. Mr. Jurik was asked in cross-examination when the topsoil was completed. His original answer was "you tell me". He then stated that it was likely completed when he provided the payment in cash, on June 27. It was his evidence that at that point he told Mr. Callan that he was behind schedule. Mr. Callan assured him the job would be done in two weeks.
- [21] Mr. Callan's evidence was that the topsoil was completed before the June 27 payment. His evidence was that the Juriks were behind in the payments of the installments when Mr. Jurik came up with some cash. He did not recall the date when he got the cash. It was his evidence that the amount was not full payment, but it was enough to keep working.
- [22] Mr. Callan provided an invoice that he stated was in relation to the topsoil provided for this job. According to that invoice, the topsoil was completed on July 22. However, this invoice appears to cover not just this job, but all topsoil deliveries to DC Landscape by the trucking firm in the period between April and July 2008. For example, the first entry is for the delivery on April 5, prior to the contract being entered into. While all of the invoices relate to Dunlewey Street in West Vancouver, it is common ground that DC Landscaping was working on another project on that street at the same time.
- [23] I find that the installation of the topsoil was completed on or about June 27 and at that time, the third advance was at that point due under the contract. This advance was not paid in full. Mr. Callan, however, elected to continue with the project. I find that to this point, the defendant was not in breach of the contract. The Juriks were; however, the defendant elected to continue work.

- [24] The next stage pursuant to the contract was to be the installation of the trees with the final instalment due after the trees and before the shrubs. An additional complexity was now added in that it is common ground that Mr. Callan was instructed to ignore the landscape plans - the contract - and to instead follow the instructions provided by Anne Jurik with respect to the "look" of the property, the type and placement of the plants. The entire property was to look natural, "like Lynn Creek". Ms. Jurik provided the defendant with a series of drawings, list of plants and instructions. However, unfortunately, no one turned their attention to how this fundamental change would affect timing of the work, pricing of the contract and how completion would be defined. As one example, the contract provided for the installation pursuant to the DMG drawing which was complete to the plant. Ms. Jurik, however, provided a series of lists and sketches. The sketches were impressionistic not detailed 'blueprints' as was the contractual drawing. The lists of plants included instructions such as; 'sword ferns tons', B.C. woodland evergreen trees everywhere', 'as if the house was dropped in a natural setting'.
- [25] The lists were delivered not only at the outset of this deviation from the DMG plan, but at various times. The lists are to some degree inconsistent. For example, the July 2 list refers to 'salal - lots and lots 20-40 pots'. A list dated July 15 refers to 'salal - tons - 100'.
- [26] Nowhere is it made clear how this new set of instructions is to mesh with the DMG drawing. In addition to the instructions given to the defendant with respect to plants to be provided, Ms. Jurik purchased plants on her own.
- [27] In short, once the decision was made to abandon the DMG drawing, there was no clarity whatsoever with respect to the scope of the work to be undertaken. As noted earlier, there was no agreement with respect to the price or timing of this revised 'plan of work'.
- [28] The contract stated that any alteration or deviation involving extra costs will be executed only upon written orders. Mr. Callan provided a version of the contract with handwritten notes on the back that state:

put it all in, then list everything to change once.

Extra to move \$30/hr/guy

Hedge on your side 500

Change 30 rhodos

I Peter Jurik take full responsibility for any & all changes made to the landscape @ 2333 Dunlewey Place. Therefore, DC landscaping bears no responsibility for changes to the job from the DMG Landscape drawing.

