

CANADA / JUDGMENT

Okanagan-Similkameen (Regional District) v. Associated Engineering (B.C.) Ltd.

2015 BCSC 909

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 909 Okanagan-Similkameen (Regional District) v. Associated Engineering (B.C.) Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Okanagan-Similkameen (Regional District) v. Associated Engineering (B.C.) Ltd.,

2015 BCSC 909

Date: 20150601

Docket: 34457

Registry: Penticton

Between:

The Regional District of Okanagan-Similkameen

Plaintiff

And

Associated Engineering (B.C.) Ltd.

Defendant

Before: The Honourable Mr. Justice Sigurdson

Reasons for Judgment

Counsel for the Plaintiff:

K. Martin

A. Wu

Counsel for the Defendant:

C. A. Wallace

K. Yawarski (A/S)

Place and Dates of Trial:

Penticton and Vancouver, B.C.

May 7-11, 23, 2012, and February 2, 2015

Place and Date of Judgment:

Penticton, B.C.

June 1, 2015

Introduction

- [1] The plaintiff, the Regional District of Okanagan-Similkameen (the "Regional District"), claims damages for breach of contract and negligence against Associated Engineering (B.C.) Ltd. ("Associated Engineering") arising from alleged breaches of professional duties in connection with contracts for certain roadwork performed as part of the Naramata Water Supply 2005 Improvements Project.
- [2] The Regional District, as part of that project, installed new water mains in roads owned by the Ministry of Transportation (the "Ministry"). The water main installation essentially consisted of excavating a trench on the roads, installing the new main, backfilling the trench, placing surface gravel and new asphalt, and doing ancillary works. The plaintiff had obtained some funding from the provincial and federal governments and also made an agreement with the Ministry that is significant in this case. Under that agreement the Ministry made a contribution of \$200,000.00 to the cost of the project and as a result the paving on the roads was generally over the full width of the road rather than repaving only part of the road by using a trench and patch system.
- [3] There were about 800 households connected to the water system in the affected area.
- [4] Regrettably, in what otherwise appears to have been a successful project, there were, from the plaintiff's perspective, some cost overruns that it says were the defendant's fault. The plaintiff says that it relied on a negligent estimate by the defendant in making its cost-sharing agreement with the Ministry and it alleges that as a result it paid for a portion of the work that ought to have been the Ministry's responsibility. The plaintiff also alleges that excessive amounts were paid to the contractor for gravel and asphalt and that the defendant was negligent when it recommended a change in the manner of doing the work which ultimately increased the cost to the plaintiff, rather than decreasing it as the defendant had advised.

- [5] The defendant denies that it provided a negligent estimate, or that the estimate was for the purpose the plaintiff now alleges. The defendant further denies that the plaintiff suffered any loss and says that the overall cost to the plaintiff was less than it would have been had the cost-sharing arrangement with the Ministry not been made. The defendant acknowledges that it made a mistake in costing the change order but says there was no loss suffered by the plaintiff. The defendant further says that the error made no difference and caused no loss to the plaintiff, because the change was inevitable and the Ministry had ample funds in the budget to cover the increase in the contract cost. The defendant denies that there was gravel improperly or unnecessarily paid for but says that it authorized payment for gravel to the contractor in accordance with the contract. The defendant also disputes that there was excessive asphalt or that the plaintiff has demonstrated that there was any loss in that respect.
- [6] This case was originally heard by another judge but he became incapacitated and was unable to deliver reasons for judgment. Accordingly, the Chief Justice assigned me to decide this case. I met with counsel and advised them that I had listened to the tapes of the trial and read the exhibits and arguments. I then had the benefit of further oral and written submissions from counsel.

Facts

- [7] Naramata is within the Regional District of Okanagan-Similkameen. The Regional District, at the behest of the Interior Health Authority, was directed to improve the standard of water, as it had been under a permanent boil water advisory. The plaintiff accordingly undertook a water improvement project to improve source water quality.
- [8] There were two main contracts on the Naramata project, one for pumps and another for piping works. When the Regional District puts in water mains, as in this project, it is required to take up the existing paving on a road if the pipe goes under that road. In this case, the affected roads are under the management and jurisdiction of the Ministry.
- [9] Mr. Andrew Reeder, a professional engineer, was the project manager for the Regional District.
- [10] In early June 2005 the plaintiff entered into a consulting services contract for the project with Associated Engineering (the "Engineering Agreement").
- [11] The original intention of Mr. Reeder was to use the "trench and patch" approach, which involved removing and resurfacing only the portion of a road under which the pipe is laid. However, in this period there were discussions between the defendant, the plaintiff and the Ministry concerning full width paving as opposed to trench and patch paving, as this would make a better road surface. Mr. Rusty Hewitt of the Ministry approached Mr. Reeder, and advised that the Ministry was prepared to contribute to the paving work on Ministry roads, on the basis that this would result in better roads with fewer cuts to the roads and uniform surfaces - essentially new roads - at a less than full cost to the Ministry.

[12] The general idea behind the cost contribution was that instead of installing the pipes in a trench and patching over them, the new pavement would cover the entire road surface and the cost would be shared between the Regional District and the Ministry.

[13] The Engineering Agreement between the Regional District and Associated Engineering contained term 1.2, which described the contractual duty and applicable standard of care as follows:

in performing the services under this agreement, the consultant shall, at all times, act in the best interests of the Regional District and exercise that degree of professional skill, care and diligence required according to generally accepted professional planning standards applicable to the performance of such services.

[14] The plaintiff asserts that that the professional services the defendant was to provide under the terms of Schedule A to the Engineering Agreement included but were not limited to the following (I will set out the plaintiff's description from its argument followed by the relevant provision of the Engineering Agreement):

(a) working with the Regional District to control the scope of the project and to ensure that Project costs fell within the Regional District's stipulated budget:

3.5.2. The consultant shall ensure that there is a clear understanding of the conceptual works with the RDOS and the scope of the design prior to his/her commencement of the pre-design. A pre-design report must be created and submitted to the RDOS, the Interior Health Authority, and the Director of Municipal Engineering Services Branch for the Ministry of Community, Aboriginal and Women Services for review and approval.

(b) preparing detailed design drawings, specifications, and contract packages in order to tender the Project work, including estimating the quantities for the various components of the work for the purposes of tendering a unit price contract for that work:

3.8.6. Produce drawings specifications and contract packages in order to tender the project. Drawings and specifications will accurately depict the design, constructability, safety concerns (i.e. WCB), and environmental issues. The tender packages shall include but not be limited to:

- Title Pages, Index Plans, Site Plans
- "Structural, Electrical, Mechanical and Civil Drawings, including all detail drawings
- Controls and Instrumentation
- General and Supplementary General Conditions, Form of Tender, Technical Specifications
- Geotechnical Data
- Agreement

- (c) preparing and submitting Class "B" cost estimates at 100% completion of the detailed design of the Project to within plus or minus 10%:

3.8.11 Submit Class "B" Cost Estimates at the following stages of Detailed Design:

- "50% completion (+/- 20%)
- 100% completion (+/- 10%)

- (d) administering contract drawings and construction contract documents for the Water Main Replacement Work, including the change provisions thereof:

3.10.4 Review and comment on shop drawings, Change Order requests, and Progress Payment Requests. Submit all approved requests to the RDOS for processing.

