

CANADA / JUDGMENT

Tri-X Excavating Ltd. v. Morman

2018 BCSC 1493

COURT

Supreme Court of British Columbia

DECIDED

31 August 2018

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2018 BCSC 1493 Tri-X Excavating Ltd. v. Morman

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tri-X Excavating Ltd. v. Morman,

2018 BCSC 1493

Date: 20180831

Docket: 14-1114

Registry: Victoria

Between:

Tri-X Excavating Ltd.

Plaintiff

And:

David Larry Morman and Christine Marie Morman

Defendants

Corrected Judgment: These reasons have been corrected on the first page to show the correct Date of Trial: May 28-31; June 1 and July 3, 2018, on September 25, 2018.

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

Counsel for the Plaintiff:

J. Forsythe

The Defendants In Person:

D.L. Morman and C.M. Morman

Place and Date of Trial:

Victoria, B.C.

May 28-31;

June 1 and July 3, 2018

Place and Date of Judgment:

Victoria, B.C.

August 31, 2018

Introduction

- [1] The defendants hired the plaintiff to blast and level the lands behind their strata residence. The defendants dispute the quality of the work and have not paid the plaintiff's account. The plaintiff sues for payment under the Builders Lien Act, S.B.C. 1997, c. 45.
- [2] The work was performed in late 2013 and early 2014. The plaintiff charged \$26,250 for the work.
- [3] The defendants' counterclaim for breach of contract and negligence. They allege that the work was not done in accordance with the terms of the contract. Their amended counterclaim further claims that the blasting exceeded their property's boundary and damaged some of the neighbouring property. The amended counterclaim also alleges that the work left their property in an unsafe and unstable condition and specifically that the rock wall blasted by the plaintiff requires remediation.

Background

- [4] The plaintiff is a company in the business of providing drilling, blasting and excavation equipment and labour. The defendants are the registered owners of lands in the Highlands District near Victoria with a civic address of 2165 Bellamy Road legally described as PID: 016-378-806, Strata Lot A, Section 2, Range 2 West, Highland District, Strata Plan 1993, together with an interest in the common property in proportion to the unit entitlement of the strata lot. It is a two-unit strata, the other property having a civic address of 2167 Bellamy Road.
- [5] The defendants hired the plaintiff to blast a rocky area behind their home and to use the rock to level the lower area of their back yard.

Plaintiff's Evidence

- [6] The plaintiff called three witnesses: Mr. Brian Baker, its president, Mr. Alex Brennand, the driller/blaster employed by the plaintiff to do the work on the defendants' property, and Stephen Bean, an expert geotechnical engineer from Thurber Engineering Ltd.

Evidence of Brian Baker

- [7] The plaintiff's president is Brian Baker. He is not a blaster. For blasting projects, the plaintiff employed Alex Brennand. Mr. Brennand attended the site but because of the size of the project Mr. Baker also attended. His role was to look at the job and assist with measuring the rock to be removed. He spoke to Mr. Morman who informed him he wanted to create a parking area for storage. He did not recall hearing about a plan to build a shop until the very end of the job. He testified he told Mr. Morman to mark out the property line. He said that Mr. Morman's instructions were to remove the rock to the grade shown by a dirt area on the site. His understanding was he was to grade the area to what he called a "rough grade." He later provided an oral bid to Mr. Morman of \$25,000. He said Mr. Morman agreed to that price.
- [8] The work was stopped for about three weeks by the City of Langford as they lacked a permit regarding fill. Mr. Baker had thought a permit was not needed as they were neither removing nor bringing in fill but just leveling the blasted rock on site.
- [9] Within a day or two of January 10, 2014 he provided a written contract to Mr. Morman because he was worried about getting paid. He said Mr. Morman refused to sign it but told him he would be paid at the end of the job. The documents described the work as "drilling, blasting and rough grade in backyard at 2165 Bellamy Road."
- [10] Mr. Baker said the job was completed around the end of January or early February 2014. When he went to get paid Mr. Morman informed him that the rough grade was eight inches too high so they returned and lowered the grade. This took about a week and involved further blasting. Mr. Morman also informed him he thought the blasting had possibly crossed the strata property line and that he would notify the neighbours. Mr. Baker spoke to the neighbours. No action has been taken by the neighbours against the plaintiff nor did the neighbours take any action against the defendants.
- [11] Mr. Baker testified normally they would scale such a rock face as that created on the defendants' property to remove loose rock but he was informed by one of his workers that Mr. Morman did not wish it done. He confirmed the plaintiff would have scaled the rock if requested.

- [12] After the extra work was completed Mr. Baker returned later in February seeking payment. He had in hand his invoice dated February 18, 2014 in the total sum of \$26,250 (\$25,000 plus \$1,250 in GST). When he arrived at the defendants' home they had a cheque ready for him in the sum of \$23,750 showing a deduction of \$2,500 for a survey, however they refused to release it to him unless he signed an indemnity agreement protecting the defendants from any claims the neighbour might advance for the alleged over-blasting of their strata lot.
- [13] Mr. Baker testified he told Mr. Morman he would have to talk to his lawyer first. They further discussed payment and according to Mr. Baker Mr. Morman offered him \$5,000 for the job. Mr. Baker said he got agitated and left.
- [14] Mr. Morman confirmed the plaintiff has not been paid. On February 21, 2014 the plaintiff filed a claim of Builder's Lien and then commenced this action and filed a Certificate of Pending Litigation against the property.