- [29] The evidence of Mr. Callan is that these notes were signed by Mr. Jurik. Mr. Jurik denies signing the notes. The signature on the back of the document does not resemble the signature that both parties acknowledge to be Mr. Jurik's signature on the front of document. I find that the notes do not bear Mr. Jurik's signature. However, in any event, even if he had signed these notes, they hardly clarify the issues of cost and timing.
- [30] It is a mystery why matters were left in such a complete vacuum. It appears from the testimony of all parties however that this is the case. It is also a mystery why Mr. Callan's carried on without either clarification or payment however it appears that this is also the case. It is clear from the faxes that the Juriks continue to treat the project as one that ought to have been completed by mid-June. Mr. Callan does not appear to have protested.
- [31] Ms. Jurik was picking out plants and giving instructions. As plants were being delivered and planted, instructions were being given to have them moved. At least in one case, this involved hiring a crane to move larger trees that had already been planted. Mr. Callan testified that he planted the trees where they were shown on the drawing, but was then given instructions to move some. It was his evidence that it took two weeks to move the trees.
- [32] Mr. Callan testified that in his view, Ms. Jurik's demands were unreasonable and it was impossible to keep up with them. Further, he further stated that her demands were out of sequence with the proper order for planting. However, he did not respond to her stream of faxes providing instructions, either verbally or in writing. He stated that he ignored some things and complied with others. For example, he observed that in one of the many lists of plants provided by Ms. Jurik, she requested more than \$5,000 additional plants. He stated that since he was not getting paid, he was not going to acquire them. He did not convey this to the Juriks. When asked why, his response was, "I think they knew it was unreasonable". Mr. Callan has been in business for a long time. His lack of response to instructions he intended to ignore is inexplicable.
- [33] Mr. Callan's evidence was that he had costed the plants, excluding the trees, on the plant list at \$5,000. He did not supply every plant on the plant list. The value of the plants on the list that he supplied was \$7,461.73. He did supply many plants that were not on the list, with his estimate of their value being \$8,353.22. However, in another list prepared by Mr. Callan, he estimated the cost of plants he supplied to be \$12,046.09. An independent quote from Art's Nursery costed all the plants on the DMG drawing, including trees, on the plant list at \$21,528.04 wholesale and \$25,833.66 retail (including tax).
- [34] As noted above, it is clear that Ms. Jurik started purchasing plants on her own as well as ordering plants from the defendant's nursery. She submitted invoices for thousands of dollars of plants, some of which were on the list and some were not. The total of the invoices for plants purchased by the Juriks was \$30,840.29 of which \$7,561.68 was described as being for replacement trees.

- [35] One measure of how far the parties had departed from the scope of the contract is reflected in the cost of plants. The total of the plants stated to be supplied by Mr. Callan, \$15,814.95, added to the total said to be supplied by the Juriks, \$30,840.29, subtracting the amount attributed to replacement trees, \$7,561.68, is \$39,093.56, a figure approaching twice that of the value of plants stipulated in the original contract.
- [36] Mr. Callan testified that relations remained cordial during the project. The Jurik's testimony was to the contrary. The tone of the faxes sent by Ms. Jurik to the defendant made it clear that the relationship had deteriorated. With the benefit of hindsight, it is not difficult to understand why this would be the case. The Juriks were pressing for the project to be finished, but there was no longer any contractual term by which completion could be determined. Mr. Callan was not being paid and was being met with what seems to be an endless stream of expensive demands.
- [37] Mr. Callan's evidence was that the job just wound down. He felt at the end that he owed the Juriks plants because he had not supplied perennials and groundcover, but estimated that the Juriks owed him \$9,000. He was prepared to treat it as even. It was his evidence that, but for the slow down and brief cease work in May, his crew was working virtually full time on the Jurik's job until it concluded. Members of his work crew gave evidence to the same effect.
- [38] It was Mr. Callan's testimony that there were extra jobs done that were not part of the contract for a total value of \$7,200 labour charges, all at \$25 per hour. These were:
- (1) drainage - 96 hours;
 - (2) move large trees - 72 hours;
 - (3) move 9' Cedar hedge (east side) - 16 hours;
 - (4) move Yew hedge and Magnolias (west side) - 48 hours; and
 - (5) lawn (lay turf, boulevard) - 72 hours less 16 [equivalent cost for Hydro seeding].
- [39] Hanno Ehrenberg, a landscaper who is also a friend of the Juriks, testified that he was hired in early July to help the Juriks finish the job. It was his testimony that he was working nearly every day on the job from early July to the end of September. The plaintiffs claim also includes a component for the labour of Mr. and Ms. Jurik. The total claim for additional labour described as being "to complete landscape project, including replanting and corrections for final inspection" is as follows:

Hanno Ehrenberg

644 hours / \$35 hour

\$22,540

Anne Jurik

455 hours/\$25 hour

\$11,375

Peter Jurik

303 hours/\$25 hour

\$ 7,583

Total:

\$41,498

- [40] It was Mr. Ehrenberg and the Jurik's evidence that they were working virtually full time to complete this job, but the defendant was hardly ever present. However, Mr. Callan's evidence was that his crew was working full time and he did not recall Mr. Ehrenberg and the Juriks working.
- [41] It was common ground that the planting is the smallest part of the landscaping job; grading and installation of topsoil being more significant in terms of labour costs. It is notable that the figure provided by the plaintiffs for additional labour to complete the project approaches the contractual amount for the entire project which included not only labour, but topsoil and plants. This is perhaps another measure of how utterly eclipsed was the scope of work stipulated in the contract. As an interesting side note, the plaintiffs prepared their own estimate of the total material and labour for the defendant's work in relation to this project. This was based upon estimates and calculations prepared by Mr. Ehrenberg. The labour for the defendants was, however, valued at \$18 an hour in this exercise, substantially less than what the defendant actually pays for labour and for below the value the plaintiff's chose for their own and Mr. Ehrenberg's labour.
- [42] It is impossible to reconcile the accounts with respect to who was doing what work on the property during July and August. The defendant's evidence in this regard was supported by the hours of work records submitted by his crew members. However, these did not specify hours spent on particular jobs. The defendant had other contracts during this period so this evidence does not corroborate the testimony regarding hours of work at the Juriks.
- [43] The Juriks and Mr. Ehrenberg's estimates are not supported by documents. In addition, it is clear that much of what Mr. Ehrenberg was charging for was not landscaping, but litigation assistance.
- [44] I have concluded that the estimate of hours worked by both sides of this dispute are exaggerated. The faxes sent by Ms. Jurik contain complaints about the crew not working or not showing up. I believe that Mr. Callan responded to the situation by slowing down and spending time on other jobs. I find that the time estimates of the Juriks are exaggerated. They did not keep records. In any event, there simply was not that much left to be done to occupy that many hours.

- [45] The Juriks also complain that the \$5,000 payment put through on Mr. Jurik's Visa by Mr. Callan was authorized. Mr. Callan agrees that he did receive particular permission with respect to the advance but asserts that Mr. Jurik had told him at the outset that he preferred to pay by Visa. It was his evidence that the Juriks were behind in their payments and he only attempted to "catch up" to what he was entitled to under the contract.
- [46] When the property was inspected on August 25, 2008 there were significant problems with respect to the standards of planting and the size of trees. The inspection report stated:
1. In general the site appears largely weed-free and the soil depths appear to be adequate. The perennials and groundcovers that have been installed on-site appear robust.
 2. The majority of the tree and hedge material that is currently installed on site has not been planted with a minimum level of care and attention. The long-term health of much of this plant material is questionable.
 3. Almost every tree inspected had been planted with the root ball either exposed or planted too far below grade so that the crown and a portion of the trunk were completely buried.
 4. Almost every tree inspected had not had the rope, burlap or wire basket properly untied and folded down into the planting area. Several trees may already have been girdled by this treatment. In one case, a portion of a wire basket has been left exposed above grade in a lawn area, which presents a clear hazard.
 5. Several of the trees on site are leaning and need to be straightened. Tree-staking is also not to standard -- the tree stakes should not be inserted into the root-ball of the tree. There are also trees on site with dead branches and damaged areas left hanging off the tree, and many of the large growing conifers (in particular the group of trees at the rear of the pool patio) have been planted too close together for long-term success.
 6. Almost all of the hedge material that I inspected on site (taxus & thuja) had not been untied and had been buried with the rope and burlap intact. Most of these plants have also been buried far too deeply and need to be lifted and re-planted.
 7. Several of the tree root-balls have horse-tail growing out of them. Any plant material with a pernicious weed such as horse-tail should be rejected when it arrives at the site and should not have been installed. This material must be removed in order to avoid long-term maintenance issues.
 8. Portions of the lawn area both on-site and on the boulevard are very soggy and do not appear to be draining properly. The sub-grade preparation may also have been inadequate. Areas of the turf have not knit together properly and will need to be repaired and/or over-seeded later on.

