

CANADA / JUDGMENT

Zettl v. Roger Garside Construction Ltd.

2016 BCSC 2307

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 2307 Zettl v. Roger Garside Construction Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Zettl v. Roger Garside Construction Ltd.,

2016 BCSC 2307

Date: 20161209

Docket: S111534

Registry: Victoria

Between:

Andreas Zettl, in his capacity as Administrator of the

Estate of Waltraud Zettl and 519981 B.C. Ltd.

Plaintiffs

And:

Roger Garside Construction Ltd. and Roger Garside

Defendants

Before: The Honourable Madam Justice Russell

Reasons for Judgment

Counsel for Plaintiffs :

G. Harney

J. Plonka

Counsel for Defendants:

N. Lott

M. Randall

Place and Date of Trial:

Victoria, B.C.

May 30- 31, 2016

June 1-3, 6-9, 2016

September 27, 2016

Place and Date of Judgment:

Victoria, B.C.

December 9, 2016

Introduction

- [1] In this case, 519981 BC Ltd. and Mr. Andreas Zettl, in his capacity as Executor of the estate of Waltraud Zettl, sued Mr. Roger Garside personally and Roger Garside Construction Ltd. ("RGC") for failure to perform in a workmanlike fashion the services for which he was paid.
- [2] At the day set aside for argument in this matter, counsel for the plaintiffs conceded that there is no basis for the pleading against Mr. Garside in his personal capacity. That allegation is abandoned and so I will not deal with it.
- [3] There is also a counterclaim in which RGC sues to recover certain unpaid invoices and lost profit relating to its early ejection from the site in September 2009. At that time, approximately 35% of the remediation work remained unfinished.
- [4] There is no dispute that RGC was paid \$728,936.00 for its work before being ejected from the site.
- [5] An Agreed Statement of Facts was put into the record as 'Exhibit 1'. I have found this exhibit to be a useful list of what elements of the case are undisputed. It reads as follows:
 - 1. The Plaintiffs and the Defendant Roger Garside Construction Ltd. entered into an oral contract in or about September, 2007 for the Defendant to remediate a house owned by the Plaintiff company at 2809 Arbutus Road, Victoria, British Columbia.
 - 2. It was an implied term of the contract that work performed by the Defendant company and its subcontractors would be done in a good and workmanlike manner and that the materials supplied would be of good quality.

3. It was a term of the contract that the Defendant company was to be paid for its management services on a cost plus 15% basis.
4. The contract was terminated by the Plaintiffs on September 14, 2009.
5. The Defendant rendered 15 invoices to the Plaintiffs prior to termination in the amount of \$802,793.91.
6. All of the invoices were paid by the Plaintiffs except for invoice #15 in the amount of \$56,442.18 which remains outstanding.
7. At the time of the termination of the contract, there was a balance outstanding which had not been invoiced by the Defendant company, in the amount of \$39,215.36.

The Evidence

- [6] The Zettl Estate and the numbered company 519981 B.C. Ltd. own a property located on the waterfront at 10-Mile Point in Victoria, B.C.
- [7] The house has a panoramic view, one which the Zettls enjoyed during their visits to Victoria from Germany, their country of origin.
- [8] The Zettls acquired the house in 1992 and would visit it from time to time every year, returning to Germany for Christmas and for their grandchildren's birthdays.
- [9] Mr. Zettl (senior), with the help of a painter friend, did minor maintenance on the house during his tenure there. However, he died in 2003 and, for a few years after his death, the house was somewhat neglected.
- [10] Mrs. Zettl continued to visit the house from time to time but missed her husband. She was hampered in her ability to make friends because of her lack of fluency in English. Consequently, she was isolated.
- [11] The house, known as Casa Buena Vista, is located such that it is subject to the forces of the prevailing southeast winds as well as the ocean. The rain is often horizontal. As a result, any vulnerable points on the house will, and did, suffer water penetration.
- [12] Mrs. Zettl decided to undertake some renovations to the house. They have not been successful. This is despite the fact that she and Andreas Zettl, her son, have spent approximately \$5.5 million on these renovations.
- [13] The previous owners had undertaken some questionable renovations. Since Mrs. Zettl had bought the house without having a home inspection, their effect was unknown to the defendant RGC until work was performed that revealed them.
- [14] Mrs. Zettl died in 2013. Her son has continued litigation against virtually all of the contractors involved in the renovations from 2007 onward.

