

CANADA / JUDGMENT

Lu v. 421688 B.C. Ltd.

2020 BCSC 93

COURT

Supreme Court of British Columbia

DECIDED

27 January 2020

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2020 BCSC 93 Lu v. 421688 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lu v. 421688 B.C. Ltd.,

2020 BCSC 93

Date: 20200127

Docket: 180123

Registry: New Westminster

Between:

Yuyang Lu

Plaintiff

And

421688 B.C. Ltd., Nancy Suk Ling Chuck, Jimmy Cheong Man

Chuck also known as Jim Choul, and John Doe also known as Jim Choul

Defendants

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

Counsel for the plaintiff:

P. Kressock

Counsel for the defendants:

S. Hu

Place and Date of Trial/Hearing:

New Westminster, B.C.

February 4 -8, 11-13 & 15, 2019

June 27 & 28, 2019

Place and Date of Judgment:

New Westminster, B.C.

January 27, 2020

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- [1] This action is based upon a construction contract entered into between the plaintiff, Mr. Lu, and the defendant 421688 B.C. Ltd. ("421") under which Mr. Lu was the owner and 421 contracted to demolish an existing home on the subject property following which 421 was to construct a new home for Mr. Lu. Mr. Lu provided deposits totalling \$375,000 to 421, however, the existing home was never demolished and construction on the new home never commenced.

- [2] The construction contract was eventually terminated by Mr. Lu approximately fifteen months after the contract was executed. Mr. Lu alleges 421 repudiated the contract and the repudiation was accepted by Mr. Lu which results in Mr. Lu claiming damages in the amount of the deposits in breach of contract, conversion and breach of trust. In addition he seeks consequential damages arising from the breach, including damages for mental distress, punitive damages and costs.
- [3] The defendant, 421, has issued a counterclaim seeking damages for breach of contract or unjust enrichment.
- [4] There are two versions of a construction contract, one in English and one in Chinese. Mr. Lu speaks only a small amount of English and does not read or write English, which was the reason there were two forms of contract between Mr. Lu and 421. A translated version of the Chinese contract has been entered as an exhibit in this trial as was the English version. There are considerable differences between the two versions of the contract.

Factual Background

- [5] Mr. Lu immigrated to Canada, specifically Vancouver, in 2013. He was a successful businessman in China having owned and operated a technology company specializing in glazing for high-speed trains. As of 2013, Mr. Lu was 58 years of age and intended to retire in Vancouver, where his daughter from his first marriage was attending university. He was emigrating with his second wife and his then four year old son with the intention of living in a detached home with his family. Also included in his family was an older brother who was experiencing health problems while living in China and who Mr. Lu was intending to bring to Canada to live with his family.
- [6] The defendants, Jimmy Chuck and Nancy Chuck are married and control the defendant, 421. Nancy Chuck is the sole director. Mr. Chuck's primary occupation at the time of the events in this case was that of a realtor, having also had a background in accounting. 421 had previously arranged for the construction of detached residences in Vancouver, primarily for clients Mr. Chuck was also representing in real estate transactions. Nancy Chuck played a very minor role in the events relevant to this litigation.
- [7] The evidence discloses that 421 did not operate as a typical construction contractor. It entered into contracts which called for a home to be built but typically assigned the construction to a separate general contractor. According to Mr. Chuck's testimony, he had intended in this case to assign all of the actual work to a contractor but also that he would retain the architect/designer.

- [8] Mr. Lu contacted the defendant, Mr. Chuck, in mid-February 2014 to inquire about Mr. Chuck building a home for Mr. Lu on a lot on West 34th Avenue in Vancouver. After meeting with Mr. Chuck and viewing the property on West 34th Mr. Chuck indicated to Mr. Lu that he was not interested in building a home on the property due to complications with the shape and slope of the lot and the presence of many trees which cause complications when building in Vancouver, due to applicable by-laws.
- [9] Later in 2014, Mr. Lu and his wife, Gang Li, as joint tenants purchased the lot on 34th Avenue on which was an eighty year old house which he intended to demolish and build a new home for him and his family. The location was important to Mr. Lu, as his son, who is autistic, could attend a school nearby, and was close to a Chinese supermarket, which was convenient for his wife. Since purchasing the property, Mr. Lu and his second wife have divorced, the relevance of which will become apparent later in these reasons.
- [10] Mr. Lu had no prior experience in new home construction in Canada and no knowledge of the processes which need to be followed in order to construct a new home, particularly the permitting process of the City of Vancouver.

Testimony of Mr. Lu

- [11] Mr. Lu contacted Mr. Chuck once again in June 2014 and asked him to build a home on the newly acquired lot. Together with Mr. Chuck, Mr. Lu visited a home in Burnaby, B.C. which Mr. Chuck advised had recently been constructed by him and which Mr. Lu described as "alright" respecting quality. Discussions followed in which Mr. Chuck and Mr. Lu considered a price per square foot for a new home and possible completion dates. Regarding completion dates, according to Mr. Lu's testimony, Mr. Chuck made various representations that a new home on the lot at 34th Avenue could be completed before the end of 2014 or early 2015. Mr. Lu testified that he advised Mr. Chuck that an early completion date was important to him, especially since he was intending on registering his son in a school nearby the location of the proposed new home.
- [12] Before a contract was signed to build the house, Mr. Lu met with, Mr. Vickram Tiku, who, Mr. Lu stated, was introduced by Mr. Chuck as an architect. Mr. Lu testified he discussed the structure of the house including the approximate size of 6,500 square feet and the layout of rooms proposed by Mr. Tiku. The meetings with Mr. Tiku were conducted with translation provided by Mr. Chuck. Mr. Tiku prepared preliminary plans after a first meeting and changes to the plans were discussed, according to Mr. Lu which would require Mr. Tiku to return with changes reflected in a new set of drawings. Mr. Lu also testified that he was never asked to approve a set of drawings and he was not aware of procedures in Canada relating to the approval of building applications.

- [13] Mr. Tiku was not a registered architect in B.C., but rather a designer who worked with an architectural firm. As discussed later in these reasons, Mr. Tiku was very experienced as a designer of single family homes, with the processes of designing such homes and the permit approval process of the City of Vancouver.
- [14] Also, up to and including a meeting of June 27, 2014, Mr. Lu testified as to several occasions when Mr. Chuck advised him orally that the house would be built "as soon as possible". Mr. Lu testified that Mr. Chuck provided several dates in late 2014 or early 2015 by which the home was to be complete.
- [15] On June 27, 2014, Mr. Lu and Mr. Chuck met and had a discussion in Mr. Chuck's vehicle to review a form of construction contract prepared in Chinese by Mr. Chuck that had been signed by Mr. Chuck prior to the meeting. Mr. Lu testified that during the meeting of June 27, 2014, he signed the Chinese version of the construction contract: "I was given the Chinese contract and after a few days was given the English contract. I was told by Jim [Mr. Chuck] they were the same". As Mr. Lu could only understand written Chinese and not English, he was only able to read the Chinese version. He was also told that in Canada there must be an English version of the contract. Parties to the contract were 421 and Mr. Lu.
- [16] In fact, there were differences between the Chinese and English versions of the construction contract, both of which had been prepared by Mr. Chuck. For example, the translated Chinese version of the construction cost stated:

Construction Cost based on square footage:

\$210 / sq.ft plus 5% GST

=6500 x 210 x 1.05 = \$1,433,250

= \$1,430,000 (\$150,000 to be paid separately)

Construction Contract:

\$1,280,000

and an attached payment schedule which included progress payments upon completion of certain stages of the work totalling \$1,280,000. In addition, there was reference to a "Deposit for construction" of \$150,000 without reference to a construction milestone or stage.

- [17] The English version referred to a total price of \$1,280,000 including GST and a construction schedule but also, with reference to a sum of \$150,000, that was payable "after 100% completed, unconditional occupancy permit issued, Landscaping completed". There was no reference in the English contract to a Deposit for Construction in an amount of \$150,000.

- [18] The English version included a clause that 421 could "assign whole [or] part of this contract to another party but assumes complete responsibility and obligations of this contract" and a clause under which the parties agreed that no holdback will be retained under the Builders Lien Act, S.B.C. 1997, c. 45, neither of which appeared in the translated Chinese version.
- [19] The English version of the construction contract included a section of general vague specifications which was spread over almost two full pages, none of which are included in the Chinese version of the contract. The Chinese version of the contract did include items included in the construction cost including surveys, engineers and other consultant costs, building permits and insurance, all building materials, appliances, air conditioning with materials and craftsmanship to be equal to a home constructed by the defendants in Burnaby, B.C. Neither version provided a detailed description of what was to be built, nor did they reference any plans for the home as final plans which would allow for submission of a building permit.
- [20] The Chinese version excluded the cost of landscaping, however, the English version did include retaining walls, fencing, topsoil and turf.
- [21] A payment schedule was included in both versions which called for payments in specific amounts payable on the completion of specified work, including upon issuance of a building permit and upon various percentages of the work being complete. No estimated dates for the payments are mentioned in the English version. However, the Chinese version has a payment schedule attached to the contract in which estimated dates for each of the payments are listed. Included in the schedule to the Chinese version is an "Estimated Payment Date" for a payment of \$150,000 as a deposit for construction and a further \$150,000 payment on "100% completed", an occupancy permit being issued, a yard and a fence. The English version mentions only one payment of \$150,000 payable on 100% completion.
- [22] Mr. Lu testified that the contract price agreed upon was \$1,430,000 (\$1,280,000 + \$150,000), a fact agreed to by Mr. Chuck. The schedule of payments attached to the Chinese version includes the \$150,000 payment on 100% completion which is included in the total of \$1,430,000 and the "Deposit for Construction" of \$150,000.
- [23] Most important in addition to the price are the schedules for completion included in the two contracts. The Chinese version includes "Estimated Payment Dates" in the payment schedule that correspond to certain stages of completion being completed by 421. The English version, which, according to Mr. Lu, was executed after the Chinese version, required the contractor "to perform all work in an expeditious manner". There was no date set by which the home was to be completed and no mechanism in the contract for either party to apply for extensions of time and no clause enabling one party to declare the other to be in default.