Evidence of Mr. Brennand

- [15] Mr. Brennand said he attended at the job site and met with Mr. Morman. He testified that Mr. Morman showed him the area he wanted blasted and that he wanted the blasted rock used to level the area behind his residence. Mr. Morman showed him where he wanted the blasting to go to and the excavation level. He stated Mr. Morman asked him to get as close to the property line as possible and that he explained to Mr. Morman that they could start blasting but as they blasted closer to the property line it would have to be located and marked. In addition, he testified he informed Mr. Morman that he had to stay at least three to four feet from the property line. He denied that Mr. Morman told him to leave three to four feet on the house side of the blasting so he could have a walkway to his backyard. He measured the blasting job, calculated the price and provided that information to Mr. Baker.
- [16] Mr. Brennand testified that he told Mr. Morman about line or shear drilling close to the property line in order to create a cleaner rock wall and help prevent over-break, but that it would cost "quite a bit more" because of the time involved. He stated Mr. Morman told him he did not want it done. He denied that Mr. Morman told him to shear cut the wall. He recalled no discussion with Mr. Morman respecting what the finished product would look like. He testified the defendant just wanted to level off the backyard and bring it down to a certain grade level so it could be used for storage.
- [17] He denied blasting past what was marked by Mr. Morman as the property line. While doing the work Mr. Brennand said Mr. Morman told him he was planning a shop or an addition. He testified he told Mr. Brennand that would be difficult because of the eight to ten foot buffer of rock to be left behind his house.
- [18] Once he completed the blasting he said he went back to do more work because of an issue with the grading of the land. He did not recall if Mr. Morman spoke to him or if he just received instructions from Mr. Baker to return.

Evidence of Stephen Bean

- [19] Mr. Bean, on behalf of Thurber Engineering Ltd., was qualified as an expert geotechnical engineer qualified to give evidence respecting rock slope stability and the engineering work required when blasting is done in residential areas. He testified he addresses among other issues how stable rock slopes are and what mitigation is needed after blasting.
- [20] Mr. Bean visited the site. He described the rock cut as not far off vertical and that the rock surface was relatively fractured. The potential for rock fall was evident. He testified that over time portions of the rock face will fall and as a result if a building was constructed close to the slope it needed to be stabilized. He said there were three main options: create a catchment zone to allow rock to fall into that zone, stabilize the slope using either rock bolts, anchors or spray a form of cement, or thirdly build a retaining wall or structure and then back fill behind the wall.
- [21] His opinion was that given the type of rock the blasting could not have been carried out without having to then stabilize the slope using one of the three methods noted. He stated that getting engineering advice prior to blasting was recommended because creating a slope such as this always creates some potential instability, hence an owner should know what would have to be done to complete the project. In part such advice was needed in order to assess the feasibility of the project. He testified that a blaster would not have the expertise to provide such advice.

Defendants' Evidence

- [22] The defendants relied on their evidence, and the evidence of Mr. Nigel Banks, an applied design technologist, Mr. Ronald Elliott, an expert in urban and residential blasting, and Ms. Isabell Maltais, an engineer with expertise in rock slope stability assessments and mitigative options.

Evidence of David Morman

- [23] Mr. Morman was clearly seeking to carry out this project as cheaply as possible. His plan was to construct a shop and possibly an addition to his home above it. Mr. Morman said that he cleared his lower back yard of about 100 trees to do so. He intended to have a contractor do the foundation and framing but he intended to build the rest himself hiring trades only when needed, noting as well he would, as he has done in the past, purchase used lumber, windows, doors and the like for the proposed shop. He has some construction experience having renovated a building for a shop in the past.