- (e) full-time inspection at specific stages of the construction including backfilling and pavement placement:

3.10.8 Provision of qualified resident personnel acceptable to the Regional District, at the project site(s), to carry out the services as specified immediately below, without relieving the Contractor of his contractual and other legal obligations in respect thereof:

- To inspect all pipe, material and equipment prior to installation
- Full-time inspection at the time of all pipe and equipment placement
- Full-time inspection at the time of bedding placement, pipe laying and back filling
- Full-time inspection during pavement placement and during street pavements
- Inspection during installation of all connections to water mains, sewers, manholes, valves, hydrants or services
- Inspection during excavation and/or exposing of all underground services, structures, or facilities
- Witness and certify the testing of water mains and equipment
- Verify the validation and confirmation of UV equipment
- Inspect all excavations to determine soil adequacy prior to installation of base and sub-base courses for street pavement
- Inspect, adequately test, and accept each course in the installation of base sub-base courses prior to placement of the next course for street pavement.

[15] In the summer of 2005, Mr. Reeder spoke to Mr. Harvey of Associated Engineering about a method to apportion costs between the Ministry and the Regional District. Associated Engineering was asked to look at a method to apportion those costs based on the width of the theoretical trench and the width of the road. Mr. Harvey created a spreadsheet and came up with a cost estimate.

- [16] By the end of September 2005 the Ministry had advised the Regional District that their budget to contribute to the work was around \$200,000.00.
- [17] Although prices had not yet been obtained from contractors, Mr. Harvey presented the plaintiff with an estimate showing a division of 53.5% to 46.5% as the anticipated cost split between the Regional District and the Ministry, respectively.
- [18] In November 2005, Mr. Harvey emailed Mr. Reeder, saying that he had calculated the Ministry's portion of the paving costs at \$219,000.00, noting that these were estimates and preliminary numbers.
- [19] By November 2005, bids from the contractors had been received and H&M Contracting Ltd ("H&M") was the low bidder on the contract for the construction of the new water supply lines. The tenders were on a unit price basis.
- [20] Based on the tender prices, the defendant estimated that the Ministry's share of paving costs was \$218,900.00.
- [21] In late November 2005, Mr. Hewitt said that the Ministry's \$200,000.00 contribution figure was firm. Mr. Reeder responded that the Regional District was also not prepared to go over their estimated figure.
- [22] The scope of the work for the contractor to perform for the plaintiff was varied on Mr. Harvey's recommendation so that the Ministry's share of the work was under \$200,000.00. The parties accepted this recommendation and it was agreed between the Regional District and the Ministry that outside the trench on local roads (as opposed to main roads), a layer of pavement would be put over the existing pavement (a pavement mat) rather than removing and replacing the existing pavement and underlying road structure. It was on this basis that the estimate of the Ministry's share of the work was reduced.
- [23] The construction contract between the Regional District and H&M was dated December 15, 2005. It was a unit price contract.
- [24] Under the construction contract, Associated Engineering was named the contract administrator and had certain contractually assigned duties. The provisions of the Master Municipal Construction Documents (the "MMCD") were incorporated in the unit price contract between the Regional District and H&M.
- [25] There was also a contract between the Regional District and the Ministry signed on December 16, 2005. It attached as Schedule A the cost estimate which provided that that Ministry's share of the cost of roadwork, engineering, and contingencies was estimated at \$199,245.75. The contract also provided that " the Province wishes for the Regional District to undertake the Upgrade utilizing full road width resurfacing of the Impacted Roads" and " will pay, to the Regional District ... \$200,000.00 in respect of the Resurfacing Works " and that the parties "acknowledge that the sum of \$200,000.00 is an estimate only, and agree that any funds remaining after the Resurfacing Works are complete will be utilized, as decided by

mutual agreement, on other local works". The contract between the plaintiff and the Ministry also provided that in undertaking the resurfacing works the Regional District would "follow the province's "Standard Specifications for Highway Construction (2006) and all applicable and current Ministry of Transportation design standards".

- [26] Mr. Don Greer, of Associated Engineering, was responsible for the construction review services and contract administration on what was referred to as contract 2, the piping contract.
- [27] To recap, on November 24, 2005 when the bids were received, Associated Engineering prepared an estimate of the cost to the Ministry of paving based on the unit prices. That estimate, based on a division of the cost of paving shared 46.5% by the Ministry and 53.5% by the Regional District, was \$218,900.00 for the Ministry's share of the work. Following discussions between Mr. Harvey and Mr. Hewitt, instigated at the defendant's recommendation, the scope of the Ministry paving work was changed such that the area outside the trench on the smaller local roads would receive a layer of pavement placed over the existing pavement (a pavement mat) rather than removal and replacement of the existing pavement and underlying road structure.
- [28] As noted, the final estimate of the Ministry's share, after the changes to the scope of work, was \$199,245.75.00. This estimate was attached as Schedule A to the December 16, 2005 agreement between the Regional District and the Ministry upon the satisfactory completion of the resurfacing works the Ministry agreed to pay \$200,000.00.
- [29] After the construction contract was entered into, but before construction had begun, the contractor H&M proposed a change to deal with the existing pavement from cold milling (where existing asphalt is ground off using a milling machine) to full depth reclamation (where the asphalt is pulverized and mixed with underlying materials and reused). Asphalt reclamation involves grinding the existing asphalt with the gravel base materials, compacting it down, and then placing the mat of new asphalt on top. On the other hand, cold milling is a process whereby the asphalt is ground up and put aside for later disposal instead of mixing it with the base materials.
- [30] By letter of February 1, 2006, Mr. Greer of Associated Engineering recommended to Mr. Reeder that the construction contract be changed to stipulate full depth asphalt reclamation rather than cold milling. This change was recommended by the defendant and was said by the defendant to be at an additional cost of \$12,725.00 but the Ministry would not agree nor would the Regional District.

- [31] The contractor subsequently proposed a similar change on the basis that the cost would be reduced by \$38,229.00. This change was recommended to the Regional District by Associated Engineering on the basis that there would not be any increase in the paving costs. The recommendation from Associated Engineering included advice that asphalt reclamation would result in savings, something that the Ministry indicated it did not care about so long as the work met the specifications.
- [32] Overall, the project appears to have been a success and, in fact, was an award-winning project. Further, with the agreement with the Ministry in place it appears the overall cost of the project was less than originally anticipated by the Regional District in the pre-tender estimate.
- [33] After the project was completed the plaintiff became concerned that the actual cost of the Ministry's share of the work was greater than estimated when the agreement with the Ministry was made, that the actual amounts paid for to the contractor for asphalt and gravel exceeded the anticipated quantities, and that the approved change order to full depth reclamation had increased costs to the estimated contract price rather than the advised reduction.
- [34] The defendant replied to the concerns of the plaintiff that it was normal for cost variations between the estimated and the actual quantities to occur in unit price contracts and that the overrun became evident because of the existence of the Ministry cost-sharing agreement. The defendant pointed out to the plaintiff that the actual construction costs were less than the tendered amounts including contingencies.
- [35] After asking the defendant to determine the share of the Ministry based on actual costs and the road as it was built, the plaintiff sent an invoice to the Ministry for an additional \$175,000.00 in August 2006. The Ministry refused to pay any additional amount for paving.
- [36] Although, the cost of full width paving was estimated at the pre-tender stage in the range of \$661,000.00, the roadwork component turned out to be slightly less than that and, with the \$200,000.00 contribution from the Ministry, the Regional District did better than anticipated in terms of the cost that it would have incurred, without the Ministry involvement, even if the work had been done on a trench and patch basis.
- [37] In terms of the additional costs that it says it incurred, the Regional District says that the defendant failed to monitor asphalt and gravel quantities on a daily basis, and as a result the cost of those items significantly exceeded the estimates. The plaintiff says that the defendant failed to call its employee Mr. Greer to testify at trial and asserts that, if called, Mr. Greer would have confirmed that the defendant failed to monitor asphalt quantities under the construction contract. The plaintiff's position is that the gravel overage and resulting cost is explained by the fact that the payment of gravel was approved in error by the defendant as a separate item when it should in fact have been included in the unit price for pipe and as a result there was a significant overpayment to the contractor.