- [15] The most recent suit, which also happened to be against the most recent set of contractors, was set aside by Gaul, J., in January 2016. This decision was reached due to Mr. Zettl's failure to provide particulars.
- [16] Andreas Zettl gave evidence but was unable to provide much useful information about the case. He was not in B.C. during many of the key time periods. Moreover, with respect to actions and decisions concerning the house, he appeared to be subject to the commands of his mother. Therefore, his input about the house was limited.
- [17] Mark Haley, a local roofer, was retained to reroof the complex roofing structure of the house. He testified at length about the condition of the house and his views on the various problems with the renovations performed by RGC. His testimony also addressed the construction decisions made by the original homeowners who preceded the Zettls, decisions which he felt were poor.
- [18] However, he was not proffered as an expert witness and no expert report was served by the plaintiffs. Consequently, despite the plaintiffs' contention that his evidence should be given some sort of special status reflecting his roofing experience, I find that his evidence is restricted to his observations only. Given that Mr. Haley is not entitled to give opinion evidence, unless his evidence is unambiguous, and requires no special knowledge to understand, I cannot give it weight.
- [19] Mr. Haley is also being sued by the Zettl estate and the numbered company. Despite this uncomfortable situation, he provided comprehensive evidence that necessitated that he testify for two days in direct, and two days in cross.
- [20] While, in general, I found him to be responsive, he often crossed the line and gave opinion evidence that I must disregard.
- [21] There is also an issue with Mr. Haley's general credibility. He took over the RGC work after befriending Andreas Zettl and Mrs. Zettl. Ultimately, he billed the Zettls over \$500,000 to redo the work that RGC had already performed. Thus, maintaining that Mr. Garside's work was deficient provided Mr. Haley with a generous source of revenue.
- [22] The Zettls advanced money to Mr. Haley on the understanding that he would provide them with a report on the RGC work and his remedial efforts. He did not do so.
- [23] When the Zettls demanded the return of their advance, Mr. Haley refused to return their money and also neglected to complete his report for them.
- [24] Subsequently, when the Zettls commenced a lawsuit against him, Mr. Haley manufactured a series of invoices that purported to detail services for the Zettls that would justify his retention of the money advanced.

- [25] Mr. Zettl agreed that he had referred to Mr. Haley as a 'swindler' after he had refused to return the money advanced despite failing to perform work which, in Mr. Zettl's opinion, merited its retention.
- [26] The Haley litigation is not before me and I do not make conclusions about it. I describe its issues only to raise the credibility problems I must consider about his evidence, notwithstanding the fact that he appeared candid and friendly while giving evidence.
- [27] However, the plaintiffs called no expert evidence and I am left to determine whether Mr. Haley's evidence alone can substantiate the claims against RGC.
- [28] It is somewhat puzzling that I was not provided with expert evidence on a reasonable contractor's standard of care in the complex circumstances of this building project. That lack of evidence has weighed against the plaintiffs' case.
- [29] I do not propose to summarize Mr. Zettl's evidence. As I noted above, he was unable to recall much about his mother's decisions. Moreover, his own involvement in the renovations was minimal, with a notable exception being his role in transferring money to pay the invoices as they arrived. He also recalled receiving instructions from his mother not to pay the last RGC invoice.
- [30] All the contracts pertaining to this renovation were signed by Mrs. Zettl.
- [31] Given the size of this project, and the great deal of uncertainty concerning the house's construction issues, it is highly unlikely that the parties would have agreed to a fixed price contract. Consequently, I find that the contract that is relevant to the case at bar was a cost plus contract. In addition, I find that this contract had a 15% management fee charged by Mr. Garside as the general contractor.

Mark Haley

- [32] Mr. Haley began to work on the site in May 2009. He remained working on the site until 2011 when Mrs. Zettl lost confidence in him as she seemed to do with everyone who has worked for her.
- [33] He is also sued in negligence and in breach of contract by the Zettls.
- [34] Over the course of his retainer, while he remained in favour, Mr. Haley became friends with the Zettls. More and more he took on the role of a sort of construction assessor. As part of this role, he photographed what he thought was deficient work performed by RGC, and advised Mrs. Zettl on the steps he believed to be requisite to remedy these deficiencies. Ultimately, he told the Zettls that all the RGC work needed to be redone.

