

CANADA / JUDGMENT

Metro Paving and Roadbuilding Ltd. v. Fortitude Structures Inc.

2020 BCCA 126

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 126 Metro Paving and Roadbuilding Ltd. v. Fortitude Structures Inc.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Metro Paving and Roadbuilding Ltd. v. Fortitude Structures Inc.,

2020 BCCA 126

Date: 20200506

Docket: CA44645

Between:

Metro Paving and Roadbuilding Ltd.

Appellant/

Respondent on Cross Appeal

(Plaintiff)

And

Fortitude Structures Inc., formerly known as Great Circle Construction Co. Ltd.

and The Guarantee Company of North America

Respondents/

Appellants on Cross Appeal

(Defendants)

Before:

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Garson

The Honourable Madam Justice Fenlon

On appeal from: An order of the Supreme Court of British Columbia, dated
July 10, 2017 (Metro Paving and Roadbuilding Ltd. v. Fortitude Structures Inc.,
2017 BCSC 1169, Cranbrook Docket S22355).

Counsel for the Appellant:

J.A. Hall

Counsel for the Respondents:

J.A. McLachlan

Place and Date of Hearing:

Vancouver, British Columbia

November 28, 2019

Place and Date of Judgment:

Vancouver, British Columbia

May 6, 2020

Written Reasons by:

The Honourable Madam Justice Garson

Concurred in by:

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Fenlon

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Summary:

The respondent was awarded a highway construction project by the province and hired the appellant as the paving subcontractor. The project was significantly delayed beyond the original planned completion date and the respondent was charged a delay penalty by the province. At trial, the appellant sought payment for paving and grading work plus interest of 18% on outstanding payments pursuant to the written subcontract. The respondent counterclaimed for the delay penalty. The trial judge found that the written subcontract expired and that a fresh oral agreement governed the relationship between the parties when the bulk of the subcontractor's work took place. He applied an interest rate of 5% to the outstanding payments but otherwise awarded most of the appellant's claim. However, finding that the responsibility for the delay on the project was divided between the parties, he levied a \$152,500 delay penalty against the appellant pursuant to the counterclaim. The appellant challenges the trial judge's findings that the written subcontract was at an end, his findings with respect to responsibility for the delay, and his decision that each party should bear their own costs. The respondent cross appeals the judge's findings with respect to responsibility for the delay. Held: Appeal allowed in part; cross appeal dismissed. The trial judge made a palpable and overriding error in finding that the subcontract was at an end. As such, the contractual rate of 18% interest should apply to outstanding payments. The judge made no palpable and overriding errors with respect to responsibility for delay and so his findings should be accorded deference on appeal. Given the results of the appeal, the appellant is entitled to trial and appeal costs.

Reasons for Judgment of the Honourable Madam Justice Garson:

I. Introduction

- [1] This appeal concerns payment for paving and grading work on a highway construction project. The project was significantly delayed beyond the original contractual completion date. The trial and the appeal concern the allocation of responsibility for that delay as between the general contractor and the paving subcontractor, the financial consequences of the delay, and the question of interest owed on outstanding payments.

II. Background

A) The Contract

- [2] The Respondent, Fortitude Structures Inc. (referred to in this appeal and at trial as "Great Circle"), and the BC Ministry of Transportation and Infrastructure ("MOTI") entered into a written agreement on June 23, 2009, to construct an improved intersection on Highway 3, at Corbin Road. This highway is the main southern link between British Columbia and Alberta. I shall refer to this contract as the "Prime Contract".
- [3] Great Circle entered into a subcontract with the Appellant, Metro Paving and Roadbuilding Ltd. ("Metro"), on June 11, 2010, for the paving work required by the Prime Contract. This contract is referred to as the "Subcontract". The Subcontract describes the work to be done as "Section 4 - Paving Construction". This is a reference to the section of Schedule 3 of the Prime Contract between MOTI and Great Circle that specifies the terms and conditions of the paving work. The Prime Contract is specifically incorporated into the Subcontract at clause 5:
5. PRIME CONTRACT: The Sub-contractor agrees to perform and comply with all of the covenants, obligations, terms and conditions binding on the Contractor under the Prime Contract, in respect of the Work, together with any changes thereto, and hereby expressly declares that he has fully informed himself of all such covenants, obligations, terms and conditions by reference to the Prime Contract. For the purposes of incorporation of the Prime Contract and the interpretation of these contract documents, "Contractor" shall be deemed to mean "Sub-contractor" in the Prime Contract.
- [4] The Subcontract contains the following provision with respect to the terms of payment:
3. ADVANCES: At the expiration of each month of Work, the Sub-contractor shall make written application for an advance to the Contractor for that portion of the Work performed in the past month. Advances shall be made by the Contractor to the Sub-contractor as and when the amounts are received therefor from the Owner and will equal the value of the Work done by the Sub-contractor as measured and certified by the Owner, at the prices stated herein, less the sum of previous payments and less the sum of 5% of the certified value.
4. FINAL PAYMENT: Upon the happening of all the following events (unless otherwise stipulated in writing): completion of the Work, payment therefor by the Owner, the expiration of the time fixed by law for the filing of liens, production of satisfactory evidence to the Contractor that the Sub-contractor has paid for all labour, materials, supplies and equipment used by the Sub-contractor, and production of evidence satisfactory to the Contractor that the Sub-contractor has paid or made arrangements to pay all claims that are made or may be made against the Contractor in respect of the work, the Sub-contractor shall be paid the remaining amount due the Sub-contractor hereunder. Final Payment as herein provided shall release the Contractor from any further obligation whatsoever in respect of this Agreement.

- [5] Schedule A of the Subcontract provides that overdue amounts are subject to a rate of interest of 1.5% per month or 18% per year:

Payment terms: All invoiced amounts are due and payable within 30 days of date of the invoice.

Final payment is due within 30 days of the earlier: (1) the last invoice date (2) the last day of work by the company.

Overdue amounts subject to interest charges of 18% per annum (1.5% per month).

- [6] The Subcontract provided that Metro's paving work was to begin within seven days as directed by Great Circle and that the paving work would be completed by August 31, 2010 (clause 6). The judge found as a fact that "when the parties entered into the [Subcontract] the anticipation was that Metro would arrive and do two weeks of paving and have something close to a clear run of the project so as to facilitate the paving that needed to be done in those first two weeks. [Metro] would then exit for two weeks, and return for one week of final paving."