- [24] It should be noted that the English version of the contract does not call for a deposit and that the first payment contemplated under the English contract was of \$200,000 upon issuance of a building permit by the City of Vancouver.
- [25] Upon execution of the contracts, Mr. Lu testified that he met with Mr. Chuck at a currency exchange business in Burnaby on June 26, 2014 and withdrew \$100,000 in cash, placed it in a plastic bag brought by Mr. Lu and delivered the bag to Mr. Chuck after the contract was signed on June 27, 2014. Mr. Lu added that Mr. Chuck had requested cash. When questioned as to why he made a payment for \$100,000, he stated that the "\$100,000 was part of the \$150,000 balance of \$50,000 was to be paid on completion".
- [26] In his testimony, Mr. Chuck denied asking for a cash deposit in that he was uncomfortable in receiving \$100,000 in cash as he was concerned that his bank would not accept such a large sum if he attempted to deposit those funds to his account. Mr. Chuck testified that he did not meet Mr. Lu at the currency exchange, that after signing the construction contract he and Mr. Lu met on a street in Burnaby near Mr. Lu's apartment. Mr. Chuck never did deposit the cash funds amounting to \$100,000 in his bank and kept those funds in his home. He also later testified to having kept the cash in his home, that some of the funds were used for deposits for contractors and the architect, some money was used for the cost of travel for Ms. Chuck and that the balance of the deposit remained in his home.
- [27] Mr. Lu then testified that on June 27, 2014 he asked Mr. Chuck for a receipt for payment of the \$100,000 and Mr. Chuck then wrote and signed a note to Mr. Lu stating, in Chinese, "Received from boss Lu Canadian Dollars 100,000" (Exhibit 4, Tab 28). Not satisfied with the wording of Mr. Chuck, on the bottom of the same document, Mr. Lu wrote "One hundred thousand Canadian Dollars has now been received from Mr. Yuyang Lu (the balance fifty thousand dollars will be paid in full in one lump sum after the account has been finalized and passing inspection)" and purports to be signed by Mr. Chuck.
- [28] Mr. Lu testified that after the contract signing and payment of \$100,000 he understood the contractor would start work immediately, that Mr. Chuck told him all applications for permits were made in 2014 and the procedures to obtain a permit had started. Mr. Lu testified that he had no idea when the application was made to the city for a building permit.
- [29] Mr. Lu added that in 2014 Mr. Chuck had suggested that a small elevator be included in the plans for the house at a possible cost of between \$100,000 and \$200,000. Mr. Lu concluded the elevator would make sense in that he was retiring and intended to continue to live in the house through his retirement. Mr. Lu also stated that Mr. Chuck told him that the addition of an elevator would not cause delay, although the testimony of Mr. Chuck and Mr. Tiku, the designer, did say the addition of an elevator and then a subsequent change to having the elevator traverse three floors of the home as opposed to two floors did contribute to the delay due to structural changes, changes to the floor plans and changes to the electrical service.

- [30] Mr. Lu also testified that he was never asked to approve and sign off for the plans for the home and that he often asked Mr. Chuck when work would be starting on the home to which he received replies of "very soon", "next week" or "tomorrow". He was concerned that no work was proceeding on site and since he understood the home would be complete by July 30, 2015, he made inquiries regarding progress to Mr. Chuck. Again, this testimony of Mr. Lu is disputed by Mr. Chuck and Mr. Tiku.
- [31] When asked in direct examination whether there was any discussion between him and Mr. Chuck regarding the project being "off schedule", his response was "no", Jim (Mr. Chuck) kept telling him they were starting "very soon", "next week" or "tomorrow". He added that "Jim stated in 2014 that all applications had been made and procedures started". He testified that he had "no knowledge" of the time required for issuance of a building permit in Vancouver, he had "no idea when the building permit application was submitted, and that he had no idea why construction had not started in 2014.
- [32] The testimony of Mr. Chuck and Mr. Tiku regarding progress and discussions with Mr. Lu is substantially different than the testimony of Mr. Lu which will be noted later in these reasons.
- [33] After the testimony on direct examination going from his lack of knowledge as to what, if anything, had occurred during the fall of 2014 to the end of that year, Mr. Lu was asked questions regarding what had occurred in March 2015.
- [34] In March of 2015, while in China, Mr. Lu testified he received a message from Mr. Chuck seeking \$25,000 for further application fees to be paid to the City. Presumably by that time he had been made aware that an application had been made to the City. On March 26, 2015, Mr. Lu asked his wife to deliver a further \$25,000 to Mr. Chuck personally, which she carried out. Tab 29 of Exhibit A at trial was a signed memorandum in Chinese, translated as follows:

Memorandum

It is hereby recorded as memorandum that today (26/3. 2015), Jim texted to notify: received from Gang LI 25,000.00 Canadian dollars for construction application fees at the City government.

26/3/2015. LU

- [35] Also during the spring of 2015, Mr. Lu and his wife separated. Mr. Lu testified that his separation and subsequent divorce granted in China would not affect the construction of the home in Vancouver. In his testimony he referred to a Divorce Agreement (Tab 3, Ex. A) signed May 3, 2015 by him and his wife in which Mr. Lu was described as Party A and his wife as Party B, and included the following paragraph:

With effect from the date of signing, Party A shall have sole possession of the land and house located at [____ West 34th Ave in Vancouver, Canada] as well as subsequent incomes or appreciation in value derived from them. The mortgager at the bank shall be changed to Party A. Party B shall use the rent from Anli Gardens in Beijing while continuing to assume repayment responsibilities of mortgage in Canada for this property and the cost of transferring the title. . . .

- [36] Since the Separation Agreement was signed, family litigation has continued in British Columbia and is not yet resolved. Ms. Li has not transferred her portion of title to the West 34th Avenue property. Mr. Lu's testimony has been to the effect that his separation and divorce has had no influence on the construction contract with the defendant 421. The evidence of the defence is much to the contrary.
- [37] In March of 2015 while in Beijing, Mr. Lu testified to having received a phone call telling him that his wife had transferred \$840,000 from a joint account in Vancouver and that he told Mr. Chuck of the same. Mr. Lu described how Ms. Li later promised to return the funds but has not done so. When asked in his direct examination whether this transaction affected his ability to complete the building contract, Mr. Lu stated that "for a few days, it had a great impact on [his] life, I was not able to pay a \$260 bill" and received money from his daughter to pay the bill. He also said that at that time, he was not indebted to 421 and that every time during his dealings with 421 and Mr. Chuck he was always able to make payments sought by the defendants.
- [38] Mr. Lu also testified that after his wife had taken \$840,000, within a few days he had money transferred from China to cover the costs of construction costs and his living expenses.
- [39] Mr. Lu denies having told Mr. Chuck to stop work on the project due to the financial dispute with his wife. As will become clear later in these reasons, Mr. Chuck has testified that upon Mr. Lu's wife having taken the funds, he was instructed by Mr. Lu to stop work.
- [40] Continuing with the testimony of Mr. Lu, he was referred to a text message received from Mr. Chuck on July 26, 2015 (Tab 34, Ex. A) which, translated, stated:

Mr. Lu, Tomorrow please prepare a bank draft of \$250,474 to the order of Jim Chuck for payment of the following items:

- 1) \$200,000 [ground breaking] advance payment portion of construction fee
- 2) \$50,000 remaining balance of deposit
- 3) \$474. Jim paid the gas bill

- [41] Although not clear on the evidence, the WeChat message of July 26, 2015 must have followed discussion between Mr. Chuck and Mr. Lu in which Mr. Lu asked for work to proceed and Mr. Chuck, in the circumstances, wanted assurance of payment.

- [42] Mr. Lu paid the sum of \$250,474 and stated that the \$50,000 amount referred to in the text of July 26, 2015 was to have been paid on completion of the contract, that he had not looked carefully at the documents and presumably if he had looked at his contract, he is stating he would not have paid the \$50,000 amount sought by Mr. Chuck. The date of this payment, i.e., July 26, 2015, was four days before the project was to have been completed, according to the testimony of Mr. Lu.
- [43] Mr. Lu testified that it was his understanding that in the Chinese version of the contract, which was the only contract he was able to read, the project was to be 100% complete as of July 30, 2015. As work on the property on West 34th Avenue had not started, he expressed his concerns to Mr. Chuck. He added that he had not agreed to extend the completion date and due to the delay, he had moved to Abbotsford where his daughter resided and had enrolled his son in school in Abbotsford.
- [44] Next, Mr. Lu was referred to a message received August 19, 2015 (Ex. 4, Tab 88) by him from Mr. Chuck on WeChat, which is a messaging website popular with Chinese speaking residents of Canada. Mr. Lu denied having received that message, which Mr. Chuck testified to having sent and in which he stated as follows:

Mr. Lu, I have just forwarded the decision (today) by the electric light company regarding moving the lamp post of the backyard. The city government is waiting for this answer before approving the location of our garage at the back. . . . Now that there is a decision from the electric light company, [one would] hope work can start next week. In addition I have asked the architect to send you tomorrow the statement(s)/proof showing the city's acceptance at the end of '14 of our construction licence application and relevant material. Mr. Lu, if there hadn't such application approval, then starting from January 1, '15 the new building code would mean adding a lot of limitations and construction costs. The following is the procedure for application for construction licences in the city of Vancouver: after receipt of application, together with all necessary documents, considered to be fully compliant (ours was prepared on December 18), a review date is given (ours was April 17), make appointment with architect, where a lot of requests and modifications will be raised. We have done most of it. Because of you sudden change of mind, everything stopped. Work resumed after two months. Now the hope is by the middle of next month we will get full approval, and to hope that next week house can be demolished first. Mr. Lu, I hope you understand that each contractor hopes to start work ASAP and finish ASAP; no one would like to delay. Frankly, because of you, there was work stoppage, which has affected my credibility in the industry, as there have been cancellations of the work I ordered from various engineering contractors. . . . Mr. Lu, I take you as my good friend, even like family, and have never complained in front of you. So, therefore, judging by your manner of speaking, you don't seem to believe that I would be able to finish the application by the end of the year, so I was a little bit uncomfortable. Tomorrow, as soon as I receive the email from the architect, I will forward it to you.