- [35] Mr. Haley and his workers redid about 95% of the roofing. He also retained subcontractors for other specialized work he thought was necessary. In most cases, Mr. Haley contacted these specialist companies for their work. However, these companies signed contracts directly with Mrs. Zettl, and so he was not responsible for paying them.
- [36] Although he appeared to act as a general contractor, he did not have the requisite experience to be one. Moreover, he claimed that he had had no desire to take over as one.
- [37] Ultimately, at a time when only the garage roof remained to be completed, he too was terminated.
- [38] The house appears to be enormous: it has three floors and many different roofs, with these roofs being flat, pitched and mansard, depending on the house level. On the lower level, there is an indoor pool with a large deck overhead that forms a roof. In addition, on the pool level, there is a guest suite, gym, and sauna. There is access to this deck from the main floor dining room. The kitchen and foyer are also located on this level. The master bedroom and ensuite bathroom are above the main living floor.
- [39] The entryway is below a substantial glass atrium.
- [40] The house was built in approximately 1982. It has been subject to other renovations by previous owners, some of which renovations Mr. Haley described as being extremely problematic.
- [41] One of the house construction issues observed by Mr. Haley relates to the addition of the bedroom on the pool level by previous owners. This addition was not done by RGC.
- [42] RGC did some renovation work on this room but its major problems are unrelated to that renovation work. Although I have no expert evidence on this point, it appears that this room was not underpinned properly. Consequently, this room may be undermining the entire foundation of that corner of the house.
- [43] Mr. Haley described this room as potentially causing a "catastrophic failure" of the building's foundation and alleged that RGC ought to have repaired it. This is obviously his opinion and cannot be given weight.
- [44] However, I accept Mr. Garside's evidence that Mrs. Zettl ordered him not to touch the four-poster bed in that room and to make what repairs he saw necessary without moving the bed. The photographs of the bed show that it was swathed in plastic. The photographs also show that the ceiling virtually rests on the tall posts at the head and foot of the bed.
- [45] Despite spending enormous sums on this house, it appears that Mrs. Zettl was concerned about the cost of the remediation process. She was not shy about stating those concerns.
- [46] I accept that, on this occasion, RGC was not given carte blanche to make repairs. As a result, stripping this room to the joists, at which point the room's structural inadequacies may have become patent, would have gone beyond what Mrs. Zettl was prepared to accept.

- [47] I compare this situation with the problem concerning the roof over the living room. When it was discovered that the living room roof had a structural defect, RGC called in an engineer, Mr. Galloway, and accepted his recommendation that three new steel beams needed to be installed. This defect was caused by the previous owners, who had notched the overhead support beams. Mr. Galloway's suggested repairs were performed.
- [48] It appears Mrs. Zettl had great trust in Mr. Haley, as he had become a friend of the family. Moreover, this trust seemed to persist, at least for a time, despite the fact that Mr. Haley was cultivating additional work at a substantial profit by readily pointing out supposed inadequacies with RGC's work.
- [49] Why the problems with the basement bedroom were laid at the door of RGC, whose work was limited by Mrs. Zettl's instructions, I do not understand.
- [50] It also became evident later in Mr. Haley's testimony that when he initially discovered the problem with the basement bedroom, he thought the risk it presented could be used against RGC. He told this to the Zettls and their solicitor, exclaiming "[w]e've got him!" Subsequently, he decided that RGC was not at fault for this dangerous situation, as the Zettls had known about it all along, and had chosen not to take steps to remedy it.
- [51] With respect to many of the remediation issues, I am unable to discern what issues arose from allegedly negligent construction, and what issues arose from the denial of RGC's right to complete its contract. In other words, had RGC been allowed to finish its work, how many of the problems alleged by the plaintiffs would have been resolved?
- [52] As an example, a complaint arose due to the stanchions on the deck over the pool. Specifically, Ms. Zettl insisted on stanchions and glass panels that would not obstruct views from the deck.
- [53] Mr. Garside, with some difficulty, came up with a design that would accomplish Mrs. Zettl's wishes, but told her that the base of the stanchions would need to be sealed on a regular basis. Once he was ejected from the site, he was unable to complete the necessary elements of his design and, not surprisingly, the stanchions leaked water onto the deck. I do not consider this to be the fault of RGC.
- [54] The other issue with the stanchions arose from the fact that Mrs. Zettl wanted to retain as much of the original 'look' of the house as possible.
- [55] The deck had been tiled originally and, at Mrs. Zettl's request, RGC searched for more of the original tiles. They were no longer available, and so Mrs. Zettl had to choose other tiles. She delayed her decision. Consequently, the space left beneath the stanchions for the tiles, although sealed, was essentially open to the elements. When RGC was terminated, and the regular resealing did not take place, that open space allowed water to enter, causing damage to the subfloor as well as structures below the deck.