B) Course of Construction in 2010

- [7] The judge found that in 2010, Great Circle had not readied the highway for paving as was anticipated in the Subcontract. The judge accepted the evidence of Metro and MOTI that, to be effective, paving must be done in temperatures of 5 degrees Celsius and rising. The judge also accepted the evidence of Metro and MOTI that by the time Great Circle requested paving services in late October and November of 2010, it was too cold to pave. On appeal, Great Circle disputes the judge's findings in respect of 2010.
- [8] Although it is not in dispute that Metro did not perform any work under the Subcontract in 2010, it did, at the request of Great Circle, do extra-contractual work to ready the highway for winter traffic. Metro did this extra paving in November 2010 with additional reapplications in January 2011. Great Circle did not pay Metro for this extra work until April and May 2011. As discussed below, the late payment became an issue when Great Circle requested that Metro resume work the following spring.

C) Course of Construction in 2011

- [9] Representatives of Metro, Great Circle and MOTI attended a meeting on May 17, 2011, in order to discuss the resumption of work. MOTI issued a "Resume Work Order" on May 17, 2011. The Order refers to Project Number 21675-0001, which is the original Prime Contract.
- [10] The Resume Work Order provides:

Pursuant to the Contract dated June 23, 2009, and the Stop Work order issued on December 1, 2010, you are hereby directed to resume work as indicated below:

All operations on the above Project are to be resumed effective May 17, 2011.

- [11] The parties dispute when Metro agreed to resume paving and the preconditions to the resumption. As indicated above, at the request of Great Circle, Metro provided further, extra-contractual paving in November 2010 and January 2011. The witness Mr. Doug Hickey (for Metro) testified that Metro was not willing to return to the job site in May 2011 without payment for the extra-contractual work and an assurance letter from Great Circle's bank. Great Circle paid Metro for the extra-contractual work but the final payment was not made until May 30, 2011. The bank assurance was provided on June 2, 2011.
- [12] Great Circle disputed this arrangement and said that Metro had agreed to return to the work site on May 30 without preconditions. Metro's paving crew began work on June 12 or 13, 2011. Before then, Metro says the project was not ready for paving--the grading work was not completed. Great Circle says that substantial portions of the project were ready for paving by May 30.
- [13] It was conceded at trial by Metro that the paving work done in June and July 2011 was deficient. Metro describes a chaotic job site and blames Great Circle for not providing Metro a clear run of work. In August 2011, Metro disputed the MOTI finding that the paving was deficient.
- [14] No work was done on the job site in August 2011.
- [15] After discussion between MOTI, Great Circle, and Metro, Metro agreed to repave a deficient area and to accept a reduced rate of pay on that area and others. Metro repaved the area in September but MOTI found the repaving also failed to meet inspection standards. This finding was appealed by Metro in a process that continued until March of 2012. There were other deficiencies in the project that were the responsibility of Great Circle.

D) Course of Construction in 2012

- [16] The project was completed on May 30, 2012.

E) Quantification of Metro's Claim

- [17] The amount claimed at trial was \$930,839.28 plus interest. This amount included \$82,724.39 for grading services and \$848,114.89 for paving services. The trial judge awarded \$45,000 for the grading services and the full \$848,114.89 for the paving services, less a payment made by Great Circle to Metro of \$431,601.28 in October 2011. Therefore the total amount owing from Great Circle to Metro following the trial was \$476,601.28. However, set off against this amount was \$152,500 due to delay penalties levied by MOTI and counterclaimed by Great Circle against Metro, which I will discuss below.
- [18] Thus, the net amount owing from Great Circle to Metro as of October 6, 2011, was \$324,101.28. Great Circle made another payment to Metro of \$268,267.58 in May 2015 after the claims were filed but before trial. As the trial judge explained:

- [56] As noted in my reasons, interest will run on this amount, \$324,101.28 from the 31st of August 2012 to and including the 14th of May 2015 at which time Great Circle is to be credited for the \$268,267.58 they paid. The balance then owing is the amount of the judgment with interest calculated to the date of the release of these reasons.
- [19] The rate of interest is in dispute on appeal. Liability for the claim is contested but the quantification other than interest is not at issue on appeal.
- [20] As indicated above, the judge selected August 31, 2012, as the date from which interest runs. Metro does not appeal this date. Great Circle does not accept this date in the context of the interest defences, which I will return to below.

III. Reasons for Judgment

A) Pleadings and the Contract

- [21] Before turning to the reasons for judgment, I shall describe the pleaded claims and counterclaims.
- [22] In its notice of civil claim, Metro claimed the balance due and owing for its paving work pursuant to the Subcontract. It sought judgment plus contractual interest at the rate of 1.5% per month, or 18% per annum.
- [23] In its response to civil claim, Great Circle pleaded that Metro's entitlement to payment was governed "entirely by the terms of the Sub-contract". Great Circle also pleaded that entitlement to payment was set out "by the express terms of the Sub-contract".
- [24] Notwithstanding the pleadings, the judge held that the Subcontract was at an end in May 2011 when the work resumed after the winter shutdown. He said at paras. 43 and 44:
- [43] The contract or sub-contract that the parties had was clearly at an end in May of 2010 when discussions began again about Metro doing paving for Great Circle on this Highway 3 project. The parties did not enter into a new contract.
- [44] It is fair and reasonable to conclude, and I do conclude, that the parties had an oral arrangement in 2011 as to the work to be requested by Great Circle and to be provided by Metro. What the parties knew about road construction is relevant to this oral contract. It seems clear from the evidence that the parties agreed that Great Circle would call upon Metro to pave when Great Circle requires Metro's services. It seems clear that Metro agreed to provide grading services to assist Great Circle in their preparedness and it is reasonable to assume that Metro would be paid something for these services. It is reasonable also to assume, and the parties apparently now agree, that the general rate of remuneration that Metro would receive would be the rate provided and determined by the Ministry's assessment of the project and essentially, at the fixed rate the parties agreed. Metro would be paid for what they did once Great Circle was paid by the Ministry.

- [25] Having found that the Subcontract no longer governed the parties' relations, he declined to award interest at the contractual rate of 18% and instead awarded interest at a rate of 5% per annum. He did not explain the basis on which he awarded interest at 5% other than as follows at paras. 49-52, indicating that it was a "compromise":
- [49] In terms of interest, the parties, when they agreed to enter into a relationship for the purposes of paving in 2010 were aware that in the business of road construction and paving considerable sums are incurred by paving companies and the expectation is that they will be paid by the general contractor, in this case Great Circle, in a reasonable period of time. Of course, the anticipation is once paving is done, it will be assessed by the Ministry quickly, it will pass, and payment will be received by the general contractor, again within a reasonable period of time.
- [50] The difficulty here of course is that Metro's paving was sub-standard and caused additional and considerable delay. Metro caused a delay post May 30, 2011 by not having its paving materials tested and pre-approved. That caused some delay at the outset. It caused delay in terms of quality of paving and that caused delay in payment being received by Great Circle. Metro also desired after one rejection to appeal the Ministry decision, and then waited several weeks before it actually followed the appeal process. That appeal was unsuccessful. As noted earlier in these reasons, Great Circle did not receive final payment for this project until the 13th of January 2013. Some but not all of that delay was associated with the poor quality of paving done by Metro and their delay in attending to the project when requested by the 30th of May 2011 as opposed to the middle of June 2011.
- [51] I note as well that the parties do not have a contract for the paving in 2011 though they both knew, as was apparently standard in the industry that interest would run on delayed payments.
- [52] Fairness suggests that there should be a compromise. I would award interest to Metro payable by Great Circle for any balance found to be outstanding as of the 31st of August 2012 and I would order interest to be paid from that date on the balance outstanding at the rate of 5% per annum until payment is finally received.