The Four Claims

[38] The plaintiff's case was presented in four separate claims.

Claim 1

- [39] The plaintiff, in order to undertake full width paving, entered into the cost-sharing agreement with the Ministry that I have described. The plaintiff says that it asked the defendant to prepare an estimate and a basis on which the cost of the work was to be shared with the Ministry. The plaintiff says that the defendant negligently estimated the cost of the work that the Regional District performed for the benefit of the Ministry. As I have described, rather than installing water mains while only disturbing and repaving a portion of the asphalt on the Ministry roads, the Regional District negotiated an agreement with the Ministry whereby funds were provided so that after construction the full width of the Ministry roads would receive new pavement. The defendant proposed a formula which all parties accepted for sharing the costs, based on a proportional share of the paved road area, with 53.5% borne by the plaintiff and 46.5% borne by the Ministry. The plaintiff says it suffered a loss because the cost it incurred in performing the Ministry's portion of work exceeded the defendant's estimate of the cost of that work.
- [40] The plaintiff claims that the estimate given by the defendant as to the cost of the Ministry's share of the roadwork, attached as Schedule A to the agreement between the Regional District and the Ministry, was negligent. The plaintiff argues that the estimated share of costs of the Ministry should have been \$223,900.00, rather than the estimate prepared by the defendant which was approximately \$200,000.00 (the amount of the Ministry contribution). The alleged error in the estimate lay in not including some of the costs of the roadwork that the defendant knew would have to be incurred, resulting in an underestimate of the cost of the Ministry's share of the paving.
- [41] Based on field measurements of the work that was actually done, the plaintiff claims that an additional 9% of the paving should be attributed to the Ministry for its portion of the road. The plaintiff asserts that the proper assessment of the value of the additional scope of work done by the Regional District from which the Ministry benefitted, above its \$200,000.00 contribution, was \$74,525.00. Taking into account the 9% shift that the plaintiff says reflects the proper distribution of the costs, the plaintiff claims the sum of \$81,232.00. This is what it says are the increased costs paid by the Regional District for the benefit of the Ministry resulting from the negligent estimate. The plaintiff asserts that this sum represents the value of additional pavement restoration outside the trench on local roads.
- [42] The defendant denies that its estimate was negligent or that the plaintiff has suffered any loss. The defendant says that the plaintiff suffered no loss because it anticipated that the paving work, a small part of a much larger contract, would cost at least \$586,187.00 and perhaps as much as \$655,000.00, before the Ministry contribution of \$200,000.00. The defendant points to the report of its expert James Greatbanks, a professional engineer. He

estimated the price of the roadworks for a trench and patch project would be \$586,187.25, that the actual cost of the project on a full depth reclamation basis was \$665,349.90 and that with the contribution of \$200,000 from the Ministry the actual cost of paving that the plaintiff incurred was about \$467,000.00. This, the defendant says, is about \$120,000 less than the plaintiff would have spent on a trench and patch approach to the contract had the plaintiff done the job without the contribution of the Ministry. The defendant says this is the context that must be examined in order to determine if there was any loss suffered by the plaintiff.

- [43] The defendant denies that the estimate of the Ministry's portion of the work was negligent and says that the estimate was reasonable for the intended purpose. The defendant says it had a dual duty - first to ensure that the plaintiff would not pay more than it would have paid to do the work without the Ministry's involvement and contribution, and second "to see that the Ministry got value for its contribution to the project".
- [44] The defendant denies that it was negligent and says that the estimate fulfilled the purpose for which it was sought, which was to obtain a contribution from the Ministry of \$200,000.00 for the paving work which resulted in the costs incurred by the plaintiff being only about \$467,000.00.
- [45] Additionally, though the defendant denies that the estimate was negligent, it contends that based on the evidence it introduced about the actual work done, the value of the work attributable to the Ministry would be less than, not more than, \$200,000.00. In this respect it relies on the report of its expert, Mr. Greatbanks, which states that the share of the pavement surface costs attributable to the plaintiff should actually be in the range of about 71 to 88 percent.

Claim 2

- [46] The second claim is that the defendant negligently prepared and recommended a change order (change order No. 2) that was requested by the contractor. In doing so, the defendant advised the plaintiff that the change would result in a cost savings when in fact the cost of the asphalt work increased and both the plaintiff's and the Ministry's portion were impacted. Although the change order suggested a savings of \$38,229.00, the plaintiff says that the defendant should have predicted a cost increase.
- [47] The evidence indicates that the result of approving change order No. 2 was to increase the cost of the pavement restoration by \$91,812.00. The plaintiff's claim No. 2 is for \$51,046.00 which is calculated as the additional cost of \$91,812.00 less the reclamation costs of \$40,766.00 [\$37,400.00 +9%], which it asserts is already included in claim 1 as the cost of the additional work required to undertake full depth reclamation instead of cold milling. However, if for any reason claim No. 1 is unsuccessful the plaintiff says the total of the claim for the negligent advice in connection with change order No. 2 should be the full \$91,812.00.

- [48] The defendant does not deny that there was an error in recommending the change order as a less costly alternative, but says the plaintiff suffered no loss. First, the defendant says that there was more than enough money from the Ministry's \$200,000.00 contribution to pay for the increase in the contract price due to change order No. 2, and the agreement between the Ministry and the Regional District contemplated that all of the Ministry's contribution would be used by the plaintiff.
- [49] Moreover, the defendant says that the second claim also fails because the change was inevitable and therefore the error caused the plaintiff no loss. The defendant says the change and increased cost was inevitable because the contract called for a particular base course which was contrary to Ministry specifications and the change order would have had to be made in any event. As such, the defendant says that the plaintiff has not proven that the work could have been done for a lesser price.

Claim 3

- [50] The third claim arises from the alleged failure of the defendant to satisfy its obligation to monitor the delivery of material by the contractor and prevent cost overruns. The plaintiff claims the sum of \$27,650.00 for the total amount of asphalt paid to the contractor that was more than 10% in excess of the engineer's estimated quantities. The calculation of this claim is based on the cost of the actual quantity of asphalt, which is \$305,640.00 less \$277,989.80 (110% of the cost based on estimated quantities of \$252,718.00).
- [51] As to this claim, the defendant denies that the plaintiff suffered a loss or that the claim has been proven.

Claim 4

- [52] Fourth, the plaintiff claims the sum of \$83,194.00, which it says it improperly paid to the contractor as a result of the defendant's approval for payment to the contractor for gravel. The plaintiff's argument is that the gravel ought to have been included and paid for in the unit price for pipe, and the defendant negligently approved payment for the gravel in the trench as an additional item.
- [53] The defendant says the approval by its engineer for payment for gravel was proper and in accordance with the correct interpretation of the contract, which allowed for payment of gravel in the trench separately from the pipe, and thus that the plaintiff suffered no loss.

Discussion

- [54] The plaintiff's claim is in negligence and breach of contract for breaching the duty of care described in the Engineering Agreement.

- [55] There is generally no dispute that the defendant was required to exercise that degree of professional skill, care, and diligence required according to generally accepted professional standards. There are some particular provisions of the agreement between the plaintiff and the defendant that are relevant to some of the claims. However, the defendant disputes the characterization of the duty with respect to the estimate that is the subject of claim No. 1, and says that it fulfilled its particular duty it had with respect to the estimate.
- [56] This case presents some difficult questions regarding the extent to which the plaintiff has proven damages from the defendant's alleged breaches of its duty of care.

