SUBMISSION OF ASTALDI CANADA INC. TO THE COMMISSION OF INQUIRY RESPECTING THE MUSKRAT FALLS PROJECT

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To: Commission of Inquiry Respecting the Muskrat Falls Project
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ATTENTION: THE HONOURABLE JUSTICE RICHARD LEBLANC, COMMISSIONER

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I. Introduction

1. The relevant provisions of the Terms of Reference of this Commission of Inquiry as they relate to Astaldi Canada Inc. ("Astaldi") are Clauses 4(b)(i)-(iii). Said clauses direct the Commission to inquire as to why there are significant differences between the estimated costs of the Muskrat Falls Project at the time of sanction and the costs incurred by Nalcor in relation to the contract entered into between Astaldi and Muskrat Falls Corporation ("MFC") dated November 29, 2013, entitled Civil Works Agreement, Construction of Intake and Powerhouse Spillway and Transition Dams, Agreement No. CH0007 ("CH0007") **[Ex. P-01865]**.

2. This Submission will set forth reasons which explains why there were delays and cost overruns in relation to CH0007 in three (3) separate categories which correspond to the aforesaid Terms of Reference, namely:

   (i) as they relate to Nalcor's supervisory oversight and conduct of CH0007 (Cl. 4(b)(i), Terms of Reference);

   (ii) as they relate to the terms of CH0007 between Nalcor and Astaldi (Cl. 4(b)(ii), Terms of Reference); and

   (iii) as they relate to the overall project management structure Nalcor developed and implemented in relation to CH0007 (Cl. 4(b)(iii), Terms of Reference).

II. Chronology of Relevant Events

3. To put in perspective the time of relevant events up to the execution of CH0007, below are excerpts from a memorandum prepared by Mr. Mauro Palumbo entitled "Memorandum Re: Late Start of Construction Activities Due to the Belated Execution of the Contract Agreement **[Ex. P-03020]**.

DATE	DESCRIPTION
April 30, 2012	Request for Pre-qualification circulated by Nalcor, which included a proposed contract award of 2nd quarter, 2013, and final completion 4th quarter 2016.
June 26, 2012	Astaldi submitted its application in response to the Request for Pre-qualification.
September 28, 2012	Nalcor issues a Request for Proposals to those who pre-qualified, including but not limited to Astaldi, such RFP which contemplated a contract award of June 3, 2014, and substantial completion November 28, 2017.
April 16, 2013	Astaldi submits a Proposal which contemplated contract award of July, 2013 and substantial completion June 30, 2018.
July 5, 2013	Nalcor issues post-bid addendum with allowance to update proposals to bidders. Such addendum contemplated a limited notice to proceed ("LNTP") on September 15, 2013, contract award of October 31, 2013 and substantial completion of June 30, 2018.
September 30, 2013	Nalcor issues a LNTP to Astaldi which expires October 31, 2013.
October 31, 2013	Nalcor amends the LNTP which revises the expiration of the LNTP from October 31, 2013 to November 30, 2013.

November 29, 2013	Nalcor awards Contract CH-0007 to Astaldi.
December 15, 2013	Shared access to powerhouse and intake area made available to Astaldi, 76 days past issuance of LNTP. Unrestricted access to Spillway.
December 20, 2013	Astaldi is given unrestricted access to powerhouse.

III. Nalcor's Supervisory Oversight and Conduct Which Contributed to Delays and Cost Overruns to Contract CH0007

4. Astaldi respectfully submits the following issues related to Nalcor's supervisory oversight and conduct caused an increase to costs and/or an impact on the schedule in relation to Contract CH0007.

Date of Award of Contract CH0007:

5. When Nalcor initially circulated a Request for Pre-Qualification in relation to CH0007 on April 30, 2012, it expressly contemplated a contract award date of second quarter, 2013, and final completion of fourth quarter, 2016.

6. When Nalcor issued a Request for Proposals to Astaldi and others on September 28, 2012, it contemplated a contract award of June, 2013, and substantial completion of November 28, 2017. It was on this basis that Astaldi submitted its proposal.

7. CH0007 was not awarded to Astaldi until November 29, 2013 **[Ex. P-01865]**. Astaldi submits the delay in awarding CH0007 resulted in delays and increased costs

8. An award in the month of June would have provided the successful Proponent, which in this case was Astaldi, to mobilize and carry out necessary on-site preparation ahead of the harsh weather conditions which are experienced in Labrador. Once a contract with the complexity such as CH0007 is awarded it takes time for a contractor to make arrangements and secure contracts with sub-contractors and third parties, as well as hire necessary employees.

9. The fact that the award of CH0007 did not occur until November 29, 2013, did not provide Astaldi lead time to prepare and make arrangements prior to the onset of the harsh weather conditions experienced in Labrador that it would have had if the award was made in June or July of that year.

10. It is clear from the evidence that both Astaldi and Nalcor understood and acknowledged the difficulties which would be experienced given the delayed award of CH0007.

11. From Astaldi's perspective, Mr. Ken Chrysslor outlined his concerns in an email dated November 22, 2013 **[Ex. P-03140]**. Mr. Ron Power, who was the General Project Manager for MFC at the time, likewise addressed his concerns in an internal email dated November 2, 2013 **[Ex. P-03039]**.

12. Notwithstanding Astaldi's concerns, Astaldi was led to believe that MFC had entered into CH0007 in good faith and that there would be a level of cooperation that would see any

outstanding issues arising as a result of the late award of CH0007 resolved in a mutually agreeable and commercially reasonable manner.

13. As was stated by Mr. Mauro Palumbo in his evidence before the Commission on May 8, 2019:

> We had-and we were convinced to have a good relationship with them, and that some principle of cooperation- good faith, good will – in order to achieve the target was feasible with this client…Our impression was that we will be able to find and solve any difficulties that we, as contractor, can face during the contract extension **[Public Transcript, Phase 2, Mauro Palumbo, May 8, 2019, p. 17]**.

14. This was in keeping with the representations and actions made by Nalcor to Astaldi and in line with Nalcor's guiding principles of "Teamwork, Open Communication, Honesty and Trust, Safety, Respect and Dignity, Leadership and Accountability, which were affirmed by Nalcor in a kick off meeting held with Astaldi on December 19, 2013 **[Ex. P-03143, p.4]**.

15. Astaldi's expectations of "good faith" was also expressly enunciated in the Limited Notice To Proceed **[Ex. P-02139, p. 2, paragraph 2]**.

On Site Authority:

16. A common theme of numerous witness who appeared before the Commission was the fact that construction on site was impeded as a result of Nalcor's failure to have appropriate personnel on site to deal with construction and commercial related issues.

17. This was specifically raised by Astaldi with Nalcor, including but not limited to correspondence forwarded by Mr. Mauro Abbafati, Astaldi's Acting Project Manager at the time, to Mr. Scott O'Brien dated June 23, 2014.

18. As stated by Mr. Abbafati:

> Contractor writes to confirm that during the last few weeks Company has been asked on numerous occasion, to provide somebody from your organization who is willing and able to stay on site Monday to Friday on a regular basis who has the knowledge and the authority to discuss and/or approve various subjects in respect of the activities which are being executed on the sire, including discussions, modifications and approvals.
>
> As you are already aware a lot of time is being lost/wasted as a result of Company not having such a responsible person on site on a full time basis. Time is of the essence with this prestigious Project, therefore it is most important that decision making should be streamlined in order that down-time is minimized and productivity is maintained. **[Ex. P-03022, p.1]**.

19. Mr. Don Delarosbil also testified he attended a meeting with Mr. Scott O'Brien in St. John's to discuss Astaldi's concerns regarding the impact of on-site Nalcor personnel lacking sufficient authority, to no avail.

20. It is evident from the evidence presented at the Inquiry that Nalcor was and is very much a "top down" organization, where decisions are made remotely and then implemented on site. As Mr. Mauro Palumbo testified regarding his experience with on site authority:

> **MR. LEARMONTH**: And in your experience on other projects around the world, is the practice for there to be a person on site from the owner's group to make, if not on-the-spot decisions that arise, at least timely decisions?

MR. PALUMBO: It's normal practice to have on site if not the client personnel at least their representative with appropriate powers in order to take decision, issue instruction, provide approvals – so perform all the activities which are required in order to get – to obtain – to grant, sorry, to grant the normal execution of the works. … Particularly when difficulties or unexpected circumstances arises. **[Public Transcript, Phase 2, Mauro Palumbo, May 8, 2019, p. 24]**

21. Mr. Don Delarosbil also testified before the Commission and stated as follows:

MR. DELAROSBIL: Well, from my point of view, it's important to have somebody on the job site that has full responsibility for that project and the ability to be able to make decisions, construction decisions. They need somebody with construction experience that'll be able to see the impacts and understand your requests, what you're looking for and why you're looking at it, and the ability to be able to make a timely decision, some on a day-to-day basis and some – have the ability to instruct others to dig in deeper to be able to get back to the contractor or contractors on the information requested.

…

MR. DELAROSBIL: Well, every other – every other site that I've worked on there was a person on-site that had that authority.

MR. LEARMONTH: A representative of the owner?

MR. DELAROSBIL: That's right, yeah.

…

MR. DELAROSBIL: Well, unfortunately, we didn't have that person on the Muskrat Falls site. The people on the Muskrat Falls site – I must say, the work team on Muskrat Falls tried hard and they worked hard, but all their decision making power was left to St. John's in, you know, main office of Nalcor.

So, they had authority – my understanding is they had authority – and this has been told by me a couple of times, by several individuals that worked on the job site, was $25,000. Well, $25,000 is not much authority in the game we're working.

MR. LEARMONTH: What was your authority on-site? You're the project manager.

MR. DELAROSBIL: I had $5 million.

MR. LEARMONTH: You could spend $5million without calling head office?

MR. DELAROSBIL: Yeah.

...

MR. DELAROSBIL: ... The issue was that there was nobody at these meetings from the Nalcor side with any decision-making power, so everything dragged on.

MR. LEARMONTH: So, if there's no decisions made at this meeting and there's a delayed process – ... – am I correct that these issues just keep piling up?

MR. DELAROSBIL: Yeah, the issues keep piling up. **[Public Transcript, Phase 2, Don Delarosbil, May 8, 2019, pp. 79-80]**

22. Mr. Georges Bader testified his experience with this Project in a similar manner:

MR. LEARMONTH: Did you ever see a situation which – in which someone on site, on their own, made a decision on an issue that involved more than $25,000?

MR. BADER: No.

MR. LEARMONTH: You didn't?

MR. BADER: No. **[Public Transcript, Phase 2, May 8, 2019, p. 2]**

23. Witnesses from other contractors gave similar testimony **[T. Harrington** (Cahill-Ganotec), 20 March 2019, p. 32; **K. Williams** (Valard), 3 April 2019, pp. 20, 28-29; **A. Rietveld** (Pennecon), 4 April 2019, pp. 14-16, 32; **T. Martin** (GE Grid Solutions), 3 May 2019, p. 29].

24. The Inquiry heard evidence from numerous other individuals unrelated to Astaldi who voiced identical issues with on site authority. They included several former Nalcor employees who expressed their concern in their resignation letters. We refer the Commission to the resignation letters of Mr. Des Tranquilla **[Ex. P-03694]**, Mr. Brian Cottrell **[Ex. P-03049]**, Mr. Ted Vanwyk **[Ex. P-03048]**, and Mr. John Mulcahy **[Ex. P-02819]**.

25. It is clear that Nalcor's failure to have personnel on site with sufficient authority caused delays to the schedule and an increase in costs to CH0007.

Excessive Amount of Contract Letters:

26. There were several contractors, including Astaldi, who testified at the Inquiry that Nalcor engaged in writing an excessive amount of contract letters.

27. As was stated by Mr. Georges Bader during his testimony on May 8, 2019:

> If you look to the records you would see around 3,000 letters-3,000 letters between project managers…So I think it's excessive." **[Public Transcript, Phase 2, Georges Bader, May 8, 2019, p. 81]**.

28. This issue was also addressed by Mr. Don Delarosbil when he stated during his examination at the Inquiry as follows:

> When you get 3,000 letters today, that's equal to 3 letters a day. Three letters a day that you have to answer and reply to and spend the time and get your commercial guys and read through the contract of where it could have been settled with a simple conversation or an understanding or something else. It just takes a lot of time. **[Public Transcript, Phase 2, Don Delarosbil, May 8, 2019, p. 81]**.

29. While it is acknowledged that all parties involved in a project such as this understand the requirement for contract letters to establish a record of events or positions on issues that inevitably arise in the construction of the work, Astaldi submits the focus on more open communication in an attempt to resolve matters would have been beneficial in reducing time and costs to the Project, rather than what appears to be the primary focus of writing Contract letters to the exclusion of focusing on conflict resolution.

30. Astaldi submits this approach adopted by Nalcor caused delays to the performance of CH0007, as well as additional costs.

Unprofessional Conduct by Nalcor Employees:

31. While it is difficult to quantify the impact unprofessional conduct by an owner may have on the schedule and/or costs of a project, Astaldi submits it is patently obvious it would negatively impact both.

32. During the evidence of Astaldi representatives the Commission heard incidents where senior Nalcor employees acted unprofessionally.

33. Mr. Don Delarosbil testified that based on the actions of senior Nalcor employees he felt compelled to document such occurrences, as he did in correspondence to Mr. Scott O'Brien dated September 26, 2016. In that correspondence Mr. Delarosbil wrote:

> Contractor wishes to point out that throughout the course of the September 20, 2016 site progress meeting Company behavior was aggressive, intimidating and demeaning towards Contractor staff. Contractor asserts that this is not an uncommon practice by Company representatives at such meetings and this had been previously addressed. Such unprofessional conduct is unnecessary, non-collaborative, damaging to the relationship....
> At the end of the referenced meeting, and contrary to Company's characterization of the events, Contractor's PM made comments relating to the unprofessional conduct as noted above and asserted that should such behavior continue Contractor would not attend these meetings in the future. **[Ex. P-03102]**.

34. Mr. Delarosbil also testified he experienced instances where Nalcor employees yelled at him in meetings, such as during one meeting with senior Nalcor employees when as a

result of such yelling he felt it necessary to leave the meeting . **[Public Transcript, Phase 2, Don Delarosbil, May 9, 2019, p.36]**.

35. Numerous other witnesses unrelated to Astaldi testified at the Inquiry as to having experienced similar unprofessional treatment by Nalcor employees.

Impact of Nalcor Assuming Role as Engineer/Payment Certifier:

36. There are two discrete engineering roles on this or any major project. The first is that of "Engineer of Record", or overall designer, which is a role that SNC Lavalin ("SNC") has occupied throughout the entire project.

37. The second role, and the one Nalcor kept to itself, was that of "Engineer"/payment certifier responsible to both parties, owner and contractor, for the independent and impartial evaluation of requests for change orders, certification of progress payments, and initial decisions of interpretive disputes regarding the contract. Contrary to best practices, Nalcor undertook this role with predictably disappointing results.

38. Article 11 of the Astaldi Contract's Articles of Agreement **[Ex. P-01865, p.35]** required the Engineer (Nalcor) to "exercise such discretion impartially within the terms of this Agreement, having regard to all circumstances":

11.1 Engineer has been retained by Company to provide procurement, construction management and contract administrations services. Engineer shall have such powers, discretions, functions and authorities as are specified in or as may be implied from this Agreement and shall carry out such duties (including issuing instructions, decisions, orders and Acceptance). **Whenever Engineer is required to exercise discretion by the giving of a decision, opinion or Acceptance, or to determine the cost or value of any matter which may affect the rights or obligations of a Party, Engineer shall exercise such discretion impartially within the terms of this Agreement, having regard to all circumstances.**

11.2 **Contractor shall comply with the decisions, orders and instructions given by Engineer in accordance with this Agreement.**

11.4 **Engineer shall be the interpreter of first instance of the Technical Requirements.**

11.6 Contractor shall not commence any Work involving permanent installation of any equipment, materials or products until the Contractor has submitted to Engineer and Engineer has Accepted the health, safety and environmental plans required by Article 15 and Engineer has issued drawings marked "Approved for Construction" for the part of the Work to be performed.

39. Article 12 of CH007 requires the Engineer to review payment certificates and all supporting documentation and make a formal determination as to the amounts properly payable to the Contractor. Article 12 includes requirements for timely review and approval of Astaldi's payment certificates (10 business days) and timely payment of Astaldi's invoices (30 days). For example, with respect to Work compensated on a monthly progress basis:

12.10 Within ten (10) Business Days of receipt of a Payment Certificate, Engineer shall review it and the supporting documentation and make a determination as set out in paragraphs (a) and (b) below; if Engineer determines that:

(a) ...

(i) the progress claimed in the Payment Certificate has been achieved, Engineer shall recommend to Company that the Payment Certificate may be Approved; or

(ii) the progress claimed has not been achieved, Engineer shall amend the Payment Certificate to reflect the progress actually achieved and advise Contractor in writing the reasons for the revision, and recommend to Company that the revised Payment Certificate may be Approved; ...

...

12.15 Within thirty (30) days following Engineer's receipt of a properly prepared invoice, accompanied by acceptable Billing Information in accordance with Article 12, Company shall pay to Contractor the amount stated to be due ...**[Ex. P-01865, p. 36]**.

40. Additional contractual obligations of the payment certifier are found at Exhibit 2 of the CH0007 Contract, including verification of labour hours and monthly progress achieved on lump sum price items. **[Ex. P-03741, p. 197]**.

41. Under Articles 14.7 and 14.8 of the Contract, the Engineer was also responsible for evaluating Astaldi's Change Requests in a timely and reasonable manner:

14.8 If Contractor considers or ought to have known, acting reasonably, that an occurrence has taken place which constitutes a Change, then Contractor shall, within ten (10) Business Days of the occurrence, or of Contractor becoming aware of the occurrence, as the case may be, give **notice in writing of such occurrence to Engineer. Within twenty (20) Business Days of such notice in writing to**

Engineer, Contractor shall request a Change Order, by submitting a Change Request to Engineer in accordance with the procedure set out in Exhibit 3 - Coordination Procedures. If Company:

> (a) agrees, acting reasonably, that the occurrence constitutes a Change, then Company shall issue a Change Order in respect of the Change;
>
> (b) disagrees, acting reasonably, that the occurrence constitutes a Change, Contractor shall proceed with the Work without delay and such continuation of the Work shall be without prejudice to Contractor's rights to advance a Dispute under Article 31.

If Contractor fails to comply with the conditions of this Article 14.8, it will relinquish its right to request a Change Order and waives any claim it may have for additional compensation and for an extension of time to complete a Milestone arising from the occurrence.

42. The role of "Engineer" involves considerable exercise of expert discretion, which in turn shapes the success of a project. This is well-understood in the industry and at law to be a quasi-judicial role. Nalcor reserved that role to itself. This is highly unusual, unprecedented perhaps in any project of this size and importance.

43. Nalcor's fundamental duty as de facto Engineer/payment certifier was to act impartially, fairly and with professional competence **[B. M. McLachlin, W. J. Wallace & A. M. Grant, *The Canadian Law of Architecture and Engineering*, 2nd ed. (Toronto: Butterworths, 1994) at p. 223: Tab 1]**; ***Oshawa (City) v. Brennan Paving Co.*, [1955] S.C.R. 76; Tab2]**, and not to be influenced by extraneous considerations **[*Kamlee Canst. Ltd. v. Oakville* (1960), 26 D.L.R. (2d) 166 (S.C.C.) : Tab 3]**. Even a truly independent

Engineer who simply accedes to the instructions given by the owner abdicates this function under the contract **[*Modern Construction Ltd. v. Moncton (City)* (1972), 4 N.B.R. (2d) 666 (N.B. C.A.) at para. 20. : Tab 4]**. Nalcor knew the risks it was running by taking on this role and the dangers this presented to the Project.

44. In *Bird Construction Co. v. Theo C. Ltd.* (2006) MBQB 61; affirmed (2007) MBCA 17 **[Tab 5]** the court held as follows [emphasis added]:

> [37] It is clear that the original contract had a fixed time for completion and provided procedures for extending the time. These procedures involved the consultant. **The consultant's role in the original or written contract was clearly intended to provide a competent person to implement orderly procedures for change orders, extensions, certification of delay and hold back of money. It is also clear that throughout the contract, at the insistence of the owner the consultant's role under the contract was reduced although he did attend at the site and participated at the conference meetings. The processes put in place by the parties did not conform to the letter of the contract but fulfilled the intent of the contract.**
>
> [...]
>
> [39] It would be absurd to allow Theo to substantially reduce the role of the consultant in the operation of the contract and then rely on the non-action by the consultant to get away from the clear intent of the contract. The parties by their conduct carried on the project without much of the documentation required from the consultant.

45. In *Domco Construction Inc. v. Aliva Holdings Inc.*, (2003) SKQB 506 at paras. 18-19 **[Tab 6]** the court held as follows [emphasis added]:

> [18] Change orders represent a change to the contract and are either "extras" which increase the price of the contract or "credits" which decrease the price of the contract. Pursuant to general condition 3 of the contract, the consultant was also "in the first instance, the interpreter of the requirements of the Contract Documents and the judge of the performance thereunder by both parties . . . ". **Walter Buchko of Chamberlain Architect Services Limited originally fulfilled this role. However, early in the contract, to save money, Randy Yano decided not to use his services and to fulfill that role himself. Mr. Yano was neither an architect nor an engineer. His decision would prove to be "penny wise and pound foolish".** By his own acknowledgment, Mr. Yano did not understand the construction industry or how it worked. He placed himself in a position he was not equipped to deal with.
>
> [19] It is clear from the evidence that while Domco accepted Mr. Yano's decision to act as his own consultant, there was no discussion between them on how change orders would be dealt with as a result of that decision. This is not surprising given the time constraints the parties were working under. **Pursuant to general condition 3.10 of the contract, the consultant was to prepare the change orders. As Mr. Yano assumed the role of consultant, this obligation should have been assumed by him. It was not.**

46. There is nothing new about all of this. It is well-known. It is bed rock, simple and understood, across the commercial construction industry, regardless of scale. This quasi-judicial role forms the foundation of a well-run project. In this case, on this project, Nalcor walked itself into an insoluble conflict of interest and should have known better.

47. As early as 1914, the British Columbia Court of Appeal held that where the contract stipulates that a contractor was to be bound by the decisions of an independent engineer,

an owner could not eliminate the role of that engineer and assume the role itself [emphasis added]:

> We think the Canadian Northern Pacific Railway Company should be dismissed from this appeal, and we can see no reason why they should not have the costs occasioned by their being brought here, the charges of fraud having failed. The plaintiffs, therefore, must pay such costs. We think the learned trial judge was wrong. It seems to us that the plaintiffs were to be bound only by the estimate of the engineer of the Construction Company. The Construction Company, however, had no engineer. There was, therefore, no person qualified to give the certificate which the defendants are relying upon. It is one thing to submit to the decision of an engineer to whose employer's interest it is to secure a fair if not a generous classification, and quite another to submit to the classification of one to whose employer's interest it is to keep down the cost of construction to the lowest possible notch. **[*Spadafora v. Welch*, 1914 CarswellBC 374 (C.A.). at para. 1. : Tab 7]**

48. Astaldi submits Nalcor lacked the experience and expertise to undertake the role of Engineer/payment certifier, a role that has been long recognized as one that should be exercised by an independent entity for the reasons stated above.

Termination:

49. Since the termination of Astaldi by Nalcor is a live issue in the arbitration proceedings, Astaldi will not provide any further comment at this time related to what Astaldi considers to be a wrongful termination, subject only to any response necessary to any

comments contained in other parties' submissions to the Inquiry or any questions the Commissioner may have during oral submissions.

IV. The Terms of the Contractual Arrangements Between Nalcor and Astaldi Which Contributed to Delays and Cost Overruns to Contract CH-0007:

Labour Productivity Assumptions:

50. Prior to the award of the Contract by Nalcor to Astaldi, Astaldi's bid was subject to an open-book analysis by Nalcor, including but not limited to the labour production assumptions carried in Astaldi's bid proposal. **[Ex. P-03135, page 1]**.

51. There is no doubt that Contract CH0007 got off to a slow and unsteady start. MFC's LNTP pushed Astaldi's mobilization into the start of the 2013-14 winter season. For a variety of reasons, the benefit of the agreed strategy to cope with winter work, called an Integrated Cover System ("ICS"), was never fully realized.

52. Astadi submits the concept of an ICS was meritorious. This was supported not only by Astaldi and Nalcor engineers, but also other engineers who appeared before the Commission, including but not limited to the Independent Engineer retained by Canada, Mr. Nik Argirov.

53. Astaldi concedes that as a result of these events and unanticipated difficulties with the uniquely and unexpectedly low productivity rates, its productivity and progress in the 2014 construction season was impeded. Overall, Astaldi's 2014 productivity was approximately 20 manhours per m^3 concrete poured.

54. Astaldi addressed these circumstances effectively. Astaldi's productivity during the 2015 construction season improved to about 15 manhours per m^3 concrete poured, exceeding all expectations. It was Astaldi's remarkable turnaround beginning in the summer of 2015 that permitted the parties to negotiate the Completion Contract in 2016.

55. During the 2015 construction season, the parties were in general agreement in forecasting an estimated overall labour shortfall (i.e. projected cost to Astaldi in excess of LMAX) of approximately $800 million.

56. MFC and Astaldi both recognized that CH0007's original budget and schedule were no longer reasonable or feasible. The parties agreed that they had to come to terms on a path forward involving a new contract price and a new and realistic contract schedule.

57. Beginning in November 2014, the parties jointly retained a noted labour productivity expert, Williams Ibbs, to analyze and report on labour productivity for the Project. Mr. Ibbs estimated that the best achievable productivity for CH0007 was approximately 11-12 manhours per m^3 concrete, under ideal conditions. **[Ex. P-01928]**.

58. In early 2015, senior leadership from both parties began negotiating a resolution of then-outstanding Contract commercial issues, but were unable to agree on a re-baselined schedule or new contract price at the time.

59. In July 2016, Astaldi was fast-approaching the contractual LMAX limit for Cost of Labour. In order for work to continue while the parties continued their negotiations, it was necessary for them to enter into a "Bridge Agreement", dated 27 July 2016, providing Astaldi with interim funding in the amount of $150,000,000. **[Ex. P-03028]**.

60. The parties continued fully open-book negotiations. Astaldi provided complete and transparent access to all its financial information to MFC in support of Astaldi's base estimate at completion cost of $2.24 billion (including $69 million of reimbursable travel and $70 million of potential risk exposure known but not quantifiable at the time).

61. MFC insisted that Astaldi suffer a loss and contribute substantially and financially to the cost of completion. MFC called this "pain share". As was stated by Mr. Stan Marshall at the Inquiry:

> Right from the outset, like I said, one of the principles was sharing the pain. And they [Astaldi] would have to incur a loss to finish the contract. [Public Transcript, July 2, 2019, p. 4]

62. In December 2016, the parties agreed to the Completion Contract. **[Ex. P-03029]**. The Completion Contract increased the Contract Price to $1.83 billion, inclusive of the amount advanced under the Bridge Agreement, plus tax and reimbursable travel allowances as provided under the CH0007 Contract. The difference between the known estimate and the reduced, fixed Contract Price of $1.83 billion (about $342 million), reflected MFC's arbitrary and unilateral assessment of Astaldi's appropriate "pain share". Astaldi affirmed its commitment to completing CH0007 and accepted the risk of a fixed price.

63. Whatever issues might have existed between Astaldi and Nalcor prior to December, 2016, any such issues were rendered moot by virtue of the terms of the Completion Contract, effective December 1, 2016.

64. The Completion Contract was a reset, if you will, representing a completely new agreement between Astaldi and Nalcor, in terms of method of payment of compensation, price, scope and time. This agreement also provided that both the parties waived any claim for damages they might have otherwise been entitled pursuant to the terms of the original contract .

65. Since these matters are issues being considered in the arbitration proceedings, Astaldi will not provide any further comment at this time, subject only to any response necessary to any comments contained in other parties' submissions to the Inquiry or any questions the Commissioner may have during oral submissions.

Limited Notice To Proceed:

66. In the initial Request for Proposals issued by Nalcor there was no contemplation of a Limited Notice To Proceed would be issued. However, on September 30, 2013, a Limited Notice To Proceed ("LNTP") was issued by Nalcor to Astaldi, which specifically referenced an expiry date of October 30, 2013 **[Ex. P-02139]**. The LNTP included Clause 5(a) which provided Nalcor the right to terminate the LNTP at its convenience with 2 days notice to Astaldi. It also contained a provision at page 2 of the LNTP that indicated the Parties "shall" enter into good faith negotiations to resolve issues which arise.