[Emphasis added.]

B) Findings with Respect to Responsibility for Delay

- [26] The judge found that Great Circle, not Metro, was responsible for the delay in 2010. He held that effective paving could not have been done in 2010.
- [27] With respect to 2011, the judge found that there was significant delay occasioned in part by Metro's failure to "respond", by which he means that Metro did not move on to the site when asked to do so on May 30, and by the poor quality of its work. At para. 4 he found that Metro was entitled to be paid but that it was

also responsible for some of the delay encountered by Great Circle in completing the contract and as such there must be a deduction from their claim for some of the delay charges incurred by Great Circle, essentially for some of Great Circle's counterclaim.

[28] The judge rejected the evidence of Metro's project manager, Jason McCarthy, and preferred the evidence of Len Sims, the main witness for Great Circle. Mr. Sims testified that if Metro had mobilized its pavers by May 30, 2011, the project would have been done earlier.

[29] As for the delay, the judge found at para. 45:

Metro would have known, or ought to have known, that any delay that they caused as a result of failing to follow Great Circle's requests for service or delay that they caused associated with shoddy workmanship would have some cost to Great Circle and that Great Circle would look to them for reimbursement.

[30] In summary, the judge found Metro responsible for the delay after May 30, 2011, because it did not have its paving materials tested and pre-approved, provided paving of poor quality, appealed the MOTI deficiency findings, and did not mobilize on site in a timely way. I infer from his reasons that he resolved the conflicting evidence about Metro's refusal to attend on May 30th in favour of Great Circle and accepted also that some responsibility for delay was attributable to Great Circle. He does not explicitly detail Great Circle's fault but the whole burden of the argument by Metro was that the main cause of the delay was Great Circle's failure to provide a clear run of the project, as opposed to a patchwork of areas available and ready for paving, as well as Great Circle's chaotic management of the project.

[31] At para. 52 the judge said, "[f]airness suggests that there should be a compromise." It is somewhat difficult to discern what factors he was balancing in his decision to compromise: either the interest rate, the interest commencement date, or both. What is clear is that the judge found both parties contributed to the delayed completion of the project in 2011.

C) Counterclaim

[32] In his consideration of Great Circle's counterclaim, the judge found at para. 53:

Turning to the counterclaim, though there is no merit in the suggestion by Great Circle that the plaintiff is responsible for the delay charges which were billed to Great Circle by the Ministry for 2010, I find that if Metro had attended at the job site as directed by Great Circle in the spring of 2011 and had done quality paving work which would have passed Ministry inspection, that a good portion of the delay through the summer months would not have been necessitated by Great Circle. Realistically, had the paving passed and had Great Circle been diligent about dealing with the deficiencies generally on the project, it would have been reasonable to expect that this project could have been wound down by 31 August 2011. As such, I find 61 days of delay costs, the delays in September and October of 2011, are attributable to Metro's failure to provide quality paving services that would pass government inspection as was anticipated they would provide under both the contract, and under the subsequent agreement. This 61 days at \$2,500 per day totals \$152,500.

[33] He specifically attributed the delays in September and October 2011 to Metro for its failure to provide quality paving and awarded \$2,500 per day for those two months to Great Circle under "both the contract, and under the subsequent agreement." This is the amount Great Circle was charged by MOTI pursuant to provision GC 33.02(c) of the Prime Contract.

D) Costs

[34] The judge held that, as success was divided, each party should bear their own costs. He gave leave to the parties to make submissions as to costs if they disagreed. Neither party sought to do so.

IV. Submissions on Appeal

A) Metro's Submissions

[35] Metro says the trial judge erred in three ways:

- a) in finding that the Subcontract was at an end in May 2011 and in applying a rate of interest of 5% per annum to outstanding payments, or alternatively in failing to apply the interest rate in the Subcontract to the 2011 oral agreement;
- b) in finding that Metro was responsible for 61 days of delay; and
- c) in not awarding costs to Metro.

i) Interest Rate

[36] Metro says the trial judge erred in finding that the Subcontract terminated in 2010 and that the work performed in 2011 was pursuant to a fresh oral arrangement. Metro says the correct characterization of the 2011 arrangement going forward was a renewal or extension of the 2010 Subcontract. Moreover, it says the judge further erred because despite finding the written contract no longer governed the relations between the parties, he made no finding as to the terms of the fresh oral agreement. He neither implied that the terms of the original contract were carried forward nor found that the parties reached a fresh agreement about interest. There was no evidence that they did so.

[37] Metro says that the judge erred in his finding at para. 51 that industry standards dictated that interest would run on delayed payments without also considering what rate was dictated by those standards. Metro contends that the judge simply imposed an arbitrary interest rate.

ii) Responsibility for Delay

[38] At para. 50 of his reasons for judgment, the judge attributed responsibility for the delay in the project to Metro's substandard work but also, as already noted, to Metro's "delay in attending to the project when requested by the 30th of May 2011 as opposed to the middle of June 2011." He deducted \$152,500 for late charges.

- [39] Metro says the judge erred in attributing fault to it on account of its failure to attend the job site on May 30th. Metro says the evidence is clear that it only agreed to return to the job site if Great Circle paid the outstanding invoices and provided a bonding letter from its bank because it had not been paid for the previous year's work.
- [40] Metro says that in any event the area was not ready to pave. Metro also claims that it is an implied term of the Subcontract that it would have a clear run of the work. Specifically, it contends that the failure of Great Circle to prepare the road bed for a clear run of paving contributed to the delay. Metro says that at para. 33 of his reasons the judge erroneously relied on the evidence of Mr. Sims that if Metro had mobilized by May 30, 2011, the project would have been completed earlier, without considering the foregoing evidence. Metro says it is an error of law for the judge to fail to consider the implications of Great Circle's failure to provide a clear run.
- [41] I shall consider Metro's argument on costs below.