- [24] Initially he wanted to do the blasting himself and investigated drill equipment that used an expanding substance that breaks rock without explosives however the equipment required cost approximately \$40,000. He did not hire an engineer to specify what was required even though he knew nothing about blasting. He has no experience as a blaster nor has he hired or worked with a blaster in the past.
- [25] He testified that his hobby is rebuilding automobiles, particularly Porsches. He confirmed that he, not his wife, was making the decisions respecting the blasting and proposed construction.
- [26] He had preliminary discussions with Nigel Banks respecting the viability of building a shop in the proposed excavated area of his backyard but no plans were prepared pending removal of the rock and levelling of the site. He did not hire any geotechnical engineers or seek professional advice respecting how best to achieve the result he desired. Instead he relied on his own experience and knowledge and as mentioned planned to hire contractors only to perform work as required.
- [27] He testified that he had relied on Mr. Banks respecting the viability of building on the site however on discovery when asked if he had taken any steps to determine if it would be viable to construct a building on the cleared sight he said he had not. At trial he said it had slipped his mind to mention that to Mr. Banks but then stated that he relied on Mr. Banks for the design and type of building. He did not ask Mr. Banks to assist on the issue of the rock face left after blasting or locating the proposed structure.
- [28] He confirmed that before hiring the plaintiff he did not hire a geotechnical or structural engineer, nor an engineer respecting the possible need for a retaining wall. He simply said he was "sort of aware" that the wall would have to be checked for safety.
- [29] He intended to use the shop to work on vehicles although he conceded that legally he could not operate a shop on the site.
- [30] He agreed he never told the plaintiff he planned to build a wood frame building or its location in relation to the blasted wall. He said he told them he planned to build a shop. He denied saying the area was to be used solely as a parking lot and for storage.
- [31] When it came time to hire a blaster he testified that he contacted HSS Blasting and Western Grader for quotes. HSS told him it would be very expensive and quoted him \$25,000 for just one area so he told them not to give an estimate as he could not afford it. When he was told by Mr. Baker the plaintiff could do it for \$25,000 he told Western Grader not to quote. He testified it was Mr. Brennand who raised sheer cutting with him and that the first time he heard that would be an extra cost was at trial.

- [32] He testified that when he thought the blasting was getting close to the property line between the two strata lots he spray painted a red line. He did not recall the date he did that. He denied discussing the red line with the plaintiff saying he painted it one evening and assumed when they came back the next day they would realize it showed the boundary. While he was home when they started work that day he said that was before he woke up so he did not go out and confirm that the red line was the property line.
- [33] He initially advanced a claim for fencing required by the blasting but agreed it would have been required in any event.
- [34] On the issue of scaling of the cut rock face he denied telling the plaintiff not to scale the slope.
- [35] Mr. Morman confirmed that he had the cheque made out to pay for the job when he met with Mr. Baker in mid-February. He had reduced it by \$2,500 to cover survey costs he had incurred after the blasting was complete. He explained the only reason he did not release it was because of the alleged over-blasting and his concern respecting the neighbours suing them as he was not on friendly terms with them. He further confirmed that had Mr. Baker signed the indemnity he would have given him the cheque.
- [36] When it was put to him that being ready to pay the plaintiff meant he was satisfied with the work he said at the time he had not realized the "extent of the damage" until professionals looked at it.
- [37] Mr. Morman testified that when the strata lot next door came on the market he and his wife bought it because they were concerned the neighbour might sue them. That was not based on anything said or done by the neighbour. Despite that, when the neighbour put his property on the market, they bought it for \$368,000 with 100 percent financing, explaining they did so to avoid any risk of being sued.
- [38] At no time did he consider what might be required to make the blasted wall safe enough to permit him to build a structure immediately adjacent to it. He had not discussed that with the City of Langford nor his own designer. He never told the plaintiff they needed the area to be a certain size and that a structure would be placed at the foot of the wall created by the blasting.
- [39] Regarding his claim for losses arising from storage of vehicles, parts and tools he testified that after he semi-retired in 2010 and closed his repair shop, he had moved his equipment, tools, supplies, cars and parts to trailers in Sooke, B.C. They were parked outside. They were not climate controlled. He explained he did so because to rent an adequate space would have cost \$5,000 a month and it would have taken six months just to install equipment and shelves to do so. He said he was claiming for losses arising from damage caused to those items while in storage.

- [40] He conceded that most vehicles claimed as damaged or reduced in value were purchased after 2014.

Evidence of Christine Morman

- [41] Ms. Morman testified that the plan was to construct a shop at the rear of the house and possibly an addition on top. She was not party to the contract when it was entered into. She stated she had spoken to Mr. Baker at length later on about sheer-cutting the wall but her evidence was not clear that was prior to the making of the contract.
- [42] She said they were afraid the neighbours might sue or that a purchaser might sue, hence they purchased the adjoining strata lot.

Evidence of Nigel Banks

- [43] Mr. Banks testified that he has been an applied design technologist since 1981 with his own firm. He has designed many homes and small commercial properties. He attended at the site in late 2013, met with Mr. Morman, reviewed the site plan, and Mr. Morman described the building he wished to construct. He reviewed the zoning and confirmed with the City of Langford what could be done on the site and checked matters such as setbacks. He said he reported verbally to Mr. Morman what could be done on the site regarding those matters. In all he made four or five site visits including after the blasting was complete. He said at one point he did a rough plan for the building, although can no longer locate it. He had no interaction with the blaster nor did he address the slope and any remedial work required.

Evidence of Ronald Elliott

- [44] Mr. Elliott was qualified as an expert respecting residential and urban blasting, rock slope stabilization and seismic monitoring. He prepared his report on the assumptions that Mr. and Mrs. Morman intended to construct a building adjacent to the blasted area and that they required the rock to be blasted to within three to four feet of their property line. He also stated he was informed by Mr. Morman that the plaintiff told him they could create a sheer cut about four feet from the property line.
- [45] He examined the blasting logs of the plaintiff and the quantity of explosives used. He concluded that one of the blasts was high, two were very high and one blast had more than double the amount of explosive that should have been used, noting that the control of fly rock from such high powder factors would be challenging and that there was a risk of over-break of the rock. However, he also noted that the amounts of explosives reported from the overall powder count did not agree with the explosives reported on the individual blast reports. There was also a discrepancy in the number of detonators used. He stated this called into question the accuracy of the blaster's reports.