Claim No. 1

- [57] The issue in this first claim is the nature and existence of the duty of the defendant, whether the standard of care was met and, to the extent that it was not, whether the plaintiff has proven any loss.
- [58] The plaintiff's claim is that it entered into the cost-sharing agreement with the Ministry in reliance on what it alleges was a negligent estimate by the defendant of the Ministry's share of the cost of paving.
- [59] The defendant prepared an estimate that ultimately was attached to the agreement between the plaintiff and the Ministry under which the Ministry contributed \$200,000.00. It showed an estimated cost for the plaintiff performing the Ministry work of \$199,250.00 based on a division of cost (based on a theoretical trench) between the Ministry and the Regional District of 46.5% for the Ministry and 53.5% for the Regional District.
- [60] The defendant acknowledges that some items were missing from the estimate but says that the plaintiff's case is flawed in that it misconceives the purpose of the estimate. The defendant says that its duty was not to estimate the particular share of cost with specificity but to ensure that (a) the plaintiff was not out of pocket in its dealing with the Ministry and that (b) the Ministry's share of the cost was properly spent. Mr. Wallace, counsel for the defendant, contended that the defendant satisfied the duty that it owed to the plaintiff and the Ministry.
- [61] The defendant says that the objective of the agreement with the Ministry was cost neutrality. The Regional District was not looking to make a profit out of its deal with the Ministry, but it did not want to pay any portion of the Ministry's cost. Mr. Wallace argues that the issue is not the meaning of the agreement between the Regional District and the Ministry but whether Associated Engineering met its duty to its client the Regional District, and the crux of that question is whether it acted reasonably in all the circumstances. Mr. Wallace says that it was never intended that the costs of the parties be ascribed on the basis of a theoretical trench such as the one underlying the estimate. The estimate was simply used to arrive at a number and to obtain the \$200,000.00 from the Ministry. The defendant suggests that its duty was to prepare an estimate that ensured that the Regional District was not out of pocket as a result of the cost-sharing agreement, as compared to doing the project without the contribution of

the Ministry.

- [62] Mr. Wallace says that the plaintiff is trying to manufacture a case where there is none and cannot obscure the obvious fact that it got what it wanted out of its arrangement with the Ministry - a win-win result.
- [63] The history of the negotiations between the Ministry and the plaintiff shows that Associated Engineering suggested a proportionate share approach based on the theoretical width of the trench. In support of the position that the estimated trench fulfilled its role, to get the full amount of the proposed contribution by the Ministry, Mr. Harvey says that in effect the size of the trench was determinative of the Regional District's share. He suggests that an estimate with a more realistic trench (a wider trench) would have shown a greater percentage of the cost allocated to the Regional District. I did not see that Mr. Harvey was seriously challenged on his evidence that the trench was an aggressive calculation designed to give some advantage in the calculation to the Regional District.
- [64] However, I do not find the defendant's version of the alleged duty to be supported by the evidence. I do not accept the argument that the plaintiff's case misconceives the significance or purpose of the estimate. The evidence as a whole shows that the estimate was not simply a rough vehicle to justify or rationalize the Ministry's contribution to the project but was used to allocate the costs between the parties. The parties negotiated the scope of project work based on the estimates done by the defendant. As the variation to the proposed agreement between the Ministry and the Regional District demonstrates, the estimated amount of the Ministry work was used to shape, and in that case in fact reduce, the scope of the work to keep the contribution of the Ministry at \$200,000.00.
- [65] It is clear from the negotiations that the parties, including the plaintiff, were conducting themselves and negotiating the cost-sharing agreement on the strength of the defendant's estimate.
- [66] I find that the evidence shows that the plaintiff did not want to pay for the work that it felt was the responsibility of the Ministry. The Ministry, while it was prepared to contribute \$200,000.00 to the project, was prepared to and did reduce the scope of the work to its benefit rather than increasing the amount of its contribution. In that respect, the evidence shows that the precise amount of the defendant's estimate was of significance to both parties.
- [67] The parties' pattern of dealing with the estimates shows the reliance that both the plaintiff and the Ministry placed on the estimate. Accordingly, I find that the defendant owed the plaintiff a duty to use reasonable care in preparing its estimate of the share of the cost of the paving project between the plaintiff and the Ministry. I find that I do not have to conclude whether the defendant owed a duty of care to the Ministry as well.
- [68] I turn to the next issue; whether the estimate was negligent, in breach of the defendant's contractual duty of care.

- [69] The argument of the plaintiff is straightforward. It says that there were items related to the cost of the work for the Ministry that clearly ought to have been included in the estimate. The plaintiff adduced the expert evidence of Mr. Tom Hunt of McElhanney Engineering. His evidence was that the estimate excluded items that should have been included which would have put the estimate over \$200,000.00. I need not set them out; the fact that they were not included but related to the Ministry's share is not in dispute.
- [70] The evidence shows that Mr. Harvey was aware when he did the estimate that it left out certain essential items, and he was aware that there was a risk that the plaintiff would have to pay more than \$200,000.00 for the Ministry work.
- [71] I accept the evidence of the plaintiff's expert that, had the estimate been done properly, the additional items would have been included. Those items, if included, meant that the defendant's second estimate, the one alleged to be negligent, should have been 12% higher for a total of \$223,900.00 for the work relating to the Ministry.
- [72] An argument that must be addressed is how the estimate could be said to be negligent when it was only out by 12%, and plaintiff must have known, and I find did know, that estimates have some leeway. On that basis, it might be argued that the estimate was within a reasonable range and therefore was not negligent. However, the issue in the case at bar is not what a reasonable estimate of certain costs was but whether certain costs ought to have been included in developing the estimate. I accept the evidence of the plaintiff's expert witness Mr. Hunt that there were specific items that were excluded that ought to have been included, and I find that this error is recognized by the defendant and is not simply a matter of estimation or approximation.
- [73] There is no evidence that the estimate, at the time, of the division of work between the plaintiff and Ministry could be said to be negligent. The evidence at trial differs on whether the cost for the Ministry's share of the work was ultimately greater or less than \$200,000.00. However, apart from some missing items in the estimate that I have discussed, there is no basis to suggest, nor is any alleged, that the estimate was otherwise negligent.
- [74] Moreover, I find that even if the defendant prepared a conservative trench (or an intentionally narrow theoretical trench) for estimating cost allocation to ensure that the full \$200,000.00 was contributed by the Ministry, it would not be an answer to the plaintiff's complaint about the estimate. I find that the defendant did not tell the plaintiff that the estimate was generous to ensure the Ministry contribution was received, that cost items attributable to the Ministry were being left out or that there was a serious risk that the Ministry costs might well exceed the estimate.
- [75] The significance of the precision of the estimate was clear to the defendant. When it was \$19,000.00 over the figure of \$200,000.00, the estimate was relied on in order to adjust the work in the agreement between the Ministry and the Regional District to reduce the cost of the work for the Ministry to \$200,000.00.