[45] Mr. Lu's response was two-fold, i.e., "why would I pay you and tell you to stop work?" and "if I had seen this, i.e. the email above from Mr. Chuck of August 19, 2015, I would have terminated".

[46] In his direct testimony and cross-examination, Mr. Lu denied having received the above message of August 19, however, when referred to the transcript of his examination for discovery, specifically Q 372, he admitted to having received the message and also stated "the questions I answered were true", referring to questions from his examination for discovery.

[47] Also on August 19, 2015, Mr. Lu sent a message to Mr. Chuck stating:

Hello Jim: Please send me by email the application and approval documents from the government regarding the construction of the house on 34th Ave. for my review, my mailbox _@gmail.com.

Thank

After being referred to the above message, Mr. Lu testified as to how Mr. Chuck was using government approval as an excuse, he was concerned there was no end in sight and "needed to know the truth why there was no work". He was then asked "did you ever receive the application and documents?" to which he answered no, as he also answered to "did you ever review documents with Mr. Chuck?" Still later he stated "I only knew what Jim told me".

[48] Next, on August 20, 2015, Mr. Chuck forwarded an email from Mr. Tiku to Mr. Lu referencing : "Re: ____ W 34th Ave. Pole Relocate Request" (Tab 90, Ex. 4):

Hi Jim,

Thanks for forwarding the email from BC Hydro with reference to relocating of the existing pole and guy wire. This seems to confirm that it will not be easy to relocate the existing pole. I will convey the same to the plan checker and hope that they can allow us to retain the driveway from the lane as proposed.

Further to our phone conversation, I can confirm to you that the BP application for the subject property was submitted to the City before the Christmas Holiday season in December 2014. We received the legal suite documentation on Dec 22nd, 2014, which was forwarded to Bob.

....

We received the Building Department's comments on April 17th which included their preference to see the garage access relocated directly off the lane. For that purpose, we initiated contact with BC Hydro to confirm relocation of the existing pole and have just received an email from them only a few days ago.

Furthermore, I recall that you had clearly instructed us to hold off on the project as the owner was having second thoughts on whether to go ahead with the construction due to some personal issues. We did that for several months and only after you called me and asked me to go ahead and pursue the issuance of this Permit did we restart work.

We now have written confirmation from Hydro, and the required documentation has been submitted to landscape. We are ready with our updated drawings and will be submitting to the City in the next few days.

[49] The email from Mr. Tiku referred to above was sent with a note in Chinese from Mr. Chuck that Mr. Lu should ask his daughter to translate, as Mr. Lu was unable to read English. In his testimony, Mr. Lu stated that he did not ask his daughter to translate as she was "birthing".

[50] The translated response from Mr. Lu (Tab 91, Ex. 4) to Mr. Chuck was "Thank you, thank you". However, during his cross-examination Mr. Lu stated he was saying "stop, cease". He added that according to the Chinese dictionary the way he said it is a friendly way of saying it, an unfriendly way of saying it would be to say "stop, don't do that anymore". At this point there was a complaint regarding the trial interpreter. There were several interpreters over the various days of Mr. Lu's testimony and several arguments between him and interpreters.

[51] Mr. Lu was referred to questions 255 and 256 of his examination for discovery. The interpreter at the examination for discovery translated Mr. Lu's response as "That depends on you. Thank you". When asked what that response meant he replied: "'That depends on you' means that I hope you will deliver what you have promised".

[52] He also testified after being asked about the reference that he had asked Mr. Chuck to "hold off", "I did not ask him to hold off", "Jim used my name to tell the workers to stop". He also stated there was no discussion regarding a new completion date.

[53] On or about August 20 or 21, 2015, Mr. Chuck and Mr. Lu had dinner together at a restaurant. Also present was Mr. Lu's young son. After that meal, Mr. Chuck sent a further email dated August 21 to Mr. Lu, stating:

Mr. Lu, I promised you during our meal earlier I would build this beautiful house for you as soon as possible. We hope to get the construction license from the government by mid-September, and to finish the work by the end of July next year. I have promised that your little boy will be able to attend the school at 34th Avenue, Westside at the September school year next year. Thank you.

[54] Mr. Lu testified to having received the email of August 21 and became animated at trial, referencing Mr. Chuck's promise to finish by the end of July 2016, "I felt helpless, show me proof the application was made and if the delay was caused by the government". "I said thank you, go ahead and do it. But by July 2016 did he finish? I had to continue" and so in August 2016 he got a lawyer to write and terminate.

[55] As the above email exchange occurred in August 2015, it was apparent Mr. Lu was incorrect in his testimony about terminating the contract in 2016.

- [56] Later, Mr. Lu testified that "it was the last straw when Jim bullied my boy", that's when he decided to end it, probably shortly after the email of August 21, 2015. Mr. Lu also testified that "after the dinner he [Mr. Chuck] did nothing, waiting for July to come and finish the house, I had no contact with him".
- [57] Mr. Lu then proceeded to retain a lawyer who wrote to 421 on October 30, 2015 in which reference was made to the two contracts and that the schedule attached to the contract was an essential term of the contract (Tab 94, Ex. 4). The schedule which called for completion of portions of the work by specific dates including 100% completion of the construction by July 30, 2015. The letter continued, on p. 2:

At your request my client has [paid] the Builder and/or you personally a total of \$375,474.00 pursuant to the Agreement. I am advised by my client that no Work has [been] done on the Property including demolition and the Builder has failed to keep up the schedule.

BE ON NOTICE, the Builder is in breach of the Agreement for its failure to do the Work at all and according [to] the schedule (the "Breach"). BE ON NOTICE our client terminates the Agreement effective immediately because of the Breach.

[Note the author had presumably failed to insert "paid" in the first line quoted above before "the Builder"]

- [58] The letter continued and stated Mr. Lu would claim damages under several heads of claim and that 421 immediately return the \$375,474 previously paid to 421.
- [59] When asked why he would pay the \$250,474 to 421 in late July 2015 when no work had been performed on the site, Mr. Lu stated to the effect that when the contract was signed, his major concern was when the house would be complete, that in May 2015 he was concerned when work would start and he "knew the house would not be done by July 30 and expected to cancel and hire a new contractor . . . "when he said he needed money I was willing to give money" and when asked if there was discussion regarding a new completion date he stated "no".
- [60] In response to the letter of October 30, 2015 from counsel for Mr. Lu, Mr. Chuck retained a law firm and a detailed and lengthy response was provided by them on December 7, 2015 (Tab 98, Ex. 5). That response detailed Mr. Chuck's position that in May 2015 Mr. Lu had cancelled the contract due to a lack of funds, then asked to re-instate the contract in July 2015, provided details of the complexities of obtaining a permit for the property and efforts which had been made by Mr. Chuck, 421 and the contractor who was to build the home, Mr. Bob Minhas. The letter also detailed Mr. Chuck's position that Mr. Lu wanted out of the contract due to a dispute between Mr. Lu and his wife in which Mr. Lu's wife was claiming the property on 34th Avenue Mr. Lu denied he cancelled the contract due to a lack of funds or a dispute with his wife, now his former wife.

- [61] On September 28, 2015, Mr. Lu issued a Notice of Family Claim against Gang Li, his then wife, claiming an interest in an apartment located in Burnaby which had been Mr. Lu's residence and against the property on West 34th Avenue. Ms. Li filed a Response to Family Claim and as of the date of trial in this action, the family proceeding had not been heard or resolved.
- [62] Towards the conclusion of his lengthy direct examination, several documents were entered as exhibits relating to Mr. Lu's costs in maintaining the West 34th Avenue property, including taxes, the costs of purchasing a home in Abbotsford, B.C. after not securing a home on 34th Avenue and other costs and being unable to move into a home at the West 34th Avenue property.
- [63] On cross-examination, of relevance is the following testimony:
- Mr. Lu was aware that there could be no demolition or construction without permits.
 - Mr. Lu was shown several copies of sets of plans prepared by Tiku Design which were at Tabs 144 and 148 of Exhibit 5 marked "client review", "building permit", "issued for structural", "re-issue for BP" which showed the layout for all floors of the home to which he responded regarding Tab 144 "I haven't seen this document" and regarding Tab 148 "I have no recollection of this - I don't believe I reviewed it". He agreed to some portions of the drawings, such as the karaoke room which he had specifically requested, the theatre and basement suite. As well, Tab 148 indicated the location of the elevator he had requested which he eventually agreed was okay. The dates of the several drawings were between May 2014 and December 2014.
 - Mr. Lu agreed that in April of 2015 he told Jim, i.e., Mr. Chuck, that his wife had "transferred all of my money" which was stated to be \$840,000 and that his wife taking the funds should not affect the project in that he could get funds back from China. Mr. Lu added that his wife agreed to return \$500,000, however, there is no evidence that she did return funds.
 - After his wife took the funds, Mr. Lu travelled to China to finalize the divorce and to obtain funds, returning, he stated, June 1 or 2, 2015. He added that he told Mr. Chuck that he, Mr. Lu would be the sole owner of the West 34th property and also that his wife, would not sign over the West 34th property, "she did not follow the divorce agreement" and he learned that around one month after he returned to Vancouver after which he told his divorce lawyer to "take her to court".
 - Through to July of 2015, the relationship between Mr. Lu and Mr. Chuck as expressed in several chat messages which have been translated at Tabs 62 to 66 of Exhibit 4 were very cordial. Those messages indicated Mr. Chuck was assisting Mr. Lu in his appointments, in arrangements for his trip to China and back and that they were complementing and thanking each other. Tabs 78 through 81 were also referred to Mr. Lu during his testimony and describe how Mr. Chuck was assisting Mr. Lu in making arrangements for a visiting delegation of Chinese business persons in Vancouver. There was no discussion in those messages of the construction being delayed or any questions seeking information on the progress or lack of progress in the work.