67. An amended LNTP was issued on October 31, 2013 **[Ex. P-03138, p.4]**, revising the expiry date of the November 30, 2013.

68. While LNTP's allow contractors to carry out certain work, there are significant limitations on the work which we can be conducted by a contractor in such cases. For example, contractors operating pursuant to the terms of a LNTP are unable to enter into

long-term contracts with third parties or hire employees, as there is no certainty a contract will be awarded. In fact, in this case, Astaldi was aware at the time of Nalcor awarding it a LNTP that Nalcor had not yet secured financing for the Project, which if not obtained was detrimental to the sanctioning of the Project **[Public Transcript, Phase 2, Mauro Palumbo, May 8, 2019 p. 13]**.

69. Nalcor was well aware of the difficulties Astaldi was experiencing during the time of the LNTP, limitations which are inherent with LNTP's and which are in no way the fault of Astaldi. At a meeting held between representatives of Astaldi and Nalcor on October 31, 2013, these difficulties were discussed, and the minutes note at page 2 that: "...many of the persons that attended the meeting acknowledged the fact that [it] is quite impossible to work under these conditions": **[Ex. P-03139, page 2]**.

70. Another negative aspect to the LNTP in this particular case was that Astaldi had limited site access during this time, which significantly impacted Astaldi's ability to perform work pursuant to the LNTP.

V. Overall Project Management Structure Nalcor Developed and Implemented with Astaldi

Nalcor's "Multiple Prime" Contracting Model:

71. In 2010, Nalcor issued an RFP for EPCM services on the Muskrat Falls Project. Later that year, Nalcor selected SNC, and the two parties entered into an EPCM Agreement in February 2011.

72. In 2011 and 2012, as SNC performed some design, engineering, procurement, and project management work, Nalcor began to identify what it perceived as performance issues and personnel turnover at SNC. Eventually, Nalcor abandoned the EPCM model and imposed what it called an "Integrated Team" or "Project Delivery Team" model, whereby Nalcor itself would directly employ its own personnel to work alongside SNC. Under this new model, Nalcor and its subsidiaries, including MFC, would contract directly with each contractor, and would be responsible for management and coordination of and between all contractors. This essentially created multiple prime contractors with a relationship directly with Nalcor/MFC.

73. Nalcor was responsible to each contractor for all contractors ("Company Other Contractors" or "COCs"). This was an essential term stipulated by Nalcor in the construction contracts, including CH0007 **[Ex. P-01865]**.

74. In practice however, Nalcor siloed its COCs **[Public Transcript, Phase 2, Georges Bader, May 9, 2019, p. 12]** and there was no one independent to call Nalcor to account for this. Nalcor mobilized COCs later than planned and favoured COCs based on Nalcor's own financial circumstances which in turn were tied to agreements which Astaldi was not privy to. As interface dates slipped, Nalcor dug in its heels, driving costs and schedule impacts down to its contractors.

75. MFC withheld the integrated project schedule from Astaldi. As Mr. Georges Bader testified:

> ... there were no reasons why we couldn't be given some of the execution strategies of other contractors. ... if we receive those information, those, like dates or some executions strategies behind some dates, we could plan ahead, efficiently. Like, probably we could start four months ahead that – you know, instead of having [only a week or two weeks of notice based on discussions in progress meetings] – it's clear disruption, ...**[Public Transcript, Phase 2, Georges Bader, May 9, 2019 pp. 12-13]**.

76. Except in limited circumstances, MFC refused Astaldi's reasonable and repeated requests for schedule information regarding interfacing with COCs' schedules or progress. Project Manager Scott O'Brien erroneously claimed in his testimony that Astaldi was provided with Nalcor's integrated schedule but recanted upon being confronted with his own letters explaining the opposite. **[Public Transcript, Phase 2, Scott O'Brien, March 31, 2019 pp. 70-75]. [Ex. P-03106]**. The fact even at this late date someone this senior could

be mistaken about something so fundamental speaks volumes about the reasons this project took longer and cost more than it otherwise might have.

77. As Grant Thornton reported in its Phase 2 Report, when Nalcor and its in-house team replaced SNC beginning in 2012. SNC was pushed aside from decision-making regarding Project strategy **[Ex. P-01677, pp. 123-125]**. As former SNC CEO Bob Card observed:

> Nalcor's approach was rapidly evolving … into a self perform mode. In my experience in many multi-billion dollar project's that – while its not always successful to have a[n EPCM] contractor be the program manager, it is rarely successful for an owner to be the program manager – that was red light number one for me. The way they were approaching... their contracting in general and oversight on the project was a concern for us... We discussed our concern over the risk posture with Ed and the team. … Ed and his team left the impression of strong comfort in their approach and capability to deliver the project as then advertised I think at $6 billion... They were quite confident they could pull that off. "In April 2013, SLI prepared a report titled "Risk Review for Lower Churchill Project", which identified approximately $2.4 billion in additional, pre-execution cost exposure. While Nalcor and MFC executives Ed Martin, Gilbert Bennett, Paul Harrington, and Lance Clark were briefed on the report's contents, they decided they did not want to receive a copy of it. **[Ex. P-01677, pp. 121-136]**

78. Westney Consulting reported that there was only a 3% chance that Nalcor's planned schedule at sanction would be met. Nalcor stuck with its scheduled dates anyway. **[Exhibit P-01677, p. 127]**

79. All of these issues related to the project management structure Nalcor developed and implemented with Astaldi caused delays and cost overruns to CH0007.

VI. Conclusion

80. The foregoing outlines numerous causes for delays and cost overruns in relation to CH0007, all of which Astaldi submits were as a result of the actions and decisions taken by Nalcor.

81. Astaldi appreciates the standing it was granted, the right it was given to be heard on these issues, and the opportunity to make this Submission.

DATED at St. John's, in the Province of Newfoundland and Labrador, this 9th day of August, 2019.

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TAB 1

The Canadian Law of Architecture and Engineering

Second Edition

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Butterworths
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C. THE NATURE OF THE DUTY

1. The Position of the Architect or Engineer as Judge

The position of the architect or engineer as judge of matters between the contractor and the owner is accepted in England, the United States and Canada. In continental Europe, by way of contrast, the design professional does not assume this role.

The dangers of the architect or engineer acting as decision maker between the parties are obvious. The architect or engineer is retained and paid by the owner. Moreover, it may be doubted whether the person responsible for the plans and specifications of a project can be objective on questions of compliance with the contract specifications.

On the other hand, the role of interpreter and judge may be seen as a continuation of the design process. The architect or engineer charged with the design of the project is equipped as no one else to make decisions about its execution. For the owner and contractor to attempt to resolve their differences alone without the aid of the architect or engineer might prove difficult indeed. Moreover, in view of the integrity with which architects and engineers have generally conducted themselves, the system appears to have worked quite well.

2. Authority of the Architect or Engineer as Decision Maker

The authority of the architect or engineer to interpret the contract and judge matters in issue between the owner and the contractor stems from the construction contract between the owner and architect.

Because of the obvious potential for abuse arising from the fact that the architect or engineer is employed by the owner and has been personally involved in the design of the project, courts have tended to construe provisions conferring decision-making powers on architects or engineers cautiously and sometimes restrictively.[125] Thus, unless the architect's or engineer's intended powers to resolve matters in issue are provided for clearly and unequivocally, the court may not find them to be part of the construction contract.

Most contracts provide, expressly or by implication, that the power of the architect or engineer to make decisions between the parties ends with the contract, usually on issuance of the final certificate, after which the architect or engineer is without power, or *functus officio*.[126] However, the contract may confer on the architect or engineer continuing powers for a period of time for

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[125] See Sweet, *ibid.* at p. 653. See for example, *Roberts v. Bury Improvement Commr.*, *supra*, note 123; *McLeod v. Wilson* (1897), 2 Terr. L.R. 312 (S.C.); *Interprovincial Concrete Ltd. v. Robert McAlpine Ltd.* (1985), 14 C.L.R. 121 at 143 (Alta. Q.B.); *Dilcon Constructors Inc. v. B.C. Hydro & Power Authority* (1992), 7 C.L.R. (2d) 22 (B.C.S.C.).

[126] *Supra*, B.1.iii. See *Manders v. Moose Jaw* (1914), 7 Sask. L.R. 158 (S.C.).

the purpose of ascertaining whether repairs or remedial work is required or determining outstanding claims.[127]

3. The Duty of Impartiality

The basic duty on an architect or engineer deciding matters at issue between the owner and contractor is to act impartially, fairly and with professional competence.[128] If the architect or engineer fails to do so, the resultant certificate is no longer a condition precedent to recovery. In the following paragraphs, some major causes of disqualification of the architect or engineer as impartial decision maker are reviewed.

(i) Interest

Architects or engineers are not required to be entirely disinterested. They are employed by the owner, either under contract or as salaried individuals. They have frequently drawn the plans and prepared estimates of cost, and often have recommended the contractor and approved the contract which they are subsequently called upon to interpret. They may have made mistakes in their plans which increase the cost. Should their decisions not please the owner, they run the risk that the owner will terminate their employment as architects or engineers or not re-employ them. None of these considerations will disqualify them as impartial decision makers between the parties.[129]

Interests which have led to findings that architects or engineers could not act as impartial decision makers include:

(1) ownership of a share in the owner's or contractor's company;[130]
(2) an undertaking to the owner that the cost of the work would not exceed a stipulated sum;[131]
(3) indebtedness to the owner;[132]
(4) personal relationship to the owner; and[133]
(5) furnishing materials for the project.[134]

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[127] *Dilcon Constructors Inc. v. B.C. Hydro & Power Authority*, *supra*, note 125, at 82.

[128] *Sutcliffe v. Thackrah*, [1974] A.G. 727 (H.L.); *Oshawa (City) v. Brennan Paving Co.*, [1955] S.C.R. 76; *Kamlee Const. Ltd. v. Oakville* (1960), 26 D.L.R. (2d) 166 (S.C.C.).

[129] For a discussion of the relationship between the duties of the architect or engineer as agent of the owner and as impartial decision maker, see *Panamena Europea Navigacion Co. v. Frederick Leyland & Co.*, [1947] A.C. 428 (H.L.); see also *Taylor Const. Co. v. Georgetown (Town)* (1926), 30 O.W.N. (H.C.J.).

[130] *Re Elliott* (1848), 12 Jur. (O.S.) 445, noted in *Hudson's*, pp. 453, 849; *Sellar v. Highland Ry. Co.*, [1919] S.C. 19 (H.L.); but see, *contra*, *Ranger v. Great Western Railway Co.* (1854), 5 H.L. Cas. 72, 10 E.R. 824.

[131] *Kimberley v. Dick* (1871), L.R. 13 Eq. 1.

[132] *Ludlam v. Wilson* (1901), 2 O.L.R. 549 (C.A.).

[133] *Ibid.*

[134] *Allen v. Pierce* (1895), 3 Terr. L.R. 319 (S.C.).

If the interest of the architect or engineer is known to the objecting party at the time of contracting, it ordinarily will not constitute a ground of complaint after the award has been rendered: "If a defendant agrees to refer the matter to the plaintiff, he cannot object to the award that the plaintiff was a judge in his own cause".[135]

(ii) Fraud of Collusion

A certificate given or refused as a consequence of fraud or collusion is void and of no effect. Most often, fraud or collusion arise from a secret agreement or arrangement between the architect or engineer and one of the parties to render to the other party less than what is due. Any surreptitious dealing between the architect or engineer and the contractor will suffice to invalidate the decision of the architect or engineer.[136] Similarly, collusion between the architect or engineer and the owner not to issue a certificate or to issue one for less than the amount earned will invalidate the certificate.[137] Issuance of misleading and incomplete pre-tender information may amount to fraud.[138] However, collusion is not essential; a false report issued by an engineer has been held sufficient to relieve the contractor of the necessity of obtaining his certificate.[139] An architect or engineer guilty of fraud may be liable to the contractor in tort.[140]

(iii) Prevention of Interference

Where parties by their contract appoint someone to decide a matter between them, it is an implied term of the contract that neither party will do anything which interferes with the true and unfettered exercise of the decision-making.[141] This is an application of the principle that no person can take advantage of non-

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[135] *Matthew v. Ollerton* (1692), 4 Mod. 226, 87 E.R. 362 (K.B.); see also *Thornton Hall v. Wembley Electric Appliances*, [1947] 2 All E.R. 630 (C.A.); *Ranger v. Great Western Railway Co.*, *supra*, note 130; *J.H. Tremblay Co. v. Greater Winnipeg Water District*, [1919] 1 W.W.R. 1083 at 1087 (Man. C.A.) *per* Cameron J.A. (Haggart J.A. concurring); affd [1920] 1 W.W.R. 976 (S.C.C.).

[136] *Panama & South Pacific Telegraph Co. v. Indian Rubber Co.* (1875), L.R. 10 Ch. App. 515.

[137] *M'Intosh v. Great Western Ry. Co.* (1850), 19 L.J. Ch. 374; *Batterbury v. Vyse* (1863), 32 L.J. Ex. 177; *Grant, Smith & Co. v. R.* (1920), 19 Ex. C.R. 404.

[138] *K.R.M. Const. Ltd. v. B.C. Ry. Corp.* (1981), 40 B.C.L.R. 1 (C.A.); see also *BG Checo Int'l. Inc. v. B.C. Hydro & Power Authority*, [1987] B.C.W.L.D. 2324; vard on appeal for lack of proof of deceitful intention [1993] 1 S.C.R. 12 at 22; affg 44 B.C.L.R. 145 (C.A.).

[139] *Smith v. Finkelstein* (1910), 1 O.W.N. 528 (C.A.).

[140] See Chapter 10. Contracts between the architect or engineer and the owner frequently provide that the architect or engineer is not liable for the result of an interpretation or decision, but only if it was rendered in good faith: see Part II, Form Contracts, No. 1, Art. 2.1.20.

[141] *Minster Trust Ltd. v. Traps Tractors Ltd.*, [1954] 3 All E.R. 136 (Q.B.D.); *Sutcliffe v. Thackrah*, [1974] A.C. 727 (H.L.). See also footnotes 50 and 51, *supra*.

fulfillment of a condition the performance of which that person has personally hindered.[142]

Collusion or fraud, discussed above, are forms of prevention of or interference with the decision-making function of the architect or engineer. Other conduct constituting prevention or interference includes:

(1) failure of the employer to appoint an architect or engineer or premature discharge of the architect or engineer;[143]
(2) wrongful termination of the contractor, resulting in loss and depriving such contractor of opportunity to obtain a certificate for payment;[144] and
(3) non-fraudulent pressure on the architect or engineer by the owner with respect to the issuance of certificates.[145]

Prevention or interference with the architect's or engineer's decision-making role will not be inferred from the mere fact that the architect or engineer has had communications or engaged in discussions with either or both parties. Indeed, while the architect or engineer is not obliged to hold a formal hearing or receive formal representations on every matter decided, communications with the parties as to their positions and desires are necessary and proper. Such discussions do not amount to improper interference in the absence of evidence of surrender of the architect's or engineer's independence and impartiality.[146]

(iv) Lack of Impartiality

The fact that the architect or engineer may have strong views which coincide with one or the other party's position will not disqualify the architect or engineer. As stated by Bowen L.J. in *Jackson v. Barry Ry. Co.*:[147]

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[142] *Roberts v. Bury Improvement Commrs.* (1870), L.R. 5 C.P. 310 (Exch. Ct.); *Panamena Europea Navigacion Co. v. Frederick Leyland & Co.*, [1947] A.C. 428 (H.L.).

[143] *Degagne v. Chave* (1896), 2 Terr. L.R. 210 (N.W.T.S.C.).

[144] *Smith v. Gordon* (1880), 30 U.C.C.P. 553 (C.A.). See also *Roberts v. Bury Improvement Commrs.*, *supra*, note 142.

[145] *Hickman & Co. v. Roberts,* [1913] A.C. 229 (H.L.); *Temiskaming & Northern Ont. Ry. Commn. v. Wallace* (1906), 37 S.C.R. 696; *Northern Const. Co. v. R.*, [1925] 2 D.L.R. 582 (Alta. S.C.); *Page v. Llandaff* (1901), *Hudson's B.C.*, 4th ed. (1914), Vol. 2, p. 316, noted in *Hudson's*, p. 461; *Alberta Building Co. v. Calgary* (1911), 16 W.L.R. 443 (Alta. S.C.); *Watts v. McLeay* (1911), 19 W.L.R. 916 (Alta. S.C.); *Brennan v. Hamilton* (1917), 39 O.L.R. 367, 37 D.L.R. 144 (H.C.J.); *Blome v. Regina (City)* (1920), 13 Sask. L.R. 94, [1920] 1 W.W.R. 311, 50 D.L.R. 93 (K.B.).

[146] *Italian Mosaic Co. v. Ottawa* (1926), 30 O.W.N. 361 (C.A.); *Hatrick (N.Z.) Ltd. v. Nelson Carlton Const. Ltd.*, [1964] N.Z.L.R. 72 (S.C.); *McDonald v. Workington Corp.* (1893), 9 T.L.R. 230 at 232 (C.A.), *per* Lord Esher M.R. See discussion of *Dilcon Constructors Inc. v. B.C. Hydro & Power Authority* (1992), 7 C.L.R. (2d) 22 (B.C.S.C.), at notes 149-151 and accompanying text.

[147] [1893] 1 Ch. 238 at 247.

> The question . . . is, whether the engineer of the company has done anything to unfit himself to act, or render himself incapable of acting, not as an arbitrator without previously formed or even strong views, but as an honest judge of this very special and exceptional kind.

Thus in *Kamlee Const. Ltd. v. Oakville*, the fact that an engineer adhered to his opinions and could not be converted to those of the contractor was held not to mean that he was not acting judicially; all that was required was that he act in accordance with his own best judgment without being influenced by extraneous considerations.[148]

However, conduct of the architect or engineer which shows want of a properly independent attitude may deprive the certificates of the architect or engineer of their effect.[149] Thus, where an architect or engineer in all rulings servilely adopted one party's viewpoint, it was held that the contractor was relieved of the necessity of obtaining his certificate.[150]

In *Dilcon Constructors Inc. v. B.C. Hydro & Power Authority*,[151] the contractor's claims that the Authority's Chief Engineer under the contract and his staff had fraudulently colluded and acted unfairly and unprofessionally against the contractor were dismissed. The trial judge found the Chief Engineer's "professional ethics and judgment" were "beyond reproach".[152] Nevertheless, because the Chief Engineer had been personally involved in the issues in dispute — before the work was tendered, during the work in its administration and after the work in the evaluation and negotiation of the contractor's claims, he was estopped from adjudicating on those claims. She held that *"the appearance of bias"* resulting solely from the Chief Engineer's involvement in the Project — "not from any action or omission on his part" — precluded the Authority from enforcing the contractual provision which would have otherwise made the Chief Engineer's decision final and binding on the parties.[153]

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[148] *Kamlee Const. Ltd. v. Oakville* (1960), 26 D.L.R. (2d) 166 (S.C.C.); see also *Taylor Const. Co. v. Georgetown (Town)* (1926), 30 O.W.N. 136 (H.C.J.).

[149] *Georgia Const. Co. v. Pacific Great Eastern Ry.*, [1929] S.C.R. 630; *Pawley v. Turnbull* (1861), 3 Giff. 70, 4 L.T. 672; *Hickman & Co. v. Roberts*, [1913] A.C. 229 (H.L.).

[150] *Georgia Const. Co. v. Pacific Great Eastern Ry.*, *supra*, note 149 (unreservedly accepting owner's position); *Kerr v. Harrington*, [1947] O.W.N. 237 (H.C.J.) (accepting contractor's view without considering the rights of the owner).

[151] (1992), 7 C.L.R. (2d) 22 (B.C.S.C.).

[152] *Ibid.*, at 88.

[153] *Ibid.*, at 89. Allan J. did not ground her decision on s. 58 of the *Law and Equity Act*, R.S.B.C. 1979, c. 224. Nevertheless, she considered this provision, which is unique to British Columbia, to be a "legislative disapproval" of contracts which purport to empower a person charged with the administration of the work to determine the contractor's remuneration. Section 58 (en. 1987, c. 42, s. 51) provides:

> Performance under protest
>
> 58. (1) Where a dispute arises between the parties to a contract respecting the obligations of a party under the contract, the party whose obligations are disputed may elect to

(v) Wrong Matters Considered

The parties appoint the architect or engineer to decide matters between them in accordance with the contract and other considerations to which they have agreed. Where the architect or engineer takes into account matters which on a true construction of the contract the parties never intended the architect or engineer to consider or conversely, fails to consider matters which they intended the architect or engineer to consider, it can be contended that the latter has acted without jurisdiction and that the resultant orders are not binding.

Thus, in *Oshawa (City) v. Brennan Paving Co.*,[154] where the engineer refused to certify in accordance with the contract, adopting a method of his own, it was held that his arbitrary conduct in refusing to apply the contract relieved the contractor of the necessity of obtaining his certificate as a condition of payment.

The degree of discretion reposed in an architect or engineer deciding questions between the owner and the contractor should not be over-estimated. The task of the architect or engineer is to interpret and apply the contract which establishes the rights and obligations of the parties, not to substitute new rights and obligations.

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perform the contract in accordance with the requirements of the other party, and the electing party is then entitled to compensation from the requiring party for any

(a) service performed,
(b) property supplied or transferred,
(c) liability assumed, and
(d) money paid

by the electing party in the course of that performance beyond that which the contract required him to do.

(2) An electing party is not entitled to compensation under subsection (1) unless, within a reasonable time after he is informed that the performance is required, he gives notice to the requiring party that the performance is under protest.

(3) A contract may specify, with respect to the giving of a notice of protest, any or all of the following:

(a) the form of the notice;
(b) a time within which the notice must be received by the requiring party;
(c) the persons to whom the notice must be given;
(d) the manner in which the notice is to be given.

(4) A notice of protest has no effect unless it is communicated in accordance with every specification referred to in subsection (3) that is included in the contract.

(5) A right to compensation under this section is not affected by a decision or determination by a person connected with the administration of the contract unless he has no interest in the subject matter of the contract and is independent of every person who has an interest in the subject matter of the contract.

(6) Nothing in this section limits the right of a party to recover compensation on any other basis.

[154] [1955] S.C.R. 76.

(vi) Refusal to Decide

A distinction must be made between refusal to certify at all and refusal to certify on the merits. If the architect or engineer refuses to put his or her mind to the matter for decision, or delays inordinately, the contractor may be relieved of the need to obtain a certificate as a condition of payment.[155] If, on the other hand, the architect or engineer considers the problem and concludes that no certificate should be issued, the architect or engineer cannot be compelled to issue a certificate.[156]

(vii) Procedure

The function of the architect or engineer in deciding matters under the contract is mainly administrative, notwithstanding the duty of fairness owed to both parties.[157] The architect or engineer does not adjudicate upon evidence presented by the parties, but instead performs an independent investigation. Since the decision-making process is not a full-blown judicial process, it is not necessary to have formal hearings or adhere to the formal procedural requirements which would prevail at arbitration hearings or trials.

D. LIABILITY FOR DECISIONS

For many years it was thought that an architect or engineer would not be liable either to the owner or the contractor for negligence in making decisions on matters between the parties. In *Chambers v. Goldthorpe*,[158] the majority of the English Court of Appeal took the view that the architect or engineer charged with the duty of certifying work for payment was acting as an arbitrator between the owner and the contractor. The court reasoned that since arbitrators and judges are immune from actions for negligence, architects and engineers deciding matters under construction contracts should be immune from suit from negligence in arriving at their conclusions. The court was also of the view that the threat of suit might interfere with the independence of the architect or engineer.

While the *Chambers* case was generally accepted as a correct statement of the law in England as well as elsewhere in the commonwealth, including Canada, the view adopted by the majority of the court in that case was not without dissent. Romer L.J. in *Chambers* argued that persons charged with the

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[155] *Ibid.* See also *Hotham v. East India Co.* (1787), 1 Term Rep. 638, 99 E.R. 1295; *Roberts v. Bury Improvement Commrs.* (1870), L.R. 5 C.P. 310 (Exch. Ct.).

[156] *Kempster v. Bank of Montreal* (1871), 32 U.C.Q.B. 87 (C.A.).

[157] *Sutcliffe v. Thackrah*, [1974] A.C. 727 (H.L.). But see *Mandalay Estates Inc. v. Rosebury Homes Ltd.* (1986), 21 C.L.R. 291 (Ont. Arb. Bd.) where the consulting engineer issued a certificate in a manner which was "not merely administrative". In that case, the engineer was held to be required to give each party an opportunity to put forward their views to be heard.

[158] [1901] 1 K.B. 624 (C.A.).

responsibility for making decisions under a construction contract were not acting as arbitrators or judges and ought not to receive immunity. In Canada, prior to *Chambers*, it had been held that an architect acting in an arbitral role remained answerable to the owner for negligence or unskillfulness in the performance of his or her professional contractual duty to the owner.[159] After *Chambers*, the same view was taken in South Africa.[160]

In 1974, in *Sutcliffe v. Thackrah*,[161] the House of Lords overruled *Chambers*, holding an architect liable in negligence to the owner for certifying as done, work which had not been done or which had been improperly done. The decision confirmed that the architect or engineer required by the contract to certify whether work has been done for purposes of payment owes a duty to act fairly, holding the balance between the owner and the contractor. But it held that where there is no dispute or proceeding in which evidence is put before the architect or engineer by both sides for consideration, and where the decision is not final and binding, the architect or engineer is not acting in an arbitral or *quasi*-judicial capacity, and hence is not exempt from liability to the client for negligence. While accepting that each case will depend on its own facts and the circumstances and particular terms of the contract, it was said that "in general any architect or surveyor or valuer will be liable to the person who employs him if he causes loss by reason of negligence".[162]

The requirements for a true arbitral function conferring immunity for suit were further explored by the House of Lords in *Arenson v. Casson, Beckman Rutley & Co.*,[163] where it was held that a valuator of shares appointed by the parties could be liable in negligence. The majority emphasized the requirement of a dispute resolved in accordance with procedure in the form of an inquiry where the parties present their evidence and respective contentions to the decision maker. This, together with the finality of the decision, were viewed as essential to immunity. Lord Salmon stated:[164]

> I would sum it up by stating that it was long ago rightly decided in *In re Hopper*, L.R. 2 Q.B. 367, that a valuer enjoys the immunity of a judge or arbitrator only if what he does assumes the character of a judicial inquiry, for example, by the parties submitting their dispute to the valuer for adjudication and the valuer listening to or reading the contentions made by or on behalf of the parties and to any evidence which they may put before him and then publishing a decision which is final and binding save for any appeal which the law allows.

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[159] *Badley v. Dickson* (1886), 13 O.A.R. 494; see also *Irving v. Morrison* (1877), 27 U.C.C.P. 242 (C.A.). *Chambers v. Goldthorpe*, *supra*, note 158, was distinguished in *Campbell Flour Mills v. Bowes; Campbell Flour Mills v. Ellis* (1914), 32 O.L.R. 270 (C.A.). See also *Hudson's*, pp. 161-69 and cases cited therein.

[160] *Hoffman v. Meyer*, [1956] (2) S.A. 752.

[161] *Supra*, note 157.

[162] *Ibid.*, at 745, 752-53, *per* Lord Morris of Borth-y-Gest, and at 737-38, *per* Lord Reid.

[163] [1977] A.C. 405, [1975] 3 All E.R. 901 (H.L.).

[164] *Ibid.*, at 439.

Lord Wheatley offered the following *indicia* for immunity:[165]

(1) there is a dispute or a difference between the parties which has been formulated in some way or another;
(2) the dispute or difference has been remitted by the parties to a person to resolve in such a manner that that person is called upon to exercise a judicial function;
(3) where appropriate, the parties must have been provided with an opportunity to present evidence and/or submissions in support of their respective claims in the dispute; and
(4) the parties have agreed to accept that person's decision.

The minority took the view that anyone appointed to perform professional services, whether in a decision-making capacity or not, was liable for negligence in the exercise of that duty, excepting judges appointed by the state, in which case other principles apply.

These decisions have been applied in Canada, with the result that architects and engineers may be liable for want of care and skill in making decisions under the contract, unless the decisions are made in the course of resolving a dispute in an inquiry-like procedure and their decisions are final and binding on the parties.[166]

[165] *Ibid.*, at 427-29.