- [76] Accordingly, I find that the defendant was negligent in not including items of cost it knew or ought to have known were attributable to the Ministry in preparing its estimate, and that amounted to negligence and a breach of the Engineering Agreement.
- [77] The more difficult question is the assessment of damages.
- [78] The plaintiff's position on damages is based on what it says is the proper division of the cost of the work between the plaintiff and the Ministry. The plaintiff says that had the estimate not been done negligently (and the missing items had been included) there would have been a revision in the scope of the work (as there had been when the first estimate of the Ministry's share was over \$200,000.00) and that the damages should be based on what the plaintiff says is a more accurate division of the respective costs between the plaintiff and the Ministry.
- [79] The plaintiff argues that its damages should be based on the work that it says it did for the benefit of the Ministry over and above the negligent estimate. It says that damages should be based on the analysis by the defendant at the end of the job of the actual cost, plus 9% to account for what the plaintiff asserts is the correct division of cost between the plaintiff and Ministry.
- [80] The damage claim by the plaintiff in respect of its first claim is explained by its expert witness Mr. Hunt, at pages 31 to 32 of his report:

Associated's calculation for area of pavement removed for the entire site was correct. During project delivery, Associated as the Contract Administrator should have protected the integrity of the funding agreement between the Regional District and the Ministry. It was clear that only \$200,000 worth of work should be provided for Ministry pavement upgrades. The Ministry was prepared to accept a pavement restoration program that limited the work to the cap of \$200,000.

As indicated earlier in this report, the change from cold milling of the asphalt surface on Robinson Avenue and Naramata Road only and pavement overlays on local roads, to full depth reclamation of asphalt and base gravels on all roads was at an increased cost. The work ultimately completed by the contractor resulted in a new pavement structure for all roads. The Ministry, by capping their funding, originally accepted a reduced pavement structure for all roads except Robinson Avenue and Naramata Road. In the end the Ministry got the full benefit of the original scope of work (at time of tender), with a \$200,000 cap.

Based on MCSL's original estimates for pavement restoration attributable to the Ministry, the Ministry received additional benefits for all local roads as follows:

- 6,875 m² (area of local roads) cold milling (total MoT pavement area highlighted in dark blue on page 12 less highlighted light green amounts in the same column) @ \$5.44/m² (reclamation negotiated price for pavement removal) for a total of \$37,400
- 100 mm depth of 25 mm Base Course gravel for the same 6,875 m² (6875 x 0.100 = 687.5 m³) @ \$54/m³ for a total of \$37,125.

The total of \$74,525, based on reclamation unit price for pavement removal, is the added benefit to the Ministry. However, this does not take into consideration the 9% shift in the cost share formula indicated earlier in the report. The 9% shift would result in further increased benefit to \$81,232. This total also does not address any quantity overruns and there are no cost allocations associated with additional depths for gravel and pavement over all roads.

The change from cold milling to full depth asphalt reclamation provided a higher standard of road for the Ministry improvements and will reduce maintenance costs to the Ministry over the life cycle of the road. Maintenance costs will be reduced and reconstruction costs will be deferred for many years.

The assignment of costs for the pavement restoration was confirmed in the Regional District's and Ministry's agreement, which assigned 53.5% to the Regional District and 46.5% to the Ministry based on area calculations. Associated's method for calculating the areas and costs were appropriate. After construction, a detailed calculation based on field measurements revised the cost share formula and shifted 9% more of the cost to the Ministry. This shift in cost allocations and final constructed quantities resulted in costs to the Ministry well in excess of the funding cap of \$200,000. The Ministry also received a higher standard of road construction.

- [81] The plaintiff's argument appears to be that adjustments would (or could) have been made to the agreement between the plaintiff and the Ministry had the plaintiff known the correct estimate of the cost of the Ministry portion of the work. The plaintiff says that based on the actual value of the work undertaken for the Ministry and the appropriate share of costs between the plaintiff and the Ministry, the measure of damages should be \$81,232.00.
- [82] I disagree with the plaintiff. In my view, the proper measure of damages is the loss that the plaintiff suffered by relying on a negligently prepared estimate by the defendant.
- [83] Had the plaintiff and the Ministry been told by the defendant at the time of the estimate that the Ministry share of the work was going to be 12% more than the amount that the Ministry was then prepared to contribute, a number of things might have occurred. The plaintiff could have sought a greater amount of contribution from the Ministry. The plaintiff could have reduced the scope of work by agreement with the Ministry so the Ministry portion was within a \$200,000.00 estimate. The plaintiff might have determined that in all the circumstances a \$200,000.00 contribution to the project by the Ministry was a sufficient contribution to the project and decided to generally go ahead with the full width paving on the basis that it in fact did.
- [84] I do not think that the fact that this project turned out well from the perspective of the Regional District because of the contribution of the Ministry means that the plaintiff suffered no damages. The defendant says there is no loss because actual percent of work attributable to the plaintiff was higher, and the overall cost to the plaintiff was less than it would have been if the Ministry had not been involved. The defendant's expert Mr. Greatbanks said:

By my calculation, using the as built drawings 71.3% of the pavement surface would have been lost to a trench and patch approach and, using the contract drawings 88.0% of the pavement surface would have been lost to a trench and patch approach.

As determined from the final progress payment the full depth reclamation costs were \$655,349.90 (exhibit 4).

Using the as built drawings 71.3% would be attributable to the RDOS (\$467,264.47) and 28.7% would be attributable to the Ministry (\$188,085.43).

Using the contract drawings 88% would be attributable to the RDOS (\$576,707.91) and 12% would be attributable to the Ministry (\$78,641.99).

[85] I accept that the evidence shows that the cost of the roadwork project to the plaintiff without the Ministry's contribution would have been higher than it was. However, that does not mean that the plaintiff has not suffered a loss as a result of the negligent estimate. The plaintiff had negotiated a contribution from the Ministry. It is entitled to the benefit of that contribution and is entitled to damages for any loss that it may have suffered from relying on the negligent estimate in entering its agreement with the Ministry.

[86] It has not been shown that the impugned estimate was inaccurate other than by not including items that total \$23,900.00. The complaint of the plaintiff under this particular claim is not that the estimate of the division of paving between the plaintiff and the Ministry was calculated negligently, or that the overall cost was not properly estimated, but only that the estimate that was relied on by the plaintiff was lower than it ought to have been by the cost of the excluded items, totalling \$23,900.00.

[87] The question is what loss, if any, the plaintiff suffered by relying on the negligent estimate. Clearly the cost to the plaintiff was lower than it would have been without the Ministry contribution, but that I do not think is the issue. The plaintiff was entitled to receive careful advice from its engineer in negotiating its agreement with the Ministry.

[88] I find that the evidence shows that if a non-negligent estimate had been made the project would have gone ahead with the Ministry contribution. The result of an non-negligent estimate might have been some modification of the scope of the work to reduce the cost of the work done for the Ministry, perhaps some greater contribution by the Ministry, or perhaps acceptance by the plaintiff of the possible additional share of the cost in recognition of the financial benefit to the project of the \$200,000.00 contribution from the Ministry. In determining damages, I have to assess the value of that lost opportunity to the plaintiff.

[89] Doing the best I can on the evidence I find that the plaintiff has lost a real opportunity by the error in the estimate but I find the loss is not in the range suggested by the plaintiff. Taking into account the contingencies that I have described, I assess damages for this claim at \$10,000.00.