· Mr. Lu agreed that Tab 11 of Exhibit 4 was evidence of the withdrawal of \$100,000 cash by his wife, Gang Li from Heng Sheng Financial Party Ltd. in Burnaby B.C. That \$100,000 withdrawal was used on June 26, 2014 for the deposit to 421. Mr. Lu added that Mr. Chuck had driven him to the financial exchange.

· Mr. Lu was also presented with a memorandum in Chinese and the translation to English (Tab 29, Ex. 4) that on March 26, 2015, "Jim texted to notify: received from Gang Li 25,000 Canadian Dollars for construction application fees at the City government".

· Mr. Lu acknowledged a document in Chinese and translated into English signed by Mr. Chuck dated July 27, 2015 (Tab 30, Ex. 4) in which the following was stated:

Received from Mr. Yuyang LU cashier's cheque for \$250,474 for payment of the following items:

- 1) \$200,000 - according to (a) in Construction Contract, advance payment for partial construction cost at the commencement of work.
- 2) \$50,000 - for payment of the balance of deposit
- 3) \$474 for gas charges paid out of Jim's pocket

· When asked if the \$200,000 payment was because he had terminated the contract and Mr. Chuck wanted \$200,000 to re-start the contract, Mr. Lu answered he never gave instructions to terminate.

Testimony of Nancy Chuck

[64] Ms. Chuck's testimony was very brief and of no significance to the issues.

Testimony of Jimmy Chuck

[65] After describing his long term business as a realtor, part-time builder and investor, Mr. Chuck also referred to his builder, i.e., Bob Minhas, and the early meetings with Mr. Lu, firstly when Mr. Lu visited a home recently built by Mr. Minhas in Burnaby and then to visit with Mr. Lu and Mr. Minhas the lot at West 34th Avenue. He described how both he and Mr. Minhas did not believe the lot was good to build on due to its steep slope, many trees, trees on or near the property line which would have to be removed for which the neighbour's permission was needed and that there needed to be a set-back between the house and the trees.

[66] Regarding the contents of the two contracts, Mr. Chuck testified that he explained every line of the contracts to Mr. Lu who, he said, "was not interested in the details", "would not care about the details" and that Mr. Chuck told Mr. Lu that one "cannot even do a demolition without a permit" and without a permit he did not know when they could start, it depends on finished floor plans and time for the City to process the application and issue a permit. He stated there was "no start date, no finish date" but that Mr. Lu wanted the house finished as soon as possible. Mr. Chuck testified that the contract was an "estimated payment

schedule", that Mr. Lu wanted to have his money ready but explained to him he did not know when they could get a building permit and that based upon experience, it could take 2.5 months for City approval and ten to twelve months to build, also depending upon weather, City inspections and that the stages of construction would be approximately two months apart.

- [67] Regarding the deposit of \$100,000 received in cash, Mr. Chuck stated he was "initially uncomfortable" receiving cash especially since his bank would not accept a deposit of such a large sum of cash. He agreed that he had used approximately \$30,000 to \$35,000 to repay himself for the fees which had been paid to the City for the building permit application which he had paid by cheque. Also, he admitted that some of the cash was given to his wife for travel purposes.
- [68] Regarding the payment of \$250,474 to the defendants on July 27, 2015, Mr. Chuck testified that he "required that amount before accepting the request from Mr. Lu to re-start the contract" after having previously told by Mr. Lu to stop work after it was found that his wife had taken his money in either April or May.
- [69] Regarding reviews of draft sets of plans prepared by Mr. Tikou, Mr. Chuck testified as to having initially reviewed floor plans with Mr. Tikou with Mr. Lu present, that Mr. Lu sought changes including a karaoke room, hardwood floors in some areas, changed the size of some rooms and that after the first set of floor plans were ready for application to the City, Mr. Lu wanted to add an elevator as his right leg was getting worse and Mr. Lu was intending to live in the home in retirement. Adding an elevator involved structural and electrical changes as well as changes in room sizes, meant the project had to be re-engineered by the structural engineer in the affected areas all of which would cost time and money. He was concerned about making the application for a building permit to the City before the end of 2014 due to a new Vancouver Building Code coming into effect in 2015. If the application were delayed to 2015, the effect would be to make the design and construction in compliance with the incoming Building Code which was more onerous than the Building Code that was in effect up to the end of 2014.
- [70] Mr. Chuck stated that the application for the permits was submitted to the City in December 2014 so that the former, less onerous Building Code prior to 2015 would apply to the project. He added that he met with Mr. Lu and Mr. Tikou and acted as interpreter of the application as Mr. Tikou did not speak Chinese. After the final drawings were submitted, Mr. Chuck testified that the City provided a review date of April 2015. He continued and told Mr. Lu they had "beaten the deadline to submit" the application at a Christmas party to which he and Ms. Chuck had invited Mr. Lu and also told Mr. Lu of the City review date in April 2015.

- [71] Mr. Chuck stressed in his testimony that Mr. Lu had never mentioned concerns with the progress of the work on his home prior to the letter from Mr. Lu's lawyer in late October 2015. The letter came after Mr. Lu asked for a copy of the building permit application on August 19, 2015 and Mr. Chuck's response by way of WeChat. He added that Mr. Lu "had to know if the permit was applied for in December 2014 that construction could not be completed by the end of July and I told him so".
- [72] After the application had been made to the City, it was a matter of awaiting a review with the City. Mr. Tiku later testified the wait was longer than had been the case in previous years because the City had been inundated with applications prior to the end of 2014 as many applicants wanted to beat the December 31, 2014 deadline when the new Building Code would come into effect which would increase the complexity and cost of construction.
- [73] Once the City commenced a review of the application, representatives of the City and Mr. Tiku met and the major items in issue with the City were the location of the garage, trees and a hydro pole which affected the relocation of the garage.
- [74] Mr. Chuck continued and testified as to how Mr. Lu had called to terminate the contract as Mr. Lu's wife had taken Mr. Lu's money and they agreed to terminate the contract. He added that he told Bob Minhas and Mr. Tiku to stop work on the permit at that time, i.e. April 2015.
- [75] In and about early May 2015, Mr. Chuck assisted Mr. Lu with a lawyer to represent Mr. Lu regarding a separation agreement and Ms. Chuck drove him to meetings with the lawyer on May 15. Mr. Chuck sent WeChat messages on that day to Mr. Lu and Mr. Lu responded by WeChat saying "I have forwarded it to Grace, thank you Big Brother". The reference to Grace was Mr. Lu's wife and that Mr. Lu had forwarded a message from Mr. Chuck for Grace to meet at the lawyer's office. Mr. Chuck also stated that by May 15, Mr. Lu had terminated the contract.
- [76] Further correspondence by way of WeChat was referred to by Mr. Chuck in his testimony which referred to Mr. Chuck arranging to assist Mr. Lu getting to the airport for Mr. Lu's flight to China, the purpose of which was related to his family dispute (see Tabs 61-65, Ex. 4) The correspondence concluded with three WeChat messages dated May 23, 2015 stating as follows:

Tab 63

Hello Jim: Sorry to bother you this late. Because LI Gang suddenly said to go to Beijing this afternoon, and so got my daughter over to take care of younger brother. Because [my] daughter is here, tomorrow you don't need to send me off. Thank you Big Brother for your true feelings and I wish you and your family well. Let's meet again on return! Lu.

Tab 64

Mr. Lu, wishing you everything smooth-going.

Tab 65

Thank you Big Brother and your family for all the true feelings and great hospitality. Please take care. See you when I come back!

- [77] Mr. Chuck then testified that in July 2015 he heard from Mr. Lu who had obtained a divorce in China and since an agreement with his former wife that Mr. Lu was happy with and his wife had agreed to give away title to the West 34th Ave. property, he had money to continue the contract.
- [78] At that point, Mr. Chuck testified that as the contract had previously been terminated, in order to proceed with Mr. Lu's request he re-start work on the contract it was necessary to make a new financial arrangement to complete the home and he needed funds for deposits for the contractor, Mr. Minhas, and for Tiku Design. Mr. Chuck stated he needed a \$250,474 bank draft from Mr. Lu which consisted of a \$200,000 ground breaking advance payment, \$50,000 representing the balance of the deposit and \$474 for a Fortis invoice which Mr. Chuck had paid regarding the west 34th Avenue property.
- [79] Mr. Chuck also testified regarding the relationship between him and Mr. Lu with an exchange of friendly WeChat messages on July 14 regarding Mr. Chuck arranging a taxi for Mr. Lu and into November 2015 when Mr. Lu sought assistance from Mr. Chuck regarding arranging a cruise of the harbour for visiting Chinese businessmen. In that respect, Mr. Chuck referred to sixty-six WeChat messages sent by Mr. Lu to Mr. Chuck between May 17 and July 24, 2015 referring often to "Big Brother", thanking Mr. Chuck's family and never once, according to Mr. Chuck, relating concerns Mr. Lu may have had regarding a July 30, 2015 completion date for construction of the home. Mr. Chuck also testified to a phone call he received from Gang Li who was crying as Mr. Lu would not allow her to see their son which resulted in Mr. Chuck arranging to "bring them together" to talk regarding the child.
- [80] Also, Mr. Chuck testified that Mr. Lu was made aware of the application to the City for a building permit, the April 2015 date for review set by the City and that the first progress payment made by Mr. Lu was the \$25,000 portion of the payment made in late July 2015. He confirmed that his version of what had been happening was set out in his WeChat message to Mr. Lu of August 19, 2015 (Tab 88. Ex. 4). Mr. Chuck stated at the dinner he had on or about that day that Mr. Lu told him he would be happy if the house was completed by July 2016.
- [81] Also, on July 30, 2015, after receipt of the cheque from Mr. Lu of \$250,474, Mr. Chuck sent a form of building contract to Mr. Minhas, for construction of the home (effectively a subcontract) stating "all along he intended to do this" and that he hadn't assigned the contract earlier (Tab 85, Ex. 4). He added that from the \$250,474 received from Mr. Lu, he paid \$100,000 to Mr. Minhas (Tab 84, Ex. 4). Preparation of the contract with Minhas Holdings and payment of \$100,000 to Minhas Holdings was consistent with Mr. Lu having instructed Mr. Chuck to resume work on the project.