B) Great Circle's Submissions

- [42] Before turning to Great Circle's submissions on appeal, I shall mention the basis of its defence to Metro's claim at trial. It is important to recall that Great Circle at first pleaded that no amount was due and owing for Metro's paving work because Metro had failed to complete the work pursuant to the terms of the Subcontract. Great Circle pleaded that Metro's breach led to it incurring damages, including daily penalties assessed by MOTI, and expenses. Great Circle specifically pleaded and relied on the Prime Contract and Subcontract. Great Circle counterclaimed that it was assessed \$2,500 per day by MOTI and that it was entitled to pass on the penalty to Metro.
- i) Interest Rate
- [43] On appeal, Great Circle says that it was open to the trial judge to find that the Subcontract was at an end in May 2010 and that the parties entered into a fresh oral arrangement. Further, in reliance on the provisions of the Interest Act, R.S.C. 1985, c. I-15, s. 3-4, Great Circle contends that the trial judge did not err in finding that a rate of interest of 5% per annum applied to payments owing pursuant to this fresh oral arrangement.
- [44] In its factum, Great Circle says that support for the trial judge's conclusion that the parties did not extend the Subcontract in 2010, and the fact that Metro considered it to be at an end, can be found in: Metro's refusal to attend the job site in 2010 despite Great Circle's request that it do so; the necessity of a site meeting in May 2011 at which Metro promised to attend and grade and pave in 2011; and new terms agreed to in 2011, which included a revised scope of work.

- [45] Great Circle submits that if this Court determines that the trial judge erred in his finding that the Subcontract had ended and did not continue to govern the relations between the parties, then the judge failed to consider Great Circle's contractual defences to Metro's interest claim. Great Circle says that at trial it advanced several defences to Metro's claim for payment of interest on its unpaid invoices. As stated in its factum, those defences are:
- (a) no interest is payable because the Appellant never provided an accurate invoice to the Respondents as required under the Subcontract;
 - (b) in the alternative, no interest is payable because the Respondents are entitled to holdback payments owing to the Appellant without interest accruing pursuant to general condition 62 of the Prime Contract;
 - (c) in the further alternative, the Appellant was not obligated to pay the Respondents before it received payment for the Subcontract works from the Ministry in January 2013, and therefore no interest ran before that date.
- [46] Great Circle says that if this Court decides the Subcontract did not end, the matter should be remitted to the trial judge to consider these defences. In the further alternative, Great Circle says this Court could on the record decide the interest defences.

ii) Responsibility for Delay

- [47] In response to Metro's contention that it had an agreement it would be paid and would be provided with a bank letter before beginning work in 2011, Great Circle points to evidence to the contrary from several witnesses who testified that Metro agreed to be on site on May 30, 2011.
- [48] Great Circle says Metro's appeal of this award should be dismissed for the following reasons:
- (a) the Trial Judge committed no error in concluding that the Project could have been wound down by August 31, 2011 had the Appellant paved to specification and the 61 days of delay in September and October 2011 were therefore attributable to the Appellant's failure to provide quality paving services that would pass government inspection;
 - (b) in the circumstances the Appellant was not entitled to a clear run at the work; and
 - (c) there is no evidentiary basis for the Appellant's assertion that a failure to have a clear run at the work was responsible for the poor quality of its paving services.
- [49] Great Circle says there was conflicting evidence on all these three points. Great Circle contends that there was evidence to support the judge's findings and it cannot be said he made a palpable and overriding error in this regard.

V. Submissions on the Cross Appeal

A. Great Circle's Submissions

- [50] Great Circle says that in the event this Court finds the Subcontract did not terminate, and thus the judge erred in awarding interest at 5%, then its award for the delay charges should be increased from 61 days to either 129 or 132 days for delay in 2010 and 2011.
- [51] Great Circle repeats its assertion that Metro breached the contract by failing to attend on site when directed. It says further that Metro was not entitled under the Subcontract or at law to a clear and unimpeded run at the work. Finally, Great Circle says Metro caused delay by providing substandard work.

B. Metro's Submissions

- [52] In response, Metro reviews the conflicting evidence on three issues. Metro asserts that even if Great Circle was entitled to require Metro to pave in October of 2010, the weather would have rendered the paving impossible, impracticable and likely to result in deficiencies. Metro also says that the trial judge clearly considered evidence with respect to Metro's poor quality paving in the summer of 2011, as indicated by the judge's attributing the 61 days of delay following this period to Metro; consequently, the award takes into account poor quality of paving and there is no basis to increase it.
- [53] Metro concludes that Great Circle has not demonstrated that the trial judge erred in his conclusion with respect to Great Circle's claims for delay caused by Metro.

VI. Analysis

- [54] I would state the issues of fact, or mixed fact and law, that underlie this appeal and cross appeal, as follows:
- a) Did the judge err in his conclusion that the Subcontract was neither extended nor renewed in May 2011?
 - b) If so, did the judge err in inferring or implying a term of the 2011 oral agreement for payment of 5% interest on outstanding accounts?
 - c) If (a) is answered in the affirmative, should this Court consider and determine Great Circle's defences to Metro's claim for interest or remit the matter to the trial judge?
 - d) Did the judge err in attributing 61 days of delay to Metro? (Metro says no delay was attributable to it. On the cross appeal, Great Circle says the delay penalty should be increased to 132 days.)
 - e) Did the judge err in holding that the parties should bear their own costs?
- [55] The factual issues that Metro raises in its appeal of the award to Great Circle for 61 days of delay are the same issues raised by Great Circle's cross appeal.

A. Did the judge err in his conclusion that the Subcontract was neither extended nor renewed in May 2011?

[56] For the reasons that follow I conclude the judge made a palpable and overriding error in his conclusion that the terms of the original Subcontract did not continue to govern the relations between the parties.

[57] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, governs the standard of review for this question. It provides that questions of contractual interpretation are questions of mixed fact and law, reviewable by appellate courts on a deferential standard of review. In that case, Justice Rothstein wrote for the Court:

[50] Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.

[52] this Court in *Housen* found that deference to fact-finders promoted the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings (paras. 16-17). These principles also weigh in favour of deference to first instance decision-makers on points of contractual interpretation. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law.

[58] It is trite law that the goal of contractual interpretation is to ascertain the objective intentions of the parties: *Sattva Capital Corp.* at para. 55. The question of whether the Subcontract was at an end, and a new oral arrangement was made at the May 17 meeting, depends on the objective intentions of the parties: *Leemhuis v. Kardash Plumbing Ltd.*, 2020 BCCA 99 at para. 15; *Aubrey v. Teck Highland Valley Copper Partnership*, 2017 BCCA 144 at para. 35; *Rudyak v. Bekturova*, 2018 BCCA 414 at para. 23.

[59] I turn to the facts germane to this interpretative question.