- [56] Notwithstanding Mr. Haley's implications to the contrary, I do not consider the failure of the stanchions and the accompanying water ingress to be the fault of RGC. I have no expert evidence that, had the original RGC design been completed, it would have been inadequate. Consequently, I cannot rule against RGC on this point.
- [57] As well, it seems that much of the leakage was occasioned by Mrs. Zettl's refusal to make a decision about the tiles so that the stanchion design could be completed.
- [58] Mr. Haley also pointed to photos he had taken showing a wire sticking through the roofing material as evidence of inadequate workmanship. Mr. Garside acknowledged that this showed unfinished work but stated that, had RGC been allowed to complete its work, it would have been properly dealt with by way of a "bird cage" and a cap.
- [59] In the absence of expert evidence, I do not accept that this example satisfies the allegation that RGC's work was inadequate. It was unfinished but so was the contract.
- [60] There are many other photos taken by Mr. Haley of water-stained joists around doorways and windows, from which I am asked to infer the following: RGC had either improperly constructed the frame or had failed to take reasonable steps to shelter or seal the frame from rain. I cannot make this necessary inference. I have no evidence of what ought to have been done by a reasonable contractor in the circumstances. I remain uninformed by evidence as to whether the RGC work was completed, and thus faulty, or whether the failure of the RGC work is so entirely unambiguous that I should conclude the water staining resulted from RGC's negligence.
- [61] I have many more photos of roofing that Mr. Haley claims demonstrate a lack of proper installation. In essence, he is asking that I accept his supposedly expert observation. However, these photos mean nothing to me as evidence, as they were not put into evidence by a qualified expert. Thus, I cannot rely on them to come to any conclusions about the standard of work performed by RGC.
- [62] One of Mr. Haley's serious allegations relates to the unfinished state of the roof over the garage. However, Mr. Garside testified that he had asked Mrs. Zettl many times about hiring another roofer to finish the garage roof. This issue emerged after Mrs. Zettl advised that she was not satisfied with the work of RGC's original subcontractor, and terminated that subcontractor.
- [63] The garage roof was unfinished due to Mrs. Zettl's termination of the RGC subcontractor who had begun the job. Initially, she would not respond to Mr. Garside's requests to hire another roofing contractor. Later, she was spending time in Germany, where Mr. Garside could not reach her. As a result, that unfinished and unprotected membrane showed apparent UV damage. Therefore, the roof remained unfinished as a result of Mrs. Zettl's failure to make a decision. It was not due to RGC's dereliction of duty.

- [64] Another telling example relates to the allegedly faulty 'cricket' on the roof in front of the master bedroom's ensuite bathroom. I understand this term refers to a blind gutter installed temporarily (pending completion of the roof) to catch water. The allegation is that the SBS membrane used to line it was not properly installed. I cannot tell this from the photo provided, nor do I have evidence of what was wrong with the installation, as this would require expert opinion. Therefore, the evidence is entirely unhelpful and has no weight to support the pleadings against RGC.
- [65] Another allegation repeated by Mr. Haley was that several of RGC's installations were not in compliance with manufacturers' specifications. These allegations related mainly to the use of membranes, with him focusing in particular on the floor of the deck above the pool. In regard to this area, he said that the seams of the membrane needed to be overlapped but were instead butted up against each other.
- [66] Mr. Haley's view was, of course, opinion, and not properly put before the court. Even more problematic was the fact that he presented nothing to indicate what the manufacturers' specifications were and how they were ignored by RGC.
- [67] As well, Mr. Garside answered these allegations in his own evidence, given as an adverse witness called by counsel for the plaintiffs and binding on the plaintiffs: *Lam v. Chiu*, 2012 BCSC 441 at paras. 24-26.
- [68] The complaint about the membrane is an example of how Mr. Haley's evidence often amounted to speculation. The seams could not be overlapped because they were to have tile laid over them. Had the seams been overlapped, Mr. Garside explained, the tiles could not be laid flat. The surface needs to be as even as possible for a satisfactory tile installation.
- [69] The first membrane was a temporary waterproofing exercise. Mr. Garside had advised Mrs. Zettl that she had six months to choose her tiles. She did not make the deadline.
- [70] Had RGC been allowed to finish the deck above the pool, the RGC crew would have applied another membrane, a Schluter membrane, and then a thin layer of mortar on top of that membrane. Subsequently, they would have trowelled it on, placed a Ditra Mat (a waterproof "cushion") by pressing it into the mortar, installed the strip over the joints, and applied thin set mortar in which to embed the tiles. Finally, they would have put on the tiles and grouted them.
- [71] In light of this construction plan, it was the inability to finish the work through the early termination of the RGC contract that caused many of the difficulties pointed to by Mr. Haley.
- [72] At one point after Mr. Haley had begun working on site, there was a major leak from the solarium down into the dining room. He claimed that RGC was responsible for this due to their failure to properly install a drain. However, RGC had not worked on that portion of the house for six months and had had no problems with leaks there. Moreover, it was only after Mr. Haley took the concrete tiles off the roof outside the solarium that this problem emerged.