- [82] Exhibit 4, Tabs 45, 48, 49, 50, 51, 55, 75, 86 and Exhibit 5, Tabs 112 and 136 were presented to Mr. Chuck which were invoices and cheques to Mr. Minhas, Tiku Design, National New Home Warranty, Mountain Maple (arborist), Summit Engineering, Fortis and others for the cost of design, deposits and other miscellaneous payments made in furtherance of the project.
- [83] After receipt of the correspondence from the lawyer for Mr. Lu alleging 421 had repudiated the contract Mr. Chuck sent two email messages to Mr. Tiku on November 10 and 12, which stated as follows (Tab 134, Ex. 5):

November 10, 2015

Hi Vikram, I am sorry to inform you that the owner of ___ w. 34th changed his mind again regarding the construction of his house on the above property. I received his lawyer letter and asked us to stop work. Please send me a follow up email regarding the progress of our building permit application from August, 2015 to date, thanks.

November 12, 2015

Dear Vikram, please send updated email as discussed, also, try to keep the application alive because the ex wife like to take over the project if she can settle with her ex husband, thanks.

- [84] Those documents also disclose an email of November 6, 2015 from Mr. Tiku to Mr. Chuck attaching "updated elevations indicating the 11' main floor height".
- [85] On November 24, 2015, Mr. Chuck received an email from Mr. Tiku in which Mr. Tiku "wanted to clarify some of the issues which have come up" which included the following statements (Tab 97, Ex. 5):

- Our design development process has involved multiple meetings with you and the owner and numerous changes had been requested which were complied with.
- The subject lot is a complex one, trapezoidal in shape, involves a steep grade and has multiple trees on the property and on adjacent properties. There is also a Hydro pole along the rear p/l which impedes access from the lane.
- In consideration of the site issues, we had also met with the owner at the site before embarking on the design, to explain to him the complex issues involved.
- Based upon the requirements laid out by the owner and yourself, we developed a design after multiple meetings and were close to finalizing the scheme when the requirement for an elevator was introduced by the owner. This involved a major re-design which we did and were able to finalize the revised package and get the owner's approval and sign off. The drawings were then sent to the structural engineer and eventually submitted in December 2014.

· Since my last email of August 20, 2015, there has been regular back & forth with City staff. Based on staff review, the arborist revised their tree report which was finally cleared by the Landscape division. They also agreed to allow the retention of the proposed garage at the location which had been a strong preference for the owner as he had wanted a barrier for the traffic noise from the busy road across. Once the arborist undertaking and the updated structural drawing for the garage is submitted to the City, the Landscape Division will sign off and the plan checker can proceed to issue the permit. We have not heard back from the plan check regarding any other pending item.

[86] On February 12, 2016, a letter (Tab 100, Ex. 5) was sent from the City to Mr. Tiku regarding the permit application which was forwarded to Mr. Chuck and in turn to Mr. Lu's then counsel in which the Housing Review Branch stated that since the application had been inactive for a considerable period of time, it would be void. The City advised there may be extenuating circumstances and the City would consider reviving the application, however, the newer most-recent Vancouver Building By-Law would apply to the project.

[87] The following summary of testimony from the cross-examination of Mr. Chuck was relevant:

- It was suggested to Mr. Chuck that he wanted the original \$100,000 payment in cash so that he could avoid payment of taxes on account of the same, however, Mr. Chuck testified that Mr. Lu had insisted on paying cash.
- Mr. Chuck stated that he reviewed the contracts with Mr. Lu but Mr. Lu "was not interested in details" and was not paying attention when he was explaining the contract.
- Mr. Chuck stated the date of June 20, 2015 on the Chinese version of the contract was incorrect and that Mr. Lu could read the two page Chinese contract which included the \$150,000 deposit. He also stated that both contracts were signed on June 27, 2014.
- On a copy of the Chinese contract, (Tab 158, Ex. 5) Mr. Chuck crossed out \$150,000 and wrote in \$100,000 as the deposit as a reminder that Mr. Yu still owed \$50,000 on the deposit.
- Mr. Lu was made aware that April 17, 2015 was the first possible date that a building permit could be issued and when the building permit application was delivered on December 18, 2014 Mr. Lu was told the construction would not complete by July 2015.
- He was aware that Mr. Tiku was not a registered architect but was an experienced designer qualified to design single family homes.
- There were to be new financial arrangements after the contract had been terminated in April by Mr. Lu and was being "re-started" in late July as Mr. Chuck was not trusting Mr. Lu and therefore sought the late July payment which totalled \$250,474.
- He realized after the dinner with Mr. Lu on August 21, 2015 that Mr. Lu was unlikely to get ownership of the land on 34th Avenue due to the dispute with his former wife.

· In his financial dealings with Tiku Design, Mr. Chuck or 421 have paid Tiku \$9,750 + GST (for a total of \$10,237 on 30/6/2014 & 13/12/14) and still outstanding is \$8,200 + GST (\$8,610).

Testimony of Vikram Tiku

- [88] Mr. Tiku is a senior designer who carries on business under his company, Tiku Design Studio Inc. He, through his company, works in coordination with an architectural firm located in adjacent offices. Mr. Tiku has designed, made submissions for development permits and building permits and prepared other construction documents for over 150 houses and duplexes on the lower mainland of British Columbia. Based upon his testimony, his prior experience in dealing with permitting authorities at various cities, in particular the City of Vancouver, it is apparent that he is qualified to design single family residences and is very familiar with the various applicable building codes including those in the City of Vancouver.
- [89] The plaintiff made an issue during trial that Mr. Tiku had been represented to Mr. Lu as an architect. If so, and whether or not Mr. Tiku was an architect is irrelevant to the claims of the plaintiff. He was a qualified, experienced and capable designer of single family homes in the City of Vancouver whose drawings had been accepted by the City on many occasions.
- [90] According to Mr. Tiku, every one of the approximately 150 building permit applications submitted by them over many years were all eventually approved by the City.
- [91] Mr. Tiku attended at the West 34th lot on February 15, 2014 at the request of Mr. Chuck to familiarize himself with the lot, reporting back to Mr. Chuck on the same day by email (Tab 119, Ex. 5) regarding his preliminary comments on the lot. He said: "Overall looks like a pretty nice lot. Does requires confirmation of setback towards the ravine part from City" with an emphasis on the maximum square footage home which could be built on the lot. He stated that after his initial viewing of the site, there were no developments for several months.
- [92] Mr. Tiku testified that he met Mr. Chuck, Mr. Lu and Mr. Lu's wife on a subsequent site visit so as to know of the owner's requirements and vision for the proposed home. He noted in particular the trees on the property and those on or near the lot line with neighbours. Mr. Chuck translated for Mr. Lu.
- [93] Mr. Tiku testified that he met with the owner multiple times, more than four times and that on all occasions, Mr. Chuck was also in attendance. Many of those meetings were at Mr. Tiku's office when Mr. Tiku presented design drawings, the parties discussed changes, explained to Mr. Lu what could and could not be done and regarding interpretations of the by-laws, he would attempt to "push the envelope of the zoning by-law" with the City to try to make the best use of the property. He stated he was trying to customize the house to meet the owner's wishes.

- [94] Mr. Tiku was referred to a series of several drawings prepared for the Lu residence, referred to as a schematic submission, a few months before the building permit was to be applied for, likely late summer or fall of 2014 (Tab 41, Ex. 4). Those drawings were preliminary for discussion with the owner and were reviewed with him and in some cases included options for the owner. Mr. Tiku recalled that he had completed the drawings to the point of referring the same to the structural engineers after the owner sought an elevator which required several changes to the design including the layout of the home and structural issues.
- [95] Mr. Tiku was then referred to an email to Mr. Chuck of August 23, 2016 attaching several drawings dated between July 8, 2014 and January 15, 2015 and stated in the email (Tab 139, Ex. 5):

Hi Jim,

Please find attached various schematic layouts with their dates which will indicate the various stages of the design development process. You will notice that the elevator was introduced first on the main floor only in Sept 2014 and post-discussion with the owner incorporated into the design as reflected on the drawings dated October 2014. It was probably during this time period when the owner may have been informed re. the final implementation of the upcoming revisions to the Vancouver Bylaw which were going to be in effect starting January 1, 2015 as per the text I have already sent to you.

I have also attached a list of Consultants for this project.

I had inquired with the City re. a copy of the BP application form. They confirm that a permit was opened on December 18, 2014. . .