[60] The trial judge's finding that the Subcontract was at an end is at odds with the pleadings and submissions as well as the evidence. Metro pleaded and relied on the original Subcontract. Importantly, in its response to Metro's claim and in its counterclaim, Great Circle also pleaded and relied on the original Subcontract.

[61] In submissions at the conclusion of the evidence, counsel for Great Circle said this:

Now, we say -- and I don't think there's much issue on this, but we say that the subcontract remained binding on the parties and that Section 6 of the subcontract requires -- provides that Metro is required to begin work within seven days as directed by Great Circle and to complete its work by August 31st, 2010.

So, in the present instance the parties' conduct indicates that the completion date was extended by agreement.

[Emphasis added.]

- [62] On appeal, Great Circle says that there was ample evidence to support the trial judge's finding that an oral contract was made at the meeting of the parties and MOTI on May 17, 2011, and there is no basis for concluding the judge erred. Great Circle points to a number of transcript extracts to support this submission. Those extracts all relate to discussions about the performance of the paving contract in October 2010 or May 2011. None of the evidence relates to an affirmation, termination, renewal, or extension of the original terms of the contract. Specifically, none of the evidence referred to concerns payment terms or interest provisions.
- [63] No evidence, either witness testimony or documentary, has been brought to our attention that supports the proposition that the parties did not intend the terms of the Subcontract to apply to the resumption of work in 2011. Even if the contract could be said to have expired, the parties clearly continued on the basis of the same payment terms. Put another way, even if the ongoing arrangements of the parties following the May 17 meeting could be said to constitute a new oral contract, there is no basis to find that all of the payment terms from the original contract were not carried forward.
- [64] In conclusion, it was neither pleaded nor argued at trial that the parties' relations going forward after May 2011 were not based on the same financial terms as those contained in the original Subcontract. To the contrary, the evidence was overwhelmingly in support of the conclusion that the parties simply extended the existing contractual arrangements when work resumed in 2011.
- [65] I am of the view that the trial judge made a palpable and overriding error in finding that the Subcontract was at an end in May 2011. I conclude that the payment terms of the Subcontract continued to govern the relationship between the parties.

B. Did the judge err in inferring or implying a term of the 2011 oral agreement setting payment of 5% interest on outstanding accounts?

- [66] In light of my conclusion on the first issue, I am of the view that the trial judge erred in finding that a 5% rate of interest applied to outstanding accounts. As the Subcontract continued to govern the relationship between the parties, the contractual rate of 18% interest continued to apply to outstanding accounts.

- [67] It will be recalled that at para. 52 of his reasons for judgment, the judge said, "[f]airness suggests that there should be a compromise." It is not clear if the judge meant this "compromise" to be a compromise of the interest rate, or the date at which the interest runs, or both. If the judge meant the "compromise" to mean lowering the interest rate from 18% to 5%, this is an error of law given my finding that the terms of the Subcontract continued to apply.
- [68] If the judge meant the "compromise" to refer to a compromise as to the date from which interest runs, this date was not challenged by Metro on appeal, but it is by implication challenged by Great Circle in the context of its contractual defences to the interest claim. I will return to these defences below.
- [69] By my calculation, the value of the reduced interest rate is approximately \$186,000. I note that the judge did not attempt to quantify this amount. He left the "math" to the parties. Further, the parties did not quantify the interest differential on appeal.
- [70] In my view, the judge made a palpable and overriding error in his conclusion that the term for payment of interest at 18% no longer applied. I would accede to Metro's claim to entitlement to interest at 18% and allow Metro's appeal of the order awarding it interest at the rate of 5% and substitute an award at 18% per annum simple interest.

C. Should this Court consider and determine Great Circle's defences to Metro's claim for interest or remit the matter to the trial judge?

- [71] The next issue is whether this Court should consider and determine Great Circle's defences to Metro's claim for interest or remit the matter to the trial judge. Great Circle refers to these submissions as its "interest defences". Great Circle says that, if this Court finds that the Subcontract still governed the relationship between the parties, then Great Circle has a contractual basis to argue that no or less interest is owing on any outstanding payments. Great Circle says that as the trial judge failed to consider these defences, these issues should be remitted to him. As I understand the reasoning of the judge, he did not consider it necessary to deal with the interest defences in his reasons for judgment once he decided to reduce the interest rate from 18% to 5% after finding that the Subcontract was at an end.
- [72] On appeal, Metro made no written or oral submissions on Great Circle's interest defences. Also, Metro did not dispute that these submissions could be raised in the main appeal as opposed to the cross appeal. Because the interest defences amount to the respondent seeking to vary the order in its own favour, they ought to have been raised in the cross appeal: *Morrison v. Coulter*, [1991] 82 D.L.R. (4th) 568 at 572 (B.C.C.A.); *AD General Partner Inc. v. Gill*, 2018 BCCA 436 at para. 88, leave ref'd [2019] S.C.C.A. No. 20
- [73] However I shall consider them as pleaded as doing so does not affect the outcome of this appeal.

[74] Great Circle says that the interest defences should be remitted to the trial judge, for his reconsideration. I am of the view that the record before us is adequate to respond to Great Circle's submissions. In addition, it is in the interests of justice in this appeal, and in keeping with the principles of proportionality, that the matter be determined by this Court, if possible, rather than remitted to the trial judge: *Sullivan v. Struck*, 2018 BCCA 256 at para. 33. As discussed below, the facts underlying this aspect of the appeal are not in dispute, enabling this Court to properly consider the defences.

[75] Great Circle contends that it was not required to pay any interest on the outstanding amounts for two reasons, and makes an additional argument that the date at which interest runs should be later than that selected by the trial judge. First, Great Circle says no interest is payable because Metro did not provide accurate invoices as required by what they say is an implied term of the Subcontract. Second, Great Circle submits that the provisions in the Prime Contract providing that no interest is payable on held-back payments due to a "default event" (which they say includes failing to provide accurate invoices) apply to the Subcontract so no interest is payable. Finally, Great Circle says it was not obligated to pay Metro before it received payment for the paving work from MOTI in January 2013 and therefore no interest ran before that date.

[76] I will deal with these submissions in turn.

i) Inaccurate Invoices

[77] Great Circle says that implied in the provision of the Subcontract that payment is due within 30 days of the date of the invoice is the condition that the invoice must be fair and accurate. Great Circle says that a contractor cannot be obligated to pay interest on an invoice that is manifestly inaccurate.

[78] Great Circle says this argument was not considered by the trial judge. While the judge made no reference to this submission in his reasons for judgment, reasons must be considered in the context of the entire record before the reviewing court: *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para. 101. In closing submissions at trial, Great Circle canvassed this argument extensively and it was very clear from the judge's remarks that he was alive to the issue but that he rejected the argument.