Claim No. 2

- [90] The defendant had an obligation to review and comment on change order requests from the contractor. That much is not in dispute.
- [91] It is acknowledged by the defendant that it erred in recommending change order No. 2 to the plaintiff when the defendant ought to have known that the cost would be greater but told the plaintiff it would be less.
- [92] According to the plaintiff, the effect of the admitted error was not simply an increase in costs of \$47,000.00 above the contract price but, according to the expert witness Mr. Hunt, it was to increase the cost of the pavement restoration by \$91,812. This takes into account the earlier scope of work change following the initial estimates and according to the plaintiff also takes into account a detailed analysis of the impact of the move to full depth reclamation.
- [93] Mr. Hunt, explains this claim at para. 26 of his report:

Change Order #2 prepared by Associated, included on page 28, indicates a reduction in the overall contract price of \$38,229. However, the Regional District and the Ministry signed an agreement earlier that effectively reduced the scope of work for pavement restoration in the amount of \$122,041. MCSL's worksheet entitled "Change Order #2" on page 27 provides the net effect this change has on the reduced contract price after the \$200,000 Ministry cap is applied. Change Order # 2 should have been reviewed by Associated on the basis of the reduced contract scope. If this had occurred, Change Order #2 would have resulted in a net increase to the contract price by \$91,812. Not the reduced value of \$38,229. As well, this additional scope increased the cost for Ministry works because the Regional District's and Ministry's agreement had already eliminated the need to remove the asphalt on local roads and also increased the cost for pavement removal on Robinson Avenue and Naramata Road from \$3.70/m² to \$5.44 m².

The e-mails included on page 21 and 22, indicate that the Regional District was not prepared to pay more for the change proposed by the contractor for pavement restoration. However, it appears that the contractor was basing their projected cost savings on the original contract quantities, while the signed agreement between the Regional District and the Ministry reduced the contract quantities and resulting costs for pavement restoration.

Associated was aware of the reduction in the overall project quantities as they were the Contract Administrator and they prepared the quantity schedule and cost included in the Regional District's and Ministry's signed agreement. It appears that the reduced contract value for the reduced scope of work resulting from the Regional District's and Ministry's agreement was never formally communicated by Associated to the general contractor, otherwise the alternative pavement restoration program would have resulted in an increase in the contract value not a decrease as indicated by the issuance of Change Order #2.

- [94] The plaintiff says that the additional cost on the local roads is already included in its first claim, in the amount of \$40,766.00, and if claim No. 2 is allowed in full that amount should be deducted so that it is not duplicated in this part of the award.

- [95] The plaintiff says, and I find that the evidence supports, that it would not have approved any requested change by the contractor that increased costs.
- [96] The defendant essentially makes two points in answer to the claim that the plaintiff has suffered increased costs as a result of the change order: (1) that it was inevitable, and (2) that there was no loss because there was ample money in the budget from the Ministry to do this work.
- [97] I will deal with the latter point first. The argument is that even with the change order, the cost of the Ministry portion of the work based on the as-built drawings is less, according to Mr. Greatbanks, than \$200,000.00. According to Mr. Greatbanks, the cost of the roadwork using a cold milling approach, accounting for the need to dispose of the millings and import base course, would have been \$664,607.00.
- [98] I do not think there is merit to the defendant's argument that the plaintiff suffered no damage because there was money in the budget from the Ministry to cover this work and the agreement with the Ministry provided that all of its money would be used. The change order in question took place after the main contract was in place and after the agreement with the Ministry had been entered into by the Regional District. While the agreement that the Regional District had reached with the Ministry was clearly beneficial to the plaintiff, it was entitled to the benefit of that agreement as well as the benefit of its agreement with the contractor. It has not been shown by the defendant that the increased cost of this work was somehow covered by the Ministry money. The agreement with the Ministry, and amount of the contribution the plaintiff was to receive from the Ministry, were in place when the impugned change order was recommended.
- [99] I think the only real defence of merit to this claim is whether the plaintiff has proven that it suffered a loss by the defendant's error or whether, as the defendant puts it, the move to full depth reclamation was inevitable such that the change order would have been required regardless of increased cost.
- [100] The defendant's argument was that although the contract called for millings or "well-graded base course" to be used in the base course, this was contrary to the Ministry specifications and millings would not meet the requirement for well-graded base course. Since the millings were not permitted under the specifications and because the agreement between the Regional District and the Ministry requires the Regional District to follow Ministry specifications, the plaintiff would have had to accept a change order for the cost of their disposal. In other words, the change order of which the plaintiff complains would have come about in any event.

- [101] The plaintiff disputes that the move to full depth reclamation was inevitable. It says that the evidence shows that the change order was not inevitable. In particular, the plaintiff points to, (a) the notes of a September 2005 meeting that indicated that the Ministry would prefer to have the existing surface course milled throughout the project and reused as a base course and (b) the fact that attached as Schedule A to the Ministry agreement with the Regional District is the phrase "cold milling - to full depth and re-spread as base course".
- [102] I find that the evidence shows that change order No. 2 was not inevitable.
- [103] The evidence persuades me that the plaintiff has suffered a loss arising from the negligent recommendation of the change order. The evidence shows that if the cost to the Regional District had been shown as increased rather than decreased, it would not have approved the change order.
- [104] I find the evidence of Mr. Hunt also supports the position that millings are acceptable for use as an alternative material to well-graded base course provided that it is approved by the Ministry, which I find to be the case in this instance. There was no evidence that cold-milling was unacceptable to the Ministry. In fact, the evidence indicates the reverse. The plaintiff's counsel asks me to draw an adverse inference from the fact that Mr. Greer of the defendant and the responsible party would have given evidence if the change was inevitable. I find that I need not draw an adverse inference from his failure to testify, as on the evidence I am satisfied the change was not inevitable. The plaintiff is therefore entitled to damages for the loss it suffered from the negligent preparation and advice in connection with this change order.
- [105] In terms of damages, the plaintiff conceded that if I awarded the amount of the first claim I should deduct an amount from the second claim to avoid duplication. As I assessed damages under the first claim at \$10,000.00, I allow this claim in the amount of \$80,000.00 to avoid duplication.

Claim No. 3

- [106] The plaintiff asserts that under the Engineering Agreement the defendant was required to provide inspection services, and that under the incorporated conditions in the MMCD the quantities provided by the contractor were to be measured by the defendant, as the contract administrator, on a daily basis. The allegation is that the asphalt quantities were significantly over the estimated amounts in the construction contract, that they were reasonable estimates at the time but that as a result of the defendant's breach of contract the plaintiff paid more than it ought to have paid for asphalt.
- [107] The claim is for \$27,650.00.
- [108] The Engineering Agreement requires the defendant to provide an estimate of quantities at the time of the tender within a range of plus or minus 10%.

[109] Although the claim is explained by the plaintiff's expert in terms of the alleged share of the cost between the Ministry and the plaintiff, the claim here is really for the asphalt overage that was caused by the alleged breach of contract by the defendant. The plaintiff's claim is for the cost of additional asphalt that exceeded 10% over the estimate. In his expert report, Mr. Hunt describes the claim as the amount paid for asphalt (\$305,640.00) less the amount of 110% of the estimate (\$277,989.00) equalling an amount of \$27,650.00.

[110] Mr. Hunt described this asphalt overrun claim as follows:

A brief review of the tender quantities related to final payment quantities indicated that the original estimates by Associated were reasonable but quantities for asphalt and 25 mm Base Course gravel had overruns.

There appears to be an excess of asphalt placed on the site over what was required under the contract terms. Much of this additional pavement is in areas outside of the Regional District's restoration work and has been allocated, by Associated, to the Ministry's portion of the work. The contract required the contractor to weigh the asphalt and make payment by the tonne. The depths of asphalt recorded during quality control testing does not equate to the tonnage of asphalt actually placed. Based on the document review completed by MCSL there is no explanation for the overrun.