[166] See *Sport Maska Inc. v. Zittrer*, [1988] 1 S.C.R. 564, a decision on appeal from the Quebec Court of Appeal, where L'Heureux-Dubé, J. speaking for the Court, reviewed the common law decisions including *Sutcliffe v. Thackrah*, *supra*, note 157 and *Arenson v. Casson, Beckman Rutley & Co.*, *supra*, note 163 to arrive at an identical result. See also *Dominion Chain Co. v. Eastern Const. Co.* (1976), 68 D.L.R. (3d) 385 at 393-94, 12 O.R. (2d) 201 (Ont. C.A.); affd [1978] 2 S.C.R. 1346, 84 D.L.R. (3d) 344 *sub nom. Giffels Associates Ltd. v. Eastern Const. Co.*; *D.M. Drake & Co. v. Dave's Plumbing & Heating (1962) Ltd.*, unreported, Vancouver Registry No. C786424, November 30, 1979, [1980] 1334-01 B.C.D. Civil (B.C.S.C.).

TAB 2

1954 CarswellOnt 145
Supreme Court of Canada

Oshawa (City) v. Brennan Paving Co.

1954 CarswellOnt 145, [1955] 1 D.L.R. 321, [1955] S.C.R. 76

The Corporation of the City of Oshawa (Defendant), Appellant and Brennan Paving Company Limited (Plaintiff), Respondent

Kerwin C.J. and Rand, Kellock, Cartwright and Fauteux JJ.

Judgment: June 1, 1954
Judgment: June 2, 1954
Judgment: June 3, 1954
Judgment: December 9, 1954

Proceedings: On appeal from the Court of Appeal for Ontario

Counsel: *J.J. Robinette, Q.C.* and *G.K. Drynan* for the appellant.
P.B.C. Pepper for the respondent.

Subject: Contracts; Public

Headnote

Construction Law --- Payment of contractors and subcontractors — Entire contract — Conditions precedent to payment — Certificate of completion — Duty of impartiality regarding issuance

Function of engineer — Both agent of owner and certifier — Construction of specifications — Bound by previous conduct.

A building contract provided that no money should become due unless and until an estimate or certificate therefor should have been signed by the engineer. There was no general arbitration clause. The only matter expressly left to the engineer in the event of dispute was "as to the meaning and intent of the plans and specifications". Held, the issues in and the circumstances of this case required an inquiry into the engineer's conduct in his capacity as agent of the owner as well as a quasi-judicial certifier between the parties. If as agent he bound the owner to the advantage of the contractor in relation to this dispute, and if as certifier he failed to consider and give effect to that conduct, then he had not acted judicially. If he had not acted judicially, then the contractor was freed from the contractual necessity for having the engineer's certificate as a condition precedent to the right to payment. It was not necessary that the engineer's conduct should go so far as to amount to fraud or undue collusion with the party employing him. It was sufficient if his conduct was such that it would be inequitable to require compliance with the condition precedent. Although it was the engineer's function under the general conditions of this contract to decide the meaning and intent of the plans and specifications, the Court might inquire and determine whether, during the progress of the work, the engineer, by his conduct or otherwise, led the contractor to understand, or confirmed its understanding, that the plans and specifications permitted a certain thickness of asphaltic top. If the engineer, or those for whom he was responsible, did either of those things, then he, and through him the owner, would be estopped from now placing a different interpretation on them. The present case was a clear case of estoppel. When the time came for the engineer to issue his final certificate, he ignored the fact of his previous conduct and thereby failed to act judicially. On further appeal, held (by the Supreme Court of Canada), when the engineer refused to certify for the gravel by weight as called for by the contract, but adopted a method of his own, he abdicated his proper function under the contract. His refusal to certify in accordance with the contract was completely arbitrary and illegal. It could not be doubted that the "Estimate or Certificate", the possession of which was made a condition precedent to payment, was one covering the work as to quality and quantity at the appropriate rate called for according to the prices

stipulated in the contract. In departing from the area thus marked out the engineer rendered his certificate no longer essential to the contractor's right of action.

Construction Law --- Engineers — Scope of authority over construction

A building contract provided that no money should become due unless and until an estimate or certificate therefor should have been signed by the engineer. There was no general arbitration clause. The only matter expressly left to the engineer in the event of dispute was "as to the meaning and intent of the plans and specifications". Held, the issues in and the circumstances of this case required an inquiry into the engineer's conduct in his capacity as agent of the owner as well as a quasi-judicial certifier between the parties. If as agent he bound the owner to the advantage of the contractor in relation to this dispute, and if as certifier he failed to consider and give effect to that conduct, then he had not acted judicially. If he had not acted judicially, then the contractor was freed from the contractual necessity for having the engineer's certificate as a condition precedent to the right to payment. It was not necessary that the engineer's conduct should go so far as to amount to fraud or undue collusion with the party employing him. It was sufficient if his conduct was such that it would be inequitable to require compliance with the condition precedent. Although it was the engineer's function under the general conditions of this contract to decide the meaning and intent of the plans and specifications, the Court might inquire and determine whether, during the progress of the work, the engineer, by his conduct or otherwise, led the contractor to understand, or confirmed its understanding, that the plans and specifications permitted a certain thickness of asphaltic top. If the engineer, or those for whom he was responsible, did either of those things, then he, and through him the owner, would be estopped from now placing a different interpretation on them. The present case was a clear case of estoppel. When the time came for the engineer to issue his final certificate, he ignored the fact of his previous conduct and thereby failed to act judicially. On further appeal, held (by the Supreme Court of Canada) when the engineer refused to certify for the gravel by weight as called for by the contract, but adopted a method of his own, he abdicated his proper function under the contract. His refusal to certify in accordance with the contract was completely arbitrary and illegal. It could not be doubted that the "Estimate or Certificate", the possession of which was made a condition precedent to payment, was one covering the work as to quality and quantity at the appropriate rate called for according to the prices stipulated in the contract. In departing from the area thus marked out the engineer rendered his certificate no longer essential to the contractor's right of action.

The judgment of the court was delivered by *Kellock J.*:

1 With respect to the claim for gravel, Mr. Robinette relies only on the absence of a final certificate from the engineer. As to the asphalt, his position is twofold: (1) that the claim for any amount over the 3000 tons mentioned in the specifications is irrecoverable for lack of an "order from the engineer in writing" as required by clause M of the General Conditions of Contract; and (2) that as to the remainder, it is in the same position as the gravel, namely, irrecoverable for lack of the engineer's certificate.

2 With respect to the gravel, it is provided by the specifications that the "basis of payment for this material shall be per ton, all material being weighed on the city weighscales by the city weigh-master and checked on the job by the inspector designated by the engineer." The engineer, in his final certificate, however, entirely disregarded this provision. What he did is thus described in the judgment of Roach J.A., who delivered the judgment of himself, Hogg and Gibson JJ.A.:

> He took the total surface area and multiplied it by 6 inches (the depth of gravel called for) and determined the total number of cubic yards. Then by adopting what someone told him was the weight of a cubic yard of gravel, he determined the quantity by weight of the total cubic yards. To that amount he added *something* as an allowance for gravel used in filling the voids in the rubble that was used to fill soft spots. How he could determine the quantity of gravel that was used in these soft spots I am totally unable to understand. He did not know the depth or area of the soft spots or the size of the voids.

3 This, of course, was not in accordance with the contract, and its construction is, in the circumstances, entirely a matter for the court. Clause F of the General Conditions upon which some reliance is put by the appellant has no bearing. It reads as follows:

> Work mentioned on the plans or specifications shall be performed as though shown on both. In the event of dispute, the decision of the engineer as to the meaning or intent of the plans and specifications shall be final.

4 While the gravel was being furnished to the job and worked into it, there was no dispute whatever as to what was called for. The gravel was supplied to the job as directed by the inspector who was the representative of the engineer. Accordingly when the engineer refused to certify for the gravel by weight as called for by the contract, but adopted a method of his own, he abdicated his proper function under the contract. His refusal to certify in accordance with the contract was completely arbitrary and illegal. The appellant has concurred in the position taken by the engineer and has maintained this position down to the present, thus bringing itself within the principle of the decision in *Panamena v. Leyland*[1]. In that case, when the surveyor insisted on matters outside the quality and quantity of the work, which alone he was by the terms of the contract authorized to take into consideration, and this was concurred in by the appellant, the respondent was absolved from the requirement with respect to a final certificate. The same applies in the case at bar.

5 By the terms of the contract the respondents covenated to

> Do the whole of the works herein mentioned with due expedition and in a thoroughly workmanlike manner, in strict accordance with the provisions of this Agreement, and the said Plans, Specifications and General Conditions therein referred to...

6 The appellant on its part covenanted with the respondents:

> That if the said work including all extras in connection therewith, shall be duly and properly executed as aforesaid, and if the said Contractors shall observe and keep all the provisos, terms and conditions of this Contract, they, the said City, will pay the said Contractors therefor the sum of $112,282.32 (more or less) according to the schedule of unit prices in the Form of Tender, upon Estimates or Certificates signed by the Engineer.
>
> Provided that no money shall become due or be payable under this Contract unless and until an Estimate or Certificate therefor shall have been signed by the Engineer as herein provided the possession of which is hereby made a condition precedent to the Contractors' right to be paid or to maintain any action for such money or for any part thereof.
>
> Provided also that the said City shall not be liable to pay for work rejected or condemned by the said Engineer, or to pay any money upon any Estimate or Certificate until the work so rejected or condemned has been replaced by new material and workmanship to the written satisfaction of the said Engineer...

7 It cannot, in my opinion, be doubted that the "Estimate or Certificate", the possession of which is made a condition precedent to payment, is one covering the work as to quality and quantity at the appropriate rate called for according to the prices stipulated in the contract. In departing from the area thus marked out the engineer rendered his certificate no more essential to the respondent's right of action than it would have been in *Panamena's* case had the surveyor in that case, issued his certificate for a reduced amount by reason of his view of the economical manner in which performance of the work had been carried out, a matter entirely outside the scope of his authority to consider.

8 The lack of an order in writing for the quantity of gravel in excess of the estimate of 2600 tons is not an obstacle in the way of the respondent, and, as already pointed out, Mr. Robinette does not rely upon this point. That estimate was for the 6" gravel course only and did not include the gravel used in filling the soft spots. It has not been shown what the respective amounts required for the gravel course and the soft spots respectively, were, and therefore it is not shown that the 2600 tons for the gravel course was exceeded. It was, no doubt, for this reason that Mr. Robinette took the position he did on this point.

9 With respect to the asphalt, the relevant provisions of the original contract, as amended by the later contract, as well as the specifications, are as follows. The original "Information to Bidders", after providing for the removal of the existing pavement and sub-structure, went on to state:

> It is then proposed to fill the space formerly occupied by the ties with compacted asphaltic concrete base course, and also to build up the shoulders of the present concrete base with the same material, after which it is proposed to spread the consolidated asphaltic concrete wearing surface, *varying the thickness from 1" to 2"*. In making this consolidation of the asphaltic concrete wearing surface, it is proposed that the engineer should set grades at intervals not exceeding 50 feet, which will effect a parabolic cross sectional contour on the finished pavement.
>
> Attention is drawn to the fact that this *contour must be carefully followed,* in order to strengthen the bearing value of the pavement, and in order to *partially eliminate the excessive crown* which is apparent on the existing street.

10 Item 327 of the original specification has the following:

> The surface course shall consist of coarse aggregate sand and mineral filler uniformly mixed with asphalt cement and shall be laid upon the previously prepared pavement base to a minimum thickness of one inch and a maximum finished depth of two inches, as directed by the Engineer.

11 Clause G. of the General Conditions provides that no work shall be done without lines, levels, and instructions having been given by the engineer, "or without the supervision of an inspector." It is provided by the specification, under the heading "Method of Payment", that:

> All hot-mix, hot-laid asphalt mixtures supplied and incorporated into the work will be paid for at the price tendered per ton.
>
> The Owner will provide and place a man at the Contractor's weigh scale for the purpose of weighing the mixtures incorporated into the work, and the net weights so determined will be the only basis for payment.

12 The specification under the amending contract under the heading "Scope of Work" provides:

> Remove existing concrete base.
>
> Excavate the material thereunder to a depth to provide a 6" crushed gravel base course and new concrete sub-base 8" thick and a minimum of 3" binder and asphaltic top.
>
> Provide 6" crushed gravel base course and 8" concrete base and minimum of 2" of asphaltic binder and 1" of asphaltic top.

13 The engineer interpreted, for purposes of his final certificate, the later specification as to the wearing surface, as providing for a thickness of 1 inch only. In his view, "minimum" in the second paragraph of the amending specification under the heading "Scope of Work" above, was confined to the 2 inches of asphaltic binder and did not apply to the 1 inch of asphaltic top. He therefore entirely disregarded the actual quantity of asphalt delivered and arrived at a theoretical figure by taking the superficial area on the footing of 1 inch in depth and ascertaining the weight by that means.

14 It has been expressly found in the courts below, that in executing the work after the amending contract was entered into, the respondent continued the practice it had previously followed and laid a minimum thickness of 1 inch and a maximum thickness of 2 inches, under the specific instructions of the inspector on the job. Both the respondent and the inspector considered that in so doing they were carrying out the terms of paragraph G. of the General Conditions of Contract. No one suggested that there was any ambiguity in the terms of the contract in this respect until the completion of the work when the engineer, Meadows, did so, as above mentioned. When the question of a final certificate came up

Meadows had himself up to that time, issued progress certificates for asphalt on the basis of tonnage actually delivered, and the respondent had received payment.

15 The appellant again places reliance upon clause F. of the General Conditions already quoted above and contends that Meadow's decision as embodied in his final certificate, governs.

16 In the language of Roach J.A. the answer is:

> That *during the progress of the work* there was no dispute between the plaintiff and Meadows as to the thickness of the asphaltic wearing surface called for by the plans and specifications. The plaintiff's interpretation of the plans and specifications as they related to that item differed from the interpretation Meadows now says he intended they should bear, but the parties were not disputing about it. The plaintiff did not know that there was any difference between their respective interpretations.

17 Roach J.A. also says:

> Meadows saw the plaintiff proceeding with the work in compliance with the understanding of its superintendent, but never communicated any objection to the plaintiff. At the trial Meadows stated that on one occasion he objected and in substance warned the superintendent against laying down a greater thickness than 1 inch of asphaltic wearing-surface. The superintendent in his evidence denied any such discussion and the trial judge accepted the superintendent's evidence.
>
> Meadows must have known that the plaintiff, in laying down a thickness of asphaltic top in excess of 1 inch, was doing so because its superintendent interpreted the plans and specifications as permitting it and requiring it where to do so was necessary for proper drainage. If he felt — and he now says he did — that the plaintiff was thereby exceeding the thickness authorized, he should have interfered at the time. To stand by and do nothing about it was to acquiesce. Even more important than the foregoing is the fact that Courtlee specifically instructed the superintendent to proceed as he did. To my mind it is idle to say that Courtlee thereby exceeded his jurisdiction. He was on the job to see that the work, as it progressed, had that standard of excellence agreed upon between the parties. He gave those instructions, not for the purpose of varying the plans and specifications, but for the purpose of requiring the contractor to live up to them.

18 In my opinion the engineer has in this instance also, abdicated his function under the contract. The asphalt, like the gravel, was to be paid for by weight. This was the "only basis of payment" provided for by the contract. The same principle, therefore, applies as in the case of the gravel save as to the excess over the estimate of 3000 tons as to which the lack of an order in writing is, in my opinion, fatal.

19 Accordingly the appeal should be dismissed with costs but the judgment should be varied by deducting $1,305.02, the value of 160.125 tons of asphalt which is the amount in excess of the estimate. In the circumstances, this variation should not affect the costs.

Appeal dismissed with costs and judgment of the Court of Appeal affirmed subject to a variation.

Solicitors of record:
Solicitors for the appellant: *Creighton, Fraser, Drynan & Murdoch.*
Solicitors for the respondent: *McMillan, Binch, Wilkinson, Stuart, Berry & Dunn.*

Footnotes

1 [1947] A.C. 428.

End of Document

TAB 3

1960 CarswellOnt 143
Supreme Court of Canada

Kamlee Construction Ltd. v. Oakville (Town)

1960 CarswellOnt 143, [1960] S.C.J. No. 1, [1961] S.C.R. viii, 26 D.L.R. (2d) 166

Kamlee Construction Ltd. v. Oakville (Town)

Kervin C.J.C., Locke J., Cartwright J., Judson J., Ritchie J.

Judgment: November 21, 1960
Docket: None given.

Counsel: None given

Subject: Contracts

Headnote

Construction Law --- Termination of building contract — Rescission and repudiation

Engineer — Duty to act judicially — Disagreement between engineer and contractor — Repudiation — Completion by other contractor on cost-plus basis — Reasonable in circumstances.

Appellant entered into a contract with respondent for the construction of a storm sewer. Differences arose between the engineer's representative and appellant's manager, particularly as to establishing the grade for the pipe, which culminated in the engineer's ordering a back-hoe operator employed by appellant to widen a trench causing a sanitary sewer to be broken and flood the trench. Appellant thereupon removed its men from the job and indicated that it refused to complete the work as long as the engineer in question had control. Respondent informed appellant that unless the work was resumed by a specified date it "will take whatever steps it deems necessary and expedient to complete the work according to the said contract and will hold you responsible for any additional costs incurred and any damages suffered". A meeting subsequently took place at which nothing was settled but respondent's officials were to consider the matter further. Subsequently the job was completed by another contractor under a cost-plus contract. In an action by appellant in which respondent counter-claimed damages the trial Judge found that appellant had been justified in stopping work because the engineer had not acted judicially and that as nothing had been settled at the meeting it had been a breach of contract for respondent to enter into another contract for completion of the job without any notice to appellant. He dismissed the counter-claim and held that in any event respondent had made no effort to mitigate its damages. The Court of Appeal held that the engineer had acted judicially and that appellant had not been justified in abandoning the work and allowed respondent's counter-claim. On further appeal, held, the appeal should be dismissed. The fact that an engineer adhered to his own opinions and could not be converted to those of the contractor did not mean that he was not acting judicially. The duty to act judicially meant that he had to act in accordance with his own best judgment without being influenced by extraneous considerations. Respondent's letter insisting on the resumption of work on the date specified was notice that appellant's repudiation was accepted unless it returned to work on the date mentioned. The actions of respondent in awarding the contract to complete the job had to be judged not by the result but by circumstances existing at the time, and in the circumstances respondent had acted in a reasonable and proper manner in entering into the cost-plus contract.

***Locke, J.*, (dissenting) Kerwin, C.J.C., concurs with Ritchie, J.:**

1 By the contract entered into between the parties dated July 6, 1956 for the construction of the storm relief sewer, the appellant agreed to complete the work on or before September 5, 1956. Time was not, by the terms of the contract, declared to be of its essence and the evidence is clear that the respondent did not insist upon its right to have the work done by the date specified. While it does not appear that any new date was fixed for completion, it was undoubtedly in the contemplation of both parties that this should be done with all reasonable speed.

2 As is pointed out in the judgment delivered in the Court of Appeal, the specifications and the general conditions were declared to be part of the contract and I agree with the conclusion of that Court that the discontinuance of work on October 30, 1956, coupled with the letter written on that date by the then solicitors for the appellant, amounted to a breach of the contract which would have entitled the respondent to elect to treat the contract as repudiated and to terminate it by oral or written notice.

3 There are two questions to be determined, namely, as to whether the respondent elected to terminate the contract and communicated the fact of such election to the appellant, as it was bound to do, before entering into the contract for the completion of the work by another contractor and, if the answer to this be in the affirmative, whether the respondent complied with its legal duty to minimize its loss flowing from the breach.

4 By para. 4 of the statement of claim the appellant alleged that work was suspended on October 30, 1956 "by reason of interference with the workmen of the plaintiff by employees and agents of the defendant and the failure of the defendant to comply with the terms and specifications of the contract". It was further alleged that there had been a failure to pay moneys due under the contract. Following this, the pleading read:

> While the plaintiff was negotiating with the defendant to adjust the differences between the plaintiff and the defendant, the defendant wrongfully cancelled the contract and employed another contractor to complete the balance of the contract.

The relief claimed was for amounts alleged to be payable in respect of work done and extra work, and a further sum for loss of profit and damages for breach of the contract.

5 By the statement of defence it was alleged that in breach of the contract the appellant had abandoned the work and had been informed on November 7, 1956 that unless the work was resumed by November 9, 1956 the town would have the work completed by other contractors. The allegation in para. 4 that the defendant had wrongfully cancelled the contract while the parties were negotiating to adjust their differences was not denied nor any reference made to such negotiations. The defence relied upon the written notice given by it on November 7th.

6 The letter from the solicitors for the appellant of October 30, 1956 above referred to, addressed to the reeve and members of the town council, stated that the appellant was withdrawing its equipment from the job as of that date for a variety of reasons, which were stated and read in part:

> My client is prepared to return to the job and complete the same in accordance with the contract specifications, but refuses to do so while that particular engineer, allocated to the job from Phillips and Roberts, has control over the situation.

7 Following the receipt of this letter there were certain meetings between K. A. Morrison, the manager of the appellant company, and his solicitor, with the mayor of Oakville, by name Anderson, and Mr. K. C. Needham, who was at the time the town manager of Oakville and also the treasurer, apparently with a view of arranging terms upon which the appellant would resume work. According to Needham, there was a meeting with Morrison and his solicitor on October 31st, at which time Needham said that Morrison said that they would not return to the work unless the engineer Reekie, who was the resident engineer on the job, and Manners, who was employed as inspector, were removed. According to Needham, there was a further meeting on November 7th with Morrison, his wife, and Peter Schmidt, vice-president of the appellant who was engaged on the work, at which time Needham said that he restated the position taken by the town that they would not consider payment of the progress estimate for the month of October until the contractor returned to the work, and it was apparently made clear that they would not consider removing the resident engineer or the inspector.

8 Following this meeting, Needham wrote to the appellant the letter of November 7th, formally acknowledging the letter of October 30th from the solicitors and saying that by the contractors withdrawing from the contract they had left

the unfinished sewer in an extremely dangerous condition and that, in the event of heavy precipitation, it would rapidly fill up with storm water which would cause serious damage to both public and private property. The letter continued:

> Your action leaves the Town of Oakville no other alternative but to advise you that unless your firm returns to the job site on or before November 9th, 1956, and continues full scale operation to the completion of the job in accordance with the terms of the contract, the Town of Oakville will take whatever steps it deems necessary and expedient to complete the work according to the said contract, and will hold you responsible for any additional costs incurred and any damages suffered.

9 On November 8th the solicitors for the appellant wrote to Needham acknowledging the letter last mentioned and saying:

> The first important item which must he clarified is the fact that a draw is due Kamlee Construction Company Limited, and as yet, Mr. Morrison, of Kamlee Construction Company Limited, has heard nothing of these monies which are owing. It is essential, that before Kamlee Construction Company Limited directs the machinery and men back on the job that this draw be paid.
>
> Secondly, it is essential that it be understood that Kamlee Construction Company Limited will adhere to the contract which, of course, indicates the specifications, and in adhering to the contract, insists that after the engineer has laid out the work, that a qualified inspector be allocated to the job who will act as a liaison between the engineer and the contractor. In doing this, further friction and conflict of personalities will be eliminated.
>
> My client has advised me that this letter is to be taken as a notice of intention to return to the job to complete the same in accordance with the contract, it being clearly understood that the above demands be adhered to.

10 According to Needham, he had on November 7th invited tenders for completion of the work from three contractors, G. M. Gest Ltd., the Halton Paving & Contracting Co. and one Durbano, who had tendered for the entire work earlier in the year, and on November 8th the Gest company submitted a written tender for the completion of the work on a force account, or cost-plus basis. On or about the same day the Halton company offered to complete the work on the basis of its original tender, which would have required a payment of approximately $35,000.

11 The fact that this had been done was not communicated to Morrison or anyone else on behalf of the appellant and, at the time of the meetings which took place on the day following, this was unknown to them.

12 On the morning of November 9th, according to Morrison he, his wife and Schmidt had a meeting at Oakville with the mayor and Needham. At this meeting he said that the mayor stated that he would like to have Mr. Roberts of the firm of engineers for the work by whom Reekie was employed, present at the discussion and suggested that they meet again at 3 o'clock that afternoon. It is to be remembered that at this time the letter from Needham of November 7th had been, to Morrison's knowledge, received. At the meeting in the afternoon with the mayor, Needham and Roberts, there was a further discussion. Morrison said:

> I had suggested then to them that we are ready to start the work anytime providing it was properly laid out; the way it should be laid out. I had asked for the engineer to be removed from that job but I said I'll even allow you to keep your engineer; I know they're very hard to get right now, as long as you put on that job a competent and qualified inspector we will go right ahead and finish our job.

According to Morrison, the mayor answered "we will take this matter up with our committee and we will let you know" which terminated the discussion.

13 Peter Schmidt, who was present at both meetings but who was uncertain of the date, said that at the afternoon meeting Morrison had said that they would immediately start the job again if they would pay the money owed up to that time which should have been paid in September and October, and asked them if it would be possible to have a more

experienced man as inspector on the job. Schmidt said that Needham and Anderson did not say anything then and that Roberts, who was present, did not say very much but, after about half an hour, Anderson had said that "they would arrive at a decision and then subsequently would let us know what their decision was" and that this had terminated the meeting.

14 Needham, called for the defence, was not asked about the matter of the meetings of November 9th in direct examination. In cross-examination, however, he was asked "You heard Mr. Morrison and Mr. Schmidt give evidence that you said you would consider the representations and let them know what you decided to do, let them have your decision, isn't that right?" to which he answered "That may have been answered in that way earlier in the week but not on Friday, the 9th." He said further that he could not say definitely whether there had been a meeting or meetings on November 9th and, when asked if he remembered a discussion in which he had said that he would take the matter up with the Works Committee in the afternoon or later in the day, said "I cannot remember it being referred to the Works Committee" and said that he and the mayor had the authority of the Works Committee and the Council to proceed and take what action was necessary.

15 E. F. Roberts, who attended the afternoon meeting at the request of the mayor, said that it was held at Needham's office and that Messrs. Morrison, Schmidt and the town solicitor, Mr. Depew, were present. He said nothing about the mayor being there. At this time he said that they asked Morrison what his intentions were as to continuing the contract and that the latter had informed them that if the engineers and the inspectors were taken off the job he would consider continuing the work and said that no direct answer or reply was made to that and that is all there was to the meeting. Roberts, however, when asked if the meeting broke up on the understanding that the contractor would be advised of the town's decision said that he could not say definitely if any promise was made or not. When it was pointed out to him that Morrison had sworn that the outcome of the meeting was that they were to be advised, the witness said that he could neither confirm or deny it. The time when this meeting concluded was shown to have been 4 o'clock in the afternoon of the 9th.

16 The mayor, by whom the undertaking referred to by Morrison was said to have been given, was not called by the defence.

17 Neither Morrison nor Schmidt had said that Mr. Depew was present at either of the meetings of November 9th. Needham, however, had said that he had been present on that date at a meeting attended by the mayor and Roberts but Morrison was not at this meeting. It would appear that Roberts must have been mistaken when he said that the solicitor was present at the meeting referred to by Morrison and Schmidt as, had it been otherwise, I would assume that Mr. Depew would have given evidence regarding it. A letter dated November 9th addressed by the firm of Humphrey & Depew to Sneath & Rapson, the solicitors who were at that time advising the appellant, had been put in evidence during the examination-in-chief of Morrison. The letter which presumably was written after 5 o'clock on November 9th, the day of its date, acknowledged the letter of November 8th addressed by the solicitors for the appellant to the town manager and said:

> Your clients stopped work over a week ago without justification, and were given an opportunity to resume operations to-day, which they did not take. The Town is having the work completed forthwith by other contractors.

This letter is signed "Humphrey and Depew" and, if it were in fact dictated by Mr. Depew, who was advising the town, it is evident that he had not been at the meeting referred to by Humphrey & Schmidt and was unaware of any such undertaking as that said to have been given by the mayor.

18 It is, I think, also of some significance that Morrison was not cross-examined as to the meetings of November 9th. The only questions directed to Schmidt concerning the matter were as to whether at the time of the conference Morrison had told him of the receipt of the letter from the town manager on November 7th. To this he had replied that Morrison had told him of the letter and said: "That's one of the reasons we went to that conference."