9. There is a serious run-off problem coming onto the site from the neighbouring property to the north. We have alerted the neighbour and British Pacific Properties to this situation and have recommended that the neighbour install additional drainage.
9. In summary, almost every tree and hedge on site, (with the exception of some material at the rear & side patio) needs to be lifted and re-installed in order to meet a minimum acceptable standard. Dead and damaged plant material should be removed. Areas of the lawn also need to be repaired to the owner's discretion.
10. Additionally, at the time of final inspection for the return of the landscape bond held by British Pacific Properties, there will need to be a minimum of 14 trees on site (not including streetscape areas) that meet BPP size requirements: (3.5 m height for conifers and 6 cm caliper for deciduous trees). At present there are approximately 3 conifers to sufficient size on site, however I estimate that there are only 3 to 4 deciduous trees on site that meet the size requirements. Existing undersized trees will either need to be replaced or supplemented with approximately 6 to 8 additional trees to the minimum 6 cm caliper.
- ...
- [47] The plaintiffs state that they incurred costs in replacing plants and trees and correcting planting in order to pass the final inspection.

Discussion

- [48] The plaintiffs claim that, according to their calculations the value of all the work performed by the defendant on the property was \$10,830 and that the defendant should be required to refund the difference between that amount and the amount that was paid; \$35,700. In addition, the defendant should pay the cost to the plaintiff to obtain the bargain which the defendant refused to perform. In particular, the plaintiffs claim for:
- (1) the cost to hire Mr. Ehrenberg, \$22,540;
 - (2) the plant material they supplied, \$30,840;
 - (3) the cost for labour for labour for Peter Jurik, \$7,583; and
 - (4) the cost for labour for Anne Jurik, \$11,375.
- [49] In addition, the plaintiffs say they should be awarded damages in the amount of \$5,000 for loss of use and enjoyment of their home caused by the breach of contract and negligence claims. Finally, the plaintiffs submit that they should receive aggravated damages for the defendant's conduct throughout, including the unauthorized Visa transaction and the defendant's repeated refusal to help the plaintiffs mitigate by planting two small sections of the property as requested.

- [50] The position of the defendant is that it should receive credit for completion of the grading and topsoil, for the approximately \$15,000 worth of plants that were supplied, the \$7,200 additional labour costs that were incurred in addition to what was provided for in the contract, and \$2,000 for soil removal. Counsel submits that there was no expert evidence with respect to the plant material that failed the inspection. Counsel notes that we do not know why the plants failed and we do not know specifically what the cost was to remedy.
- [51] As noted earlier, I have concluded that, for the reasons given earlier, as of June 27, the defendant was not in breach of contract and the plaintiffs were \$1,000 behind with respect to their contractual obligations. The defendant had completed grading and the topsoil installation. What remained to be performed was the planting. At that point, the contract was effectively abandoned by both parties. The DMG drawing was not to be followed, but rather, Ms. Jurik's design, as it evolved, was to be implemented. Unfortunately, and inexplicably, the parties did not turn their minds to creating new contractual benchmarks either with respect to timing or price. In the absence of contractual terms, the defendant's work from that point forward is to be based upon quantum meruit.
- [52] The plaintiffs acknowledge that the defendant's work is to be valued on a quantum meruit. However, they undertook an exercise through Mr. Ehrenberg that involved him calculating how long he estimated the work would have taken, and what was done, all valued at \$18 per hour.
- [53] This is not the appropriate approach in the circumstances. First, I have found that the defendant performed the grading and top soil portions of the contract. After that the parties abandoned the contract. It is not appropriate, therefore, to go back to the beginning of the contract to assess the defendant's work. Rather, it should be valued from June 27 forward. The defendant is entitled to retain amounts paid prior to that time pursuant to the contract.
- [54] I find that the defendant established that it provided plants in the amount of \$15,814.95. However, the contract provided for the defendant to supply plants of a value of \$21,528 wholesale according to the quote in evidence. The defendant did not supply plants of this value and the plaintiffs should receive credit for the difference. I find further that the defendant has established an extra labour cost, excluding planting, in the amount of \$7,200 and \$2,000 for soil removal. In addition, the defendant would be entitled to compensation for the labour involved in planting; however, it is not possible on the evidence to provide a value for this claim. Ignoring that aspect, by the end of the engagement, the Juriks owed DC Landscaping:

\$15,814.95

Plants

\$ 7,200.00

Extra labour costs

\$ 2,000.00

Soil removal

Total:

\$25,014.95 - \$5,000 payment July 18 = \$20,014.95 - \$5,713 = \$14,302.95 plus some amount for labour involved in planting

[55] I am satisfied that there were deficiencies in the planting work. In particular, was a deficiency in the planting of trees and hedges was described in the inspection report of August 25, 2008. There was, as well, a problem with undersized trees that needed to be replaced or supplemented with trees of the minimum 6 cm caliper. The plaintiffs assert that all these deficiencies are with respect to plants planted by the defendant. Mr. Callan's evidence was that his crew was doing virtually all of the planting. He did not allege that the plaintiffs' work was deficient. I find that the defective plants were planted by the defendant and that these deficiencies amount to a breach by the defendant.

[56] However, it is for the plaintiff's to prove their loss. The documentation provided by the plaintiffs in support of their damage claim is exaggerated. In many cases, amounts that would properly be recoverable are not segregated from amounts that are clearly not. It does appear that \$7,561.68 was spent on replacement trees that had been originally supplied by the defendant and had to be replaced because they were undersized, dead or dying. Mr. Ehrenberg's charges for the period between September 30 and October 7 with respect to ordering replacements, removing the failed and dead trees and shrubs, and receiving replacements are appropriate, and amount to \$2,240. Labour charges for re-planting both with respect to replacement plants and plants that had been planted by the defendants that required adjustment would be appropriate; however, in neither Mr. Ehrenberg nor the Jurik's claims are these amounts segregated.

[57] What is clear in this analysis is that the damages that the plaintiffs have appropriately quantified do not exceed the amounts that are owing to the defendant with respect to the contract and quantum meruit and therefore I make no award for damages for breach of contract or negligence.

[58] I decline however to make any award to the defendant with respect to the quantum meruit claim. Quantum meruit is based upon equitable principles of unjust enrichment. The principles to be applied in addressing what is reasonable remuneration in the context of such a claim were addressed by Mr. Justice Burnyeat in *Malik (Representative ad litem of) v. State Petroleum*, 2008 B.C.J. 2260. In short, the claim is to be valued on the basis of "what the job is worth" in all of the relevant circumstances.

- [59] In the present case, in all of the circumstances I am unable to conclude that "the job was worth" more than the remuneration already received by the defendant together with an offset for the amount to address deficiencies. The appropriate result, in my view in these unusual circumstances, is to treat the claim for breach of contract and negligence and counterclaim for quantum meruit as a wash.
- [60] The plaintiffs have claimed for damages for the loss of use and enjoyment of their home caused by the defendant's breach of contract and negligence. In my view, the loss of use and enjoyment resulted first, from the plaintiff's failure to pay the contractual instalments when due, and second, from the decision to abandon the contract without negotiating new contractual benchmarks. Neither party behaved in a business-like fashion and that led to frustration on both sides. This, however, is not a breach of contract that can be laid at the feet of the defendant. In my view, this is not a case for aggravated damages.
- [61] In the result, the plaintiffs established breach of contract, and have established damage flowing from the breach. However, the damage they were able to quantify is roughly equal to the unpaid balance pursuant to a combination of the contractual claim and the quantum meruit claim advanced by the defendant.
- [62] In the result, I dismiss both the claim and counterclaim.

"Ross J."

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