- [73] Clearly, Mr. Haley was not informed about the force of the wind and rain at the site: he attempted to use tarps to protect the roof, which were subsequently shredded, and thus of no protective use at all. Mr. Haley attempted to blame RGC for the ensuing flood, attributing it to a plumbing leak due to an uncapped pipe. However, the pipe was an old installation that was no longer in use and could not have flooded the area affected. I accept Mr. Garside's explanation that Mr. Haley had failed to properly tarp the exposed roof. The result was that rainwater ran down between the wall and the new stucco RGC had installed earlier and also ruined the redone ceiling in the dining room.
- [74] There are many other problems that Mr. Haley implied resulted from RGC's inadequate work on the house. However, I have no direct evidence that is probative on these topics.
- [75] I cannot find that Mr. Haley's evidence supports an allegation of negligent work or a breach of contract against RGC.

Roger Garside

- [76] Mr. Garside impressed me as a candid, honest witness. I find that he did his best to satisfy a demanding and distrustful client concerned with the mounting costs of her renovations.
- [77] He did his best to explain the various elements of the construction that were ongoing. He also attempted to hurry her along to choose materials so that he could complete the project. He said that Mrs. Zettl was a likeable person, but also often would not commit to a choice, as for example, her dawdling when it came to choosing the tile replacements for the deck and roof.
- [78] Mr. Garside also had many photographs of his ongoing work. The work looks acceptable to me but more importantly, I cannot judge its adequacy or lack thereof: I have no evidence that would indicate that it did not meet a reasonable standard.
- [79] Respecting the beam to be placed beneath the roof over the indoor pool, Mr. Garside is open about his misreading of the engineer's specifications.
- [80] In my reasons on the application for a non-suit brought by the plaintiffs, I described this issue as follows:
- [11] Were it not for the forthright admission of Mr. Garside that he had indeed made a mistake in using a 2-ply beam rather than the 3-ply beam to span the pool room ceiling, I would have granted Mr. Lott's motion for a non-suit.
- [12] However, the consulting engineer who was retained by RGC to do the design specifications for the pool room required the beam be a 3-ply beam and it is not. In my view, the mistake made by RGC presents a scintilla of evidence which could result in a finding of negligence or breach of contract.

- [81] Moreover, in that decision, I noted that the plaintiffs would have to demonstrate the damages that flowed from this error.
- [82] There was no evidence about this beam other than that the new beam was identical to the beam that had, without failing, held up the roof above the pool for many years. The 3-ply beam would have met the engineer's specifications, but the 2-ply beam has not failed or caused any demonstrable problem.
- [83] Regarding the lack of building permits, Mr. Garside explained that the initial report on remediation of the house from Read Jones Christopherson ("Read Jones") included an estimate of approximately \$7,000.00 for obtaining building permits.
- [84] Mr. Garside advised Mrs. Zettl that it would be wise for her to get building permits but it appears to me that she declined both to retain Read Jones, and to give instructions to obtain building permits. She did not want to spend the required \$7,000.00 at that time.
- [85] Mr. Garside would have had to defy Mrs. Zettl's instructions to get building permits.
- [86] It would no doubt have been the wiser course to obtain building permits, but the obligation is the owner's under the relevant municipal bylaw.
- [87] The contract between RGC and Mrs. Zettl was a cost plus contract. Mr. Garside's company was asked to do a general remediation of the house without any clear picture of how extensive the required repairs might be. He could not have taken on any other kind of arrangement.
- [88] Mr. Garside had the benefit of reading the Read Jones report and saw their cost estimate. His own cost for the contract was very close to what the Read Jones cost would have been over the term Read Jones suggested.
- [89] As the general contractor, Mr. Garside was not on site every day. He used competent tradespeople, assigned them work, and left them to complete it. Moreover, he responded to any concerns expressed by Mrs. Zettl and would meet with her to go over invoices.
- [90] When ejected from the site in September 2009, Mr. Garside said that there was about 35% of the work left to do. Much of this work was finishing work, and it is my impression that most of Mr. Haley's complaints related to this particular type of work.
- [91] Again, work that was yet to be completed cannot be taken as a failure or a breach of contract by RGC because Mr. Garside was never given the opportunity to finish. He remained willing to advise any successor who asked about the work. However, except for the leak over the solarium, he was never contacted for assistance or information.
- [92] I will not refer to any of the photographs taken. They are not helpful to me in determining whether the RGC work was faulty. I can only see that some of the work was incomplete.