- [96] Mr. Tiku also referred to several other preliminary drawings which had been prepared by his office for review with Mr. Chuck and the owner (Tabs 144 through 157, Ex. 5) which also included drawings prepared by the structural engineer. He also testified that the final drawings submitted to the City on December 18, 2014 were "signed off" by the owners. Mr. Tiku added that there had been multiple changes incorporated into the drawings after meetings with the owner and Mr. Chuck.
- [97] Mr. Tiku also testified as to the "huge rush" to get the building permit application filed with the City before the City planning department closed for the winter vacation due to the coming implementation of the new Vancouver Building Code effective January 1, 2015. The effect was considerable delays in obtaining approval for plans submitted to the City.
- [98] In April 2015, the plan checker sent an email to Mr. Tiku regarding a review meeting with the City for April 17, 2015. Exhibit 5, Tab 100 included submissions made to the City starting in December 2014 regarding reviews. The City issued a deficiency list, which Mr. Tiku described as "normal" and that he had already submitted changes and that an itemized response was given to the City, especially in areas where he had been "pushing the envelope". Again, he testified that the process of design review with the City was normal procedure and all issues were discussed with the owners through Mr. Chuck "several times".

[99] Mr. Tiku also testified regarding the B.C. Hydro pole and the location of the garage sought by Mr. Lu which became an issue with the engineering department as did the location of many trees in relation to the garage requiring relocation of the garage and the power pole. Mr. Tiku stated that these were the only issues outstanding at the time the contract was eventually terminated. Prior to that time, Mr. Tiku stated that he had been asked to hold off by Mr. Chuck.

[100] An email message from Mr. Tiku to Mr. Chuck of August 20, 2015 aptly summarizes many of the events and outstanding issues during 2015, noting that the date of that email was in or about the time that the relationship between the owner and Mr. Chuck was coming to an end. That email was quoted at para. 48 of these reasons.

[101] The direct examination of Mr. Tiku concluded with a statement by him that in the summer of 2015 the City was giving no timelines for the issuance of permits as it was taking between eight and twelve months for them to catch up with the many applications that had been submitted before the end of 2014 due to the new City Building Code.

[102] On cross-examination, Mr. Tiku stated:

- He never gives timelines for permit issuance as any date for issuance is out of his control once submitted to the City.
- The elevator was introduced in September 2014 by Mr. Lu when the drawings had almost been completed and resulted in completely changed floor plans. The introduction of the elevator and subsequent decision by the owner to have it operate between three floors resulted in very significant changes to the structural, electrical and layout drawings and many of the subsequent delays were related to the trees, the hydro pole and location of the garage.
- Through his time on this project he never met with Mr. Chuck alone, and only with Mr. Lu present. His dealings with Mr. Lu were all through Mr. Chuck as Mr. Lu did not speak or write English and Mr. Tiku had no knowledge of Chinese.

Testimony of Bob Minhas

[103] The final witness at trial was Mr. Minhas, the principal of Minhas Holdings, who was to be the general contractor for the Lu residence. Minhas Homes, according to Mr. Minhas, has been in business for seven or eight years and builds custom homes on 99% of its projects.

[104] Mr. Minhas testified as to his efforts to move the project forward, including seeking permission from a neighbouring owner and the City for a tree removal permit, applying for a New Home Warranty policy, dealing with the Landscape Department at the City regarding sidewalks the City sought to have re-designed, the garage foundation issues had to be arranged so as not to disturb tree roots, relocation of the hydro pole and relocating the garage which the owner did not want to relocate. He also testified to having dealt with an elevator contractor for the project.

- [105] Mr. Minhas received a cheque from Mr. Chuck for \$100,000 on July 30, 2015 for "deposit on ____West 34th Ave" and also signed a contract with 421 which was effectively an assignment of the agreement with the owner, specifically the English version. He paid \$1,742.70 for the Homeowner protection certificate, paid the arborist \$1,221.40, expenses to clean up the existing house and for a report on asbestos in the existing house.
- [106] When the relationship between the owner and 421 came to an end in October 2015, he stated he was ready to remove asbestos and was waiting for the demolition permit.
- [107] On cross-examination, Mr. Minhas confirmed he never did speak to the owner.

Credibility - Assessment of the Testimony

- [108] What was agreed to and what was accomplished? Why did the contract for construction of Mr. Lu's home not proceed? The manner in which this case unfolded makes an assessment of the testimony of Mr. Lu and Mr. Chuck particularly important as is the testimony of Mr. Tiku and, to a lesser degree, that of Mr. Minhas.
- [109] Assessing the testimony of Mr. Lu was complicated by the need for a translation of his several days in the witness box. On several occasions, Mr. Lu appeared to disagree with the interpreter which gave the impression that he did have a basic understanding of English and in turn that he was not in agreement with the interpretations of the translators.
- [110] On several occasions during his testimony, Mr. Lu stated that his memory was poor, which appeared to be a correct self-assessment. Mr. Chuck testified as to Mr. Lu not being interested in details when explaining the terms of the proposed contract. Although the court is satisfied that Mr. Tiku in particular through the translations of Mr. Chuck took considerable time to review details of the plans and the nature of the work and the reasons for delays, however, in his testimony Mr. Lu minimized the significance of any time he spent with the designer.
- [111] Although Mr. Lu testified on many occasions of the importance of his understanding that the project had to be completed by July 30, 2015, on no recorded occasion, in writing or in WeChat (which is recorded in Chinese), or elsewhere did he complain about delays but said that he was often told by Mr. Chuck that work would begin soon, next week or similar responses. Even in late July 2015 when work was, according to Mr. Lu, to be complete by July 30, 2015, he made a further payment of \$250,474 to Mr. Chuck, at a time when work had not even started.
- [112] Mr. Lu stated that he was never asked by Mr. Tiku or Mr. Chuck to sign off on plans to be submitted to the City, contrary to the testimony of Mr. Chuck and Mr. Tiku.
- [113] As of the date of trial, title to the West 34th Avenue property had remained in the joint names of Mr. Lu and his former wife and litigation between them, which included a dispute regarding ownership of the property, was still ongoing. If ownership of the West 34th Avenue property remained in issue between Mr. Lu and his former wife, it is unlikely Mr. Lu

would have wished to continue to pay for improvements on the property, half of which would likely have benefited his former wife due to a family property dispute. Also, Mr. Lu having paid \$250,474 on July 27, 2015 is consistent with Mr. Chuck's testimony that Mr. Lu wished him to proceed.

[114] For the reasons set out above and the following findings, I find the testimony of Mr. Lu to be unreliable and not credible:

- Regarding the \$100,000 cash payment made in June 2014 by Mr. Lu, I accept the testimony of Mr. Chuck that it was Mr. Lu who insisted on paying cash, that it is very unlikely he would insist on payment of \$100,000 in cash knowing his bank would not accept the same.
- Although he testified to having asked Mr. Chuck on many occasions when work would start and received, according to him, unsatisfactory answers, not once during the approximately fourteen months did Mr. Lu complain in writing, by email, WeChat or otherwise, that the project was not proceeding satisfactorily. If the July 31, 2015 date for completion was so important to Mr. Lu, he most likely would have taken steps early in 2015 when it was apparent a permit had not been issued and work was not proceeding. He was fully aware of the reasons for delay and that the dispute with his former wife, changes in the proposed work, the complications of dealing with the City and the new Building Code all contributed to delays. I accept the testimony of Mr. Chuck and particularly Mr. Tiku in that they met often with Mr. Lu to discuss the project.
- I accept the testimony of Mr. Tiku that Mr. Lu had "signed off" on the set of plans submitted to the City on December 18, 2014 after those plans had been reviewed by Mr. Lu. It would be highly unlikely the designer could submit plans which the owner had not approved.
- Mr. Lu testified that he was never shown any of the plans which are at Tabs 144 and 148 of Exhibit 5, however, if he had not been shown any plans, he would most likely have become concerned and raised it with Mr. Chuck and Mr. Tiku, however, he did not do so.
- At trial, Mr. Lu denied having received the August 19, 2015 email from Mr. Chuck which enclosed an email from Mr. Tiku, however, he admitted to having received the same in his testimony on examination for discovery which was read back to him at trial. That email originally authored by Mr. Tiku was in English and in forwarding the same to Mr. Lu, Mr. Chuck suggested to Mr. Lu that he have his daughter translate for him which he did not do. If Mr. Lu was concerned at that point in time as he expressed during his testimony, he clearly would have had his daughter translate it for him. He did not. Mr. Lu would have seen it was from Mr. Tiku and would likely have known the email was related to the house.

[115] I accept the testimony of Mr. Chuck and Mr. Tiku in particular as to the reasons for delays in obtaining a building permit, specifically, Mr. Lu having put a hold on the contract due to the circumstances surrounding his divorce, due to changes to the proposed plans, delays on the part of the City in reviewing the building plans and that completion was an estimate depending upon achieving milestones or stages in the permitting, design and construction of the work. Mr. Lu was informed throughout of the delays in obtaining a permit and

reasons for the same and specifically, if he honestly believed the completion date was to be July 31, 2015, then he waived the requirement to complete by that date by advancing \$250,474 to 421/Mr. Chuck on July 27, 2015; \$200,000 of that \$250,474 was for a "ground breaking advance payment" which can be interpreted as payment of the first progress claims under the English and Chinese versions of the contract. No permits had been issued, no demolition had been commenced and no work on site had commenced. At that time, Mr. Lu was fully aware that the house would not be completed for possibly one year from July 2015, assuming a building permit would be issued in or about September 2015. The documentary evidence is consistent with this finding.