The first area of concern is the quantity of asphalt placed on the project. MCSL's estimated asphalt quantity for Robinson Avenue and Naramata Road for Ministry pavement restoration was 758 tonnes (worksheet page 12 column entitled MoT Pavement (t) shaded in light green). Similarly, the Ministry's share of asphalt required on local roads was 826 tonnes (worksheet page 12 same column as listed above with orange shaded number minus light green) for a combined total of 1,584 tonnes. MCSL and Associated both assumed each cubic metre of asphalt weighted 2.4 tonnes (reference A #2339). Quality control testing during construction confirmed that each cubic meter of asphalt was 2.3 tonnes/m³ (reference A #3555 to #3557) which is 4.3% lighter. Applying this factor to the estimated volumes results in the total estimated asphalt volume for Robinson Avenue and Naramata Road at 727 tonnes and local roads at 792 tonnes (1,519 combined). As provided by Associated in Schedule A to the Regional District's and Ministry's agreement (insert Schedule A page 7), the Ministry's share of asphalt for local roads was estimated at 960 tonnes and the Ministry's share for Robinson Avenue and Naramata Road was 630 tonnes for a combined total of 1,590 tonnes for all Ministry roads. The actual quantity of asphalt placed on all Ministry shared roads was 2074 tonnes (insert page 30). This means that the asphalt quantities actually placed on the Ministry's portions for road upgrades were 36% greater than the original volumes estimated by MCSL and Associated.

The contract quality control program included asphalt core tests, which records actual pavement thicknesses (reference A #3555 to #3557) showed an average thickness for this project at 56 mm rather than the 50 mm specified in the contract. This equates to a 12% overrun on asphalt volume throughout the project. The total estimated asphalt overrun on Ministry roads is 36%. As indicated earlier in the report, the cost sharing distribution between the Regional District and the

Ministry increased the Ministry's share of pavement restoration by 9%. The 12% overrun in depth of asphalt plus the 9% shift in responsibility identifies 21% of the 36% increase in the Ministry asphalt quantities. Nothing in the documentation explains the 15% difference. For pavement restoration works, constructed quantities are generally within +/- 5% of the quantity estimates provided at time of tender.

[111] According to the plaintiff's argument, the effect of what Mr. Hunt is saying is simply that the total cost of the asphalt for the project was \$305,640.00, which exceeded the estimated quantities of \$252,718.00 by \$42,922.00, or 21%.

[112] The plaintiff says that the explanation for the overrun of asphalt is threefold: (1) increased thickness of the pavement from the original design (asphalt core tests showed average thickness for the project at 56 mm rather than 50, an increase of 12%); (2) the original road dimensions contained errors (which was admitted by Mr. Greer of the defendant); and (3) the lack of monitoring created a situation in which quantities which were not placed onsite could be billed for.

[113] The plaintiff's counsel argues that under the Engineering Agreement the defendant was required to provide full-time inspection services during the placement of the bedding pipe backfilling and pavement to ensure compliance with the construction contract. The plaintiff's counsel also argues that the defendant was required to collect sufficient information to ensure all components and features not observable from the surface were recorded. The plaintiff argues that section 1.1.3 of the MMCD, which contained the measurement and payment provisions incorporated into the contract with the contractor, required the weight measurements for all items delivered by truck to be verified by weight slips and all quantities to be measured on a daily basis.

[114] The plaintiff says that they requested that quantities be checked and received information that the quantities were on track. Mr. Greer, in his affidavit in response to interrogatories, said he did not recall if weight tickets were collected on a daily basis or not.

[115] The plaintiff's expert said this at pages 35 and 36 of his report:

Where full time contract administration services are not provided, which includes quantity surveyors and full time measurement staff, as is the case for this project, prudent engineering would dictate that the contract documents be prepared to recognize the reduced level of engineering services and alternative measurement and payment procedures would be defined to amend the MMCD payment method. Contract documents are often modified to specify measurement and payment by surface area, which allows quantities to be determined after construction. This also ensures the contractor does not get paid for placing a thicker mat of asphalt than what is specified in the contract. Associated's project management contract with the Regional District had shared inspection services between two contracts at the same time. This project clearly has a large overrun on the pavement quantities and gravel quantities resulting in additional payment to the contractor of \$135,410 over the expected scope of work provided in the original schedule of quantities, at time of tender.

As Associated did not have a full service contract with the Regional District, which would have provided sufficient resources to measure quantities and collect all supplied weigh tickets during construction, payment items in the contract should have been redefined to allow measurements of finished products by area. This would eliminate the additional payment for asphalt and gravel, as neat line calculations would be the basis for payment regardless of the work performed by the contractor.

- [116] Although the plaintiff has shown that the asphalt was thicker than required in spots, the evidence also indicates that this complaint must be tempered to some degree by the fact that the density of the asphalt was slightly below the contractual requirement. If the density conformed to specification, the thickness of the asphalt would be reduced, at least to some degree.
- [117] The plaintiff has to demonstrate that it has suffered a loss by the defendant's failure to monitor the asphalt quantities as required by its agreement.
- [118] From the plaintiff's expert, the precise nature of the duty of the defendant in these circumstances is unclear. The expert suggests that when engineering services are not provided prudent engineering would require modification of contract documents to allow quantities to be determined after construction.
- [119] Although the plaintiff has probably shown that there was more asphalt laid than estimated, I am not satisfied on the evidence that the plaintiff has proven that it suffered a loss because it has not shown to my satisfaction that the project could have been done at a cost for asphalt significantly different than it was or that the failure of the defendant to provide proper monitoring of the asphalt has resulted in increased cost to the plaintiff.
- [120] Accordingly, I find that this claim has not been proven on the evidence.

Claim No. 4

- [121] I turn now to Claim No. 4, the gravel claim. It is similar to the asphalt claim in that the plaintiff claims it paid for more gravel for the project than it should have, but involves a different matter of contractual interpretation.
- [122] The plaintiff claims the sum of \$83,194.00 on the basis that payment to the contractor for gravel was approved by the defendant when it ought not to have been. The issue comes down to a question of whether the proper interpretation of the contractual documents identifies certain gravel as a separate item for which payment should be made to the contractor, as it apparently was, or whether some of the gravel was not a separate pay item but should have been included in the unit price for pipe and thus payments were improperly authorized by the defendant.
- [123] The plaintiff's position is that the gravel should not have been authorized for payment to the contractor because it was included in the cost items for pipe.

[124] Mr. Hunt expressed the claim this way in his report:

In addition, the 25 mm Base Course gravel quantity is excessive. The 25 mm Base Course gravel final quantity is close to the total volume of gravel required under all pavements, which is contrary to the contract specifications. Gravel was supplied and placed based on volume calculated in m³. Associated's original estimates provided sufficient quantities to cover the entire pavement restoration areas. However, gravel placed within trenches is considered part of the watermain installation cost as defined in MMCD and if paid separately, may explain why there was a large overrun in gravel. Contractors are not usually paid for work done beyond the scope specified. The MMCD measurement and payment clause is inserted below:

[125] As stated, the answer to this claim depends on the interpretation of the appropriate provision for payment under the contract. Although Mr. Hunt's evidence on the meaning of the contract may be admissible on the issue of the appropriate standard of care for contract administration by an engineer, it is not admissible in my view on the question of the proper meaning of the contract. However, it is perhaps of some assistance in explaining why there was a large difference between the estimated quantity for gravel and the amount for which the contractor was paid.

[126] Mr. Hunt said: " gravel placed within trenches is considered part of the watermain installation cost as defined in MMCD and if paid separately, may explain why there was a large overrun in gravel."

[127] The plaintiff's argument is that measurement and payment are contractually required to be in accordance with the MMCD. As set out in Mr. Hunt's report, the relevant provision reads:

1.8 Measurement and Payment.

1 Payment for watermain will be made separately for various sections of watermain consistent with; pipe materials and diameters, depths of mains and backfill requirements shown on Contract Drawings and described under the individual payment items in the Schedule of Quantities and Prices.