- [93] I note that Mr. Garside admitted that he could not explain some examples of water ingress where he had done work. In my view, that admission does not indicate negligence, but simply that the building's circumstances have changed, as a result of the passage of time, since the work was done and left exposed.
- [94] I am also of the view that, had there been deficiencies found in the RGC work after it was complete, that RGC would have, as testified to by Mr. Garside, made repairs under its warranty.
- [95] With the exception of the leaks caused by Mr. Haley's removal of the mansard roof over the solarium, at no time before this lawsuit was Mr. Garside offered the opportunity to correct any deficiencies, or even to comment on those that were alleged.
- [96] The Levelton Consultants' report of July 24, 2009, prepared by professional engineers at the request of Mrs. Zettl, concerned the quality of the roof construction performed by RGC. This report was not produced by the plaintiffs. Instead, it was produced in the cross-examination of Mr. Haley by the defendant to support his contention that the RGC work was not deficient.
- [97] Mrs. Zettl concluded that Levelton was prepared to "whitewash" the performance of RGC (of which there is no evidence), and she disregarded the report.
- [98] A number of other engineering firms were consulted by the Zettls after RGC left the site, but no other reports seem to have been produced, as none was submitted in this litigation. I find that this is not only puzzling, but also suggests, as the defendant submits, that none of these engineering firms would have endorsed the plaintiffs' allegations of negligence or breach of contract against the defendant.

The Building Permit Issue

- [99] The plaintiffs allege that RGC's failure to obtain building permits and thus to invite inspections are demonstrative of negligence and breach of contract.
- [100] However, the relevant municipal bylaw (Saanich Building and Plumbing Bylaw, 2005, No. 8627) makes it very clear that, where permits are required, the obligation to obtain permits is that of the owner of the affected property.
- [101] It reads as follows:

SUBSECTION 2.2 - OBLIGATIONS OF OWNER

2.2.1 Every owner shall obtain all required permits or approvals, and pay all fees and provide all deposits prior to the commencement of work.

[Emphasis added]

- [102] Given that Mrs. Zetl had not agreed to Read Jones's recommendation that permits be acquired, or Mr. Garside's comment that it would be wise to obtain them, it appears to me that she was aware of the need for permits. Consequently, I find that she knowingly required that the work be done in the absence of permits.
- [103] While it is reasonable to assume that, had Mrs. Zetl decided that she should get permits, she would have delegated that responsibility to Mr. Garside, the fact remains that it was her obligation to see that the permits were obtained. It was not his obligation to 'talk her into' obtaining the permits.
- [104] As well, notwithstanding Mr. Haley's implications to the contrary, there is no evidence of what damages flowed from the failure to obtain permits.
- [105] Once again, I do not have expert evidence to support the contention that the lack of permits constituted a breach of contract or prima facie negligence based on a standard of care analysis.
- [106] Essentially, the plaintiffs claim that, since RGC performed the work without permits, the doctrine of 'illegality' results in the following: a foreclosure of Mr. Garside's claim for his unpaid invoices, as well as an automatic determination that RGC's work was both negligent and in breach of contract.
- [107] The plaintiffs submitted a number of cases to support their position. In addition, the plaintiffs based much of their argument on a simple assertion that the necessary standard of care had been established and did not require expert evidence. However, while this proposition was clear, at no time did the plaintiffs outline the appropriate standard of care, nor did they explain how it had been established. Repeating a proposition without foundation a number of times does not establish its reliability.
- [108] I also find that many of the cases cited in support of the assertion that the lack of building permits indicated negligence were not properly described by the plaintiffs.
- [109] For example, the plaintiffs referred to the case of *Shafazand v. Whitestone Management Ltd.*, 2014 BCSC 21 [Shafazand] at paras. 277-279 of their closing submissions. In that case, the court applied the illegality doctrine to deny a contractor his counterclaim for amounts owing. The contractor had submitted false and misleading plans to the municipal authorities when constructing an illegal suite. Ultimately, the court acknowledged it would be unfair to grant the plaintiff's claim while disallowing the defendant's counterclaim on policy grounds, as both parties were aware of the illegality. Consequently, the Court denied both claims.
- [110] If the plaintiff wishes to follow the reasoning of *Shafazand*, then his claim should also be denied under the illegality doctrine.

[111] I also note that at para. 236 of their closing submissions, the plaintiff referred to *Nicholls v. Martin*, [1998] B.C.J. No. 2218 (BCSC) [Nicholls] for the proposition that negligence has been found where a party fails to obtain the requisite permits for construction work. However, the plaintiff's characterization of this case oversimplifies the court's actual ruling. In *Nicholls*, the plans that both parties had agreed to were not followed, and so the defendant contractor was found to be in breach of contract. The Court noted that the defendant contractor was liable for breach of contract "whether or not the system in fact constructed by the defendant would have worked or met regulatory requirements": para. 55.

[112] Moreover, in regard to negligence, the Court found the following at para. 62:

The defendant has claimed that the sewage system failed not because of the design changes but because of the soil compaction. The design changes did indeed cause or materially contribute to the failure of the sewage system. However, given that liability has already been imposed with respect to breach of contract, the decision with respect to liability does not in any event rest wholly upon a finding with respect to causation in negligence.