- [46] He testified from his examination of the site there was no attempt made to use pre-split blasting or any other form of wall control blasting to create a shear cut. He was of the opinion some of the blast holes may have been possibly drilled behind the property line; however, he was relying on Mr. Morman's advice respecting where that line was.
- [47] He concluded there appeared to be a disconnect between the instructions given to the blaster and Mr. Morman's expectations, that mass rock blasting techniques were used with no effort to limit over-break, something he said is not appropriate where control of over-break next to a property line is required. Generally, he found poor quality control. He also stated there is a significant additional cost to carry out wall control blasting and that cost may have been ignored in preparing the blast designs for the project. He opined that a reasonably competent blaster should have included wall control blasting as part of the requirements for the site given it had to occur close to the property line.

Evidence of Isabelle Maltais

- [48] Ms. Maltais of Ryzuk Geotechnical Engineering was qualified as a geotechnical engineer to provide an expert opinion on whether the rock slope was unsafe and, if so, what work was required to make it safe and to permit the proposed shop and addition to be built adjacent to it. She was not qualified to give expert opinion on the costs of such work. She assumed that the proposed addition would not have a high concrete retaining wall with back fill between the wall and the rock slope.
- [49] She opined that large rock masses on the slope were potentially unstable due either to fractures or joint sets or where left overhanging and unsupported. She concluded that the potential for rockfall was significant. She noted that "for long-term stability, removal or mitigation of the unstable rock masses must be undertaken particularly given that the [a]ddition is to be located within the rockfall hazard area".
- [50] She recommended scaling of the wall, followed by the application of shotcrete followed by rock bolts. Although she assumed that a high foundation wall and backfill were not considered as part of the original plan, she noted that that was a possible solution to eliminate the rockfall hazard. She stated as well that if the shop location was moved away from the wall, construction of a barrier away from the wall with an area as catchment would work to address the safety concerns.

Plaintiff's Claim

- [51] As noted earlier the plaintiff's claim is based on an oral contract. It is trite law that notwithstanding that, a contract may still be found if the court is satisfied that agreement has been reached on all essential terms (*Le Soleil Hotel and Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 at para. 323).
- [52] The issues in this instance are:

- a) What were the terms of the contract between the parties?
 - b) Did the plaintiff perform the work in accordance with the contract's terms?
 - c) Was the plaintiff entitled to be paid on completion?
 - d) Are the defendants entitled to any set-off?
- [53] There are three principal areas of dispute. The first is whether the parties discussed the blasting approach to be taken and the type of rock face that was to result; secondly, whether the blasting was to stop three to four feet short of the shared property line to permit a pathway to access the new area created below; and thirdly, the proposed use of the levelled area for which the blasting was being performed as a factor related to the rock face required.

Discussion

- [54] There is no dispute there was a contract. What is disputed is the scope of work covered by the contract, the interpretation of the contract and the degree to which the work was performed.
- [55] Both Mr. Baker and Mr. Brennand testified they were present at a site visit at 2165 Bellamy Road with Mr. Morman. Ms. Morman was not present at the initial meeting. Both Mr. Baker and Mr. Brennand were clear in their evidence that Mr. Morman instructed them they were to drill and blast a certain amount of rock to grade level which he referred to as "dirt level" as shown by a patch of ground in the area to be enlarged. Mr. Morman testified he was "fairly confident" that they understood his instructions but he gave no detailed evidence of what those instructions were. They all agreed that the price was \$25,000. While Ms. Morman testified she had a later discussion with Mr. Baker, the nature and content of that conversation was not put to Mr. Baker. It was after the contract was made.
- [56] Mr. Brennand recalled speaking to Mr. Morman about "line drilling". He denied discussing "shear cutting" because he does not use that technique in residential areas. He testified Mr. Morman did not want such a technique used as he was concerned about the increased cost.
- [57] Both Mr. Brennand and Mr. Baker testified that Mr. Morman originally told them he intended to use the excavated area at the back of his property as a parking lot and for storage. While Mr. Brennand recalled later that Mr. Morman mentioned the potential of a shop or addition to his house, that was after the contract was formed and after work had begun. Mr. Morman stated he told them from the beginning he wanted the area levelled for a shop but he did not provide details or tell them where it was to be built. I am satisfied that Mr. Morman was not aware at that time of what might be involved in remediating the rock face depending on the use of the property. I am also satisfied that nothing was said to either Mr. Brennand or Mr. Baker that might alert them to Mr. Morman expecting them to address rock face remediation. It was not a term of the contract. I find it was not something Mr. Morman turned his mind to.