19 Upon this evidence the learned trial Judge, dealing with the meetings of November 9th, made the following finding of fact:

> The plaintiff also asked for and obtained a meeting with the town corporation officials. Nothing was finally or definitely settled at the meeting but I accept the evidence that the town officials were to consider the matter further and let Mr. Morrison know their decision. This they did not do, but without further communication with Mr. Morrison or his solicitors, awarded a contract to the G. M. Gest Ltd. to complete the work.

20 This finding of fact was not disturbed in the Court of Appeal, Laidlaw, J.A., who wrote the judgment of the Court merely saying as to this:

> The contractor did not resume work on November 9th in accordance with the notice to it from the town and on that day representatives of the parties had two meetings. Immediately after those meetings, solicitors for the town notified solicitors for the contractors as follows: [quoting the letter of November 9th]

Nothing is said in the reasons for judgment as to the agreement which the learned trial Judge found to have been made on the afternoon of that date.

21 The first question above mentioned is to be decided, therefore, upon the facts as found at the trial. The learned trial Judge further found as a fact that the appellant did not abandon the contract. However unwise were the actions of the appellant in withdrawing its outfit from the site, leaving only a watchman in charge and seeking to impose further conditions into the existing contract, the letters written by its solicitor on October 30th and November 8th and the conduct of Morrison and his solicitors at the meetings with the town manager and the other representatives of the town about October 30th show clearly that the appellant intended to return and finish the work if the conditions it sought to impose were agreed to. The respondent, on receipt of the letter of October 30th and upon the appellant withdrawing its equipment from the work, might have elected to treat these actions as a repudiation by the appellant of its written obligations and have notified the appellant that it elected to terminate the contract, and thereafter might have recovered such damages as flowed from the breach. It is, however, perfectly clear from the evidence which I have quoted and from the facts found by the learned trial Judge as to the meetings on the afternoon of November 9th that, at 4 o'clock that afternoon, both parties treated the contract as subsisting. The agreement then made amounted to an abandonment of the condition that work should be recommenced that day.

22 The respondent relies upon the letters written by Needham on November 7th and the undoubted fact that the appellant did not resume work on November 9th as having terminated the contract, and it is upon this footing that the judgment appealed from proceeds. This, however, completely ignores the fact that the letter of November 7th was written by Needham and that, in his presence and obviously with his approval, the mayor of Oakville had on the afternoon of November 9th promised that they (meaning he and Needham) would take the matter up with the Works Committee and inform Morrison of their decision. Assuming as I do that Mr. Depew was unaware of this arrangement at the time the letter of November 9th was written by his firm, in view of the finding of the arrangement that had been made that afternoon it appears clear that it was written in ignorance of the undertaking which had been given then and cannot affect the situation.

23 It is common ground that no notice, either written or oral, was given by the respondent of the decision of the Works Committee. Needham said that later that day he had informed the Gest company that their tender for the completion of the work was accepted and it was agreed that they would commence operations on the following Monday, November 12th.

24 The election of a party to treat a contract to be performed *in futuro* as repudiated by the other contracting party and to terminate it is not effective until the fact of such election has been communicated to the other party (*American Red Cross v. Geddes Bros.* (1920), 55 D.L.R. 194 at p. 209, 61 S.C.R. 143 at p. 163, *per* Anglin, J.; *Scarf v. Jardine* (1882), 7 App. Cas. 345, Lord Blackburn at pp. 360-1). The letter written by Needham on November 7th was, in my opinion,

sufficient notice of an intention to treat the contract as repudiated unless the appellant resumed the work not later than November 9th. However, at 4 o'clock on the afternoon of that date Needham and the mayor who, according to the former, had been authorized by the Works Committee of the town to carry on the negotiations, had made the agreement referred to which was quite inconsistent with the town relying upon the terms of the letter of November 7th. At 4 o'clock on the afternoon of November 9th it was not too late for Morrison to have directed a resumption of the work had these officials not led him to believe that the matter was still in the process of negotiation. Had the decision of the Works Committee been to refuse the proposals made at that time on behalf of the appellant, a further notice of an election to terminate the contract would have been required and none was given.

25 The issue was expressly raised, as I have pointed out, by para. 4 of the statement of claim. The appellant would have also been entitled to say, in my opinion, that the respondent was estopped by the conduct of the mayor and the town manager from asserting that the agreement had been terminated by the failure of the appellant to resume the work on November 9th. Estoppel should be pleaded and there is no such plea in the record but the issue is sufficiently raised by the statement of claim.

26 The agreement between the parties not having been terminated, the action of the respondent in letting the completion of the work to the Gest company and excluding the appellant was a repudiation of the contract which enabled the appellant to elect to treat it as terminated and to bring the present action, and the letter of November 14, 1956 addressed by its solicitors to the solicitors for the defendant and the commencement of the action were sufficient notice of such election: *Canada Egg Products Ltd. v. Can. Doughnut Co.*, [1955], 3 D.L.R. 1, S.C.R. 398.

27 I would allow this appeal with costs in this Court and in the Court of Appeal and restore the judgment at the trial, save that there should be added to the sum of $19,189.64 allowed by that judgment the sum of $757.76 referred to in the concluding paragraph of the reasons for judgment of the Court of Appeal.

Ritchie, J. **Cartwright, J. (dissenting) concurs with Locke, J.; Judson, J., concurs with Ritchie, J.:**

28 This is an appeal from a decision of the Supreme Court of Ontario, reversing the decision of the learned trial Judge and allowing the respondent's counterclaim in respect of the damages claimed to have been suffered by it as a result of the appellant's failure to complete the construction of a storm sewer on and under Kerr St. and Bond St. in the Town of Oakville which the appellant had undertaken to construct under a contract executed on July 13, 1956.

29 The appellant commenced work on the contract on the 24th of July, and it very soon developed that Mr. Reekie, the representative of "the Engineer" named in the contract, and Mr. Morrison, the appellant's manager, did not agree as to the method of establishing the grade for the pipe which was to be installed and the places at which grade and bench marks were given by the engineer. Differences also existed between the engineer and the contractor with respect to the use of a jointing compound, as to the method of compacting of backfill and as to whether or not certain hydro poles should have been removed at the expense of the town. All these matters are reviewed in great detail in the decision rendered by Laidlaw, J.A., on behalf of the Court of Appeal, but the factor which was a continuing source of disagreement between the engineer and the contractor was the method of establishing grade, and although this did not present an irreconcilable difference for so long as the work was confined to Kerr St. where the trench was comparatively shallow, it did result in ever-increasing unpleasantness between Mr. Reekie and the appellant's manager from the time that work was started on the deeper trench on Bond St. These disagreements culminated on or about October 26th when the engineer, in face of the contractor's known wishes to the contrary, ordered a backhoe operator, who was employed by the appellant as an independent contractor, to widen the trench on Bond St., causing a sanitary sewer to be broken and water and other contents from it to rush into the trench.

30 As a direct result of this last-mentioned incident, the contractor removed its men and machinery from the job, leaving only a watchman at the site of operations, and on October 30th the appellant's solicitor wrote to "The Reeve and Members of the Town Council" stating that the appellant was "withdrawing its equipment from the job as of this date", and reciting as the reasons for this action the fact that there had been difficulties and differences occasioned by the

Engineer making changes in the specifications, and the further fact that the town had not made payments in accordance with the contract. This letter went on to say:

> My client is prepared to return to the job and complete the same in accordance with the contract specifications, but refuses to do so while that particular engineer, allocated to the job from Philips & Roberts, has control over the situation.
>
> I have forwarded a copy of this to the bonding company for its attention.
>
> You might advise me as to your attitude on this matter at your early convenience, and arrange to have all draws that are due my client paid.

31 Although it is not entirely clear from the evidence how soon or how often representatives of the parties discussed the situation between October 30th and November 7th, it is established that there was at least one meeting during this period, and that until the latter date the appellant was still refusing to return to work until the amounts allegedly payable by the town had been paid and the engineer had been removed.

32 The respondent's attitude at this time is clearly set out in its letter of November 7th which was written in the form of an answer to the appellant's letter of October 30th. This letter reads in part as follows:

> Your action leaves the Town of Oakville no other alternative but to advise you that unless your firm returns to the job site on or before November 9th, 1956, and continues full scale operation to the completion of the job in accordance with the terms of the contract, the Town of Oakville will take whatever steps it deems necessary and expedient to complete the work according to the said contract, and will hold you responsible for any additional costs incurred and any damages suffered.

33 On November 8th the appellant's solicitor replied to this letter in the following terms:

> I have the copy of your letter dated November 7th, and I have taken the whole situation up with Mr. Morrison of Kamlee Construction Company Limited.
>
> The first important item which must be clarified is the fact that a draw is due Kamlee Construction Company Limited, and as yet, Mr. Morrison, of Kamlee Construction Company Limited, has heard nothing of these monies which are owing. It is essential, that before Kamlee Construction Company Limited directs the machinery and men back on the job that this draw be paid.
>
> Secondly, it is essential that it be understood that Kamlee Construction Company Limited will adhere to the contract which, of course, indicates the specifications, and in adhering to the contract, insists that after the engineer has laid out the work, that a qualified inspector be allocated to the job who will act as a liaison between the engineer and the contractor. In doing this, further friction and conflict of personalities will be eliminated.
>
> My client has advised me that this letter is to be taken as a notice of intention to return to the job to complete the same in accordance with the contract, it being clearly understood that the above demands be adhered to.

34 It will be seen that this letter represents a modification of the appellant's attitude to the extent that withdrawal of the engineer is no longer made a condition of returning to work provided that a new inspector is "allocated to the job who will act as liaison between the engineer and the contractor". This was not very much of a concession, however, because the inspector was an employee of "the Engineer".

35 Instead of returning to work on November 9th as required by the terms of the town's letter the contractor's representatives met with the town authorities on the morning of that day, seeking to have those terms varied so as to comply with the conditions outlined in the letter from the contractor's solicitor of November 8th. According to Mr. Morrison, the appellant's manager, the representatives of the parties only talked for a little while in the morning and

met again at about 3:00 p.m. when Mr. Roberts of Philips & Roberts Ltd., "the Engineer" named in the contract, joined the group and they "sat around there awhile; nobody had much to say; you couldn't get anything definite done". The meeting broke up at 4:00 o'clock and as Mr. Morrison left he says that the mayor told him that he was taking the matter up and would let the contractor's representatives know whether their requirements would be met or not.

36 Of this meeting, the learned trial Judge has said:

> Nothing was finally or definitely settled at the meeting, but I accept the evidence that the town officials were to consider the matter further and let Mr. Morrison know their decision. This they did not do, but without further communication with Mr. Morrison or his solicitors awarded a contract to G. M. Gest Ltd. to complete the work.

It is my understanding of the evidence that when Mr. Morrison and his fellow directors came to this meeting the appellant was in breach of its contract and it had neither accepted the town's offer to permit it to return to work nor given any indication of intending to complete the job except on its own terms. The learned trial Judge has found that "Nothing was finally or definitely settled at the meeting" and, in my opinion, the fact that "the Town officials were to consider the matter further and let Mr. Morrison know their decision" did not constitute an agreement to waive the existing breach and there was, in any event, no consideration for such an agreement. With the greatest respect for those who hold a different view, I am of opinion that the appellant's rights were not altered by what transpired at this meeting and that its position was the same when its representatives left as it was when they entered so that it was still in breach of the contract. The respondent was free to notify the appellant either that it was discharging its inspector as the appellant required or that it was employing another contractor. It adopted the latter course, pursuant to which its solicitors wrote to the appellant's solicitor on the afternoon of the meeting in the following terms:

> We have been asked to reply to your letter of November 8th to the Town Manager.
>
> Your clients stopped work over a week ago without justification, and were given an opportunity to resume operations to-day, which they did not take. The Town is having the work completed forthwith by other contractors.

37 It is clear that before November 9th the town had made inquiries and received offers to complete the work from two other companies, G. M. Gest Ltd. (hereinafter referred to as the "Gest Company") & Halton Paving & Construction Co. (hereinafter referred to as the "Halton Company") and after the meeting with the appellant's representatives the town closed with the Gest Company, subject to the approval of the town council for completion of the job on a cost-plus basis although the Halton Company had made a firm offer. The Gest Company started work on November 12th.

38 On December 27th the appellant commenced this action, claiming that the cancellation of the contract and the employment of another contractor to complete it was without cause or justification and seeking payment for work and labour done and certain extra costs and damages for loss of profits and breach of contract.

39 By its defence the respondent made a general denial and by counterclaim, joining the Fidelity Insurance Co. as surety for performance of the work, it alleged breach of contract by the appellant in abandoning the work and claimed damages for the additional costs to which it was put in having the contract completed by the Gest Company. The original claim in this regard was for $27,073.69, but this was amended by the Court of Appeal to $41,161.83 being the amount awarded by that Court.

40 The learned trial Judge found that the appellant was justified in stopping the work because Mr. Reekie did not act judicially in carrying out his duties as engineer, and he found that as nothing had been finally or definitely settled at the meeting of November 9th it was "premature action and a definite breach of contract" for the town to close with the Gest Company without giving the appellant any notice of its decision so to do. In the result, he gave judgment for the appellant in the amount of $19,189.64 which the respondent admitted to be owing. He dismissed the appellant's claim for loss of profits and damages for breach of contract and the respondent's counterclaim, saying with respect to the latter that if his decision had been otherwise he would not have allowed the counterclaim in full because the respondent had made "no effort to mitigate damages".

41 From this decision the respondent appealed, asking that the judgment of the learned trial Judge be set aside and the counterclaim allowed, while the appellant cross-appealed, asking that the judgment be varied by increasing the quantum of damages awarded to it.

42 In rendering the judgment on behalf of the Court of Appeal, Mr. Justice Laidlaw reviewed the facts and the terms of the contract very fully and accurately and concluded that the engineer had acted judicially, that the appellant was not justified in abandoning the work, and that the appellant had no right to return to the work except upon such terms and conditions as might be stipulated by the town. The essence of his judgment in this latter regard is to be found in the following statement:

> The Town was not under any obligation to permit the contractor to resume work after the contractor wrongfully abandoned the contract, but it offered the contractor the opportunity of doing so on the condition that it returned "to the job site on or before November 9th". The contractor did not accept that offer or comply with that condition and not having done so the town then entered into an agreement with G. M. Gest Ltd. for the completion of the work. I can find no fault whatever on the part of the town in doing so forthwith after the contractor failed to take advantage of the opportunity to resume work on or before November 9th.

43 In the result the judgment of the learned trial Judge was varied, allowing the appellant's claim in the agreed sum of $19,947.40 and allowing the counterclaim of the respondent in the amount of $41,161.83, The appellant's cross-appeal was dismissed.

44 It is from this judgment that the appellant now appeals, contending that it was justified in withdrawing its men and machinery from the job because of the conduct of the engineer in interfering with the progress of the work and because there were at the time moneys to which the appellant was entitled under the contract in respect to certain extras and of the October "draw" which remained unpaid.

45 Having regard to the appellant's known shortage of working capital, it might well be considered that its request for the aforesaid payments was not an unreasonable one, but it was not one to which the respondent was required to accede. To set up the lack of such payment as a valid ground for repudiation and to make it a condition of returning to work that such payment should first be made cannot, for the reasons stated by Laidlaw, J.A., be justified under the contract.

46 I also agree with Laidlaw, J.A., that having regard to the terms of the contract the conduct of the engineer afforded no ground for repudiation. The position of an engineer under such a contract as has been said by both the trial Judge and the Court of Appeal is that he is required to act "judicially" (see *Hickman & Co. v. Roberts*, [1913] A.C. 229 at p. 239), and I take this to mean that the decisions which he makes must be dictated by his own best judgment of the most efficient and effective way to carry out the contract, and that he must not be influenced by extraneous considerations and, particularly, that his judgment must not be affected by the fact that he is being paid by the owner. The fact that in this case Mr. Reekie adhered to his own opinions and that he could not be converted to those of the contractor did not mean that he was not acting "judicially".

47 As has been indicated, there was a battle of wills between the representatives of the engineer and those of the contractor on many basic questions concerning both method and detail, but the appellant embarked upon the work subject to the conditions of a contract which required it to conform to the decisions and adopt the methods of the engineer, and the fact that it considered some of these decisions to be wrong and some of these methods to be unsuitable did not entitle the appellant to stop work on the contract.

48 The attitude of the contractor towards the contract itself is perhaps best exemplified by the anwers of Kenneth A. Morrison, the appellant's manager, respecting the clause which empowered the engineer to interpret the specifications:

> Q. Then, No. 12: "The Owner will be represented on the work by the Engineer or other duly authorized person. The decision of the Engineer shall he final and binding upon both of the contracting parties as to the interpretation

> of the specifications and as to the material and workmanship." Did you accept the engineer's ruling? A. I did not. Q. Although the contract specifically says — A. I don't care what the contract says. The Engineer can't interpret anything in the specifications. HIS LORDSHIP: Q. Well, do you mean that? A. I mean that. Q. There is what it says, why don't you accept it? A. Because the stand I take here when a contract is written, and something is on that paper, there's nobody can make any change in it except a third party, if the two parties do not agree on it, and I do not agree with that. Q. But you have already said when you signed the contract that you would agree? A. Well, that may be. Q. The engineer's ruling shall be final and binding? A. That's quite possible but to my mind that contract is an unfair contract from beginning to end. Q. That may be. A. That's not for me to judge. Q. No, but it is for me, and you signed it? A. I did. I didn't sign it, but it's signed by the Company.

In light of this attitude the surprising thing is not that the contractor repudiated the contract when it did but that it did not do so at an earlier date.

49 In a most able argument presented on behalf of the appellant, it was urged that even if the action of the contractor were to be regarded as an unjustified repudiation of the contract, it was nevertheless a repudiation that had not been accepted by the town and that the contract still subsisted for the benefit of both parties when the respondent, without notice to the appellant, retained the Gest Company to take over and complete the work. In support of this proposition it was contended that the town's letter of November 7th did not constitute an acceptance of the breach of contract by the appellant but was rather a mere statement that unless the work was recommenced on or before November 9th the breach might then be accepted and that, in fact, the matter was still being negotiated between the parties when the new contract was awarded to the Gest Company.

50 In my view the town's letter of November 7th was much more than a statement that it might accept the breach if work was not resumed on November 9th — it, in fact, constituted notice to the appellant that unless the work were so resumed the town would "take whatever steps it deems necessary and expedient to complete the work ...". The fact that there were negotiations between the parties on November 9th is, to my mind, beside the point as there is no suggestion that when they broke up in the afternoon of that day the appellant had made any offer to return to work on anything but its own terms. It is true that the terms might be said to have been slightly modified in that there was no longer an insistence on the withdrawal of the engineer, provided that the inspector was changed, but the appellant was in no position to dictate any terms at all. When the correspondence between the parties from October 30th to November 9th is examined, it is clear to me that the appellant was given notice on November 7th that its repudiation was accepted unless it returned to work on the 9th, and when it did not do so the respondent was fully justified in regarding the contract as at an end and employing another contractor.

51 The law to be applied in these circumstances is stated by Sir Louis Davies, C.J.C., in *American Red Cross v. Geddes Bros.* (1920), 55 D.L.R. 194 at p. 196, 61 S.C.R. 143 at p. 145, where he says:

> The question then, it seems to me, in every such case must be whether under the proved facts adoption of one party to a contract of its repudiation by the other party may be inferred from the proved facts, or whether an actual notice of acceptance or adoption must be given by the party receiving notice of the repudiation to the party repudiating.
>
> It seems to me from reading the authorities that such an actual notice of acceptance or adoption is not necessary but that adoption may be reasonably inferred from all the circumstances as proved.

As I have indicated, I am of opinion that the terms of the respondent's letter of November 7th and the other circumstances above referred to amply support the conclusion that the appellant's repudiation of the contract was adopted by the respondent and that the employment of the Gest Company in no way constituted a breach of contract by it. There remains to be considered the amount of damages to which the respondent is entitled in respect to its counterclaim. In *British Westinghouse Elec. & Mfg. Co. v. Underground Elec. R. Co. of London*, [1912] A.C. 673 at p. 689, Viscount Haldane, L.C., outlines the following principles governing the question of damages for breach of, contract:

> The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. In the words of James L.J. in *Dunkirk Colliery Co. v. Lever* (1878), 9 Ch. D. 20, at p. 25, "The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business."
>
> As James L.J. indicated, this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business.

52 In the present case, by reason of the appellant's breach of contract, the work of installing the storm sewer on Bond St. remained uncompleted and on and before November 9th the respondent had received an offer to complete this work from the Halton Company for a fixed price of $35,012. The offer from the Gest Company provided for compensation in accordance with the terms of Schedule "A" attached to their letter of November 8th which reads as follows:

> (a) The compensation to be paid to us shall be our cost plus 15% to cover Engineering and Profit.
>
> (b) Our cost shall consist of:
>
> (1) Expenditure on wages for labour and supervision at the rates set out in Schedule "B" plus 10% to cover Workmen's Compensation, Unemployment Insurance and Vacation Pay.
>
> and (2) Equipment Rental at the rates set out in Schedule "C".
>
> and (3) Expenditure on materials in accordance with the provisions of Schedule "D".
>
> and (4) Overhead expense calculated at 15 per cent of the total of items b(1), b(2) and b (3).

The appellant contends that the reasonable course for the town to have followed under the circumstances would have been to award this contract to the Halton Company at the fixed price quoted by it rather than to enter into a cost-plus contract in which the compensation was to be awarded on the above basis.

53 In the result, the costs and charges of the Gest Company vastly exceeded the amount of the Halton Company tender, but the actions of the appellant are not to be judged by the result but by the circumstances existing at the time when the decision to award the contract was made.

54 On November 9th, when the contract was in fact let, winter conditions were at hand and there was a serious risk owing to the absence of an outfall sewer from the Kerr St. section of the work, and although the Halton Company was a reputable concern and would have been able to start work within a reasonable time, it was nevertheless, in my opinion, not unreasonable for the town to have decided that the demands of the situation could be more immediately and effectively met by the Gest Company who had a complete organization ready to work and stationed only a few streets away. The town appears to have taken advice from Philips & Roberts Ltd., "the Engineer" named in the contract, and it was Mr. Reekie's opinion that the Gest Company's offer should be accepted.

55 In a letter to the town council of November 12th the town manager made the following comment:

> G. M. Gest Limited submitted a bid on a force account basis estimating a time of completion of 25 working days. It is estimated that this bid would amount to approximately $32,000.00. Because of the closeness of the two bids and the fact that G. M. Gest Company were available to commence work on Monday, November 12th, 1956, this Company was awarded the contract.

56 The fact that the estimate proved to be completely out of line with the result cannot, in my opinion, form any basis for concluding that the town acted otherwise than as a reasonable man would have done under the circumstances.

57 The general observations made by Lord Macmillan in *Banco de Portugal v. Waterlow & Sons Ltd.*, [1932] A.C. 452 at p. 506, although made in a very different connection, nonetheless appear to me to be apt. He there said:

> The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.

58 I am in agreement with Laidlaw, J.A., in finding that the town acted in a reasonable and proper manner in entering into the agreement with the Gest Company.

59 I would dismiss this appeal with costs. It should be observed that Fidelity Insurance Company of Canada, one of the defendants by counterclaim, was not a party to this appeal.

End of Document

TAB 4

1972 CarswellNB 56
New Brunswick Supreme Court, Appeal Division

Modern Construction Ltd. v. Moncton (City)

1972 CarswellNB 56, 27 D.L.R. (3d) 212, 4 N.B.R. (2d) 666

Modern Construction Ltd. v. City of Moncton

Limerick, Hughes, and Bugold, JJ.A.

Judgment: April 28, 1972

Counsel: *William Hoyt*, for the Plaintiffs, Appellants.
D. M. Gillis, Q.C., for the Defendant, Respondent.

Subject: Contracts
Headnote
Construction Law --- Payment of contractors and subcontractors — Extras — Whether action premature

***Bugold, J.A.*, concurred with *Limerick, J.A.*:**

***Limerick, J.A.*:**

1 The background and facts of this appeal are fully set out in the reasons for judgment of my brother Hughes.

2 For the reasons set out by him I concur with his findings that both the action and the counterclaim were premature and must be set aside.

3 I concur that the plaintiffs' appeal to increase the amount of the judgment must be dismissed and that the cross-appeal of the defendant is allowed in that the judgment in favour of the plaintiffs is set aside as being premature. The plaintiffs' appeal against the counterclaim is allowed.

4 The appellant having succeeded in part and lost in part there will be no costs of appeal to either party.

5 As to costs of trial I direct that there be no costs to either party. The defendant can raise a question of law at any stage of the trial or proceeding. This however does nottgive him the right to costs if he thereby causes costs to be unreasonably incurred and wastes the time of the court. In this case the defendant could and should have applied to set aside the plaintiffs' claim on summons or by preliminary motion at the commencement of trial on the ground the plaintiffs had failed to make and deliver a statutory declaration that all wages and materials were paid in full, a condition precedent to action and a ground on which this Court dismissed the action. The defendant thereby caused great unnecessary expense involving about 12 days of trial. The normal course would be to allow the defendant costs up to the opening day of trial only. It is however evident from the defendant's claim on the appeal, that its judgment on the counterclaim should be upheld even though the judgment in favour of the plaintiffs was set aside, that the defendant would have proceeded with its counterclaim at trial even though the plaintiffs' action was dismissed on a preliminary motion. This doubtlessly was the reason for claiming not only on the basis of a setoff but as a counterclaim as well.

6 In such event the defendant would have been entitled to costs up to the opening day of trial and the plaintiffs of counterclaim and of trial.

7 Since both parties are at fault for the unnecessary costs of trial I would allow no costs of trial to either party.

Hughes, J.A.:

8 The plaintiff Modern Construction Limited brought this action for a balance which it claimed to be due and owing to it for work and labour done and materials provided for the defendant The City of Moncton under a contract dated September 4, 1964 for the construction of the Turtle Creek Dam and Associated Works as part of a project carried out by the defendant for the supply of water to the inhabitants of the City of Moncton, and for the price of extra work and labour done and materials supplied at the request of the defendant, or its resident engineer or agents under the said contract, alternatively, on a quantum meruit as reasonable remuneration for such extras, and for interest on the sums owing to it by the defendant from July 1, 1966 until payment.

9 In the interest of brevity the plaintiff Modern Construction Limited will be referred to as "Modern"; the plaintiff The Bank of Montreal as "the Bank"; the defendant The City of Moncton as "the City"; James F. MacLaren Limited as "MacLaren"; Andrew F. Brodie, a professional engineer in the employee of MacLaren, as "Brodie" and the contract between Modern and the City dated September 4, 1964 as "the contract".

10 Modern commenced work under the contract on September 11, 1964 in compliance with instructions from MacLaren which had been employed by the City as its engineer for the project, and was required by the terms of the contract to complete the work on February 12, 1966. The contract provided that in the event the work was not completed by that date liquidated damages at the rate of $100 per day, together with the City's costs occasioned by the delay, were made chargeable against Modern.

11 As the work proceeded, progress certificates were issued by Brodie which authorized payment at the rate of 85% of the value of the work done and materials provided by Modern as determined by him. On June 16, 1966 when Modern's work was substantially completed Brodie issued a progress certificate entitled "Completion Certificate for Payment" certifying that the work had been substantially completed on May 10, 1966, that the total value of work done by Modern in accordance with an attached schedule was $2,297,817.16, that after deducting the hold-back of 10% a balance of $2,068,035.44 remained. From this remainder the total of previous payments was deducted and left a balance due Modern of $136,938.92. On May 17 and 18, 1966 Modern had delivered to MacLaren seven claims for extras totalling a large sum but in making the Completion Certificate for Payment all seven claims were disallowed in toto.

12 Modern commenced the present action by a writ of summons tested as of August 12, 1966 and served on the City on the same date. The statement of claim attached to the writ claimed a total sum of $541,043.94 together with interest thereon from the 7th day of July 1966 at the rate of 10% per annum until payment. Modern however made a number of amendments to its statement of claim before trial and during the course of the trial abandoned items of its claim. In the result its claim consisted of the following:

Claim #1.	Hold-back	$ 229,781.72
Claim #2.	Remedial work to joints of conduit	8,846.06
Claim #3.	Cole Road Reservoir extras	29,226.00
Claim #4.	Claims arising out of the supply and placing of till in the main dam	55,662.10
Claim #5.	Measurement for payment of stripping from the spillway area and other borrow pits	127,214.01

Claim #6.	Supply and place specified rip-rap material as directed in lieu of excavated rock backtill, behind the chute wall at the sides of the spillway	14,312.52
Claim #7.	Extras for trucking rip-rap from alternate source	8,608.73
Claim #11.	Interest at 10% on sum found due from date of demand to date of judgment.	