- [116] Counsel for Mr. Lu has submitted that Mr. Chuck's testimony at trial was unreliable or not credible. Counsel emphasized the actions of Mr. Chuck which occurred during the testimony of Mr. Tiku and Mr. Minhas on February 13, 2019, which were reported to me on February 14, 2019.
- [117] The court was made aware on February 14, 2019 that Mr. Chuck, who was seated in the gallery during the testimony of Mr. Tiku and Mr. Minhas, was attempting to influence the testimony of those witnesses by holding up a written "cue".
- [118] I am satisfied that Mr. Chuck appeared to attempt to influence witnesses by holding up an open three-ring binder while facing the witness and pulling the binder down when those actions may have been seen by the court or counsel.
- [119] I am not aware what, if any information was passed to the witnesses by Mr. Chuck on those occasions, however, I accept that there was an attempt to influence the testimony which could result in consequences for Mr. Chuck.
- [120] I am satisfied that Mr. Tiku and Mr. Minhas were very credible and knowledgeable witnesses who would not have been influenced in their testimony, much of which was corroborated by exhibits entered at trial. It would be difficult to communicate any information of significance through this method, and, in listening to and observing Mr. Minhas and Mr. Tiku's testimony, I did not notice any out of place behaviour.
- [121] Regarding the submission of Mr. Lu that the actions of Mr. Chuck briefly described above support Mr. Chuck's lack of credibility such that I should disregard his testimony, I am not in agreement. While there is no doubt that what Mr. Chuck did while sitting in the gallery is wrong, in my opinion his actions do not relate his wish to be able to control those affiliated with him. Nonetheless, I do find that Mr. Chuck's conduct indicates disrespect for the court and a need to review his testimony with caution, which I have done, where unsupported by other evidence. Mr. Chuck did err in some of his testimony, however, his testimony as to what occurred between him and Mr. Lu is to be preferred and is supported by the circumstances, the exhibits and by the testimony of Mr. Tiku.
- [122] In summary, I find the following regarding credibility:

- As a result of his conduct, Mr. Chuck's testimony has been approached with caution where it is unsupported by other evidence;
- I find Mr. Minhas and especially Mr. Tiku to be credible and knowledgeable witnesses. I do not believe their testimony was affected by the actions of Mr. Chuck; and
- Mr. Lu's testimony is not particularly credible, especially where it conflicts with the documentary evidence and that of Mr. Tiku and Mr. Minhas.

[123] Overall, I make the following findings of fact regarding the series of events:

- Conclusions relating to the contract/agreement are set out in detail below;
- Mr. Tiku met with Mr. Lu on several occasions to discuss the project, and Mr. Lu had signed off on the set of plans submitted to the City;
- Mr. Lu could not reasonably have believed the project would be complete by July 30, 2015 and his behaviour is not consistent with such a belief. I find that in or around spring 2015, Mr. Lu asked Mr. Chuck to cease or pause work on the project, likely as a result of the ongoing family law dispute. In or around July 27, 2015, Mr. Lu made a payment of \$250,474 to restart work; and
- Sometime between August and October 2015, Mr. Lu evidently changed his mind about going forward with the project, perhaps again as a result of the litigation with his then wife (he filed his Notice of Family claim on September 28, 2015). Mr. Lu's lawyer sent the letter to Mr. Chuck/421 on October 30, 2015 indicating Mr. Lu's position that the defendants were in breach of the contract.

The Issues

What was the Contract Between the Parties, if any?

[124] Previously in these reasons for judgment, I have reviewed some of the significant differences between the English and Chinese versions of the contract, both of which were signed by the parties.

[125] Mr. Lu testified that the Chinese version of the contract was prepared and signed before the English version and that he understood from Mr. Chuck that an English version of the contract was required for construction contracts in Canada. He added that Mr. Chuck presented the English version "after a few days time" from execution of the Chinese version and testified "I was told by him that the first contract and the contract afterwards were the same I wish to clarify, My Lord, that without the preceding Chinese contract, I would not have signed the English one, because I can't understand it".

[126] The English version of the contract was never translated into Chinese.

[127] Mr. Chuck testified that he "explained every line" of the English version to Mr. Lu for an hour but that "Mr. Lu wasn't really too interested in the details". Whether he did explain everything to Mr. Lu is uncertain.

[128] Mr. Chuck testified that the Schedule portion of the Chinese version, which contains a schedule of payments was prepared after the first page of the Chinese version was signed and after the English version was signed. Mr. Chuck also testified that the Schedule was prepared afterwards because Mr. Lu wanted to know when he needed to have funds ready to pay.

[129] Mr. Lu also testified:

The completion date in the contract was the most significant part of the contract. If there's no such promise, we would not have this contract. I would not even sign the contract and it would not exist.

He therefore was stating that the schedule to the Chinese version was not added after the first page of the Chinese version was executed, but that it was there when he signed it.

[130] I add that the English version of the contract as translated is dated June 27, 2014. The Chinese version shows Mr. Chuck's signature as having been affixed to both pages on June 20, 2015 and Mr. Lu having executed the Chinese version on June 27, 2014, as he had previously testified.

[131] It is obvious that the reference to 2015 adjacent to Mr. Chuck's signatures was an error and should have read 2014.

[132] Considering all of the testimony regarding the contracts and the two versions, I find that both parties have a poor recollection of when and in what order the two versions were executed, however, it is more likely that they were signed on the same day at or about the same time.

Validity of the Agreement - Certainty

[133] *Berthin v. Berthin*, 2016 BCCA 104 [Berthin] sets out the test for determining whether a contract is sufficiently certain to be valid:

[46] The test, of course, is not what the parties subjectively intended but "whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract": see G.H.L. Fridman, *The Law of Contract in Canada* (6th ed, 2011) at 15. As stated by Mr. Justice Williams in *Salminen v. Garvie* 2011 BCSC 339:

The test for determining consensus ad idem at the time of contract formation is objective: it is "whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract"; it is "whether a reasonable... [person] in the situation of that party would have believed and understood that the other party was consenting to the identical term": Fridman, *supra*, p. 15; see also *Smith v. Hughes* (1871), L.R. 6 Q.B. 597 at 607 adopted in *St. John Tugboat Co. Ltd. v. Irving Refining Ltd.*, [1964] S.C.R. 614, 1964 CarswellNB 4 at para. 19, and *Remington Energy Ltd. v. B.C. Hydro & Power Authority*, 2005 BCCA 191 at para. 31, 42 B.C.L.R. (4th) 31. The actual state of mind and personal

knowledge or understanding of the promisor are not relevant in this inquiry: *Hammerton v. MGM Ford-Lincoln Sales Ltd.*, 2007 BCCA 188 at para. 23, 30 B.L.R. (4th) 183, citing S.M. Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book Inc., 2005) at 103. In short, if a reasonable person would find that the parties were in agreement as to a contract and its terms, then a contract would exist at common law: *Witzke (Guardian ad litem of) v. Dalgliesh*, [1995] B.C.J. No. 403 (QL), 1995 CarswellBC 1822 at para. 59 (S.C. Chambers). The test's focus on objectivity animates the principal purpose of the law of contracts, which is to protect reasonable expectations engendered by promises. [At para. 27.]

[134] *Ko v. Hillview Homes Ltd.*, 2012 ABCA 245 [Ko] provides helpful guidance in this case. The case, from the Alberta Court of Appeal, provides a thorough overview of Canadian and English authorities on the issue of when a contract is too uncertain to be valid.

[135] Ko begins with the following comment:

[2] The overarching aim of contracts is to let two or more parties predictably govern themselves by their own self-imposed rules. That aim fails if one cannot tell whether they have a binding contract or not: *Radhakrishnan v University of Calgary*, 2002 ABCA 182, 312 AR 143 (para 48); *VK Mason Construction v Bank of Nova Scotia* 1985 CanLII 608 (SCC), [1985] 1 SCR 271, 58 NR 195 (para 22); *BG Checo International v BC Hydro etc* 1993 CanLII 145 (SCC), [1993] 1 SCR 12, 147 NR 81 (para 108); *Brick Protection Corp v R*, 2011 ABCA 214, 510 AR 336 (para 48). So the rules to create a contract must be known and straightforward. A putative contract of unpredictable validity is almost useless. Almost as bad is a contract of unpredictable contents.

[136] The facts of *Ko* can be briefly stated. The parties had a \$1,200,000 written agreement to build a new home and then convey the lot in question. The terms of the contract are set out at paras. 12 to 13. At issue was one item in the Addendum which said the house was to contain 1666 more square feet at \$88 per square foot. The agreement did not say any more about what or where that extra square feet (which represented a 59% increase to the size of the home) would be. No part of the agreement was ever performed.

[137] The Court was critical of what it described as Canadian courts' "reluctance to hold any agreement too uncertain to enforce", and of the practice of "inventing terms which the parties never imagined", or worse, leaving the parties "with a binding contract of unknown and unstated content" (para. 8). The Court reiterated:

[81] A supposed contract with an uncertain material term is not a contract, and not even an agreement, and is usually impossible to perform or enforce. See *Watson v Jamieson*, *supra*, and *Cotterhill v Parkway Development Corp* (1982) 1982 ABCA 110 (CanLII), 39 AR 398 (CA) (para 10).

[138] The Court noted that context is key:

[91] What terms are essential depends on the type of contract: *Mitsui etc v Jones Power Co*, 2000 NSCA 95, 189 NSR (2d) 1 (para 64); *Milroy v Klapstein*, 2003 ABQB 871, 24 Alta LR (4th) 349 (paras 24-25). So what is enough specificity to make a valid contract to buy an existing power mower may not be enough for a contract to build a new house. Price is vital in a sale contract: *Edperbrascan Corp v 177373 Canada* (2000) 2000 CanLII 22694 (ON SC), 50 OR (3d) 425, 9 Bus LR (3d) 234, affd and adopted (2002) 22 Bus LR (3d) 42 (Ont CA); *Vachon Construction v Cariboo (Regional District)* (1996) 1996 CanLII 1851 (BC CA), 78 BCAC 43, 136 DLR (4th) 307 (CA); *Rana v Nagra*, supra.

[Emphasis added.]

[139] The Court provided further examples from the case law:

[104] Where there is an agreement to repair premises and lease them out, the commencement date and just what repairs will be made, are all essential. The purported contract was void for uncertainty therefore: *Mitchell v Mortgage Co of Canada* (1919) 1919 CanLII 50 (SCC), 59 SCR 90, 48 DLR 420. (On dates, see also *Prudential Assurance Co v London Residuary Body* [1992] 2 AC 386 (HL(E).)