- [58] Mr. Morman knew the contract was for a low price given he had sought estimates from others. His expert Mr. Elliott noted that a "line drilling" or shear cut approach would result in "substantial" additional costs. Also, Mr. Morman acknowledged he had no knowledge of blasting, hence is unlikely to have specified a particular approach. He was not aware of issues that could arise regarding the blasted area and his building plans. He did not engage a geotechnical engineer in advance. He did not determine whether it was viable to construct a building on the levelled area in so far as it related to the rock face. At best he had some preliminary discussions with Mr. Banks but those were unrelated to the blasted rock face. The defendants have failed to establish that they had any real awareness of what might be required to stabilize the rock slope after blasting or that they communicated such instructions to the plaintiff when entering into the contract. I accept as a result the defendants never informed Mr. Brennand or Mr. Baker of where the building would go or inquired with respect to what was required to make the wall safe for the intended use of the property.
- [59] I am also satisfied that the contract was for blasting services only, that there was no term of the contract respecting the type of rock face to be left, nor was there a term in regards to the importance of the rock face as it might relate to proposed construction. In addition, I am satisfied the parties did not agree that there was to be a three to four foot walkway left for access to the backyard. I reach these conclusions because:
- a) I accept the evidence of Mr. Baker and Mr. Brennand that they were only hired to blast the rock face and to use the rock to fill the lower area of the property to rough grade. They were not provided with any directions respecting the type of rock face to be left nor that a structure was to be constructed near the rock face;
 - b) While sheer or line cutting was raised by Mr. Brennand, it was not contracted for given the defendants' concerns about cost and, in any event they did not undertake any planning respecting the location of the proposed structure and the need for rock face remediation;
 - c) When the plaintiff initially finished the blasting and levelling, the defendants asked Mr. Brennand and Mr. Baker to return, not to address any issue relating to the rock face, but rather to level the filled area. While the issue of possible over-blasting was raised, the rock face itself was not an issue;
 - d) The defendants had prepared a cheque and were willing to release it to the plaintiff but only if an indemnity was signed relating to the alleged over-blasting of the neighbours' property. There was no mention of any concerns respecting the rock face; and,
 - e) The lack of three to four feet for access to the yard was not mentioned as an issue when payment was offered nor was there sufficient evidence it was contracted for.
- [60] In addition, the amended counterclaim alleged the contract was for a specified elevation and that the blasting did not go down to that elevation resulting in a future need for higher retaining walls. No expert evidence was lead respecting the matter of the elevation of the

graded area. I accept the evidence of Mr. Baker that he was contracted to grade to a "rough grade" and that when Mr. Morman asked that the plaintiff's employees return and do further work, they did so. I note that no formal elevation readings were specified by Mr. Morman who simply referred the plaintiff to an area of dirt that he said was the level to be achieved. Mr. Morman's willingness to pay for the work supports a finding the work was satisfactorily performed. There is no evidence, other than Mr. Morman's comment that he now required retaining walls, on the issue of grade. As a result, I find that the rough grading contracted for was carried out.

- [61] I conclude the contract was performed by the plaintiff in accordance with its terms and the plaintiff is entitled to be paid. The plaintiff is entitled to a declaration of entitlement to a lien against PID: 016-378-806 Strata Lot A, Section 2, Range 2 West Highland District, Strata Plan 1993, together with an interest in the common property in proportion to the unit entitlement of the strata lot as shown on form 1 (the "Land"). The plaintiff is further entitled to a declaration that the plaintiff's lien is a charge against the Land in priority to all right, title and interest of the defendants.
- [62] Judgment is granted in favour of the plaintiff in the sum of \$26,250.00.
- [63] In light of this finding, the counterclaim of the defendants for breach of contract is dismissed.
- [64] I will next address the defendants' counterclaim for negligence and their claimed set-off.

Counterclaim

- [65] The defendants' counterclaim is for negligence and breach of contract. As mentioned, the defendants' claim of breach of contract is dismissed, leaving their claim in negligence. It is trite law that the defendants must prove a fact or issue to the required standard of proof (*Northland Properties Corp. v. British Columbia*, 2010 BCCA 177 at para. 5). In addition, the defendants must prove their damages. In *Martin v. Goldfarb* (1998), 41 O.R. (3d) 161 (C.A.) at 37, cited in *Seaport Crown Fish Co. v. Vancouver Port Corporation* (1999), 90 A.C.W.S. (3d) 711 (B.C.S.C.), the Court of Appeal stated:

I have concluded that it is a well-established principle that where damages in a particular case are by their inherent nature difficult to assess, the court must do the best it can in the circumstances. That is not to say, however, that a litigant is relieved of his or her duty to prove the facts upon which the damages are estimated. The distinction drawn in the various authorities, as I see it, is that where the assessment is difficult because of the nature of the damage proved, the difficulty of assessment is no ground for refusing substantial damages even to the point of resorting to guesswork. However, where the absence of evidence makes it impossible to assess damages, the litigant is entitled to nominal damages at best.