13 After the action was commenced Modern's solicitor learned for the first time that on October 30, 1964 Modern had assigned to the Bank all moneys due or growing due to it under the contract and that notice of the assignment had been duly given to the City. On November 18, 1966 the Bank reassigned the benefit of the contract to Modern, but this was after the present action had been commenced. By an order dated February 5, 1970 the Bank was added as a plaintiff in the action.

14 In its amended defence and counterclaim dated June 30, 1969 the City admitted the alleged contract of September 4, 1964 and pleaded that neither the amounts claimed in the amended statement of claim nor any other amount was due by the City for all or any of the following reasons:

1. That the general conditions incorporated in the said contract provided that the amounts due thereunder should not be paid until -

(a) after the expiration of 60 days from the issuance of a completion certificate for payment . . . and that at the time of the commencement of this action 60 days had not expired from the issuance of the completion certificate for payment and the right of the plaintiff to sue thereon had not yet accrued;

(b) a final certificate for the balance had been issued, and that no final certificate has been issued;

(c) the contractor has deposited a statutory declaration that all the material and/or labour incorporated in the work have been fully paid for . . . and the plaintiff has not deposited such a statutory declaration; and,

(d) the provisions of the contract have been fully complied with namely:

(i) the plaintiff has not fully executed and performed the whole of the work as provided in the contract;

(ii) the plaintiff agreed that it would, together with a guaranty surety company authorized by law to carry on business in the Province of New Brunswick, enter a bond for the amount of two million three hundred twenty-one thousand two dollars and seventy-five cents, ($2,321,002.75), for the proper performance of the said contract . . . and the plaintiff has not entered into such a bond with a guaranty surety company authorized by law to carry on business in the Province of New Brunswick;

(iii) if extras were supplied, as alleged, which is not admitted but denied, no written orders were given therefore as required by the provisions of the said General Conditions and the plaintiff is estopped from making such claim by virtue of the provisions of the contract; and,

(iv) the defendant says that on or about the 30th day of October, A.D. 1964, the plaintiff made an absolute assignment to the Bank of Montreal, of the said contract and of all moneys due or growing due to it under the said contract and notice of which assignment was given to the defendant and that therefore the plaintiff has no cause of action against the defendant herein on the said contract.

As to the plaintiff's claim for extra work and labour done and materials provided as well as for expenses and damages, the defendant put the plaintiff to strict proof thereof. It also claimed certain sums by way of setoff and counterclaim which are referred to in the reasons for judgment.

15 The learned trial judge considered the claims numbered 1 to 7 and found, on the merits, that Modern, although entitled to be paid the hold-back of $229,781.72, was not entitled to any compensation for claims numbered 2, 3, 4, 5, 6 and 7. He then considered the items claimed by the City against Modern by way of setoff and counterclaim and made the following assessment thereof:

(a) Cement contract variation	$ 6,473.50
(b) Deficiencies in landscaping	10,000.00
(c) Liquidated damages for late completion	8,200.00
(d) Engineers, etc. by delay in completion	10,734.69
Total allowed	$ 35,408.19

which he directed to be deducted from the amount of the hold-back leaving a net sum of $194,373.53 for which he directed a judgment be entered for the plaintiff Modern against the City together with interest on that sum at the rate of 5 per centum per annum compounded annually from November 16, 1966 and costs of the action on the appropriate scale. The action by the Bank was dismissed without costs.

16 On this appeal Modern seeks a variation in the judgment in its favour contending that the learned trial judge erred in disallowing claims numbered 2, 3, 4, 5, 6 and 7 and in failing to allow interest on the gross judgment at 10 per centum per annum.

17 By its cross-appeal the City is seeking to have the judgment in favour of Modern set aside contending inter alia:

(A) The learned trial judge erred in holding that Modern was entitled to the hold-back of $229,781.72 on the following grounds:

(1) The action was premature in that it was commenced before

(a) a final certificate had been issued;

(b) a statutory declaration as to the payment of wages and materials incorporated in the work had been deposited with the Engineer by the plaintiff;

(c) the plaintiff had completed the contract, and

(d) the surety bond required by the contract had been supplied by the plaintiff.

(2) Modern's contract had been absolutely assigned to the Bank of Montreal and the learned trial judge erred in joining the Bank as a co-plaintiff.

(B) That the learned trial judge erred in awarding interest on the net sum found to be due.

18 As I have reached the conclusion that the City is entitled to succeed on its cross-appeal I do not propose to discuss Modern's claims numbered 2, 3, 4, 5, 6 and 7.

19 In his reasons for judgment the learned trial judge did not consider the issue raised by the City's defence that the action was not maintainable because of Modern's failure to comply with certain conditions precedent to its right to recover. He did, however, consider the effect of the failure of Modern to prove the issuance of the final certificate for payment provided for by section 44 of the General Conditions of the contract and following the reasoning of Clute, J. in *Brennan & Hollingworth v. City of Hamilton* (1917), 37 D.L.R. 144, and the cases therein referred to, held that:

> Since Mr. Brodie was instructed by the City Solicitor to withhold the final certificate, and he did so, it was the act of the defendant which prevented its issuance and the defendant cannot take advantage of the lack of it because of its own order to its consulting engineer. The defendant took away Brodie's authority and he then ceased to be impartial by order.

20 While I agree that, by acceding to the instructions of the City solicitor given to him after the issue of the writ to withhold the final certificate, Brodie ceased to be impartial or, as was said of the engineer in *City of Oshawa v. Brennan Paving Company Limited*, [1955] S.C.R. 76, at p. 81, he abdicated his function under the contract, that fact cannot provide a justification for the premature commencement of the action before the time for payment had arrived.

21 Section 44 of the General Conditions of the contract provides in part as follows:

> On completion of the work, and the expiration of thirty-seven days thereafter, a certificate marked "Completion Certificate for Payment" at the rate of 90% on the whole amount due under the Contract, including extras and less forfeitures and deductions as aforesaid, will be issued and the amount therein certified for payment shall be paid to the Contractor, and a "Final Certificate" for the balance, shall be issued and the amount therein certified for payment shall be paid to the Contractor after the expiration of 60 days from the date of issuance of the Completion Certificate for Payment, provided the provisions of the Contract have been fully complied with.
>
> Before the amount certified in such Final Certificate is paid, the Contractor shall deposit with the Engineer a statutory declaration that all the material and/or labour incorporated in the work have been fully paid for, and such declaration shall be attached to such Final Certificate.
>
> Notwithstanding anything in these General Conditions contained to the contrary, the Contractor shall be entitled to receive payments on progress certificates, additional to the foregoing, in accordance with and subject to the provisions of Section 14 of The Mechanics' Lien Act of New Brunswick.
>
> The Corporation shall not be liable for, or be held to pay, any money to the Contractor except as provided above; and, on making the completion payment aforesaid, the Corporation shall be released from all claim or liability to the Contractor for anything done, or furnished for, or relating to the work, or for any act or neglect of the Corporation relating to or affecting the work, except the claim against the Corporation of the remainder, if any, of the amounts kept or retained as provided above.

22 In my view the date for issuance of the Final Certificate for the balance earned by Modern under the contract and unpaid and, for payment of such balance did not arrive until the expiration of 60 days from the date of issuance of the completion certificate, being August 16, 1966, nor was the balance due and payable until Modern complied with the condition requiring it to file with the Engineer a statutory declaration. On the date the writ was issued; namely, August 12, 1966 neither of these conditions had been fulfilled and, subject to the allegations contained in Modern's reply, the cause of action for the hold-back had not accrued and the action in respect thereof would be premature. In *Stornelli v. Dell Construction Co. Ltd.* (1966), 57 D.L.R. (2d) 103, (Ont. H.C.), Parker, J. said at pp. 106-7:

The general principle as to when a cause of action accrues is set out in 1 C.E.D., 2nd ed., p. 31, as follows: A cause of action accrues upon the failure to render the duty to be done where it ought to be rendered. Except for the purpose of declaratory decrees there can be no action without a right accrued as of the teste of the writ. Riddell, J., clearly set this principle out in *Cornish v. Boles* (1914), 31 O.L.R. 505 at p. 521, 19 D.L.R. 447 at p. 458, where he said:

> The writ was issued on the 19th April, 1913. It is as of that date the rights of the plaintiffs in this action are to be determined; subsequent events may be evidence of the state of affairs at the teste of the writ, but can themselves give no cause of action.

The matter was considered once again in *Northern Electric & Mfg. Co. v. Cordova Mines Ltd.* (1914), 31 O.L.R. 221 at p. 243, where Riddell, J., said:

> The crucial day is the teste of the writ. And, while the power exists to order that the rights of the added plaintiff are to be considered as in issue as of the date of his being so added, this does not mean the rights which he did not have at the teste of the writ.
>
> This is not a technicality. Technicalities are odious, especially when they cause delay or expense, as in the case in the vast majority of instances. Law is necessarily technical, slow and expensive enough at the best, and all legitimate means should be employed to minimize these evils. But for the Court to attempt to give the plaintiff relief according to the facts as they are at the time of the trial, instead of according to their state at the teste of the writ, would be to usurp the powers of the Legislature. We must declare the law as we find it and not make new laws.

It would, therefore, appear that this claim must be based on facts existing at the date the writ was issued, not at the time of trial and that any evidence as to subsequent events are given only to prove the state existing at the date of the writ.

The parties agreed that time of payment might be controlled by the Minister of Labour. The plaintiff, having agreed to this, cannot now complain of the delay caused by compliance with this condition. . . .

23 The rule which requires that the cause of action must have accrued at the date of the issue of the writ is well illustrated in *Eshelby v. Federated European Bank, Limited*, [1932] 1 K.B. 254, where the plaintiff, a building contractor, brought an action on November 27, 1930 against the defendant who was a surety for payment of four equal instalments of 375 pounds sterling due October 22, 1930, January 15, April 15 and July 15, 1931 to recover the first instalment. The action was tried before the official referee on March 16, 1931 at which time the plaintiff was given leave to amend his claim by adding the amount of the second instalment which fell due January 15, 1931 and was still unpaid. It was held that the amendment was not justified in as much as it admitted a new cause of action which did not exist at the date of the issue of the writ. Swift, J. who heard the appeal from the decision of the official referee said at pp. 262, 3:

> The Court has amended the statement of claim which is endorsed upon the writ, but it has not amended the writ itself; and, indeed, it could not have done so, because in order to make this action on the second instalment one which would come within the writ, the date of the writ would have had to be altered from November 27, 1930, upon which it was issued and soon after which it was served, up to some date after January 15, 1931. I do not think the Court could possibly alter the writ in that way. It could not make an amendment to say that the writ had not been issued until some date after January 15, 1931. It seems to me, therefore, that this amendment never ought to have been made and that this judgment, so far as it is for more than the 471 pounds 6s. which was originally claimed, is bad and must be set aside.

24 On a further appeal by the plaintiff [1932] 1 K.B. 423, Scrutton, L. J., said at p. 429:

> When the writ was issued only the first instalment was due, but when the case came on for hearing the second instalment had fallen due. The Official Referee allowed the plaintiff to amend the writ by adding to his claim the second instalment. This was, I think, contrary to the universal practice.

See also the *Law of Civil Procedure* by Williston & Rolls at pp. 118, 9.

25 In answer to the City's allegation that the amounts claimed by Modern were not due and owing by the City, Modern in its reply dated August, 1969 pleaded three matters in justification:

> (a) The Final Certificate referred to has been unreasonably and unjustifiably withheld by the defendant or its servants or agents;
>
> (b) that the statutory declaration referred to was not required from the plaintiff until after the provision of the said certificate and the plaintiff has now filed the statutory declaration on the 16th day of November 1966, and
>
> (c) a Completion Certificate was given by the defendant to the plaintiff but was defective and of no effect because it was not made in an impartial and judicial manner and failed to allow the plaintiff its just remuneration for work, labour and materials as set out in the statement of claim and reply in this action.

26 As to ground (a) the evidence does not support the allegation that the Final Certificate was unreasonably and unjustifiably withheld. The work was substantially completed by Modern on May 10, 1966, as certified to by Brodie. Thirty-seven days thereafter, the Completion Certificate for payment was issued by Brodie under date of June 16, 1966 in accordance with section 44 of the General Conditions, and the Final Certificate for Payment was not due until 60 days after June 16 or August 16, 1966. The writ was issued and served August 12, 1966.

27 Ground (b) provides no answer to the City's allegation that the action was commenced before Modern complied with the condition requiring it to file a statutory declaration with the Engineer. The declaration was filed only on November 16, 1966 more than three months after the commencement of the action. Section 44 of the General Conditions does not make the issue of the Final Certificate a condition precedent to the filing of the statutory declaration. The absence of a Final Certificate therefore is no excuse for Modern's failure to file the declaration.

28 In my view the filing of the statutory declaration required by section 44 of the General Conditions constituted a condition precedent to Modern's right to be paid not only the amount of the hold-back but also of any claim it might have for extras, and ground (3) does not affect the matter. The failure of Modern to comply with this condition before action brought renders the action premature and on this ground I would allow the cross-appeal and dismiss the action.

29 There are, however, grounds upon which I think it must be found that Modern's claim for extras is not maintainable. By the contract Modern put itself into the hands of the engineer to determine its entitlement to payment for its work and materials. Brodie, the engineer, having decided that Modern was not entitled to payment for the extras which it had claimed, Modern is bound by his decision unless under the terms of the contract or under some legal or equitable principle it should be allowed to escape from its bargain and to have the matters in dispute tried by a court of competent jurisdiction.

30 Section 12 of the General Conditions reads in part as follows:

> 12. Should any discrepancies appear, or differences of opinion or misunderstanding, arise as to the meaning of the contract or of the General Conditions, Specifications or Drawings, or as to any omissions therefrom, or misstatements therein, in any respect, or as to the quality or dimensions, or sufficiency of the materials, plant or work, or any part thereof, or as to the due and proper execution of the works, or as to the measurement or quantity or valuation of any works executed, or to be executed under the Contract, *or as to extras thereupon or deductions therefrom*, or as to any other questions or matters arising out of the Contract, *the same shall be determined by the Engineer*, ...

31 Section 30 reads in part:

> 30. The Engineer shall have the right to make or order any alterations and changes, such as he may deem advisable, at any time before or during the prosecution of the work, in any line, grade, plan or detail thereof, or to suspend or omit any portion of the work, or to increase or decrease the dimensions of any part of the work, or to vary in any other way the work herein contracted for; or to order any additional or extra work to be done, or additional or extra materials to be furnished; and the Contractor shall, in pursuance of written orders of the Engineer to that effect, proceed with, carry out and execute the works as directed, and shall supply such additional materials and do such additional or extra work in pursuance of such orders, without being entitled to any extension of time for completion, or any additional payment on account thereof, except only as herein provided. In each and every case where additional or extra work or material of any kind is ordered to be done or supplied, or where the Contractor does or supplies, or contemplates doing or supplying any work or material which he considers extra or beyond the requirements of the Contract, or upon which he intends claiming any extra or additional payment, *he is required, before commencing any such work, or procuring any such material, to obtain from the Engineer a written order therefor*, stating that the same is an extra and will be paid for as such, and also clearly defining the nature of such extra work or material, and the amount the Contractor is to receive therefor, or the terms under which the same is to be paid for and the extension of time, if any, to be allowed; and the Contractor shall also, before beginning any such extra work or commencing to deliver any such additional material, notify the Engineer in writing of his intention to commence work thereon or delivery thereof, so that a proper account or record of the same may be kept by the Engineer.
>
> In case of the Contractor's neglect or failure to observe fully and faithfully the above conditions, he shall forfeit all right to payment therefor, which he otherwise might have had, and shall not make any claim in respect thereof; and if made, the Corporation may reject the same as invalid, and he shall not have any right of recovery in respect thereof, at law or otherwise, *unless he shall have obtained the consent of the Engineer in writing to his making such claim.*
>
> Nothing herein contained is to preclude the Corporation from having any extra or additional or other work done by the Corporation workmen or other parties, in the event of satisfactory arrangements therefor not having been concluded between the Engineer and the Contractor, or for any other sufficient reason, in the opinion of the Engineer. In the event of any circumstances arising at any time which, in the Contractor's opinion, would entitle him to additional compensation, and which are not fully provided for herein, he shall at once, on the discovery of such circumstances, notify the Engineer in writing, and shall state in his notification clearly and fully what the circumstances are, and the additional sum or compensation he intends to demand therefor, or otherwise he shall have no claim in respect thereof. If any work, labor or material which the Contractor was required to perform or supply under the Contract is directed by the Engineer to be changed or omitted, whereby a less quantity or work, labor or material is performed or supplied, then the Engineer may deduct from the contract price the value of any work, labor or material not required to be performed or supplied, ascertained in accordance with the schedule set out in the Tender for the work and/or as determined by the Engineer. All claims of every nature, which the Contractor may have in respect of this Contract or work done thereunder, are to be summarized and submitted by him (in duplicate) to the Engineer, together with his full account for the work, at the time of completion, and he shall make no claim of any nature afterwards; and no claim not then made, or allowed by the Engineer, shall be sustainable, *and the Engineer shall be in no way disentitled to determine any and all question or questions concerning said claims, except by his personal fraud*, and this submission and reference to the Engineer may be made a rule of court,*and no action or suit shall be commenced by either party to the Contract until after the said Completion Certificate for Payment shall have been signed by the Engineer, and then only for the amount appearing thereby to be due to the said Contractor.*

32 Modern did not before commencing any of the work for which it now seeks to recover as extras "obtain from the Engineer a written order therefor" required by the first paragraph of section 30, and in accordance with the second paragraph of the same section it forfeited "all right to payment therefor, which he otherwise might have had, and shall not make any claim in respect thereof; and if made, the Corporation may reject the same as invalid, ...".

33 The concluding paragraph of section 30 of the General Conditions provided "the Engineer shall be in no way disentitled to determine any and all question or questions concerning said claims, except by his personal fraud, ...". Ground (c) pleaded in the reply seeks to avoid the consequence of this provision by alleging that the Completion Certificate which in effect decided Modern's right to payment, and denied payment for the extras now claimed, was of no effect because it was not made in an impartial and judicial manner and failed to allow just remuneration for the work, labour and materials. In support of this plea C. D. Carter a professional engineer employed by Modern during the execution of the contract, provided the only evidence. He testified that the entire performance of Brodie as a resident engineer in charge indicated he was far from impartial and owing to the fact Brodie had become committed to the pricing of the project before the contract was let put him in a position where it was most difficult to be impartial. Mr. Carter failed to disclose a single instance to support his contention that Brodie was far from impartial and in my view his evidence in this respect is a mere opinion unsupported by solid evidence.

34 Brodie denied he was not impartial and swore he appreciated that his work involved looking after ten major contracts on the Turtle Creek project and that he recognized his responsibility to act in a judicial manner. By that he said he meant he had to be as fair as he possibly could and had to interpret the specifications as they were written, "not necessarily as we had intended to write them;" and that for this reason he delegated all day to day detailed inspection work to other members of the staff so he could keep himself free from it so that if there was ever a situation whereby a disagreement should arise which he had to decide he would not have been involved in it himself. He denied he had made statements to the effect no extras would be allowed on the job and said he had processed fifty change orders for other contractors on the project.

35 In my opinion the preponderance of evidence supports the conclusion that Brodie acted properly in the administration of the contract and the fact he disallowed in toto claims numbered 2, 3, 4, 5, 6 and 7 is of no significance as the learned trial judge whose impartiality in the matter cannot be questioned reached the same conclusion.

36 Having come to the conclusion that Modern is not entitled to judgment in this action because the action was commenced prematurely it is unnecessary to consider the effect of the joinder of the Bank of Montreal as a co-plaintiff or the right of Modern to be paid interest.

37 As to the claims of the City pleaded by way of setoff and counterclaim, it is my view all four items are merely matters of defence and that the City is not entitled to a separate judgment thereon against Modern. Moreover the claims for cement contract variation and deficiencies in landscaping were matters which should have been determined by the engineer prior to the issue by him of the Completion Certificate for Payment and any allowance for such items and for delay in completion of the contract provided for in section 29 of the General Conditions should have been reflected in the sum certified to be payable in the Final Certificate. In this respect the City having withdrawn Brodie's authority is in no better position to claim them as deductions than Modern is to assert its claim.

38 In my view the plaintiffs' appeal must be dismissed, the defendant's cross-appeal in so far as it seeks to set aside the judgment in favour of the plaintiff Modern, allowed the judgment in fayour of the plaintiffs set aside in toto and that there be no judgment in favour of the defendant on its counterclaim.

39 I regret exceedingly the necessity for proposing that this case be disposed of as I now feel it must be, since Modern is clearly entitled to a large sum of money which in justice it should have been paid without regard to the outcome of its claim for extras. It is also regrettable that the City declined to waive its objection on the ground of the alleged prematurity of the action when the Court indicated that it was prepared to decide the issues to avoid the expense of further litigation.

40 I have considered the matter of costs and while I would be inclined to grant an order in favour of the defendant for costs up to and including an early stage of the trial, I am not convinced that the order proposed by the other members of the Court is not justified and I shall concur in it.

End of Document

TAB 5

2006 MBQB 61
Manitoba Court of Queen's Bench

Bird Construction Co. v. Theo C. Ltd.

2006 CarswellMan 78, 2006 MBQB 61, [2006] M.J. No. 86, 146 A.C.W.S. (3d) 638, 200 Man. R. (2d) 273, 51 C.L.R. (3d) 306

Bird Construction Company (Plaintiff) and Theo C. Limited and Polychronis Emmanuel Kostas a.k.a "Paul" Kostas (Defendants)

Kaufman J.

Judgment: March 8, 2006
Docket: Winnipeg Centre CI 02-01-28615

Counsel: Dave Hill, Richard Van Dorp for Plaintiff
Randie Kushnier for Defendants

Subject: Contracts; Corporate and Commercial

Headnote

Construction law --- Contracts — Building contracts — Terms of contract — Express terms — General principles

Defendant K, owner of defendant T Ltd., entered into cost plus contract with plaintiff for construction of hotel — Parties effectively by explicit or implicit agreement strayed from contract — Change orders, time extensions, and requests to amend schedules were not administered and documented through T Ltd.'s consultant as required — Substantial performance was completed three months after date stipulated in contract — Plaintiff claimed $433,158.22, as well as relief relating to builders' lien and statutory holdback, against both defendants — Defendants counterclaimed for $900,000 in lost revenue and unnecessary expenses incurred due to plaintiff's breach of contract — Counterclaim dismissed — Consultant's role was clearly intended to provide competent person to implement orderly procedures for change orders, extensions, certification of delay, and holdback of money — It was also clear that at K's insistence, consultant's role under contract was reduced — Contract contemplated that completion time delayed beyond control of contractor would not be viewed as breach and that contract would be extended by appropriate amount of time — It would be absurd to allow T Ltd. to substantially reduce role of its consultant in operation of contract, and then rely on consultant's non-action to escape clear intent of contract — Parties by their conduct agreed to use conference meetings as way to implement intention of contract — This replaced contractual requirement to document matters through consultant — Delay in completion of project was completely due to factors covered by contract, being cause beyond contractor's control — Delayed substantial completion date did not breach contract.

Construction law --- Contracts — Building contracts — Miscellaneous issues

Defendant K, owner of defendant T Ltd., entered into cost plus contract with plaintiff for construction of hotel — Parties effectively by explicit or implicit agreement strayed from contract — Change orders, time extensions, and requests to amend schedules were not administered and documented through T Ltd.'s consultant as required — Substantial performance was completed three months after date stipulated in contract — Plaintiff claimed $433,158.22, as well as relief relating to builders' lien and statutory holdback, against both defendants — Defendants counterclaimed for $900,000 in lost revenue and unnecessary expenses incurred due to plaintiff's breach of contract — Action against T Ltd. allowed — T Ltd.'s claim that elevators installed were unfit for purpose was unsubstantiated and was contradicted by fact that they were still operating — Actual damages flowing from elevator problems were never proven — T Ltd. failed to show that repairs to parking lot were related to change of plans in trenching, or that plaintiff was at fault for failing to put down two more inches of asphalt — Amount claimed as damages for non-completion of contract was not supported by evidence; nor was there any evidence connecting lack of putting down asphalt with any subsequent damages — Plaintiff's claim for insurance deductibles related to thefts was allowed — Deductibles were legitimate cost

of carrying on project under cost plus contract — T Ltd.'s claim for extra staff that had to be paid for three months longer was dismissed, as delay was not attributable to plaintiff and claim duplicated its already rejected claim for lost revenue — T Ltd. owed plaintiff net amount of $ 425,659.40 after set-off of $7,498.82 — As there was no evidence that K personally guaranteed contract, claim for personal judgment against him was dismissed.

Construction law --- Contracts — Breach of terms of contract — Damages — Miscellaneous issues

Defendant K, owner of defendant T Ltd., entered into cost plus contract with plaintiff for construction of hotel — Parties effectively by explicit or implicit agreement strayed from contract — Change orders, time extensions, and requests to amend schedules were not administered and documented through T Ltd.'s consultant as required — Substantial performance was completed three months after date stipulated in contract — Plaintiff claimed $433,158.22, as well as relief relating to builders' lien and statutory holdback, against both defendants — Defendants counterclaimed for $900,000 in lost revenue and unnecessary expenses incurred due to plaintiff's breach of contract — Action against T Ltd. allowed — T Ltd.'s claim that elevators installed were unfit for purpose was unsubstantiated and was contradicted by fact that they were still operating — Actual damages flowing from elevator problems were never proven — T Ltd. failed to show that repairs to parking lot were related to change of plans in trenching, or that plaintiff was at fault for failing to put down two more inches of asphalt — Amount claimed as damages for non-completion of contract was not supported by evidence; nor was there any evidence connecting lack of putting down asphalt with any subsequent damages — Plaintiff's claim for insurance deductibles related to thefts was allowed — Deductibles were legitimate cost of carrying on project under cost plus contract — T Ltd.'s claim for extra staff that had to be paid for three months longer was dismissed, as delay was not attributable to plaintiff and claim duplicated its already rejected claim for lost revenue — T Ltd. owed plaintiff net amount of $ 425,659.40 after set-off of $7,498.82 — As there was no evidence that K personally guaranteed contract, claim for personal judgment against him was dismissed.

Construction law --- Contracts — Breach of terms of contract — Breach by contractor — Delay — Time specified for completion

Defendant K, owner of defendant T Ltd., entered into cost plus contract with plaintiff for construction of hotel — Parties effectively by explicit or implicit agreement strayed from contract — Change orders, time extensions, and requests to amend schedules were not administered and documented through T Ltd.'s consultant as required — Substantial performance was completed three months after date stipulated in contract — Plaintiff claimed $433,158.22, as well as relief relating to builders' lien and statutory holdback, against both defendants — Defendants counterclaimed for $900,000 in lost revenue and unnecessary expenses incurred due to plaintiff's breach of contract — Counterclaim dismissed — Consultant's role was clearly intended to provide competent person to implement orderly procedures for change orders, extensions, certification of delay, and holdback of money — It was also clear that at K's insistence, consultant's role under contract was reduced — Contract contemplated that completion time delayed beyond control of contractor would not be viewed as breach and that contract would be extended by appropriate amount of time — It would be absurd to allow T Ltd. to substantially reduce role of its consultant in operation of contract, and then rely on consultant's non-action to escape clear intent of contract — Parties by their conduct agreed to use conference meetings as way to implement intention of contract — This replaced contractual requirement to document matters through consultant — Delay in completion of project was completely due to factors covered by contract, being cause beyond contractor's control — Delayed substantial completion date did not breach contract.

Construction law --- Contracts — Payment of contractors and subcontractors — Cost plus contract — General principles

Defendant K, owner of defendant T Ltd., entered into cost plus contract with plaintiff for construction of hotel — General conditions amount increased from $200,000 in revised budget to $279,000 in progress billing No. 11 — Parties effectively by explicit or implicit agreement strayed from contract — Change orders, time extensions, and requests to amend schedules were not administered and documented through T Ltd.'s consultant as required — Substantial performance was completed three months after date stipulated in contract — Plaintiff claimed $433,158.22, as well as relief relating to builders' lien and statutory holdback, against both defendants — Defendants counterclaimed for $900,000 in lost revenue and alleged that certain expenditures in general conditions estimates were not incurred — Charge for general conditions upheld — It was clear that intent of cost plus contract was that $175,000 fee paid to contractor be net fee to contractor, and that all cost not due to failure by contractor to fulfil its obligations would be chargeable to owner — None of general concerns and suspicions alleged by T Ltd. were supported by evidence — While there were

extra costs of general conditions due to extended contract time, delay in completion was not attributable to fault of plaintiff — It followed that extra charges in general conditions occurring as result of extended contract work would be chargeable to T Ltd.