[79] In closing submissions, the following colloquy took place between counsel for Great Circle and the trial judge:

MR. MCLACHLAN: If Metro issues an invoice for \$246,000 or whatever it is, right, and it's found three years later on the basis of this court's finding that that was properly owing and invoiced, they get 18 percent.

But by the same token they can't stand here and say for three years you owe us \$755,000, less some amorphous amount for 50 percent and 75 percent which they've only I think acceded to at trial -- I mean, I'll have to check the pleadings, but I don't think they've even acknowledged in the pleadings that it's 75 and 50 percent. It's a different matter. You can't now suddenly say, "Oh, well, yeah, I was wrong on my invoice, but the judge says you're owed this, so we get 18 percent".

THE COURT: That happens all the time.

MR. MCLACHLAN: If -- I say where they're specifically aware of the error it behooves them to issue that invoice. It's not like they've made a mistake.

THE COURT: But your client has the money.

THE COURT: [Metro] agreed -- they agreed at the beginning that they would be paid according to what the Ministry says the amounts are. They agreed at that date in 2011, September-ish, to accept the 50 percent and the 75 percent on certain --

MR. MCLACHLAN: 75 percent in May.

THE COURT: Yes, okay. So --

MR. MCLACHLAN: And what was --

THE COURT: -- the fact that they just didn't do -- send a little piece of paper disentitles them to any interest or the interest they -- everybody contracted for three or four years?

[80] Great Circle points to cases supporting the proposition that contractors must keep accurate accounts and that there is no obligation to pay for incorrect and inappropriate charges. I have not been provided with any authority for the proposition that interest will not run on outstanding payments in the context of disputed payments. I see no merit to this argument and would not accede to this argument on the record before us.

ii) Default

[81] In the alternative, Great Circle says that no interest is payable because it was entitled to hold back payments owing without interest accruing pursuant to general condition 62 of the Prime Contract. The Prime Contract reads, in material part:

GC 62.01 Any of the following events shall constitute an Event of Default whether any such event is voluntary, involuntary, or results from the operation of law or any judgment or order of any court or administrative or government body:

(g) the Contractor fails to perform any of its obligations or breaches any term of the Contract and has not corrected the failure, or is not, in the opinion of the Ministry Representative, diligently proceeding to correct the default, within the time period specified by the Ministry to correct the default, if any;

- (i) any information, or document furnished by or on behalf of the Contractor to the Ministry in connection with the Tender or as a result of the Contract is materially incorrect;

GC 62.02 On the occurrence of any Event of Default, or at any time thereafter the Ministry may deliver written notice to the Contractor specifying the Event of Default and the Ministry may, at its option, elect to carry out any one or more of the following:

- (b) retain as a holdback any payment due to the Contractor under the Contract, including any sums currently being held-back by the Ministry
- (d) take all actions in its own name or in the name of the Contractor that may reasonably be required to remedy the Event of Default, in which case any payments, costs and expenses incurred by the Ministry in remedying the Event of Default shall be payable by the Contractor to the Ministry on demand, and the Ministry may set off against any sums owing by the Ministry to the Contractor, including any amount retained by the Ministry as a holdback under GC 62.02(b);

GC 62.03 If any amounts have been retained as a holdback by the Ministry in accordance with GC 62.02(b) or GC 62.02(d), the subject funds shall continue to be held back and shall be dealt with as follows:

- (c) no interest shall be calculated or payable by the Ministry with respect to any amount being retained by the Ministry as a holdback in accordance with GC 62.02(b) or GC 62.02(d).

[82] Great Circle says these provisions are incorporated into the Subcontract by virtue of clause 5 of the Subcontract. Great Circle contends that failing to provide accurate invoices is an "Event of Default" under clause GC 62.01(g) or (j), and as such they were entitled to hold back payment and no interest was owing on the held-back funds pursuant to clause GC 62.03 (c).

[83] The judge indicated his strong disagreement with the proposition that Great Circle could hold back its payment until a dispute was resolved but have no obligation to pay interest. He did not specifically consider this proposition in his reasons for judgment, but he indicated very firmly in the course of submissions that he was of the view there was no merit to the submission in the following exchange with counsel for Great Circle:

THE COURT: Yes, okay. Now, again putting a scenario to you --

MR. MCLACHLAN: Okay.

THE COURT: -- a person decides they don't want to pay, so they litigate the thing for five years and in five years there's a judgment at which it turns out they are entirely wrong --

MR. MCLACHLAN: Yeah.

THE COURT: -- and your argument is, okay, you're entirely wrong, but because of this provision I don't have to pay you any interest on this money for the five years that I litigated matters?

MR. MCLACHLAN: Yeah, under the reading of that. If --

THE COURT: Again, that doesn't make any commercial sense.

MR. MCLACHLAN: It's no different than the Ministry holding that money for five years and us having -- us having litigated --

THE COURT: No, it is very different --

MR. MCLACHLAN: All right.

THE COURT: -- because your guy has been paid by the general contractor for the work that his subcontractor has done. He is holding that money and he could potentially hold that money for five years, litigate the dispute, concede it at the end and say, "By the way, it's five years later, you're not entitled to interest".

THE COURT: Well, counsel, I must say --

MR. MCLACHLAN: I know --

THE COURT: -- it's just not making any sense to me that --

MR. MCLACHLAN: My Lord, I see that this is an uphill battle and I'm trying my best to convince you.

[84] I am of a similar view. I see no merit in this argument and would not accede to it.

iii) Pay When Paid

[85] In the further alternative, Great Circle says that it had no obligation to pay Metro until it was paid by MOTI and so interest should not run until that date. Great Circle did not receive payment from MOTI for the paving work until January 16, 2013, when the full amount minus the holdback was deposited into its account. The holdback amount was deposited on January 24, 2013. It will be recalled that the judge awarded interest from August 31, 2012, that is, five months earlier than Great Circle received payment.

[86] Great Circle relies on clause 4 of the Subcontract, which suggests that it was not obligated to pay Metro until it was paid by MOTI. It follows, Great Circle argues, that no interest is payable before that date. I repeat clause 4 of the Subcontract here for convenience:

4. FINAL PAYMENT: Upon the happening of all the following events (unless otherwise stipulated in writing): completion of the Work, payment therefor by the Owner [MOTI] the Sub-contractor shall be paid the remaining amount due the Sub-contractor hereunder. Final Payment as herein provided shall release the Contractor from any further obligation whatsoever in respect of this Agreement.

[Emphasis added.]