2 Payment for watermain and service connection include saw cutting pavement, trench elevation, disposal of surplus excavated material bedding, supply and installation of all pipe, bolts, gaskets and tie rods, imported or native backfill as shown on the Drawings, cleaning, pressure and leakage testing, flushing, disinfection, all surface restoration as specified under Section 02223 - Sub-section 3.6, except permanent pavement restoration, and el other work and materials necessary to complete the installation as shown on the Drawings and specified under this Section.

Measurement for waterman will be made along centreline of man, through valves and fittings, with no deduction for length of valves or fittings, over surface after work has been completed.

[128] The contract contains supplementary conditions that the parties agree take precedence. They contain a similar clause, also numbered clause 1.8, and it provides as follows:

1.8 SUPPLY AND INSTALL 300 MM DIA. PVC DR35 RESERVOIR DRAIN PIPE IN COMMON TRENCH WITH 600 MM DIA. AND 300 MM DIA. WATER MAINS

.1 300 MM DIA. PVC35 pipe will be measured by lineal metres for installation in common trench with the 600/300 mm dia. water mains.

.2 Payment will include asphalt saw cutting where required, excavation, fittings and related materials, disposal to Contractor's disposal site, import or native backfill, surface restoration (excluding asphalt), cleaning all other work, materials and equipment necessary to complete the installation. Payment will be made at the Contract Unit Price specified in the Schedule of Quantities and Prices.

[129] Under clause 1.3 of the supplementary specifications, payment for contract items shall be full compensation for labour, materials, etc. for which separate payment is not provided elsewhere in the contract. It is the application of the last part of clause 1.3 that is in issue - is payment for gravel in the trench to be made at the unit price provided for elsewhere in the contract?

[130] The defendant's position is that its approval for payment was in accordance with the measurement and payment provisions of the contract. It says that the gravel that the plaintiff says ought to be included in the unit price for the watermain installation is in fact a separate pay item. It refers to clauses 1.14 and 1.15 of the supplementary specifications, which provide:

1.14 MoT - SELECT GRANULAR SUBBASE (SGSB) - VARIABLE THICKNESS FOR ROAD

.1 MoT select granular subbase (SGSB) will be to Ministry of Transportation specification. Measurement for SGSB of variable thickness will be measured for actual quantity placed in cubic metres. The volume for payment will be based on the length and average roadway width and depth.

.2 Payment will include supply of the select granular subbase material, placement, adjustment of moisture content, shaping and compaction. Payment will be made at the Contract Unit Price specified in the Schedule of Quantities and Prices.

1.15 MoT - 25 MM WELL GRADED BASE COARSE VARIABLE THICKNESS FOR ROAD

.1 MoT 25 MM well graded base coarse will be to Ministry of Transportation specifications. Measurement for well graded base course at variable thickness will be measured for actual quantity placed in cubic metres. The volume for payment will be based on the length and average roadway width and depth.

.2 Payment will include supply of 25mm well graded base coarse material, placement, adjustment of moisture content, shaping and compaction. Payment will be made at the Contract Unit Price specified in the Schedule of Quantities and Prices.

- [131] Although, as I noted, this is a matter of contractual interpretation rather than expert evidence, the position of the plaintiff expressed by Mr. Hunt is that the supply of trench gravel is incidental and according to the MMCD the unit cost payment includes everything but the asphalt. He explained that the gravel amount was 36% greater than specified and estimated in the contract. He noted however that with the Ministry contract in place, the estimated value for 25 mm crushed base gravel was \$69,552.00 and the total paid for 25 mm crushed base gravel was \$152,010.00. The plaintiff asks me to infer that the significance of this evidence of the amount paid for gravel and the amount in the original estimate for gravel is that the overage is explained by the inappropriate approval for payment by the defendant.
- [132] The fundamental principles of contractual interpretation are well settled, and were reviewed by Madam Justice D. Smith in *Grace Residences Ltd. v. Whitewater Concrete Ltd.*, 2009 BCCA 144:
- [23] The principles of contractual interpretation were considered in *Group Eight Investments Ltd. v. Taddei*, 2005 BCCA 489, 57 B.C.L.R. (4th) 278 (C.A.) at paras. 20-21. They can be summarized as follows:
- (a) words must be given their plain and ordinary meaning unless to do so would result in an absurdity;
 - (b) words must be interpreted in light of the whole of the contract and the intention of the parties expressed therein; and
 - (c) the court assumes that the words in a contract are there for a purpose; it may reject an interpretation that would render one of the contract's terms ineffective.
- [24] More recently in *Chuddy v. Merchant Law Group*, 2008 BCCA 484, 300 D.L.R. (4th) 56, Mr. Justice Smith, in dissenting reasons, provided a helpful summary of the principles of contractual interpretation:
- [207] The relevant principles of contractual interpretation are well-settled. The court must determine what the parties meant by the language they used in their written agreement, viewed objectively in the context of the circumstances in which the agreement was made. Evidence of the subjective intent of one or other party is inadmissible for that purpose. Where the language used is unambiguous, extrinsic evidence is not admissible to alter, vary, interpret, or contradict the words used in the contract. Resort to extrinsic evidence is normally permissible only when the document contains an ambiguity in the sense that "after considering the agreement itself, including the particular words used in their immediate context and in the context of the agreement as a whole, there remain two reasonable alternative interpretations". If there is such an ambiguity in the words used, the court should interpret them in a manner that accords with commercial reality and that avoids a commercial absurdity.

- [133] I have concluded that under the proper interpretation of the contract, gravel is an item that is part of the work to be done to install the pipe, which falls under surface restoration under clause 1.8 of the supplementary conditions (consistently with the definition under the MMCD), and that payment for gravel outside the trench is a separate pay item under 1.14 and 1.15.
- [134] Reading the contract as a whole I find that there is harmony in the plaintiff's interpretation that gravel in the trench is part of imported backfill and provisions for payment under clauses 1.14 and 1.15 are for gravel that is not part of the trench. In my determination, that gives meaning to all of the provisions of the contract, there is no ambiguity and does not interpret the provisions in isolation. I agree with the plaintiff's interpretation that payment for gravel in the trench including surface restoration is to be paid to the contractor as part of the unit price for pipe while gravel outside the trench can be an additional pay item.
- [135] I find that the evidence supports the position of the plaintiff that the approval of the defendant for payment of gravel in the trench, which should have been part of the unit price for pipe installation, amounted to negligent administration of the construction contract. I do not see it suggested that the original estimate of gravel was faulty. Allowing for allowing for some variation from the original estimate, recognizing that the plaintiff has the burden of proof and doing the best I can on the evidence at trial, I award damages under this claim of \$60,000.00.

Conclusion

- [136] I find that the plaintiff has proven that the defendant was negligent and breached the contract between the parties and has proven damages.
- [137] With respect to the 4 claims advanced I find that the plaintiff has proven damages as follows:
- Claim 1:
- \$10,000.00
- Claim 2:
- \$80,000.00
- Claim 3:
- \$0.00
- Claim 4:
- \$60,000.00
- [138] The plaintiff is also entitled to costs.

[139] I was told there were some ancillary matters the plaintiff wished to make submissions about if it was successful. If the parties are not able to agree on matters such as interest, they are entitled to make further submissions in that respect by arranging a time through the registry to appear before me.

"J. Sigurdson J."

The Honourable Mr. Justice J. Sigurdson

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