Table of Authorities

Cases considered by *Kaufman J.*:

Campeau v. Desjardins Financial Security Life Assurance Co. (2005), 2005 MBCA 148, 2005 CarswellMan 473 (Man. C.A.) — considered

Kei-Ron Holdings Ltd. v. Coquihalla Motor Inn Ltd. (1996), 29 C.L.R. (2d) 9, 1996 CarswellBC 1251 (B.C. S.C.) — considered

Statutes considered:

Builders' Liens Act, R.S.M. 1987, c. B91

Generally — referred to

ACTION by construction company for payment under contract and relief relating to builders' lien and statutory holdback; COUNTERCLAIM by defendant owners for lost revenue.

***Kaufman J.*:**

1 The plaintiff ("Bird") is a company carrying on the business of construction. The defendant Theo C. Limited ("Theo") built and owns the Hampton Inn, a hotel located in Winnipeg (the "hotel"). The defendant Kostas ("Kostas") is an officer and effective owner of Theo.

2 The plaintiff initially claimed $920,131.48, inclusive of GST, plus interest.

3 The plaintiff also claimed relief relating to Builders' Lien and statutory holdback. The claim was made against Theo, and Kostas was sued personally as well.

4 Pursuant to a court order in December 2002, Theo paid the invoiced holdback amount. Bird acknowledged that a calculation error resulted in a claim of $10,000 plus $700 in GST which should be deducted. The amount claimed in this action, as a result of the foregoing, is $433,158.22 plus interest at the Bank of Canada rate, plus 4% compounded monthly as at February 28, 2002 (the date that the holdback amount was billed).

5 In an amended statement of defence and counterclaim, the defendants say that as at September 30, 2001, they had paid $3,952,973.24 inclusive of GST and statutory holdbacks, and they further admit the particulars of registration of lien. They generally deny the amount owing as exaggerated and without foundation and allege that many charges under the contract were unauthorized.

6 The defendants set out a series of specific amounts that should not have been charged or that ought to be deducted as damages caused by plaintiff for which defendants should be compensated.

7 Theo also advances a counterclaim for lost revenue and unnecessary expenses incurred as a result of Bird's breach of contract.

8 Kostas denies any personal liability for any amount that may be owing and alleges that he was simply acting on behalf of Theo.

9 I propose to generally set out the events that give rise to this claim and then deal with each of the issues raised.

10 In the fall of 2000, Kostas had discussions with Tim Talbott, Vice-President and Branch Manager of Bird, with respect to the hotel he was proposing to build. At this time, Kostas owned and operated two Super 8 Motels and he was exploring the type of contract that he would enter into. Talbott suggested several options that they could work under. He gave Kostas an estimate in January of 2001, based on proposed square footage that the project could be constructed in eight months and cost in the range of $6.5 million.

11 During consideration of a cost plus option, he also gave him a list of proposed general conditions with an estimated cost of about $162,000. The general conditions were twenty items that essentially were the general work and disbursements of Bird managing the construction site, including items such as first aid, general clean-up, power consumption, temporary telephone, building permit performance bonds, insurance and so on.

12 In March of 2001, Nejmark Architects ("consultant") provided drawings. A revised budget was provided by Bird. The budget was still at about six and a half million dollars and the general conditions had risen to just under $200,000.

13 A letter of March 2, 2001 from Bird proposed for consideration two names for project manager and two names with respect to project superintendent. The letter expressed caution with respect to budget as design was still being finalized. Thompson was picked as the project manager and Kleemola became the superintendent.

14 During this time, Bird was also obtaining information with respect to financing of the project from Kostas.

15 On the 4th of April 2001, Theo as owner and Bird as contractor entered into a Cost Plus Contract. Bird's fee was fixed at $175,000 payable in seven monthly payment of $25,000 each and there is no dispute that the fee has been paid.

16 Both sides tried to rely on conversations and correspondence conducted at this time to bolster their respective cases. However, the contract states as follows:

> **Article A-2 Agreements and Amendments**
>
> 2.1 The *Contract* supersedes all prior negotiations, representations or agreements, either written or oral, relating in any manner to the *Work*, including the bidding documents that are not expressly listed in Article A-3 of the Agreement — CONTRACT DOCUMENTS.
>
> 2.2 The *Contract* may be amended only as provided in the *Contract Documents*.

17 The parties effectively by explicit or implicit agreement strayed from the contract. Change orders for example were not approved by Theo's consultant but in direct discussions with Kostas. Kostas was on site on a regular basis and at times entered into subcontracts directly rather than going through Bird.

18 Generally speaking, the contract contemplates complete control of the work by Bird and supervision by the consultant. Change orders, time extensions and requests to amend schedules were all contemplated by the contract to be administered and documented through the consultant but were not. While the consultant attended meetings and was involved on site, virtually all consultant documentary responsibilities were not followed.

19 The contract indicated the work was to commence by the 9th of April 2001 and "subject to adjustment and contract times provided for in the contract documents" attain substantial performance of the work by the 16th day of November 2001.

20 The certificate of substantial performance was issued the 13th day of February 2002 certifying that the work has been substantially performed within the meaning of *The Builders' Liens Act* on the 8th day of February 2002.

21 Throughout the project, in addition to being on site, Kostas met regularly with principals of Bird, particularly Thompson and Kleemola. This was in addition to the conference and sub-trade meetings.

22 The parties conducted 19 regular conference meetings, reviewing the progress of the project and discussing various items that needed to be looked after, assigning responsibility for dealing with them. Kostas was present at 18.

23 Records of the meetings in point form were circulated as reports to all present. The earliest one, Exhibit 13, was April 2, 2001, and Exhibit 52, being conference report number 19, records a meeting on January 8, 2002 with the next one being scheduled January 22, 2002.

24 Each of the reports on the first page stated that the notes are considered to be correct and errors or omissions had to be notified within seven days or at the next scheduled meeting or the minutes will be accepted as written. There were no errors or omissions reported.

25 There were also thirteen sub-trade meetings and Kostas is shown as attending the last three, being Exhibit 48 meeting of December 10, 2001, Exhibit 50 the date being December 20, 2001 and Exhibit 53 being the meeting of January 7, 2002 (the exhibit is actually dated 2001 but it is clearly a typographical error).

26 These sub-trade minutes again noted on the front page that errors or omissions had to be notified within seven days or at the next scheduled meetings or the minutes will be accepted as written. No errors or omissions were noted.

27 The amount claimed by the plaintiff is substantiated by invoices tendered, backed up by documents which were tendered and submitted in the same fashion throughout the project. The cost charged was the cost of the work as defined in Exhibit 12, Article A-4. Eleven progress claims were submitted, plus the holdback invoice, together with supporting documentation. Progress Claims 1 to 6 were paid, but Progress Claims 7 to 11 were only partially paid. The defendants, in effect, admitted the amount claimed represented the unpaid portion of the invoices.

28 The amount that may ultimately be owing, if any, depends on the defence and counterclaim. If completely or substantially successful, the amount claimed by the plaintiff could be eliminated and the plaintiff could owe Theo money.

29 The issue of delay will be dealt with first because:

(a) the allegation supports a counterclaim of $900,000 for lost revenue;

(b) some of plaintiff's claim is alleged to be unwarranted costs as they are attributable to the delay;

(c) some of the set-offs are expenses incurred by Theo as a result of the delay; and

(d) the analysis of credibility with respect to the issue of delay will weigh heavily on any further credibility findings on specific items.

Delay

30 Theo relies on the contract which stipulated a date for substantial completion of November 16, 2005. Theo says there were no agreements, written or verbal, extending this time. It supports its argument by pointing to the correspondence and discussions prior to the signing of the contract in which an eight-month schedule was contemplated. Theo says they were concerned about the completion date and, in fact, the contract provided a bonus of $10,000 for early completion. Kostas testified that he hired Bird because he had confidence that Bird would complete the contract on time. Theo points out that in direct examination, Kostas indicated he intended to open in accordance with the contract before Christmas. Gamble, Theo's accountant, confirmed this was the date intended before the contract was signed. Theo submits that as Bird failed to meet the date for substantial completion, it breached its contract and therefore it cannot charge for any costs incurred by virtue of its breach and is liable for damages which flow from such breach.

31 Bird submits that the contract stipulates certain delays for which the contractor is not responsible. It points out that these delays were recorded in conference reports and that it is clear that no objection was made with respect to the delays even though the consultant was present and Kostas attended all but one of the conferences. The same comment is made with respect to the sub-trade meetings, the last three of which Kostas attended.

32 Bird points out too, that Thompson's evidence was that the weather and the inability to get timely decisions from Kostas caused the delay. This was supported by Kleemola. Bird points out that the delay of information flow from Kostas is confirmed not only in the minutes of meetings but in memos from his own consultant in the late summer and early fall (Exhibits 90-102). Exhibits 101 and 102 are dated as late as December 4 and 10, 2001. All are memos from the

consultant to Kostas, requesting information necessary to carry out some part of the job. It is Bird's position that as activities are interrelated, delay on one aspect affects scheduling in other parts of the job.

33 Kostas testified that he did not say anything at the meetings because he "didn't want to start a war" that would jeopardize the project and says that he complained privately to Thompson and Kleemola. As to the consultant's memos to himself, he derisively dismisses them as attempts by the consultant to increase his fees by generating paper.

34 There is a dispute between Kleemola and Thompson on the one hand and Kostas on the other as to the precise conversations that took place a couple of times over lunch. Thompson and Kleemola testified that Kostas was asked when he intended to open the hotel. At one time he answered I don't know and at another time he changed the subject by discussing the Euro. Kostas denied changing the subject as alleged and explained that he said I don't know because of frustration about the delay in construction. At another point in the evidence, he indicated that he complained to Bird away from the meetings about the delay and indicated that someone will have to pay.

35 There were attempts by Theo to identify specific areas of delay and they were answered by Bird's witnesses by either indicating that it was unavoidable or that it did not hold up the project. Minic Drywall Ltd. was an example of both explanations. Bird explained that labour shortages in the industry caused the delay. They outlined the steps taken to eliminate the impact on the project and testified that ultimately it did not delay the project.

Analyis

36 In *Campeau v. Desjardins Financial Security Life Assurance Co.*, 2005 MBCA 148 (Man. C.A.), Freedman J.A. said as follows:

> 34 In questions of ambiguity arising out of commercial agreements, a court should consider the commercial context in which the words were used. See, e.g., *Paddon-Hughes Development Co. v. Pancontinental Oil Ltd.*, [1999] 5 W.W.R. 726, 1998 ABCA 333, and *H.W. Liebig & Company Limited v. Leading Investments Limited*, [1986] 1 S.C.R. 70. The principle is expressed in the oft-quoted passage from Lord Wilberforce's decision in *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.) (at p. 574):
>
> > ...No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating. ...
>
> 35 At all times an effort should be made to "avoid an interpretation that would result in a commercial absurdity. Rather, the document should be construed in accordance with sound commercial principles and good business sense. Care must be taken, however, to do this objectively" (Goudge J.A., for the Ontario Court of Appeal in *Kentucky Fried Chicken Canada v. Scott's Food Services Inc. et al.* (1998), 114 O.A.C. 357 at para. 27).

37 It is clear that the original contract had a fixed time for completion and provided procedures for extending the time. These procedures involved the consultant. The consultant's role in the original or written contract was clearly intended to provide a competent person to implement orderly procedures for change orders, extensions, certification of delay and hold back of money. It is also clear that throughout the contract, at the insistence of the owner the consultant's role under the contract was reduced although he did attend at the site and participated at the conference meetings. The processes put in place by the parties did not conform to the letter of the contract but fulfilled the intent of the contract.

38 Exhibit 12 at page 71, GC 6.5 deals with delays:

> **GC 6.5 Delays**

6.5.1 If the *Contractor* is delayed in the performance of the *Work* by an action or omission of the *Owner*, *Consultant*, or anyone employed or engaged by them directly or indirectly, contrary to the provisions of the *Contract Documents*, then the *Contract Time* shall be extended for such reasonable time as the *Consultant* may recommend in consultation with the *Contractor*. The *Contractor's Fee* and the *Guaranteed Maximum Price* shall be adjusted by a reasonable amount for overhead costs incurred by the *Contractor* as the result of such delay.

. . . . .

6.5.3 If the *Contractor* is delayed in the performance of the *Work* by labour disputes, strikes, lock-outs (including lock-outs decreed or recommended for its members by a recognized contractors' association, of which the *Contractor* is a member or to which the *Contractor* is otherwise bound), fire, unusual delay by common carriers or unavoidable casualties, or without limit to any of the foregoing, by a cause beyond the *Contractor's* control, then the *Contract Time* shall be extended for such reasonable time as the *Consultant* may recommend in consultation with the *Contractor*. The extension of time shall not be less than the time lost as the result of the event causing the delay, unless the *Contractor* agrees to a shorter extension. The *Contractor's Fee* and the *Guaranteed Maximum Price* shall be adjusted by a reasonable amount for overhead costs incurred by the *Contractor* as the result of such delay.

6.5.4 No extension shall be made for delay unless notice in writing of claim is given to the *Consultant* not later than 10 *Working Days* after the commencement of delay, providing however, that in the case of a continuing cause of delay only one notice of claim shall be necessary.

(Underlining mine)

39 It would be absurd to allow Theo to substantially reduce the role of the consultant in the operation of the contract and then rely on the non-action by the consultant to get away from the clear intent of the contract. The parties by their conduct carried on the project without much of the documentation required from the consultant.

40 The contract contemplates, understandably, that completion time that is delayed beyond the control of the contractor will not be viewed as a breach and the contract would be extended by an appropriate amount of time. The intent of the documentation is to advise the owner and to allow him to respond. It also records the matter.

41 Kostas attended every one but one of the conference meetings and was aware of the delays as a result of weather. He was also aware of the actions required of him. He was receiving memos from his consultant as late as December, requesting information that was necessary for continuation of the contract.

42 His explanations are completely unbelievable. He insists that he did not say anything at the meetings because he did not want to start a war. This does not explain why he did not vigorously pursue Bird away from the meetings if, in fact, as he says, he was planning to open in November.

43 Kostas' explanation that he did not bother responding to the minutes because he felt they were inaccurate appears to be advanced as a fall back position if I do not accept his evidence that he did not say anything because he did not want to start a war. In any event, it is not reasonable to conclude that he would be attending these meetings with all the people running the project, receive the minutes and say nothing either at the meeting or after it.

44 If he is to be believed, we are to accept that while preparing to open in November and spending money on doing so even in September and October, he was still being polite, not wanting to start a war, even in the fall through November and December.

45 His dismissal of his own consultant's memos asking for information as an attempt to generate fees does not contradict the fact that the consultant was requesting the information. It does confirm the consultant's diminished role on the job.

46 I accept Kleemola's and Thompson's evidence that the couple of times they asked him about when he intended to open, he said once that he didn't know and the second time he changed the conversation to the Euro. This behaviour is consistent with his attitude toward his own consultant's memos.

47 His explanation as to why he said I don't know, namely, that it didn't look like the project was going to be completed on time is not a credible explanation and certainly inconsistent with his other evidence that he was spending money and proceeding to prepare to open in November.

48 It is curious that the consultant was not called as a witness with respect to this matter or any of the other matters given his contemplated role in the contract, his presence on the job and his expertise. It may be that there is a fee dispute but, in any event, I am not drawing any adverse inference from this lack of evidence other than observing that without it, Kostas' evidence is uncorroborated.

49 I find that the parties by their conduct agreed to use the conference meetings as a way to implement the intention of the contract, namely, to share information and keep everybody updated. This replaced the contract requirements to document matters through the consultant.

50 Given the foregoing, I find that the delay in completion of the project was completely due to factors covered by s. GC 6.5.1 being by an action or omission of the owner or by weather being a cause beyond the contractor's control and, accordingly, the delayed substantial completion date did not breach the contract. A similar decision can be found in *Kei-Ron Holdings Ltd. v. Coquihalla Motor Inn Ltd.*, [1996] B.C.J. No. 1237 (B.C. S.C.), paras. 168, 169 and 186.

Quantum of Counterclaim

51 Theo advanced a claim for $900,000 for loss of revenue as a result of the hotel not opening on the date contemplated in the contract. In case I am wrong about the delay, I will briefly examine the quantum claim.

52 Theo's interpretation of the evidence uses the approach of averaging out income presented in evidence over a number of years or the life of the hotel. It relies on the reasonable assertion that, as Gamble put it, a month lost is not recoverable.

53 Theo tried to approach it on the basis of gross profit.

54 Bird recalculated the matter on the basis of Gamble's Exhibits 87, 106, 109, 110, 111 and 112, showing in the last three fiscal years the best performance is $2.4 million in sales for an average of $200,000 per month to the end of February 2005.

55 Bird then continues to talk about actual profit percentages.

56 It seems to me that when one takes account of lost revenue, one should not only look at profits since there are fixed costs that the revenue covers and, if a person loses this income as a result of a breach of contract, they are entitled to recover these costs as well as profit.

57 I accept Gamble's approach which is to take average revenue and deduct that amount which was an expense in earning that revenue. Unlike fixed costs, this would be an expense not incurred when the revenue is not earned. He estimates this avoidable expense at 20%.

58 Using as an average, $200,000 per month to the end of February 2005 and deducting 20% for expenses incurred in earning this income, leaves a recoverable loss of $160,000 per month or $480,000 for the three months alleged to have been lost as a result of the late completion.

General Conditions

59 Kostas states that he was concerned about the amount of General Conditions from the beginning. He was of the view that this was an area in which it would be difficult to monitor costs. Put less politely, he was of the view that this is an area in which Bird could increase its costs at will.

60 There were multiple complaints about the General Conditions, starting with the allegation that the plaintiff hired itself without tender to perform work under the contract described as General Conditions. This allegation in paragraph 16 of the amended statement of defence and counterclaim was not pursued. This is understandable since it is clear that the General Conditions were in fact intended to cover cost to Bird for work done by its own people.

61 Kostas notes that the General Conditions amount increased from $200,018.00 in Progress Billing No. 1 (Exhibit 65) to $279,000 in Progress Billing No. 11. He submits that certain expenditures contained in the estimates were not incurred. These unspent figures would add up to $75,375.00 so that the final adjusted figure was in fact $354,375.00, being an increase of $154,357.00 from the estimate in Progress Billing No. 1.

62 He points out that Talbott testified that they like to be "bang on" with their estimate of General Conditions. He also complains that neither he nor his accountant were able to follow all the detailed documentation that Bird gave them to support the General Conditions charge.

63 In its brief, Theo's attitude toward the General Conditions is summed up as follows:

> The huge increases, the lack of providing understandable breakdowns to Kostas and the complicated detailed figures given all support Kostas's concerns, namely that a lot of costs can be put into General Conditions by the contractor which are almost impossible to track or verify.

64 Theo also alleges at the end of its argument that it claims the amount of the increase in General Conditions as damages for breach of contract by virtue of the fact that Bird failed to perform the contract within the time provided. In effect, in its argument Theo conceded that its claim for the amount of the increase in the General Conditions is based on the allegation that the extra costs were incurred as a result of the delay in the contract and the increase in expenses connected with this extension.

65 Bird submits that the cost of General Conditions is always subject to change and that Theo was consistently cautioned about this by Bird. It submits that it provided all documentation possible to Theo to justify and detail the increase in General Conditions cost. Bird points out that there were no challenges to the documents submitted as justification.

Analysis

66 Of relevance to this particular issue and others are two items in the contract:

> (a) References to maximum contract price have been removed;
>
> (b) At the end of Article A-4.1 detailing some of the items included in cost of the work is the following general paragraph:
>
> > Notwithstanding the foregoing and any provisions contained in the General Conditions of the *Contract*, it is the intention of the parties that the *Cost of the Work* referred to herein shall cover and include any and all contingencies other than those which are the result of or occasioned by any failure on the part of the *Contractor* to exercise reasonable care and diligence in the *Contractor's* attention to the *Work*. Any cost due to failure on the part of the *Contractor* to exercise reasonable care and diligence in the *Contractor's* attention to the *Work* shall be borne by the *Contractor*.

67 It is clear that it is the intent of this Cost Plus Contract that the $175,000 fee paid to the contractor be a net fee to the contractor and that all cost that is not due to failure on the part of the contractor to fulfill its obligations shall be chargeable to the owner.

68 None of the general concerns and suspicions alleged by Theo were detailed or supported by the evidence. The only contention by Theo with respect to increased cost of General Conditions that was concurred in by witnesses for Bird was that there were extra costs of General Conditions attributable to the extended contract time. As I have already found that the delay in completion was not attributable to any fault of Bird, it follows that extra charges in General Conditions occurring as a result of the extended contract work would be chargeable to the owner and, accordingly, the charge for General Conditions will remain.

Elevators

69 Theo says that the elevators installed were deficient and not fit for the purpose. It claims a set-off for the installation of replacement elevators in the amount, including GST and PST, of $153,270.72. Although Theo and its consultant Riddell were the ones who selected the company to install the elevators, the actual contract was signed between Bird and Thyssen Krupp to provide and install the elevators according to the specifications.

70 Theo called evidence, including Riddell, to show that problems started with the elevators in January of 2002 and continued to the date of trial. The problems had to do with the elevators stopping and having to be reset. While Thyssen Krupp initially attended to deal with the matter, they ultimately refused to do so, and Theo argues that the elevators have to be replaced.

71 Bird points out that they were not told about the problems with the elevators until March of 2003 as Kostas chose to deal with Thyssen Krupp himself and through the assistance of his consultant Riddell. Bird also points out that there is no evidence of the elevators being unfit for the purpose as they were still operating at the time of trial and Riddell testified that a maintenance contract should have fixed the problem. Bird says that the absence of a maintenance contract is not their responsibility.

Analysis

72 Section GC 12.3 in the contract deals with the contractor's warranty and it states as follows:

> 12.3.1 The warranty period with regard to the *Contract* is one year from the date of *Substantial Performance of the Work* or those periods specified in the *Contract Documents* for certain portions of the *Work* or *Products*.
>
> 12.3.2 Except for the provisions of paragraph 12.3.6, the *Contractor* shall be responsible for the proper performance of the *Work* to the extent that the design and *Contract Documents* permit such performance.
>
> 12.3.3 Except for the provisions of paragraph 12.3.6 and subject to paragraph 12.3.2 and Article A-4 of the Agreement — COST OF THE WORK, the *Contractor* shall promptly correct defects or deficiencies in the *Work* which appear prior to and during the warranty periods specified in the *Contract Documents*.
>
> 12.3.4 The *Owner*, through the *Consultant*, shall promptly give the *Contractor* notice in writing of observed defects and deficiencies that occur during the warranty period.
>
> 12.3.5 The *Contractor* shall enforce the warranty obligations of the *Subcontractors* and *Suppliers* which shall include the following provisions:
>
> > .1 The *Subcontractor* or the *Supplier* shall correct promptly at their expense defects or deficiencies in the work which appear prior to and during the warranty periods specified in the *Contract Documents*.

.2 The *Subcontractor* or the *Supplier* shall correct or pay for damage resulting from corrections made under the requirements of paragraph 12.3.3.

12.3.6 The *Contractor* shall be responsible for obtaining *Product* warranties in excess of one year on behalf of the *Owner* from the manufacturer. These *Product* warranties shall be issued by the manufacturer to the benefit of the *Owner*.

(Underlining mine)

73 The claim that the elevators are unfit for the purpose is unsubstantiated and, in fact, is contradicted by the fact that the elevators were still operating at the time of trial. Theo's own witness, Riddell, indicated that a service contract would cure the problem. There is no suggestion that Bird is responsible for putting in place a service contract.

74 The actual damages flowing from the problems with the elevator were never quantified or proven. Even if they were, the contract stipulates that the contractor is to be notified promptly. Given the way the project proceeded, I would not emphasize the fact that the consultant did not get involved in giving notice in writing as stipulated in Article 12.3.4. The intent and spirit, however, of the contract is that the contractor is to be advised promptly. The owner chose not to advise the contractor until March of 2003 so that even if he had quantified damages for problems with the elevator, I would find that he was precluded from making any claims against the contractor.

Parking Lot Repairs

75 Theo claims a credit for a charge of $1,096.75 for repairs done to the parking lot October 16, 2003. It alleges that the repairs were made necessary by either the failure to put on the final two inches of asphalt or the fact that the trenching done by the electrician for cable did not follow the diagram but in fact went through a portion of the parking lot. The amount paid is Exhibit 77 and the photos of the trenching are in Exhibit 78. Theo contends that Forest Park ought to have been called to explain the trenching. Theo also claims an unspecified amount as damages for future problems caused by this diagonal trenching.

76 Bird, testifying through Thompson, indicates that the areas that were repaired were not in the areas where the trenches were.

77 Bird's subcontract with Maple Leaf provided that a further two inches of asphalt would be installed in the spring of 2002 at a cost of $6,000. Given the lack of payment and break of relations between the parties, the asphalt was never installed and was never billed.

78 Theo submitted a copy of a fax from Superior Asphalt marked as Exhibit 76, indicating that as per the site inspection and the directions received, they proposed to prepare the surface, install an average of two inches of hot-mixed asphalt and line paint at a price of $35,342.00, plus GST. Theo claims this amount of $37,815.94 as damages for non-completion of the Bird contract.

Analysis

79 The onus is on Theo to connect alleged errors or omissions by Bird with the damages it claims.

80 I am satisfied that Theo has failed to show that the repairs in the amount of $1,096.75 were related to the change of plans in the trenching. No evidence other than speculations by Kostas was called to connect it. The picture would seem to indicate that the area covered by the trench is much smaller and removed from the area of the repairs.

81 Similarly, the onus is on Theo to prove that the quote by Superior Asphalt of $35,342.00, plus GST, is somehow related to the failure of Bird to have the asphalt placed on the lot. Without evidence and cross-examination, it is difficult to connect the failure to perform $6,000 worth of work to the need to spend approximately $35,000. I would add,

parenthetically, that the quote obtained is dated October 27, 2005 as the work had not yet been done but even the passage of time, without evidence, fails to explain the discrepancy in prices.

82 Theo was not billed for the work by Bird. Any reasonable increase over $6,000 might be claimable if Bird is found at fault for not putting down the asphalt. The amount claimed is not supported by the evidence nor is there any evidence connecting the lack of putting down the asphalt with any subsequent damages. Both claims in relation to the parking lot are dismissed.

Insurance Deductible

83 Theo claims that $9,000 for insurance deductibles should not be chargeable to Theo.

84 $4,000 of the claim related to four $1,000 deductibles related to thefts on the site and Theo says that security was not good enough to stop these four minor thefts and, therefore, it should be Bird's responsibility.

85 Bird also claims $5,000 deductible on its own insurance policy for its own tools and, again, Theo says that it should not be responsible for losses as Bird was in charge of security.

86 Theo further points out that the insurance for contractor's equipment was to be in a form acceptable to the owner and no evidence was led by the plaintiff that the owner knew about Bird's policy or approved it. Theo further complains that the other policies had a deductible of $1,000, whereas Bird's was $5,000.

87 It is difficult to follow the last point as presumably a higher deductible would lower the premium and as it was a Cost Plus Contract, the premium would be chargeable to Theo.

88 Bird points out that Kleemola testified that proposed security measures with quotes were given to Kostas but he refused all of them and only later did he ultimately accept security cameras.

Analysis

89 I have already indicated that the lack of formality in the performance of this contract was waived continuously by both parties. There is no evidence to suggest that either the security measures or the insurance contracts themselves were unreasonable in any way and, as this is a Cost Plus Contract and the deductibles were a legitimate cost of carrying on the project, the request by Theo to deduct this amount from the claim is dismissed.

Interest

90 Theo claims there should be a deduction of $3,806.37, showing as Item 128 on Progress Billing No. 11, which is to the month ending February 28, 2001. It is Theo's position that interest remains to be argued by the parties.

91 As the matter is still to be argued, the amount of $3,806.37 interest will be deducted from the claim.

Extra Staff

92 Theo claim $25,145.00 for extra staff engaged early and that had to be paid for three months longer because of delay. This extra charge consists of a general manager, who was paid every two weeks, as well as other staff required for the hotel. The documentation referred to is Exhibit 106, the February Statement of Operations.