[87] In oral submissions, the judge considered this position and noted the unfairness of depriving the Subcontractor interest where the delayed payment from MOTI to Great Circle arose from disputes that had nothing to do with Metro. In an exchange with counsel for Great Circle, he said:

THE COURT: Okay. Then there seems to be some dispute between your client and the Ministry in some fashion of which I know nothing that suggests that the payments are not received for a long period of time. Why should Metro have to wait and not earn any interest because the general contractor is having a dispute with the owner? Because the evidence before me, I think, is that once these progresses go in, they get paid unless there's something -- unless there's some dispute --

MR. MCLACHLAN: Once the progresses get finalized --

THE COURT: Yes.

MR. MCLACHLAN: -- they get paid.

THE COURT: Right.

[88] At trial, Metro countered this argument by relying on Schedule A, which was attached to the Subcontract and which also governs the terms of payment by adding the additional payment term:

Final payment is due within 30 days of the earlier: (1) the last invoice date (2) the last day of work by the company.

[89] Relying on this term, Metro argued that final payment was due 30 days after the date of the last invoice. As indicated above, this position is problematic because corrected invoices were never issued following Metro's agreement with MOTI to take a reduced rate of pay for the deficient sections. The trial judge was alive to these issues. In colloquy with counsel for Metro, he said:

THE COURT: Well, how can -- how can you claim payment for, for example, Corbin Road prior to the date at which it was finally agreed what would be paid for Corbin Road? And likewise, how can you demand payment for Highway 3 at a date prior to the time it was settled how much you were going to be paid?

MR. HALL: I think, My Lord, in many respects this -- we have to -- you have to make the best of something of a contractual mishmash.

THE COURT: Mm-hmm.

MR. HALL: And in my submission what happened in early October 2011 with respect to Corbin Road and what happened in March to May 2012 with respect to Highway 3 and those deductions were adjustments on the price or adjustments on the amount, but the amount was due when the -- when the work was done and the invoice was created and 30 days had passed.

THE COURT: So, you're saying the obligation on Great Circle is to pay pursuant to the contract within 30 days even if they know that the paving has failed?

MR. HALL: I would say this, that -- that when it is determined what the amount is, one looks back to the date that payment, whatever it was, was due and apply whatever interest or penalties there might accrue --

THE COURT: Okay.

[90] The clause in the Subcontract and the additional payment terms in Schedule A appear to conflict and they create, in the words of trial counsel, a contractual "mishmash" or "quagmire".

[91] As noted already, Metro made no written or oral submissions on this point on appeal. The judge did not explain in his reasons for judgment the basis upon which he determined that interest should run from August 31, 2012. The potential events and dates that would entitle Metro to payment are: the last day of work, which was when Metro finished repaving a deficient section on September 18, 2011 (based on Schedule A to the Subcontract); the last invoice date, December 31, 2011, (based on Schedule A); the date on which MOTI issued its progress estimate reflecting the agreements with Metro to take a reduced rate of pay on the deficient sections, June 19, 2012, (the date of the agreement by Metro to take a reduced rate); or the dates MOTI paid Great Circle, which are January 16 and 24, 2013 (based on Subcontract Clause 3).

[92] The question to resolve is which of these conflicting contractual provisions should prevail. There is no dispute about the underlying facts. Consequently, this Court is, if necessary, in as good a position as the trial court to resolve the issue.

[93] In my view, the trial judge was correct to note the unfairness of relying on the last invoice date. It was issued before the agreement to take a reduced rate of pay was finalized. Metro never did formally issue a corrected invoice. The judge was also correct to note the unfairness of relying on the date at which MOTI paid Great Circle. MOTI's payment to Great Circle was delayed owing to disputes that had nothing to do with Metro.

[94] In my view, the payment obligations can be seen to have crystallized once MOTI issued their draft progress estimate on June 19, 2012. This point was made in the alternative by Metro in submissions at trial:

MR. HALL: But if you're not with me on that, My Lord, then I say this, that the payment is due when the amount is progressed and the -- all of the paving amounts were progressed on June 19th, 2012. That is when all of these issues had been -- had been determined, the --

THE COURT: What date is that?

MR. HALL: It's June 19th, 2012. That's when Mr. Greg Smith issues his progress number 16 and if I recall correctly, drafts supplemental agreements as well to modify the agreements and I say that's when the Ministry said, "All right, the amounts due for paving are X and Y and Z", and that has to be the date -- the latest date I say that amounts were due to Metro.

[95] Thus Great Circle knew how much it owed Metro by June 19, 2012. Mr. Sims indicated in cross-examination that the issues with the paving deficiencies and payment were resolved by June 19, 2012. As such, in my view the contractual term "the last invoice" date can be construed as this date and as such it triggers the obligation for final payment. Payment would be due 30 days from this date. This is very close to the date selected by the trial judge, a difference of only about six weeks. Although the judge did not explain the basis for his decision that interest should run from August 31, 2012, it is so close to June 19, 2012 (plus 30 days), that I would infer the judge reached a similar conclusion. I would not disturb the order made by the judge in respect to the date from which interest is payable.

D. Did the judge err in his award of the penalty for 61 days of delay to Great Circle?

[96] Did the judge err in his award of the penalty for 61 days delay to Great Circle? Answering this question requires consideration of the judge's findings that Metro was not responsible for delay in 2010; that Metro was contractually required to attend the job site in May 2011; that Metro was not entitled to a clear run of work in 2011; and that Metro's defective work contributed to delay.

[97] The conflicting evidence as to the responsibility for the delay consumed most of the testimony and submissions at trial and on appeal. Metro contends with considerable vigour that the fault lies with Great Circle. The standard of review is a highly deferential one. The judge weighed the competing submissions and conflicting evidence on the responsibility for delay, but ultimately divided fault as he saw fit. I am not persuaded that he made a palpable and overriding error. For the following reasons I would not disturb the judge's factual findings.

[98] Metro and Great Circle both dispute the judge's award of compensation for 61 days' delay to Great Circle. Metro says in its appeal no penalty at all should have been assessed against it, on the basis that it was not responsible for the delay. Great Circle says not only did the judge not err in awarding a 61-day penalty but he should have awarded Great Circle up to 132 days of penalty. As this last ground of appeal and the cross appeal rest on the same findings I shall consider them together and chronologically.

i) 2010

[99] I begin with the judge's findings about the cause of delay in 2010.

[100] The paving work could not be done by the September 30, 2010 date specified in the contract because the preparatory work had not been done.

[101] On October 28, 2010, the project was prepared for winter layup and went into hiatus.

[102] The judge dismissed Great Circle's delay claim for 2010. Metro says that the judge made no error. Metro relies particularly on the evidence of Mr. Biggin-Pound, (a Great Circle witness), who conceded in cross-examination that fall was a problem for paving and that Corbin Road was not ready to pave until after November 5, 2010.