- [66] While where there is a contractual duty of care in both contract and tort, the contractual duty must govern, the plaintiff acknowledges that the duty in this case is likely one and the same under contract and tort. As noted in *B.G. Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12 at para. 16:
- [16] Viewed thus, the only limit on the right to choose one's action is the principle of primacy of private ordering -- the right of individuals to arrange their affairs and assume risks in a different way than would be done by the law of tort. It is only to the extent that this private ordering contradicts the tort duty that the tort duty is diminished. The rule is not that one cannot sue concurrently in contract and tort where the contract limits or contradicts the tort duty. It is rather that the tort duty, a general duty imputed by the law in all the relevant circumstances, must yield to the parties' superior right to arrange their rights and duties in a different way. In so far as the tort duty is not contradicted by the contract, it remains intact and may be sued upon. For example, where the contractual limitation on the tort duty is partial, a tort action founded on the modified duty might lie. The tort duty as modified by the contractual agreement between the parties might be raised in a case where the limitation period for an action for breach of contract has expired but the limitation period for a tort action has not. If one says categorically, as we understand *Iacobucci J.* to say, that where the contract deals with a matter expressly, the right to sue in tort vanishes altogether, then the latter two possibilities vanish.
- [67] To succeed in their claim in negligence, the defendants must demonstrate that the plaintiff owed them a duty of care, that the plaintiff's behavior breached the standard of care, that the defendants sustained damage and that the damage was caused, in fact and in law, by the plaintiff's breach (*Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3).

Did the Plaintiff Owe the Defendants a Duty of Care?

- [68] The plaintiff acknowledges that it owed the defendants a duty of care.

Did the Plaintiff Breach the Standard of Care?

- [69] Here the applicable standard of care is that of a reasonable blasting contractor acting in the circumstances of this case.
- [70] The defendants tendered the report of Mr. Elliott to support their claim of a breach of the standard of care. Mr. Elliott relied on the blasting logs to determine a blast volume for each blast, opining that an examination of the blast factor used on each blast will indicate the degree of quality control being exercised by the blaster. From this he concluded the powder factor for one of the blasts was high, two were very high and one had more than double the amount of explosives that should have been used, noting a resulting risk of over-break in the rock.
- [71] However, he qualified his report:

Of note also in the above table, the amount of explosives reported from the overall Powder Count does not agree with the amount of explosives reported on the individual blast reports. If all of the explosives reported on the overall Powder Count were actually used to break the rock shown on the blasting logs, the overall powder factor would be 1.73 lbs./cu.yd., indicating that the shots would have been grossly overloaded. Other possibilities are that not all of the Blasting Logs were produced, or some of the explosives reported on the overall Powder Count went to another job. According to the overall Powder Count, a total of 328 - 16ft. long EZ-Det detonators were used, however, the total number of detonators used based on the individual blasting logs shows that 215 EZ-Det detonators were used, so there is a discrepancy of 113 detonators. This calls into question the accuracy of the blaster's reports.

- [72] In this case the incomplete information respecting the calculations renders such calculations unreliable.
- [73] In addition, Mr. Elliott relied on instructions from Mr. Morman that included the assertion that he had requested a four-foot area along the back wall between the rock cut and the property line so he would have access along the top of the rock cut. Also, Mr. Morman told Mr. Elliott that he intended to construct a shop adjacent to the rock cut and within the excavation site, and that he was told by the blasting company that they could create a shear cut at the four-foot distance from the property line and that he was expecting to see a shear cut like that seen on most highway cuts where pre-split blasting is carried out on 0.76 metre centres.
- [74] The difficulty that arises with Mr. Elliott's report is that he relied on assumed facts that have not been proven. Where such facts are not proven, the value of an expert's opinion is undermined (*Bulkley Valley Restorations Ltd. v. Thurber*, 2017 BCSC 1127 at para. 19).
- [75] In particular the assumption that the blasting did not allow for the four-foot offset has not been proven. As I have found, I am not satisfied the defendants conveyed that requirement to the plaintiff. In addition, a surveyor was not called to give evidence on the location of the property line nor was any expert opinion provided on the amount or extent of the alleged over-blast or over-break.
- [76] In addition, I have not found that the plaintiff was told that a shop was to be constructed adjacent to the rock cut nor that a sheer cut was requested. Those assumptions were clearly relied on by the expert. The lack of proof that those matters were part of the contract undermines the weight to be given to the opinion. The defendants have failed to prove the assumptions upon which Mr. Elliott's report was based, including the powder amounts used on the job and the location and extent of the alleged over-break.
- [77] As a result, Mr. Elliott's opinion about whether the plaintiff's work measured up to the required standard of care cannot be relied upon. Even if it were, Mr. Elliott's comments that there would have been a risk of over-break due to the excess amount of energy being used in the blast do not go so far as to say that the high powder factors did cause over-break in this instance. He concluded only that "some of the blasts may have been overloaded, possibly

contributing to over-break beyond the wall of the excavation". [Emphasis added.] Mr. Elliott testified on direct that he could not say for sure whether the blast holes were behind the property line because he did not know the location of the property line.