[105] Another contract was held void for uncertainty, where terms for future payment of the price were very incomplete: *Kelly v Watson*, supra.

[107] On terms of payment where the price is not all payable at once, see *Murphy v McSorley*, supra, and other cases near the beginning of this subpart F.3.

[108] Again, absence of detail on some terms of time for payment, and on specifications of the house to be built, were fatal in *Cotterhill v Parkway Development Corp*, infra (CA).

[140] Ultimately, the Court found on the facts of *Ko* that the contract was too uncertain to be valid and enforceable.

[141] I do note the Court's comments at para. 117 that "the law of British Columbia on uncertainty differs somewhat from the law in other provinces", and at para. 118 that:

[118] A number of Canadian decisions, especially in British Columbia, suggest reluctance to find a contract void for uncertainty. But one must be careful, and not misquote binding authority. A number of important cases confine that reluctance to contracts partly or fully performed, at least on one side: *Kelly v Watson*, supra; cf *BCE Development Corp v Cascade Investments* (1987) 1987 CanLII 3197 (AB QB), 80 AR 386, 391 (para 21), 65 Alta LR (2d) 22, affd (1987) 1987 ABCA 240 (CanLII), 56 Alta LR (2d) 349, 47 RPR 308 (CA); *G Scammell & Nephew v HC & JG Ouston*, supra at p 255 (AC); cf *Hudson's Building and Engineering Contracts*, p 13 (para 1-010) (12th ed 2010). Other authorities seem to confine it to non-lawyer informal commercial contracts: Lord Wright in *Hillas v Arcos*, supra, at pp 503-04 (All ER Rep); *G Scammell & Nephew v HC & JG Ouston*, supra at p 16 (All ER); cf *Innovest Development Corp v Chow* (1994) 1994 CanLII 3109 (BC CA), 52 BCAC 241, 100 BCLR (2d) 366 (CA); cf *Langley Lo-Cost etc v 474835 BC*, supra (paras 39 ff). One should not confuse this

reluctance with the general rule to interpret a contract, if possible, so as to make it work.

[142] In *Berthin* the Court of Appeal noted that, where possible, courts are to avoid finding a contract void for uncertainty. However, the principle that the court should not construct unexpected terms remains the same:

[47] Of course, the terms in question must be enforceable - i.e., must have a definite as opposed to uncertain meaning such that a court can order either for damages or for specific performance in the event of breach. There is no doubt that courts will "lean heavily against finding contracts void for uncertainty" (*Copperart Pty. Ltd. v. Bayside Developments Pty. Ltd.* (1996) 16 W.A.R. 396 (S.C., Full Court) at 399, quoted in S.M. Waddams, *The Law of Contracts* (5th ed., 2005), 42 at fn.128). Thus Madam Justice D. Smith stated in *Frolick v. Frolick*, *supra*:

An effective agreement requires a meeting of the minds of the parties. An enforceable contract requires a consensus between the parties on all of the essential terms of their agreement. It is the responsibility of the parties, not the court, to clearly express those essential terms so "that their meaning can be determined with a reasonable degree of certainty": *Scammell and Nephew Ltd. v. Outston*, [1941] A.C. 251.

If the parties fail to reach a meeting of the minds on the essential terms of their agreement, or fail to express themselves in such a fashion that the meaning of the terms they agreed upon cannot be reasonably divined by the court, then the agreement will fail for lack of certainty. However, the requirement of certainty of the terms is always balanced with the reality of transactional negotiations. Parties may intentionally leave gaps in the terms of an agreement to provide for future or mutually satisfactory accommodations. In those circumstances, the court should not apply the doctrine of certainty so rigidly so that the intentions of the parties to create a binding agreement are thwarted.

Lambert J.A. observed in *Griffin v. Martens* (1988), 27 B.C.L.R. (2d) 152 (C.A.) at ¶4: "As long as the agreement is not to be constructed by the court, to the surprise of the parties, or at least one of them, the courts should try to retain and give effect to the agreement that the parties have created for themselves." [At paras. 30-32; emphasis added.]

Application of the Law to the Facts

[143] There were two versions of the contract, one of which Mr. Lu could not read, and there are significant differences between the two versions as discussed previously in these reasons. The English version states a contract price of \$1,280,000 with no reference to a deposit. The Chinese version states on page 1 "Construction Contract \$1,280,000" and on page 2, i.e., the Schedule, provides for an additional \$150,000 deposit. Both parties agreed in their testimony that the contract price agreed upon was \$1,430,000. The reference to the deposit included an "Estimated Payment date" of June 25, 2014 and an Estimated Payment Date of July 31, 2015 for payment of the final \$150,000 on "100% completion".

- [144] There were no specific plans for the construction of the home referenced in either contract. The English version included vague descriptions of what was to be built, whereas the Chinese version had no description or detail of what was to be built.
- [145] Regarding a date for completion, the Estimated Payment Date for 100% Completion of July 31, 2015 was ten months from issuance of a Building Permit by the City, which never occurred for reasons referred to above.
- [146] The parties did not conduct themselves in accordance with the terms of either contract.
- [147] Considering all of the above, I find that the parties were never *ad idem* other than for a total contract price, that Mr. Lu would have a house of unknown style and specifications of approximately 6,000 square feet by an estimated date of July 31, 2015, assuming a building permit were issued by September 30, 2014. These terms alone are insufficient to form the basis of a contract.
- [148] Mr. Chuck/421 have submitted that a new arrangement or contract was entered into by the parties in or about July 27, 2015 when Mr. Lu advanced a further \$250,474 to the defendants and their understanding that the home would be complete in July 2016 assuming a building permit was issued in September 2015. By that point in time, the home to be built was defined and based upon drawings prepared and submitted to the City by Mr. Tiku subject to some changes which remained to be negotiated with the City.
- [149] Mr. Lu denies any such agreement and a new contract or arrangement was never prepared. It was not clear, even from the testimony of Mr. Chuck whether the original contract price still applied. If a new or modified agreement had been entered into, which is unclear on the evidence, then that agreement was repudiated by the letter from Mr. Lu's solicitor sent October 30, 2015. I reject the defendants' submission on this point.

Decision

Case Law - Remedies

- [150] The concepts of quantum meruit and unjust enrichment inform my assessment regarding the appropriate remedy.
- [151] In *Bond Development Corp. v. Esquimalt (Township)*, 2006 BCCA 248 (leave to appeal to SCC refused), the parties had performed some aspects of a contract that failed for lack of consideration:
- [20] The conduct of the parties suggesting they considered themselves bound by their agreement and the finding by the trial judge at para. 105 that, "the activities in relation to the plaintiff were more than substantially complete subject to the finalization of the contract in June of 2002," cannot overcome the fact the parties were not *ad idem* on essential terms: the value of the CRB site and the terms of the stipulated priced contract, specifically the quality of the work to be designed and built.

- [152] The trial judge awarded, and the Court of Appeal confirmed as appropriate, an award on a quantum meruit basis. The Court described quantum meruit claims as follows:
- [22] A claim for quantum meruit is for reasonable remuneration for the services provided, "the amount it deserves" or "what the job is worth" (*Ketza Construction Corp. v. Mickey*, 2000 YTC 4 at para. 13). Thus, the trial judge was correct when he noted at para. 102 that, "[q]uantum meruit involves consideration of the amount and value of the services rendered, not potential profit." The amount to which a plaintiff is entitled on the basis of unjust enrichment is the value of the benefit obtained by the defendant, and not the loss to the plaintiff assessed as if the contract were fulfilled. If Bond is entitled to restitution it is to be for the value of benefit it conferred upon Esquimalt; that is, the market value of the development services it provided. That value must be determined from the evidence.
- [153] The test for unjust enrichment was set out by the Supreme Court of Canada in *Kerr v. Baranow*, 2011 SCC 10, there must be: (1) an enrichment of or benefit to the defendant; (2) a corresponding deprivation of the plaintiff; and (3) the absence of a juristic reason for the enrichment.

Application of the Law to the Facts

- [154] As the parties were never ad idem, on the contract, all of the claims of Mr. Lu against the defendant for breach of contract, breach of trust, non-pecuniary damages, punitive damages are dismissed.
- [155] However, Mr. Lu has paid to 421 and Mr. Chuck a total of \$375,474. This case is somewhat unique in that it would be unfair to allow Mr. Chuck to retain the full \$375,474 and it would be similarly unfair to order the return of the full amount to Mr. Lu. Applying the test as set out in *Kerr*, if Mr. Chuck retains the full amount: (1) Mr. Chuck retains a clear monetary benefit; (2) Mr. Lu loses that monetary benefit; and (3) there is no juristic reason for a portion of that monetary benefit (subject to the discussion below). It would be similarly unfair for Mr. Lu to recover the full amount: (1) Mr. Chuck's actions have resulted in some benefit to Mr. Lu; (2) have cost Mr. Chuck a corresponding loss of time and other resources; and (3) there is no juristic reason for the enrichment.
- [156] Therefore I order an accounting between the parties for payment made by the defendants to Minhas Holdings (\$100,000), Tiku Design (\$18,338), Naxiend Home Warranty (\$1,742.70), Mountain Maple Ltd. (\$1,121.40), Summit Engineering Corp. (\$5,250.00) and Fortis BC (\$474.00), for a total of \$126,926.99.
- [157] In addition to the payments made by the defendants listed above, the defendants are entitled to an award in quantum meruit for their efforts to advance the project, including coordinating contractors, meeting with the consultants and other efforts in an eventually unsuccessful effort to proceed with the project. I assess the value of that work at \$40,000.00.

[158] After deducting payment made by the defendants of \$126,962.88, and a quantum meruit award of \$40,000 from the \$375,474 advanced to the defendants, the balance of \$208,547 is ordered to be paid to the plaintiff.

Costs

[159] If the parties cannot agree on costs, I will hear submissions; appearance to be scheduled by Supreme Court Scheduling.

"Jenkins J."

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