[113] At para. 65, the Court concluded:

However, even if the contract had been not for a system with the specifications set out by Hoel Engineering Ltd. and incorporated into the permit, but for any functioning system capable of regulatory approval, the defendant would nevertheless have been liable for breach of contract and negligence, as I have found he built a sewage system that did not properly function and did not comply with the requirements for final approval.

[114] In my view, the plaintiffs mischaracterized *Nicholls* by implying that the focus of the decision was the contractor's liability due to their failure to obtain the required permits.

[115] When looking to the effect of illegality, courts in modern times have distinguished between illegality in the context of a contract's wording versus its performance. In *Haghdust v. BC Lottery Corporation*, 2014 BCSC 1327, [Haghdust], the Court ruled that, despite employees being barred from being on gambling premises by their employment contracts, they were entitled to collect their gambling winnings from lottery tickets they had purchased. At para. 202 of *Haghdust*, the Court stated the following:

I also note that in *Still*, Roberts J.A. highlighted an analytical difference between a contract that is illegal to form and a contract that is performed by one of the parties in a manner prohibited by statute: *Still* at para. 22. In the latter case, courts are more likely to avoid invalidating the contract. . . .

[116] Similarly in *Lotusland Estates v. Ali*, 2002 BCSC 131, the Court ruled in favour of the plaintiff contractor who had built an unlawful rental suite and remained unpaid. In coming to its decision, the Court found that the construction of the suite itself was not illegal, but that its use as a rental property would be. Both parties were aware that the suite would be put to an illegal use and, in this case, it was the defendants who "instituted and directly benefited from the use of the suite": para 46. Consequently, the Court ruled that the defendants could

not benefit from the doctrine of illegality to avoid paying the contractor for his work.

[117] Here, Ms. Zettl benefited from saving the \$7,000.00 cost of obtaining permits. Mr. Garside would actually have profited from obtaining permits, as the cost plus contract entitled him to an additional remuneration of \$1,050, this amount representing 15% of \$7,000.00. He had nothing to gain from working without permits.

[118] Further, no damages have been proved to arise from the failure to obtain permits.

[119] No liability to RGC arises from the failure to obtain permits.

Breach of Contract

[120] I have no evidence to demonstrate that RGC failed to perform its contract in a good and workmanlike manner or that the materials supplied were of poor quality. Consequently, I dismiss the plaintiffs' claim on this ground.

Negligence

[121] It is trite law that to establish negligence, a party must prove the existence of a duty of care, a standard of care, a breach, causation and damages: *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para. 96.

[122] The duty is admitted. However, without evidence of a standard of care, I cannot determine whether any breach occurred. As I have noted above, in the absence of evidence to inform me of the way in which a reasonable contractor would have done the work RGC has done, I have no ability to assess the quality of the work performed.

[123] This is not a case where a roof blew off after being hit for the first time by a serious wind. That obviously faulty construction would not require expert evidence to support a contention that the roof was not properly underpinned.

[124] The general rule is that expert evidence is required when assessing the quality of a professional's work unless the work is of a non-technical nature. Specifically, as noted by the Court in *Roy v. British Columbia (Attorney General)*, 2005 BCCA 88 at para. 36:

4. Where, as here, at issue is the standard of a competent member of a trade or profession ... evidence of those carrying on that profession is necessary unless ... the matter is one of "non-technical matters" or those of which an ordinary person may be expected to have knowledge.

[125] More recently, the Court of Appeal summarized the law in this area as follows:

Thus, where the conduct of a professional person is in question, expert evidence may be necessary to establish that the conduct conformed to the standard of care for the particular profession, at least where scientific or technical considerations arise that are beyond common understanding. Even then, however, it remains open to [a] judge and jury to determine that the standard of the profession is inadequate where, for example, it is apparent, that obvious precautions are not taken.

Burbank v. R.T.B., 2007 BCCA 215 at para. 72, leave to appeal to the SCC refused, [2007] S.C.C.A. No. 316.

[126] Similarly, in Tristram Hodgkinson & Mark James, *Expert Evidence: Law and Practice*, 4th ed. (London: Sweet & Maxwell, 2015) at 569:

Certainly in a construction case it is almost inconceivable that a party would prove such an allegation [negligence] in the absence of expert evidence in the courts, though an arbitrator might on occasion consider himself able so to find unassisted.

[127] The courts in British Columbia have demonstrated reluctance to find that a contractor was negligent in cases where no expert evidence was led. Where an absolute rule requiring expert evidence in every negligence case against a contractor cannot be stated for obvious reasons, the need for an understanding of technical evidence and for a comparison to an established standard of care is patent: *Malhotra v. Water Front Homes Ltd.*, 2015 BCSC 1068 at para. 37 [Malhotra]; *Commercial Electronics Ltd. v. Savics*, 2011 BCSC 1275 at para. 214.