93 The evidence supporting the expenditures is deficient in details with respect to staff and there is no explanation as to how Theo can claim a portion of payment which, according to the evidence, was covered by a Motel 8 Corporation. It is also difficult to understand and was not satisfactorily explained why Theo hired staff when it was obvious that the project was delayed. The explanation by Kostas was that staff had to be trained. This does not explain the early hiring. Kostas further explained that good staff had to be hired in order to retain them. This seems to be a decision by Kostas, not a result of anything Bird did.

94 The above, however, are peripheral for two reasons:

(a) I have already found that the delay was not attributable to the fault of Bird, and

(b) this claim is a duplication of a claim that has already been rejected.

95 There was a counterclaim for lost revenue for the three months attributable to the delay. This counterclaim was rejected but its calculation effectively included the cost of staff for the three months. The claim for lost revenue, had it been allowed, would have covered the cost of any staff.

96 As the delay was not the fault of Bird and the claim duplicates the claim for lost revenue, the request for compensation of staff costs for the three months is dismissed.

Temporary Heating

97 Theo claims $9,236.58 as a deduction from the claim. This amount is included in Exhibit 67 as Item 1175-7, shown as temporary heating system.

98 Theo points out that Thompson agreed that 126 heaters were provided because they were required to heat the building after November 16, 2001. It is a side issue that Theo has retained the heaters. Thompson testified Kostas authorized the purchase.

Analysis

99 Theo does not question the need for heating the building or the need for the extra heaters but, in effect, says that they were necessary because of the delay. Since the delay was not the fault of Bird, Theo's claim for this deduction is dismissed.

Clean-Up Costs

100 Theo claims $17,502.50 deduction for clean-up costs, being extra clean-up costs shown in Exhibit 67 as Item 1290-1.

101 It is Theo's argument that the item was budgeted in Exhibit 8 as $3,500 and the final cost was $19,857.00. Theo claims the difference between the budgeted amount and the actual amount.

102 Theo further argues that the contract provided that the subcontractors shall remove all waste materials and the evidence indicates that there was some clean-up after the subs by Bird.

103 Bird explained that in addition to each sub-trade cleaning out after itself they got together and cleaned, but Theo says that Bird should not have participated as it was the subcontractor's responsibility.

104 In further support of the argument, Theo points out that Bird budgeted $5,250.00 for a final clean-up and only spent $2,265.00.

Analysis

105 Bird, as general contractor, was responsible for the site, which included making sure that it was clean for other trades to come in. There is no evidence that Bird did not do its reasonable best to ensure that each subcontractor, either individually or collectively, cleaned up the site. It is reasonable that the residual clean-up had to be done to keep the project moving. I am satisfied this was a legitimate cost and is properly chargeable to the owner.

Studs

106 Kostas alleged that the studs were screwed in improperly as there was only one screw at the top and bottom instead of two. Thompson testified that Exhibit 83, which indicates four screws are necessary, relates to exterior load-bearing

walls. Kostas alleged that the result of failing to put in four screws is that walls were cracking and doors were twisting. No expert evidence was called to counter Thompson's experience and knowledge. No quantification of damages in relation to the alleged problem was provided. Supporting Thompson's evidence was Kleemola's evidence that the studs were put in according to code. I accept the evidence of Bird's witnesses and the claim with respect to studs is dismissed.

Ceiling Fixtures

107 Kostas claimed that the ceiling fixtures had to be reinstalled as a result of a mistake. Bird's evidence was that they were installed on the directions of the consultant and that the plans requiring the change were not provided until later. Not having the consultant to contradict Bird's evidence, I accept it, and the claim for the ceiling fixtures is dismissed.

Wall Fixtures

108 Kostas says that the wall fixtures were placed in the wrong location and had to be moved. Kleemola agrees that they were in the wrong location but says that Theo was never billed for the extra work of moving the switches. Theo adds a claim for repairing the walls, relocating pictures and replacing the vinyl all related to relocating the fixtures. The claim is with respect to three matters, two of them being charges to Theo contained in Exhibit 62 as Item Nos. 122 and 123 being, together with GST, $1,557.17 and $1,343.48, respectively. Given the admission, the claims for set-off are allowed.

109 Kostas explained that Theo will incur a charge because the vinyl to repair the wall after the wall fixtures were moved was taken from behind the headboards and now the headboards have to be moved, exposing the hole in the vinyl. He estimates that he can no longer match it and his estimate for repairs is $5,000, plus $350 GST. No explanations or details were given as to how he arrives at this number and I am not prepared to allow it.

Bath-Tub

110 There is a claim for set-off with respect to Exhibit 62, Change No. 124. This is a claim for $791.80 which is related to repairing of bath-tubs. The evidence indicates that the tubs may have been damaged by other sub-trades and Theo says they should not be charged the amount. As there is no denial or explanation with respect to this claim, it is allowed.

Amount Owing by Theo

Total Amount Claimed		$433,158.22
Interest Deducted	$3,806.37	
Light Fixtures set-offs, including GST, and	$1,557.17 $1,343.48	
Repair bath-tub	$791.80	
Total allowed as set-off	$7,498.82	$7,498.82
Net amount owing by Theo		$425,659.40

Personal Guarantee by Kostas

111 Bird put forward the conversations between Talbott and Kostas, arguing that they constitute a personal guarantee. They point to the letter from Cambrian Credit Union, Exhibit 86, indicating that Kostas arranged for approximately $1.5 million in additional funds over and above the $5 million in financing provided to Theo. Bird concludes by saying that the evidence indicates that Kostas is personally liable for the amount claimed. He was responsible himself for arranging approximately $1.5 million in additional funds over and above the corporate loan to the corporate defendant and the discussions indicate personal responsibility.

112 Kostas says that he never guaranteed in writing or verbally to make up any shortfall. He only indicated that he would arrange for additional financing through his other companies which did not constitute a guarantee and which, in any event, he did.

Analysis and Conclusion

113 The contract, Tab 12, on page numbered 56, has both signatures by Kostas but underneath the second signature is an indication of his name and title, signing as President. No one argued that this signature constitutes a guarantee and I certainly do not take it as such.

114 Part 5 of the contract dealing with payment and financing information required of the owner is found at Tab 12, page 67. Section GC 5.1 states as follows:

> 5.1.1 The *Owner* shall, at the request of the *Contractor*, prior to execution of the Agreement, and/or promptly from time to time thereafter, furnish to the *Contractor* reasonable evidence that financial arrangements have been made to fulfill the *Owner's* obligations under the *Contract*.
>
> 5.1.2 The *Owner* shall notify the *Contractor* in writing of any material change in the *Owner's* financial arrangements during the performance of the *Contract*.

The owner is Theo.

115 While Talbott indicated that he was under the impression that Kostas would be putting in additional monies, he never went as far as to indicate that he felt Kostas was personally guaranteeing the contract nor did he indicate that they would not have entered into the arrangement if they did not have the personal guarantee of Kostas.

116 It is clear from the evidence that additional financing was in fact arranged by Kostas through his other two companies that owned the two motels. He also, pursuant to the contract, complied with requests for additional information, including allowing Bird to obtain information from Cambrian Credit Union. This was fulfilling Theo's obligation to provide information.

117 There is no evidence that Kostas personally guaranteed the contract and the claim for a personal judgment against Kostas is accordingly dismissed.

118 There was no opposition to the claims for relief under the lien and same will be granted subject to any comments counsel will make at our next meeting with respect to details.

119 Counsel are to address the issues of interest and costs and an appointment should be made with the trial coordinator, allowing for sufficient time to make submissions.

Action against corporate defendant allowed; counterclaim dismissed.

2007 MBCA 17
Manitoba Court of Appeal

Bird Construction Co. v. Theo C. Ltd.

2007 CarswellMan 62, 2007 MBCA 17, 155 A.C.W.S. (3d)
573, 212 Man. R. (2d) 152, 389 W.A.C. 152, 60 C.L.R. (3d) 133

Bird Construction Company (Plaintiff / Respondent) and Theo C. Limited (Defendant / Appellant) and Polychronis Emmanuel Kostas a.k.a. "Paul" Kostas (Defendant)

R.J. Scott, C.J.M., M.A. Monnin, B.M. Hamilton JJ.A.

Heard: January 23, 2007
Judgment: January 23, 2007
Written reasons: February 12, 2007
Docket: AI 06-30-06420

Proceedings: affirming *Bird Construction Co. v. Theo C. Ltd.* (2006), 2006 MBQB 61, 2006 CarswellMan 78, 200 Man. R. (2d) 273, 51 C.L.R. (3d) 306 (Man. Q.B.)

Counsel: R.N. Kushnier for Appellant
D.G. Hill, R. Van Dorp for Respondent

Subject: Contracts

Headnote

Construction law --- Contracts — Building contracts — Terms of contract — Express terms — General principles

Defendant K, owner of defendant T Ltd., entered into cost plus contract with plaintiff for construction of hotel — Parties, by explicit or implicit agreement, effectively strayed from contract — Change orders, time extensions, and requests to amend schedules were not administered and documented through T Ltd.'s consultant as required — Substantial performance was completed three months after date stipulated in contract — Plaintiff claimed $433,158.22, as well as relief relating to builders' lien and statutory holdback, against both defendants — Judge dismissed defendants' counterclaim for $900,000 in lost revenue and unnecessary expenses incurred due to plaintiff's breach of contract — Consultant's role was clearly intended to provide competent person to implement orderly procedures for change orders, extensions, certification of delay, and holdback of money — It was also clear that, at K's insistence, consultant's role under contract was reduced — Contract contemplated that completion time delayed beyond control of contractor would not be viewed as breach and that contract would be extended by appropriate amount of time — It would be absurd to allow T Ltd. to substantially reduce role of its consultant in operation of contract, and then rely on consultant's non-action to escape clear intent of contract — Parties by their conduct agreed to use conference meetings as way to implement intention of contract — This replaced contractual requirement to document matters through consultant — Delay in completion of project was completely due to factors covered by contract, being cause beyond contractor's control — Delayed substantial completion date did not breach contract — Defendant T Ltd. appealed — Appeal dismissed.

Construction law --- Contracts — Building contracts — Miscellaneous issues

Defendant K, owner of defendant T Ltd., entered into cost plus contract with plaintiff for construction of hotel — Parties, by explicit or implicit agreement, effectively strayed from contract — Change orders, time extensions, and requests to amend schedules were not administered and documented through T Ltd.'s consultant as required — Substantial performance was completed three months after date stipulated in contract — Plaintiff claimed $433,158.22, as well as relief relating to builders' lien and statutory holdback, against both defendants — Defendants counterclaimed for $900,000 in lost revenue and unnecessary expenses incurred due to plaintiff's breach of contract — Judge allowed action

against T Ltd. — T Ltd.'s claim that elevators installed were unfit for purpose was unsubstantiated and was contradicted by fact that they were still operating — Actual damages flowing from elevator problems were never proven — T Ltd. failed to show that repairs to parking lot were related to change of plans in trenching, or that plaintiff was at fault for failing to put down two more inches of asphalt — Amount claimed as damages for non-completion of contract was not supported by evidence; nor was there any evidence connecting lack of putting down asphalt with any subsequent damages — Plaintiff's claim for insurance deductibles related to thefts was allowed — Deductibles were legitimate cost of carrying on project under cost plus contract — T Ltd.'s claim for extra staff that had to be paid for three months longer was dismissed, as delay was not attributable to plaintiff and claim duplicated its already rejected claim for lost revenue — T Ltd. owed plaintiff net amount of $ 425,659.40 after set-off of $7,498.82 — As there was no evidence that K personally guaranteed contract, claim for personal judgment against him was dismissed — Defendant T Ltd. appealed — Appeal dismissed on other grounds.

Construction law --- Contracts — Breach of terms of contract — Damages — Miscellaneous issues

Defendant K, owner of defendant T Ltd., entered into cost plus contract with plaintiff for construction of hotel — Parties, by explicit or implicit agreement, effectively strayed from contract — Change orders, time extensions, and requests to amend schedules were not administered and documented through T Ltd.'s consultant as required — Substantial performance was completed three months after date stipulated in contract — Plaintiff claimed $433,158.22, as well as relief relating to builders' lien and statutory holdback, against both defendants — Defendants counterclaimed for $900,000 in lost revenue and unnecessary expenses incurred due to plaintiff's breach of contract — Judge allowed action against T Ltd. — T Ltd.'s claim that elevators installed were unfit for purpose was unsubstantiated and was contradicted by fact that they were still operating — Actual damages flowing from elevator problems were never proven — T Ltd. failed to show that repairs to parking lot were related to change of plans in trenching, or that plaintiff was at fault for failing to put down two more inches of asphalt — Amount claimed as damages for non-completion of contract was not supported by evidence; nor was there any evidence connecting lack of putting down asphalt with any subsequent damages — Plaintiff's claim for insurance deductibles related to thefts was allowed — Deductibles were legitimate cost of carrying on project under cost plus contract — T Ltd.'s claim for extra staff that had to be paid for three months longer was dismissed, as delay was not attributable to plaintiff and claim duplicated its already rejected claim for lost revenue — T Ltd. owed plaintiff net amount of $ 425,659.40 after set-off of $7,498.82 — As there was no evidence that K personally guaranteed contract, claim for personal judgment against him was dismissed — Defendant T Ltd. appealed — Appeal dismissed on other grounds.

Construction law --- Contracts — Breach of terms of contract — Breach by contractor — Delay — Time specified for completion

Defendant K, owner of defendant T Ltd., entered into cost plus contract with plaintiff for construction of hotel — Parties, by explicit or implicit agreement, effectively strayed from contract — Change orders, time extensions, and requests to amend schedules were not administered and documented through T Ltd.'s consultant as required — Substantial performance was completed three months after date stipulated in contract — Plaintiff claimed $433,158.22, as well as relief relating to builders' lien and statutory holdback, against both defendants — Judge dismissed defendants' counterclaim for $900,000 in lost revenue and unnecessary expenses incurred due to plaintiff's breach of contract — Consultant's role was clearly intended to provide competent person to implement orderly procedures for change orders, extensions, certification of delay, and holdback of money — It was also clear that, at K's insistence, consultant's role under contract was reduced — Contract contemplated that completion time delayed beyond control of contractor would not be viewed as breach and that contract would be extended by appropriate amount of time — It would be absurd to allow T Ltd. to substantially reduce role of its consultant in operation of contract, and then rely on consultant's non-action to escape clear intent of contract — Parties by their conduct agreed to use conference meetings as way to implement intention of contract — This replaced contractual requirement to document matters through consultant — Delay in completion of project was completely due to factors covered by contract, being cause beyond contractor's control — Delayed substantial completion date did not breach contract — Defendant T Ltd. appealed — Appeal dismissed.

Construction law --- Contracts — Payment of contractors and subcontractors — Cost plus contract — General principles

Defendant K, owner of defendant T Ltd., entered into cost plus contract with plaintiff for construction of hotel — General conditions amount increased from $200,000 in revised budget to $279,000 in progress billing No. 11 — Parties, by

explicit or implicit agreement, effectively strayed from contract — Change orders, time extensions, and requests to amend schedules were not administered and documented through T Ltd.'s consultant as required — Substantial performance was completed three months after date stipulated in contract — Plaintiff claimed $433,158.22, as well as relief relating to builders' lien and statutory holdback, against both defendants — Defendants counterclaimed for $900,000 in lost revenue and alleged that certain expenditures in general conditions estimates were not incurred — Charge for general conditions upheld — It was clear that intent of cost plus contract was that $175,000 fee paid to contractor be net fee to contractor, and that all cost not due to failure by contractor to fulfil its obligations would be chargeable to owner — None of general concerns and suspicions alleged by T Ltd. were supported by evidence — While there were extra costs of general conditions due to extended contract time, delay in completion was not attributable to fault of plaintiff — It followed that extra charges in general conditions occurring as result of extended contract work would be chargeable to T Ltd. — Defendant T Ltd. appealed — Appeal dismissed on other grounds.

Table of Authorities

Cases considered by *M.A. Monnin J.A.*:

Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — referred to

MacDougall v. MacDougall (2005), 2005 CarswellOnt 7257, 205 O.A.C. 216, 262 D.L.R. (4th) 120 (Ont. C.A.) — referred to

APPEAL by defendant T Ltd. from judgment reported at *Bird Construction Co. v. Theo C. Ltd.* (2006), 2006 MBQB 61, 2006 CarswellMan 78, 200 Man. R. (2d) 273, 51 C.L.R. (3d) 306 (Man. Q.B.), allowing plaintiff's action against T Ltd. for payment under contract and dismissing defendants' counterclaim for lost revenue.

***M.A. Monnin J.A.*:**

1 This is an appeal that arises from the interpretation of a construction contract and findings made by the trial judge.

2 Following a hearing, the appeal of the defendant/appellant Theo C. Limited (Theo) was dismissed with costs to the plaintiff/respondent Bird Construction Company (Bird) with reasons to follow. These are the reasons.

3 There were two main issues brought forward on appeal. The first is whether the contract was breached by reasons of delay on the part of Bird. The second is whether a clause in the contract dealing with the payment of interest was void due to uncertainty.

4 Because both of those issues are either fact based or a mixture of fact and law, it was incumbent on Theo to demonstrate that the judge made palpable and overriding error in arriving at his findings.

5 The parties entered into a construction contract on April 4, 2001. The contract provided for a completion date of November 16, 2001. The contract, however, was only completed on February 12, 2002. Bird sued for the balance of the contract price, but Theo, in a counterclaim, alleged that Bird was in breach of the contract due to the delay in achieving substantial completion and claimed damages. The contract provided that Bird would not be responsible for delays which were beyond its control.

6 The judge made a strong finding of credibility against the president of Theo. He went on to find that the parties had by their conduct agreed to amend certain provisions of the contract, and then went on to make the following findings with respect to the allegations of delay (at paras. 49-50):

> I find that the parties by their conduct agreed to use the conference meetings as a way to implement the intention of the contract, namely, to share information and keep everybody updated. This replaced the contract requirements to document matters through the consultant.

> Given the foregoing, I find that the delay in completion of the project was completely due to factors covered by s. GC 6.5.1 being by an action or omission of the owner or by weather being a cause beyond the contractor's control and, accordingly, the delayed substantial completion date did not breach the contract. A similar decision can be found in **Kei-Ron Holdings Ltd. v. Coquihalla Motor Inn Ltd.**, ... [1996] B.C.J. No. 1237 (S.C.), paras. 168, 169 and 186.

7 Theo argued that the delay was in fact mostly caused by a sub-trade and that the delay was Bird's responsibility and that the judge's findings were not based on the evidence. Counsel for Bird refuted this allegation and demonstrated to the court that, based on the documentary evidence alone, there was ample evidence on which the judge could come to the conclusion that he did on this issue.

8 The second issue before us was whether a clause in the contract dealing with the payment of interest was void due to uncertainty.

9 The standard form of the contract provided:

> Should either party fail to make payments as they become due under the terms of the *Contract* or in an award by arbitration or court, interest at percent (%) per annum above the prime rate on such unpaid amount shall also become due and payable until payment. Such interest shall be compounded on a monthly basis. The prime rate shall be the lowest rate of interest quoted by the Royal BANK of Canada for prime business loans.

10 The following words "Bank of Canada rate + four" were however inserted in the blank spaces in what I have just quoted.

11 In oral reasons delivered April 19, 2006, the judge found:

> Now, it is true that there is a slight confusion in that clause, and that confusion arises from the fact that the last sentence in clause 7.3.1 says the prime rate should be the lowest rate of interest quoted by the Royal Bank of Canada for prime business loans, whereas the insertion, the second line, talks about interest at Bank of Canada rate plus four per cent.
>
> Since that was inserted by the parties I will find that that is the intent of the parties, and that they simply forgot to X out the last line which talks about the Royal Bank, and that means that the interest clause would then read that should the parties fail to pay when they become due then interest will run at the Bank of Canada rate plus four per cent, per annum, above the prime rate.

12 Again, Theo argues that the judge's finding was not supported by the evidence to which Bird replies that the fact that the Bank of Canada interest clause was inserted into the contract is a clear sign of the intent of the parties that interest would be payable and at the Bank of Canada rate which is clearly more favourable to Theo than interest at the rate of any of the chartered banks.

13 Both issues raised by Theo must be considered in the light of the standard of review that I have set out earlier in these reasons and the extent of appellate review that this court can exercise. See *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), and *MacDougall v. MacDougall* (2005), 262 D.L.R. (4th) 120 (Ont. C.A.).

14 It might have been preferable if the judge, in his disposition of the delay issue, had particularized his finding as he did for other issues before him, but notwithstanding that lacuna, there was more than ample evidence before him on which he could come to the conclusion that he did. The same rationale applies with respect to the issue of interest.

15 The judge committed no overriding or palpable error. There is no basis for appellate interference. The appeal is dismissed with costs.

Appeal dismissed.

End of Document

TAB 6

2003 SKQB 506
Saskatchewan Court of Queen's Bench

Domco Construction Inc. v. Aliva Holdings Inc.

2003 CarswellSask 776, 2003 SKQB 506, [2003] S.J. No. 755, 128 A.C.W.S. (3d) 697, 34 C.L.R. (3d) 264

Domco Construction Inc. (Plaintiff) and Aliva Holdings Inc. and Royal Enterprises Corp. (Defendants)

Ryan-Froslie J.

Judgment: December 1, 2003
Docket: Swift Current Q.B.G. 219/00

Counsel: S.B. Barber for Plaintiff
T.M. Paulsen for Defendant

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial

Headnote

Civil practice and procedure --- Pleadings — Amendment — Grounds for refusal — General principles

On March 21, 2000, plaintiff, D Inc. and defendant R Corp. entered into written contract in which D Inc. agreed to provide all labour and materials for construction of restaurant — R Corp. held franchise and operated restaurant — Defendant A Inc. owned land on which restaurant was located — D Inc.'s account for materials provided and services rendered was not been paid in full — D Inc. brought action against R Corp. and A Inc. — As preliminary matter, D Inc. applied to amend statement of claim to plead quantum meruit — Application dismissed — Because request for amendment came after case for both parties was closed, there was no opportunity for defendants to call evidence or to cross-examine D Inc.'s witnesses — D Inc. gave no explanation for delay in requesting amendment to pleadings — Amendment would prejudice defendants.

Construction law --- Contracts — Payment of contractors and subcontractors — Entire contract — Conditions precedent to payment — Miscellaneous conditions

On March 21, 2000, plaintiff, D Inc. and defendant R Corp. entered into written contract in which D Inc. agreed to provide all labour and materials for construction of restaurant — R Corp. held franchise and operated restaurant — Defendant A Inc. owned land on which restaurant was located — D Inc.'s account for materials provided and services rendered was not been paid in full — D Inc. brought action against R Corp. and A Inc. — Action allowed — Project was to be stipulated price contract — Y, president and principal shareholder of R Corp. and A Inc. was responsible for preparing paperwork and chose to act as his own consultant on project — Y could not rely on his own failure as justification for refusing to pay for work performed — Defendants were ordered to pay D Inc. balance outstanding on contract in amount of $75,942.03.

Table of Authorities

Cases considered by *Ryan-Froslie J.*:

A & A Drywall Ltd. v. Fraserview Development Corp. (1998), 1998 CarswellBC 1829, 40 C.L.R. (2d) 105 (B.C. S.C.) — referred to

Arrow Services Ltd. v. Wedge (1963), 44 W.W.R. 598, 42 D.L.R. (2d) 605, 1963 CarswellSask 70 (Sask. Q.B.) — referred to

Assie v. Saskatchewan Telecommunications (1978), [1978] 6 W.W.R. 69, 7 C.P.C. 299, 7 C.C.L.T. 39, 90 D.L.R. (3d) 410, 1978 CarswellSask 89 (Sask. C.A.) — considered

Barber v. Glen (1987), [1987] 6 W.W.R. 689, 59 Sask. R. 49, 1987 CarswellSask 381 (Sask. C.A.) — referred to

Beemer v. Brownridge (1934), [1934] 1 W.W.R. 545, 1934 CarswellSask 9 (Sask. C.A.) — referred to

Catre Industries Ltd. v. Alberta (1989), 36 C.L.R. 169, 63 D.L.R. (4th) 74, 99 A.R. 321, 1989 CarswellAlta 527 (Alta. C.A.) — referred to
DIC Enterprises Ltd. v. Kosloski (1987), 26 C.L.R. 85, 1987 CarswellSask 412 (Sask. Q.B.) — considered
Frobisher Ltd. v. Canadian Pipelines & Petroleums Ltd. (1957), 23 W.W.R. 241, 10 D.L.R. (2d) 338, 1957 CarswellSask 40 (Sask. C.A.) — considered
Hasper v. Shauer (1922), [1922] 2 W.W.R. 212, 15 Sask. L.R. 410, 65 D.L.R. 516, 1922 CarswellSask 86 (Sask. C.A.) — referred to
Humboldt Plumbing & Heating Ltd. v. Humboldt Development Ltd. (January 30, 1987), Dielschneider J. (Sask. Q.B.) — referred to
Naegeli v. Marche Homes Ltd. (1999), 1999 ABPC 131, 1999 CarswellAlta 1257, 1 C.L.R. (3d) 160 (Alta. Prov. Ct.) — referred to
Nu West Decorating Ltd. v. Gateway Construction & Engineering Ltd. (1992), 1 C.L.R. (2d) 313, 80 Man. R. (2d) 32, 1992 CarswellMan 166 (Man. Q.B.) — referred to
Peter Kiewit Sons Co. of Canada v. Eakins Construction Ltd. (1960), [1960] S.C.R. 361, 22 D.L.R. (2d) 465, 1960 CarswellBC 143 (S.C.C.) — referred to
Popoff v. Isman (1950), [1950] 2 W.W.R. 87, 1950 CarswellSask 41 (Sask. C.A.) — referred to
Royal Bank v. Delayen (1983), 26 Sask. R. 289, 1983 CarswellSask 345 (Sask. Q.B.) — referred to
Sargent Douglas & Co. v. Kozic Holdings Ltd. (1985), 17 C.L.R. 13, 1985 CarswellBC 770 (B.C. S.C.) — referred to
Snead v. Agricultural Development Corp. of Saskatchewan (1990), 85 Sask. R. 13, 33 C.C.E.L. 179, 1990 CarswellSask 206 (Sask. Q.B.) — referred to
Sthamann Homes Ltd. v. Fettes (1993), 1993 CarswellSask 604 (Sask. Q.B.) — referred to
Triple R Contracting Ltd. v. 384848 Alberta Ltd. (2001), 2001 ABQB 52, 2001 CarswellAlta 120, 6 C.L.R. (3d) 198, 282 A.R. 1 (Alta. Q.B.) — considered

Statutes considered:

Pre-judgment Interest Act, S.S. 1984-85-86, c. P-22.2
Generally — referred to

Rules considered:

Queen's Bench Rules, Sask. Q.B. Rules
Generally — referred to

R. 165 — referred to

ACTION for recovery of moneys on construction contract; APPLICATION on preliminary matter for leave to amend statement of claim.

Ryan-Froslie J.:

1 On March 21, 2000, the plaintiff, Domco Construction Inc. ("Domco") and the defendant, Royal Enterprises Corp. ("Royal") entered into a written contract in which Domco agreed to provide all labour and materials for the construction of a Burger King restaurant in Swift Current, Saskatchewan. Royal holds the franchise and operates the restaurant, while the defendant, Aliva Holdings Inc. ("Aliva") owns the land on which the Burger King is located. Domco also did the site development work for the project. Domco's account for materials provided and services rendered has not been paid in full and the issue before this Court is what amount is properly due and owing to them.

ISSUES

1. *Terms of the Contract*

2. *The amount owing pursuant to the contract*

3. *Interest*

4. *Costs*

PRELIMINARY MATTER

2 As a preliminary matter, during argument, counsel for Domco requested an amendment to their statement of claim to include a claim for *quantum meruit*. Rule 165 of *The Queen's Bench Rules of Court* gives the Court a discretion at any stage of the proceeding to allow a party to amend their pleadings " . . . in such manner and on such terms as may seem just, and all such amendments shall be made as may be necessary to determine the real questions in issue between the parties."

3 As a general rule, amendments should be allowed if they can be done without injustice to the other side. The leading case in Saskatchewan is *Frobisher Ltd. v. Canadian Pipelines & Petroleums Ltd.* (1957), 23 W.W.R. 241 (Sask. C.A.). In that case, at page 298, Justice Culliton stated the law as follows:

> While leave to amend is a discretionary right to be exercised by the court, I think it can be said that the practice is for the court to allow amendments to pleadings whenever it can be done without injustice to the other side and where it is necessary to determine the issues between the parties.