[103] As there was evidence, including testimony from Great Circle's own witnesses, that supported the judge's conclusion, I would not accede to Great Circle's cross appeal that the judge made a palpable and overriding error in dismissing the claim to a penalty in 2010.

ii) 2011

[104] As already noted, there are three aspects to the delay claim in 2011.

a) May 30

[105] The first is Great Circle's contention that Metro failed to attend the job site on May 30 as it was contractually required to do. The judge summarized the evidence at para. 15:

As for 2011, Hickey confirmed that Metro agreed to mobilize for paving by 30 May but the condition was that they had to be paid for their outstanding work in November 2010. In November 2010, as a result of delay and as a result indirectly of a failure of a bypass constructed by Great Circle, it was necessary for paving to be done to get the road drivable for winter traffic. That paving was done by Metro. Hickey testified that because Metro was not paid for the November work until June 2011 they did not appear on-site until June 2011.

[106] The trial judge made the following finding at para. 50:

The difficulty here of course is that Metro's paving was sub-standard and caused additional and considerable delay. Some but not all of that delay was associated with the poor quality of paving done by Metro and their delay in attending to the project when requested by the 30th of May 2011 as opposed to the middle of June 2011.

[107] I have made several references already to the conflicting evidence on this point. The evidence of Mr. Sims, for Great Circle, supports the contention that Metro had agreed to begin paving on May 30. However, Mr. Hickey, the principal of Metro, testified that Metro agreed to show up on May 30 only if the road was ready for paving and if payment for outstanding work was settled. The evidence of Mr. McCarthy, Metro's project manager, supports the contention that Metro would mobilize by May 30, but it is unclear from his evidence whether this was for paving or grading work. He also testified that mobilization was conditional on payment for the previous work. Finally, Mr. Biggin-Pound testified that the May 30 date was proposed by Metro as the date by which they would be ready to pave. He did not testify that the willingness to commence work was conditional upon payment.

[108] The evidence on this point was conflicting. It is not quite clear if the judge accepted the submission that Metro refused to begin work until it was paid its outstanding invoices, or if the judge thought such a condition was a breach of its contract. Even if the judge made a palpable error in this regard, I find that in the overall attribution of responsibility for the

delay in 2011 it is not an overriding error. The judge did not attribute specific delay to specific contributors. Doing so was likely impossible. He took a more holistic view of the multiple causes of delay.

b) A Clear Run at the Work

[109] The second area of delay concerns what Metro refers to as its entitlement to a clear run of work.

[110] Metro contends that at law this type of contract entitles the contractor to a clear run of work. I disagree. The only appellate authority Metro cites for this proposition is *Penvidic v. International Nickel*, [1976] 1 S.C.R. 267, in which Spence J. writing for the Court adopted the following passage from *Hudson's Building and Engineering Contracts*, 10th ed. (1970) at 276:

Since a sufficient degree of possession of the site is clearly a necessary pre-condition of the contractor's performance of his obligations, there must be an implied term that the site will be handed over to the contractor within a reasonable time of signing the contract, and, in most cases, it is submitted, a sufficient degree of uninterrupted and exclusive possession to permit the contractor to carry out his work unimpeded and in the manner of his choice. This must particularly be so when a date for completion is specified in the contract documents.

[111] This passage only supports the contention that, in most cases, a sufficient degree of uninterrupted and exclusive possession of the site is required to permit the contractor to carry out his work unimpeded and in the manner of his choice, and that that is particularly so when a date for completion is specified in the contract documents. I note also that Metro does not cite the passage in full. It begins:

The degree of possession or access which must be afforded by an employer must obviously vary with the nature of the work (which might, for instance, in an extreme case be for repairs or reinstatement of existing premises while still occupied) or other circumstances (as in subcontracts, when the work often must take place alongside and subject to interference by other trades or the main contractor's own work). But in the case of a new project the main contractor will normally be entitled to exclusive possession of the entire site in the absence of express stipulation to the contrary.

[112] The passage, in full, clearly indicates that the degree of possession necessary is fact-dependent.

[113] As McLachlin J. (as she then was) indicated in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 at 1009, implying a term into a contract based on industry custom requires

evidence to support an inference that the parties to the contract would have understood such a custom or usage to be applicable; terms are implied in this manner on the basis of a presumed intention.

[114] The trial judge considered and rejected the argument by Metro that there is an implied term in this type of contract that a contractor be given a clear run of the work. Particularly in light of Sattva Capital Corp., which holds that questions of contractual interpretation are questions of fact or mixed fact and law, the implication of a term into a contract is always a question of the objective intentions of the parties and is by necessity a fact-driven exercise requiring evidence to support the inference that the parties intended the term to be implied. In my view, the judge was not wrong on these facts in rejecting the submission that, after May 30, 2011, there was an implied term of the contract that Metro would be given unimpeded access to the work site.

c) The Poor Quality of the Paving

[115] The third aspect of the delay claim in 2011 was attributable to Metro's poor quality of work. The judge was alive to the multiple causes of delay and the interaction between those causes. I would not interfere with his findings.

d) Overall Delay

[116] It was clear from the evidence, the submissions made at trial and the submissions made on appeal, as well as the reasons for judgment, that this project did not proceed smoothly or efficiently. There were multiple contributors to the project's very significant delay. The judge heard and considered the evidence. The arguments on appeal essentially ask this Court to reweigh and reconsider the evidence. The standard of review requires Metro (and Great Circle on the cross appeal) to identify palpable and overriding errors made by the trial judge. This means that the errors are plainly seen: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 6. Although it is possible to say that the weight of the evidence might support a different view than the one taken by the trial judge, that alone is not sufficient.

[117] I would not interfere with the judge's findings of fact or interpretation of the contract with regards to the reasons for delay and the responsibility for the delay. I would not accede to these grounds of appeal.

E. Did the judge err in holding that the parties should bear their own costs?

[118] Success was mixed in the court below. The quantification of the judgment is set out above at paras. 17-18. Although the judge left the math to the parties, by my calculation after all claims, counterclaims, and interest at 5%, are taken into account, Metro was awarded approximately \$110,000 after trial.

[119] The judge concluded that each party should bear its own costs. Further, the judge invited the parties to make further submissions on this point should they disagree. Neither party did so.

[120] However, the result on appeal has varied the amount owing to Metro quite significantly. Although the parties will conduct a more precise calculation, by mine the value of the increased rate of interest is about \$186,000. I would therefore award Metro its costs throughout.

VII. Disposition

[121] I would allow the appeal in part.

[122] I would award Metro 18% interest per annum on the late payments by Great Circle. Interest runs from August 31, 2012.

[123] I would dismiss the remaining grounds of appeal and the cross appeal.

[124] Metro is entitled to its costs at trial and on appeal.

"The Honourable Madam Justice Garson

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Madam Justice Fenlon"

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