[78] The plaintiff does not dispute that the blasted rock wall requires remediation, nor does the plaintiff take issue with the conclusions of Ms. Maltais of Ryzuk Geotechnical that the potential for rockfall hazard was high and that to remedy that issue scaling, shotcrete and rock bolts were required to stabilize the rock wall. Indeed, the Ryzuk report is consistent with the plaintiff's own expert report from Mr. Bean.

[79] When asked whether the plaintiff's operations caused 2165 Bellamy Road to be in an unsafe condition, Ms. Maltais opined that:

As a result of the blasting operations carried out at the site, Lot A is an unsafe condition for the proposed construction of a building unless the intent of proposed construction was to involve a retaining structure.

[80] Mr. Bean concluded that some form of engineered solution would have been required to prevent rockfall after the blasting and that all steep rock slopes of this nature have the potential, indeed likelihood for rockfall over time. He then offered the four potential remediation options noted earlier and stated:

No matter the quality of the blasting and excavation work conducted, one of the engineered solutions provided in the previous question would have been required.

[81] This is consistent with the Ryzuk report in that it does not comment on whether the blasting techniques or steps of the plaintiff caused the "unsafe condition", rather reporting that the property was in an unsafe condition "as a result of blasting operations".

[82] In other words, and I so find, the blasting work was always going to require some sort of engineered solution to stabilize the resulting rock slope in order to permit safe construction and use of a shop and addition adjacent to it. I am satisfied as noted earlier that while the defendants were "sort of aware" a structural engineer would have to look at the wall, it was not a matter they turned their minds to during planning the project and contracting with the plaintiff. Put simply, the need to stabilize the rock face was not part of the contract and was not something the plaintiff was contracted to address or remedy.

[83] The damages alleged from the blasting arose from the defendants' own lack of knowledge and their failure to obtain professional advice respecting the blasting and the post-blasting work required as it related to their intended use of their property.

[84] As a result, I find that the defendants have failed to prove, on the balance of probabilities, that the plaintiff breached the relevant standard of care.

[85] The counterclaim for negligence is dismissed.

- [86] In the event I am incorrect in my findings on the contract and negligence claims, I turn to the damages claimed. The defendants must establish they suffered damages and that those damages were caused in fact and in law by the plaintiff's breach of the standard of care.

Damages Claimed

- [87] Assuming a breach of contract, the damages the defendants are entitled to are those which would put them in the position they would have been had the plaintiff performed its contractual obligations. That is, they must establish a causal connection between the breach and their loss. The "but for" test requires them to prove their loss "but for" the breach (Water's Edge Resort Ltd. v. Canada (Attorney General), 2015 BCCA 319 at para. 40).
- [88] However, a defendant is not expected to pay for avoidable losses. That is, there is a duty to mitigate (Michaels v. Red Deer College, [1976], 2 S.C.R. 324). In addition, assessing the loss must consider what was reasonably foreseeable as resulting from a breach of the contract.
- [89] The claim for damages includes several categories: remediation of the rock slope, damages for the alleged over-blast, loss of income and damages at large.

Remediation Costs

- [90] There is no evidence that the quality of the plaintiff's work materially increased the construction costs that would have had to have been incurred in any event in order to stabilize and make the rock surface safe. That is, the rock wall, no matter the form of blasting, would require remediation.
- [91] In addition, the defendants have failed to prove the costs of implementing any of the potential remediation methods. They tendered into evidence letters and evidence from a Mr. Webber; however, it was inadmissible because it was opinion evidence tendered without a report or notice. In addition, Ms. Maltais was found not qualified to give construction costs estimates as such were not within her area of expertise. As a result, the defendants have not introduced admissible evidence of the cost of implementing any of the potential remediation methods.
- [92] In conclusion the defendants have failed to show they have incurred increased costs due to the blasting by the plaintiff. Their claim for damages for remediation of the rock face is dismissed.

Over-blast

- [93] This relates to the defendants' claim that the plaintiff blasted over the property line between their property at 2165 Bellamy and the neighbours at 2167 Bellamy Road. At the time of the blasting 2167 Bellamy Road was owned by Shawn Henry and Farrah Ofstie.
- [94] The two strata lots are two halves of a strata duplex and the only two lots in that strata development.

- [95] Regarding the property line Mr. Brennand acknowledged he was shown a brick by Mr. Morman that showed the property line. He testified however, that he told Mr. Morman he would need a line to show the property line although he could commence work with that line to be marked when he got closer to it. Mr. Brennand stated Mr. Morman initially asked him to get as close to the property line as possible but Mr. Brennand told him he had to leave three to four feet between the property line and the blasted area. He denied that Mr. Morman told him he wanted three to four feet left on the Morman side of that line for a walkway. He recalled the red line Mr. Morman had painted on the ground. Mr. Brennand denies blasting past the property line as evidenced by the red line, onto the neighbouring property at 2167 Bellamy Road.
- [96] This claim raises two issues, an evidentiary issue respecting evidence of the alleged over-blasting and a legal issue respecting the right of the defendants to advance this claim.
- [97] First, there has been no expert evidence establishing the location of the property line and where and to what extent part of 2167 Bellamy Road was blasted. Mr. Elliott's report does not establish the size and location of the alleged over-blast. Therefore, the plaintiffs have failed to prove an over-blast. They also have provided no evidence of the costs of remediating the alleged over-blast. Second, the owners of 2167 Bellamy at the time of the blasting never advanced a claim. Any claim for the lost property was theirs to advance. They sold the property to the defendants in May of 2015. The defendants knew of the alleged over-blast and indeed purchased the property because of their perception that they were at risk of being sued. There is no evidence that the property was worth less than they paid because of the alleged over-blast. In any event given they now own the entire strata development and hold all voting rights, they can potentially move the lot lines if they proceed with their plan to subdivide the property.
- [98] The defendants' claim for damages for the alleged over-blast has not been proven in either fact or law.