[128] Consequently, it is unnecessary to examine causation or damages.

The Counterclaim

[129] RGC claims for its outstanding invoices, one that was rendered on May 20, 2009 (the "May 2009 Invoice") in the amount of \$56,442.18 and one that was rendered July 10, 2014 (the July 2014 Invoice) for \$39,215.36.

[130] Mr. Garside testified that Mrs. Zetl had always paid his invoices in a timely manner. Mr. Zetl testified that he would receive instructions from Mrs. Zetl to forward payment once she received the invoices.

[131] Mr. Zetl also testified that his mother instructed him not to pay the May 2009 Invoice.

[132] The invoice was accompanied by a brief description of the time period covered, the cost of materials purchased, and the labour employed (taken from the Vendor-in-job detail). Any supporting invoices and additional details were available through Cathie Ogilvie, Mr. Garside's assistant. Moreover, as I have noted above, when she was in Victoria, Mr. Garside would meet with Mrs. Zetl to discuss the details of invoices, affording her an opportunity to receive additional information. During these meetings, he would identify the workers who had been on the site during the invoiced period and the work done.

- [133] A cost plus 15% management fee was the basis on which Mr. Garside conducted all of his work. The cost portion of the invoice related to the invoices received from the subcontractors who worked on the site and the cost of materials. To pay himself for managing the project, Mr. Garside charged his management fee on the gross amount.
- [134] There was no evidence that the work described in the invoice was left undone. Rather, it appears that, when Mrs. Zettl became disillusioned with RGC, she decided not to pay the May 2009 Invoice.
- [135] There is no dispute that the bill was unpaid, as it forms one of the statements in the Agreed Statement of Facts.
- [136] The money is due and owing and I have not been provided with any evidence to support a denial of payment. Therefore, I award the defendant RGC the sum of \$56,442.18 plus pre-judgment interest for the May 2009 Invoice.
- [137] Before his termination by Mrs. Zettl, Mr. Garside had never been terminated from a job. Mr. Garside was disappointed that he could not finish the job and was also upset that he was being denied the opportunity to complete the additional \$250,000 - \$300,000 worth of unfinished work.
- [138] Because he was upset that Mrs. Zettl felt as she did, he initially declined to invoice her for work he had already performed but not yet billed. However, once the litigation was commenced against him, there was no reason not to invoice the work, and so he rendered a bill for \$39,215.36, the July 2014 Invoice. This bill includes a 15% management fee.
- [139] The July 2014 invoice covers work done in the period from May 20, 2009 to September 14, 2009, the date RGC received a letter of termination from the Zettls' solicitor. There is no other invoice after this one.
- [140] I understand that the supporting documentation for this invoice has been produced by Mr. Garside.
- [141] There has been no proof of either negligence or breach of contract against RGC for which a set-off could be argued.
- [142] The plaintiff argues that there is a calculation mistake in the second invoice. Mr. Garside explained that the Zettls complained about the amount charged for the services of a labourer to clean up the site on the May 2009 Invoice and he advised them he would deduct it. However, that deduction was missed, charged for and then mistakenly added back to the July 2014 Invoice. I have already awarded the entire amount of the May 2009 Invoice, including the amount Mr. Garside intended to deduct. Hence, his July 2014 Invoice should be reduced by the amount of 549 hours at \$31.00, for a total of \$17,019, and the 15% management fee thereon of \$2,552.85. The GST amount charged should also be reduced accordingly.

- [143] I will leave the adjustment of the July 2014 Invoice to the parties since I do not have evidence of the GST rate or what it is based on. If the parties cannot agree, they may make an application to the Registrar for a determination of the correct calculation.
- [144] I decline to award the additional 15% for loss of profit claimed on the estimated loss of opportunity to complete the work valued by Mr. Garside at \$250,000 - \$300,000. The estimate was approximate, somewhat vague, and not supported by evidence.
- [145] In addition, as testified to by Mr. Garside, I have no evidence of the extent to which RGC was able to mitigate its damages with other work it obtained a short time after being terminated from the site. Therefore, the defendant has failed to meet its burden to establish its pleaded loss of profit.
- [146] As noted in Malhotra, to award this part of the counterclaim would amount to "a quantum leap in speculation" due to a lack of evidence: at para 38.
- [147] In conclusion, the plaintiff's claim is dismissed with costs at Scale B to the defendant RGC. Moreover, excepting the claim for lost profits, RGC's counterclaim is allowed, subject to the above-noted correction of the July 2014 invoice.

"Russell J."

The Honourable Madam Justice Russell

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