Loss of Income

- [99] The claim for income loss arises from Mr. Morman's allegation he would use the shop to work on vehicles as a source of income; this despite his acknowledgment that he could not legally operate a repair shop on the property and that this was his hobby. He claims he has lost income because the shop has not yet been built.
- [100] As determined earlier the defendants have not established the plaintiff knew of the intended use of the property. In addition, the evidence provides no basis for determining if or when the shop would have been built. Since the rock face would have required remediation no matter the blasting results, the need for remediation was not caused by the plaintiff's quality of work.

- [101] Significantly, there is no evidence respecting the value of the loss of income claim. The defendants lead no evidence of past income arising from automobile refurbishing. Also, most of the cars referred to as potential sources of income were purchased after the blasting was done. As a result, the blasting was not a possible cause of such losses.
- [102] The loss of income claim is dismissed. It has not been proven. It is too remote in any event.
- [103] The defendants advance several other damage claims.

Panels Used for Defendants' Excavator

- [104] The defendants allege the plaintiff drove its excavator over some panels they use for their own excavator work. This appears to be claimed as a set-off. This was never put to the plaintiff. Nor was it an issue when the defendants offered to pay the plaintiff the contracted price less the survey cost.
- [105] They claim \$1,200 in damages to have the panels repaired and re-painted. The prior condition and value of the panels and the effect of the alleged damage on their use and on their values is not in evidence. They have not been repaired. I am not satisfied the defendants have, on the balance of probabilities, proven either liability for the damage or the amount of damage incurred.

Costs of Re-Surveying due to Over-Blasting

- [106] The defendants failed to establish there was over-blasting hence the claim for re-surveying is dismissed.

Aggravated and Punitive Damages

- [107] At the close of their case the defendants further amended their amended counterclaim to plead aggravated and punitive damages. The factual basis for the amendment was the alleged post-litigation steps of the plaintiff and its counsel.
- [108] The defendants seek aggravated damages as a result of what they allege was abuse by the plaintiff of its superior financial position. This allegation is founded on the defendants' perception that the plaintiff refused to engage in a reasonable way respecting the issues, were determined to win, and were "recklessly indifferent to any further damages" the defendants might suffer. They submit the litigation has caused them years of distress and mental anguish. They also note the aggressive conduct of then plaintiff's counsel at Mr. Baker's discovery.
- [109] Aggravated damages compensate for aggravated damage. They are compensatory in nature. They are awarded to compensate for an injury by a defendant's high-handed conduct.
- [110] The conduct alleged does not support such a claim. While as lay litigants they undoubtedly found the litigation stressful, lengthy litigation by its very nature is stressful. No high-handed conduct by the plaintiff has been established. In addition, such alleged actions

during the litigation cannot form the basis for an award of aggravated damages and in any event usually relate to pre-litigation conduct, not the conduct of the litigation itself. Conduct of the litigation that is alleged to be improper is more properly addressed in an application for special costs.

- [111] With respect to the claim for punitive damages, the defendants say the plaintiff's conduct was high-handed and reprehensible and a departure from ordinary standards of conduct. Aside from the unproven allegations of breach of contract and negligence, the defendants rely on the filing of a Certificate of Pending Litigation by the plaintiff early in the litigation. They assert such was based on false claims and that the plaintiff continued through to trial to contest liability "without any evidentiary basis for doing so". They submit that the conduct of the plaintiff in refusing to remove the CPL despite their requests to do so was to use the CPL as an "an offensive weapon".
- [112] There was never an application by the defendants to have the CPL removed by posting security as provided for under the Builder's Lien Act. While as self-represented litigants they may view the actions of the plaintiff in relying on the CPL as offensive, that is something the plaintiff was legally entitled to do. There is no merit in the allegation that its filing or remaining on title is deserving of rebuke.
- [113] The defendants also advanced a claim for damages at large. That is a claim for non-economic loss and exemplary damages, usually arising in claims involving intentional torts. This is not such a case. In addition, given my findings on liability and the failure to prove the alleged losses in any event, such a claim has not been proven.
- [114] The claim for aggravated and punitive damages is dismissed.

Costs

- [115] As requested the parties have liberty to address costs, in writing. If they are unable to agree on a schedule for such submissions, they may apply for directions.

"The Honourable Mr. Justice Punnett"

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