See also *Beemer v. Brownridge*, [1934] 1 W.W.R. 545 (Sask. C.A.) at 550.

4 Domco's counsel argues that the amendment is not prejudicial to the defendants because they acknowledge the work and materials in issue were provided by Domco. It is the value of some of those services and/or materials that is in dispute and thus the amendment should not take them by surprise.

5 Counsel for the defendants argue they have a right to know the case they must meet and that they would have called additional evidence if a claim for *quantum meruit* was advanced, including evidence as to the reasonable cost of the material and services provided.

6 The Saskatchewan Court of Appeal in *Assie v. Saskatchewan Telecommunications* (1978), 90 D.L.R. (3d) 410 (Sask.C.A.) at page 413 held that an amendment setting up an alternate cause of action should not be allowed after all of the evidence has been heard, unless the court is satisfied that all possible evidence relating to the new matter has been submitted and there is no prejudice or injustice to the other side. (See: *Snead v. Agricultural Development Corp. of Saskatchewan* (1990), 85 Sask. R. 13 (Sask. Q.B.); *Hasper v. Shauer* (1922), 65 D.L.R. 516 (Sask. C.A.); *Royal Bank v. Delayen* (1983), 26 Sask. R. 289 (Sask. Q.B.); *Popoff v. Isman*, [1950] 2 W.W.R. 87 (Sask. C.A.); *Arrow Services Ltd. v. Wedge* (1963), 42 D.L.R. (2d) 605 (Sask. Q.B.)).

7 The question is whether the amendment would deny the opposite party a fair opportunity to meet the allegations and claims arising thereunder. In this case no evidence was led as to the reasonableness of the amounts charged by Domco for materials and services rendered. Because the request for an amendment comes after the case for both parties is closed, there was no opportunity for the defendants to call such evidence or to cross-examine Domco's witnesses on this point. Domco gave no explanation for the delay in requesting an amendment to their pleadings. Based on the information before me, I find the amendment would prejudice the defendants. The plaintiff's request to amend its statement of claim is denied.

FACTS

8 Domco is a subsidiary of Dominion Construction. It does general contracting work on commercial, industrial and high-density housing projects. Randy Ludwar has been the branch manager for Domco in Swift Current since 1998 and Lorraine Jansen-Unrau is Domco's Swift Current project and office manager. Randy Yano is the president and principal shareholder of Royal and Aliva and was the individual representing those companies in all their dealings with Domco.

9 In the summer of 1998 Mr. Yano began negotiating with Burger King (Canada) to obtain a franchise and build a restaurant in Swift Current, Saskatchewan. Originally it was intended that the land on which the restaurant was to be

built would be leased from the Swift Current Mall. Lorne Biladeau, construction manager for Burger King (Canada) and Walter Buchko from Chamberlain Architect Services Limited, a firm retained by Burger King (Canada) with regard to their building projects, were responsible for tendering the contract. They invited a number of companies, including Domco, to submit bids and provided each with specifications and drawings. Section 01010 of the specifications (para. 1.4) excluded the landlord's work from the contract. That work was described in Schedule II to the specifications and related to site development, i.e. the extension of utility services to the restaurant, sidewalks, landscaping, curbing, lighting, signing and paving. In July, 1999, relying on the specifications and drawings provided, Domco submitted a bid for $571,856.15 ($534,445 plus GST). By letter dated July 28, 1999, Domco advised Burger King (Canada) and Chamberlain Architects that they were interested in delivering the "entire project", including the landlord's work. The letter states that "[i]n reviewing the project schedule we feel we would be able to cut two weeks off of the building construction schedule if we were to be contracted to supply the supervision and control of the site work contract . . . ."

10 The awarding of the contract was delayed because of problems encountered in leasing the land. A restrictive covenant by one of the mall's tenants prevented the lease and accordingly Mr. Yano began looking at purchasing the land rather than leasing it. On November 16, 1999, to assist Mr. Yano in making this decision, Domco prepared a cost estimate for site development. This estimate was provided to representatives for the Swift Current Mall (the "landlord") as well as Mr. Yano. Domco estimated the cost for site development would be $129,340 plus GST.

11 Mr. Yano testified that it took approximately six months before an agreement to purchase the land was concluded. The evidence of Randy Ludwar and Randy Yano confirms that Domco was able to hold the prices they quoted in July of 1999 for the construction of the restaurant in spite of this delay. Mr. Yano testified that while Domco was able to hold their prices, they wanted to do the site work as well as the building. Mr. Yano's response was "no problem" and on January 6, 2000 Mr. Yano wrote to Domco stating:

> The following is to confirm that Royal Enterprises Corp., through a new subsidiary to be incorporated, will be proceeding with the construction of a Burger King Restaurant at Swift Current. Your company has been selected as the contractor to do the site work and building construction. A contract will be sent out to you shortly for your review.
>
> [emphasis added]

Aliva was incorporated to acquire the land.

12 Randy Ludwar testified that on February 2, 2000, in a telephone conversation between himself, Randy Yano and Walter Buchko, Domco was given verbal authorization to proceed with the building contract. Because the defendants were now purchasing the land as opposed to leasing it, plans for site development needed to be drawn up. These were completed on February 25, 2000, approved on March 1, 2000 and received by Domco on March 5, 2000 (See: Exhibit P-7).

13 On March 21, 2000, Domco and Royal signed a stipulated price contract for the building of the restaurant. There is no mention in this contract of site development, probably because the site plans had only been received by Domco on March 5, 2000 and they had not yet given a quote for the work as outlined in those plans.

14 It is undisputed that Domco built the Burger King Restaurant and did the site development for the project and that the defendants are pleased with the end result. The project was completed and turned over to the defendants on June 1, 2000 at which time the final inspection was also done. On June 2, 2000, the Burger King opened.

15 In their statement of claim, as amended, Domco requested a declaration for breach of trust and damages flowing from this. This claim was abandoned at trial as was the defendant's counterclaim which included a claim for punitive damages and damages for loss of business.

ANALYSIS

1. Terms of the contract

(i) Position of the Parties

16 The defendants argue that any changes to the March 21, 2000 contract must be authorized in writing. They rely on s. 1.15 of the specifications (Exhibit P-1) which forms part of the March 21, 2000 contract as well as s. 11.1 of the general conditions of the contract itself. Those sections read as follows:

> **SPECIFICATIONS**
>
> ***1.15 Change Orders***
>
> .1 The Owner, without invalidating the Contract, may order changes in the Work consisting of additions, deletions or modifications. All such changes shall be authorized by a Field Work Order issued by the Owner's representative in the field. The Contractor shall do no work outside this Contract unless and until he receives a signed Field Work Order authorizing such work. All Change Orders shall be submitted and executed in triplicate by the Contractor on the Owner's form, and shall be accompanied by a copy of the Field Work Order authorizing that work. All Change Orders shall be approved at the Owner's Corporate Headquarters and will be paid by the Owner upon completion and acceptance of the work and receipt of an invoice from the Contractor. The Contractor shall submit any and all Change Orders prior to forty-five (45) days after the store opening. The Owner will not pay Change Orders received after the forty-five (45) days without prior written notification by the Contractor and written consent by the owner.
>
> **STIPULATED PRICE CONTRACT**
>
> **GC 11 CHANGES IN THE WORK**
>
> 11.1 Except as provided in GC 12 - VALUATION AND CERTIFICATION OF CHANGES IN THE WORK, paragraph 12.4:
>
> (a) the Owner, through the Consultant, without invalidating the Contract, may make Changes in the Work with the Contract Price and Contract Time being adjusted accordingly by written order, and
>
> (b) no Changes in the Work shall be proceeded with without a written order signed by the Owner and no claim for a change in the Contract Price or change in the Contract Time shall be valid unless so ordered and at the same time valued or agreed to be valued as provided in GC 12 - VALUATION AND CERTIFICATION OF CHANGES IN THE WORK.

In support of their position, the defendants cite the Supreme Court of Canada decision in *Peter Kiewit Sons Co. of Canada v. Eakins Construction Ltd.* (1960), 22 D.L.R. (2d) 465 (S.C.C.); the Alberta Court of Appeal decision in *Catre Industries Ltd. v. Alberta* (1989), 63 D.L.R. (4th) 74 (Alta. C.A.) and two decisions from this Court, *Sthamann Homes Ltd. v. Fettes*, [1993] S.J. No. 386 (Sask. Q.B.) and *Humboldt Plumbing & Heating Ltd. v. Humboldt Development Ltd.*, [1987] S.J. No. 87 (Sask. Q.B.). The Defendants argue these cases stand for the principle that in the absence of any evidence of an agreement between the contractor and the owner, the claim of the contractor for additional payment should be rejected. Where there is disagreement as to what was discussed, the onus lies with the contractor.

17 The plaintiffs argue that while the contract required written authorization for changes, the parties adopted a different practice and that in the circumstances of this case, verbal approval of changes to the work was sufficient. They rely on the cases of *Naegeli v. Marche Homes Ltd.*, 1999 ABPC 131, 1 C.L.R. (3d) 160 (Alta. Prov. Ct.); *Triple R Contracting Ltd. v. 384848 Alberta Ltd.*, 2001 ABQB 52, 6 C.L.R. (3d) 198 (Alta. Q.B.); *DIC Enterprises Ltd. v. Kosloski* (1987), 26 C.L.R. 85 (Sask. Q.B.); *Nu West Decorating Ltd. v. Gateway Construction & Engineering Ltd.* (1992), 1 C.L.R.

(2d) 313 (Man. Q.B.); *A & A Drywall Ltd. v. Fraserview Development Corp.* (1998), 40 C.L.R. (2d) 105 (B.C. S.C.); and *Sargent Douglas & Co. v. Kozic Holdings Ltd.* (1985), 17 C.L.R. 13 (B.C. S.C.).

(ii) Written Provisions of the Contract

18 The March 21, 2000 written contract (hereinafter referred to as "the contract") was filed as Exhibit P-5 in these proceedings. It is uncontroverted that the contract was a stipulated price contract, that is Domco quoted a set price for the material and services necessary to construct the restaurant in accordance with the specifications and drawings provided. Domco was bound to complete the building for that price. Any increase in the costs of materials or services quoted was their responsibility. Pursuant to general condition 11 of the contract, the defendants, without invalidating the contract, could make changes in the work to be done with the contract price to be adjusted accordingly. No such work was to proceed without the written authorization of the owner. The contract also provided, under general condition 3 that a consultant would administer the contract. The consultant was to be " . . . an Architect or Engineer licenced to practice in the province . . . ". The consultant was to be responsible for furnishing Domco with instructions relating to the job and for preparing change orders. Change orders represent a change to the contract and are either "extras" which increase the price of the contract or "credits" which decrease the price of the contract. Pursuant to general condition 3 of the contract, the consultant was also "in the first instance, the interpreter of the requirements of the Contract Documents and the judge of the performance thereunder by both parties . . . ". Walter Buchko of Chamberlain Architect Services Limited originally fulfilled this role. However, early in the contract, to save money, Randy Yano decided not to use his services and to fulfill that role himself. Mr. Yano was neither an architect nor an engineer. His decision would prove to be "penny wise and pound foolish". By his own acknowledgment, Mr. Yano did not understand the construction industry or how it worked. He placed himself in a position he was not equipped to deal with.

19 It is clear from the evidence that while Domco accepted Mr. Yano's decision to act as his own consultant, there was no discussion between them on how change orders would be dealt with as a result of that decision. This is not surprising given the time constraints the parties were working under. Pursuant to general condition 3.10 of the contract, the consultant was to prepare the change orders. As Mr. Yano assumed the role of consultant, this obligation should have been assumed by him. It was not. Randy Ludwar testified that there was a lot of paperwork to be done once the contract was awarded. Purchase orders had to be issued for subcontractors and suppliers and shop drawings needed to be done. Normally all paperwork is sent to the architect for review but in this case there was no architect and no one to do shop reviews or inspections. If there had been an architect, he is the one who would have issued the field instructions telling Domco how to proceed. If the field instructions involved additional work not contemplated by the contract, a change order would be issued, again by the architect. Once a change order was issued, Domco would then prepare a formal quote which would be submitted to the architect for approval. With Mr. Yano acting as his own consultant (architect), none of this applied. The uncontroverted evidence of Lorraine Jansen-Unrau was that in dealing with Mr. Yano, the paperwork was one-sided. She tried to communicate with him in writing but nothing was received back from him. As a result, she spent a lot of extra time on the project. I accept Ms. Jansen-Unrau's testimony that Domco was on a very tight schedule and that she had to pressure Mr. Yano to get decisions made. The contract provided for a $300 per day penalty if Domco did not finish the project on time. Mr. Yano acknowledged he often reminded Domco of this fact.

20 A course of conduct quickly developed between the parties in dealing with change orders. Changes were usually requested by Mr. Yano or by Lorne Biladeau, representative of Burger King (Canada) at site meetings between Loraine Jansen-Unrau and/or Randy Ludwar. Ms. Jansen-Unrau and Mr. Ludwar would record the changes requested in their meeting notes, obtain quotes where necessary and then forward the quotes to Mr. Yano for his approval. Mr. Yano would provide verbal approval and Domco would proceed with the change. There was considerable evidence substantiating this course of conduct. Mr. Yano's testimony verified this course of conduct but he complained that in many instances his approval was not received until after the work was done. Mr. Yano took no notes and had no records with which to refresh his memory of events. On a number of occasions his testimony conflicted with evidence he had given at his examination for discovery on March 7, 2002. At trial, Mr. Yano testified that his approval for most of the change orders occurred in meetings with Lorraine Jansen-Unrau in July, 2000. In cross-examination, when presented with Ms. Jansen-

Unrau's daily planner, he admitted there were no meetings with her in July, 2000. I find the evidence of Lorraine Jansen-Unrau which was often verified by notations in her day timer or her daily planner to be much more credible than that of Mr. Yano. I find as a fact that Mr. Yano agreed verbal approval was sufficient for changes in the work to proceed.

21 The cases cited by the defendants in support of their position that written authorization was required are all distinguishable on their facts. In none of those cases did the Court find the written contract had been varied by an oral agreement of the parties. In this case I find the written agreement was amended by the verbal agreement of the parties. This agreement enabled Mr. Yano to act as his own consultant. As a result of that change, I find the parties entered into a course of conduct which governed how the change orders were to be dealt with, that is, that verbal approval by Mr. Yano was sufficient and that written authorization was not required.

22 As stated in Sopinka and Letterman, *Evidence in Civil Cases* (Toronto: Butterworths, 1974) at page 270:

> The Parole Evidence Rule does not operate to exclude evidence of a subsequent oral or written agreements which may alter or nullify a written contract, for otherwise parties would not be free to vary or rescind their previous agreements.

See also: *Barber v. Glen* (1987), 59 Sask. R. 49 (Sask. C.A.) at page 3.

23 In *Triple R Contracting Ltd., supra*, Justice Phillips of the Alberta Queen's Bench, in dealing with a similar situation, stated at para. 21:

> . . . when, as here, the subsequent conduct of the contracting parties points to the conclusion that they do not consider themselves to be governed by the Contract's terms and instead developed an alternative arrangement established on clear evidence, it is unreasonable to impose the written Contract on the relationship.

24 In *DIC Enterprises, supra*, Walker J. of this Court, dealt with a situation where the parties entered into a contract for the construction of a new home, which contract contained no drawings or specifications. The contract contained a provision whereby any changes in the work would be made in writing. One of the issues was whether the extras under the contract required written authorization. Justice Walker, at para. 34 of that decision quoted Goldsmith, *Canadian Building Contracts*, 3rd ed., (Carswell, 1983) at pages 87-88:

> If the contract requires a written order as a condition precedent to payment for extra work, a contractor who carries out such extra work without a written order cannot recover additional payment therefor. Whether or not a written order is a condition precedent to payment is a matter of the construction of a contract. Even if it is, it may be waived by the owner's conduct or acquiescence.

After finding the clause in issue there did not create a condition precedent to payment, Justice Walker stated:

> . . . One usual form of waiver is by the owner himself ordering the extra work. Another is to consistently ignore the requirement in practice. Another approach, with the same result, is that an employer may be liable to pay for extra work because he has expressly ordered or authorized or ratified it himself, with his liability arising independently of the building contract. Failure to comply with the requirements of form may not be fatal to a builder if he can prove the employer authorized extras.

25 In this case, it would be unreasonable to allow Mr. Yano, who brought about the change to the contract in the first place, to now rely on the need for written authorization. Moreover, Mr. Yano, at his examination for discovery on March 7, 2002 acknowledged his verbal approval was sufficient, at least for some changes:

> 350 Q MS. BARBER: If you can just flip to the revised change order which is 1, 2, 3, 4 and 5. So we were at the toilet partitions and we agreed to the number that was put to you which was 1,866. The second item under change order 3, supply and install twistlock complete with cord and plug, et cetera, et cetera, is that a change that you approved?

A With Lorraine, yes.

351 Q And would that have been a verbal approval, Mr. Yano?

A Yes.

352 Q And that would have been sufficient for your purposes for her to proceed with that change?

A Absolutely.

26 Mr. Yano cannot pick and chose when his verbal authorization is sufficient. Given the parties' course of conduct, Domco had a right to rely on his word.

27 In conclusion, it is clear that the Burger King project was to be a stipulated price contract. That is, Domco quoted a price and was expected to perform the work for that price, unless the defendants made changes to the contract which would result in either a credit or an increased cost. Mr. Yano chose to act as his own consultant on the project. The responsibility for preparing the paperwork fell on him, not on Domco. Mr. Yano's lack of knowledge and experience led to the problems, not Domco's actions. Domco tried to establish a paper trail but Mr. Yano did not follow through. He cannot rely on his failure to do so as justification for refusing to pay for work performed. As Mr. Yano testified, "some things were beyond his ability. He was only concerned with price."

2. What amount is owing pursuant to the contract?

28 At the commencement of the trial, the parties filed an agreement outlining the amounts in dispute which were identified as Change Order No. 9 and the cost for site development. This agreement was entered as Exhibit P-71 in these proceedings.

(i) Change Order No. 9

29 With reference to Change Order No. 9, Mr. Yano's position is that $11,263.42 is properly due and owing. Domco argued that $13,645.23 was properly due and owing. The difference in the amounts owing relate to two items. The first is costs associated with accommodating a six-inch column in a four-inch wall (a design flaw) and the second is the cost for a third colour of stucco which came about as a result of an image change by Burger King (Canada). At trial, Mr. Yano acknowledged that the costs associated with the six-inch column were in fact properly due and owing to Domco. That left only the third colour of stucco in dispute.

30 The evidence is uncontroverted that when Domco submitted its bid in July, 1999 it was doing so on the basis that only two colours of stucco were required in the project, Burger King beige and Burger King red. Their bid was based on a quote received from Fehr Stucco on July 28, 1999 in the amount of $18,875 plus GST. Between July 28, 1999 and March 21, 2000, when the contract was signed, Fehr Stucco went out of business. In addition, Burger King (Canada) underwent an "image change". This image change required a third colour of stucco, i.e. Burger King dark beige. Randy Yano acknowledged this change occurred after Domco's bid and that he knew there would be a cost associated with the addition of the third colour for which the defendants would be responsible. In his examination for discovery held on March 7, 2002, Mr. Yano testified as follows:

450 Q And so then you would agree with me, Mr. Yano, that that introduction of that third colour was in fact a change to the scope which would result in some extra cost to you?

A Exactly.

31 Once Domco realized Fehr Stucco could not perform the work, they sought out a subcontractor to replace them. On May 7, 2000 Lorraine Jansen-Unrau got a verbal quote from R & S Stucco to do the work, including the third colour.

Their quote was $19,000, $1,000 of which related to the third colour. Lorraine Jansen-Unrau recorded this information in her daily planner. R & S was not available to do the work so a third quote was obtained from Mr. Stucco. Mr. Stucco's written quotation was received by Domco on May 11, 2000 and was for $22,800 plus GST. This was almost $4,000 more than the original quote by Fehr Stucco. Domco decided to absorb the additional cost themselves rather than pass it on to the defendants, except for the cost associated with the third colour. Mr. Stucco verified in writing that the cost for this third colour was $1,500 to which Domco added an overhead and profit charge of $100. Mr. Yano feels this cost is too high. He offered no evidence to support his position other than his own "feelings". He argues that while he knew the third colour would have an additional cost, he never approved $1,500.

32 Lorraine Jansen-Unrau testified that she told Mr. Yano R & S had quoted $1,000 for the third colour. She believes she told him this prior to May 9, 2000 but definitely discussed it with him at a site meeting on that date. Item No. 11 of her May 9, 2000 meeting notes indicates that she was to provide costs to add the third stucco colour. Beside this item is a circle with a line drawn through it. Lorraine Jansen-Unrau testified that symbol meant that she had dealt with this issue at the May 9 meeting. Ms. Jansen-Unrau testified that at the May 9, 2000 meeting she showed Mr. Yano the notation in her day timer recording the quote from R & S. She testified that Mr. Yano would not "accept some chicken scratch from her day timer" and that he directed her to get a written quote on the third colour. As a result, she requested Mr. Stucco to break out the cost of the third colour from their quote. They did so and on May 13, 2000 she received written verification from Mr. Stucco that the cost for the third colour would be $1,500 plus GST. According to Ms. Jansen-Unrau's calendar, stuccoing began on May 13, 2000. However, only a scratch coat was applied as they were waiting for approval before they applied any of the colours. The notes of Roy Brown, the on-site supervisor, indicate that on May 26, 2000 the stucco colours were "verbally approved by Randy Yano." Lorraine Jansen-Unrau testified that Mr. Yano agreed with the third colour cost and in cross-examination, Mr. Yano acknowledged that he knew the cost of the third stucco colour before it was applied and that he allowed the stuccoing to proceed. He also acknowledged that the additional fee by Domco of $100 for overhead and profit was legitimate if the Court found the $1,500 to be properly due and owing.

33 Based on the evidence, I am satisfied that Randy Yano knew and approved the costs associated with the third colour of stucco before it was applied and that $1,500 plus the $100 for overhead and profit charged by Domco are properly due and owing by the defendants.

34 I find the amount properly due and owing for Change Order No. 9 is the amount alleged by Domco, being $13,645.22.

(ii) Site Development

35 It is clear from the evidence that in July of 1999 when Domco submitted their bid for construction of the restaurant, they were also interested in obtaining the site development contract. They expressed this interest to Burger King (Canada) and Chamberlain Architects in their letter of July 28, 1999. In November, 1999 they had given an estimate of the costs associated with the site work. In cross-examination Mr. Yano acknowledged receiving Domco's November 16, 1999 estimate for the site development which contained the following notification: "will prepare firm quote based on site plan when confirmed". This estimate was based on a landlord being responsible for developing the site. Mr. Yano had not yet made the decision to purchase the land as opposed to leasing it. The decision to purchase rather than lease the land upon which the Burger King restaurant was to be built meant that certain costs included in the November 16, 1999 estimate would no longer apply. In particular, the first set of costs dealing with the extension and installation of utility services for the main building would remain the responsibility of the Swift Current Mall. The estimated cost of those items was $44,870. When Domco received the site development plans on March 5, 2000, it requested quotes for the site work. This site work included paving, but only for a portion of the parking lot.

36 On March 28, 2000, Domco received a written quote from Mobile Paving Ltd. as follows:

$59,896 plus GST for base and paving;

$3.50 per lineal foot plus GST for asphalt curbing;

$1,650 plus GST for constructing an approach and installing a new culvert;

$3,800 plus GST for rough grading.

On April 4, 2000 Domco got a written quote from Melhoff Electric (1977) Ltd. for the electrical site work. The total quote was $25,899 plus GST ($10,772 for site electrical and $15,127 for site lights).

37 This Court accepts Randy Ludwar's evidence which is supported by a notation in his daily planner that on April 6, 2000 he prepared a quote for site development in the amount of $116,476 plus GST. The differences between the November 16, 1999 estimate and the April 6, 2000 quote are as follows:

1. The items pertaining to installation of services which were the Swift Current Mall's responsibility were deleted.

2. Site grading was reduced from $13,889 to $3,800 as per the quote from Mobile Paving.

3. The new culvert and entry approach were combined into one line item entitled "new culvert at entry approach" and were priced at $1,650 as per the Mobile Paving quote.

4. Site electrical was increased from $7,500 to $10,772 as per the Melhoff quote.

5. Site lights were added at $15,127 as per the Melhoff quote.

6. Cost for pavement services was increased from $35,000 to $59,896 as per the Mobile Paving quote.

7. Project overhead and markup were adjusted to reflect the decrease in cost.

38 Randy Ludwar testified he gave this April 6, 2000 quote to Randy Yano at a site meeting on April 7, 2000 and that Mr. Yano verbally approved it on that day with the exception of the electrical costs. This testimony is verified by the entry in Randy Ludwar's day book for April 7, 2000 which reads in part "[r]eview site development costs. Randy says go ahead as is." It is also verified by a notation which Randy Ludwar made to the quote itself which reads "hand delivered Randy Yano April 7, 2000 at 7:30 a.m. Said go ahead wit [sic] asphalt, Melhoff to revise for yard lights."

39 Randy Yano testified that he met with Lorraine Jansen-Unrau, Lorne Biladeau and Domco's site supervisor, Roy Brown on April 6, 2000. At that meeting it was decided to decrease the number of yard lights and that Lorraine Jansen-Unrau would get a new quote from Melhoff electric as a result. The testimony of Lorraine Jansen-Unrau is consistent with this. Randy Ludwar was not aware of this until the April 7, 2000 meeting.

40 It is uncontroverted that a meeting took place on April 7, 2000 and that Randy Ludwar, Lorne Biladeau, representative of Burger King (Canada), Randy Yano and Russell Wandzura, representing the defendants, were present.

41 Russell Wandzura testified on behalf of the defendants. He was hired by Mr. Yano in the spring of 2000 to manage the Swift Current Burger King once it opened. He attended the April 7, 2000 meeting as "another set of eyes" for Mr. Yano. He recalls Pat McDougall from Mobile Paving being on site at the time of that meeting and that a discussion about the paving took place between Mr. McDougall and Mr. Yano. The discussion concerned whether all of the Burger King parking lot should be paved as opposed to the portion designated for paving in the site plan drawings and if all of the parking lot were to be paved, what the cost would be. Mr. Wandzura favoured doing all of the parking lot. He recalls Mr. McDougall quoting Mr. Yano a price "just under $60,000" to pave the entire parking lot. He did not recall Randy Ludwar giving Mr. Yano any papers.

42 Lorne Biladeau, the construction manager for Burger King (Canada) at the time testified on behalf of the defendants. He stated all his notes pertaining to the Swift Current Burger King were in storage and he had not reviewed them.

He stated he visited the job site in Swift Current on several occasions to ensure the project met Burger King (Canada) standards. Mr. Biladeau was at the April 7, 2000 meeting which he said was held to discuss the site work, among other things. Mr. Biladeau testified he did not see Randy Ludwar hand Randy Yano any papers at that meeting. His evidence on this point is not very cogent, given the fact that he did not review his notes prior to testifying and that the meeting of April 7, 2000 occurred more than three years ago with him being involved in numerous projects and meetings since that date.

43 Mr. Yano testified that Randy Ludwar did not give him the April 6, 2000 quote at the April 7 meeting. In fact, Mr. Yano stated he did not receive this quote until July, 2000, long after the Burger King opened. This testimony is different from that given in questions 208 to 210 of his examination for discovery held on March 7, 2002. At the examination, he testified he was not sure if the quote was delivered to him at the April 7, 2000 meeting. He did not disagree with Mr. Ludwar's evidence that it was delivered - he just did not recall. Mr. Yano's evidence is also not consistent with the fact that on May 8, 2000 he faxed a copy of the April 6 quote to Walter Buchko of Chamberlain Architects. I find Mr. Yano's testimony is not credible and prefer the evidence of Randy Ludwar which is verified by documentary evidence. I find as a fact that Mr. Yano received the April 6, 2000 quote at the April 7, 2000 meeting.

44 Mr. Yano testified that at the April 7, 2000 meeting he spoke to Pat McDougall from Mobile Paving about the extent of the paving and its cost. Mr. Yano testified that Pat McDougall quoted him approximately $59,000 to pave the entire parking lot. When he received this verbal quote, Mr. Yano testified he phoned one of his partners and then verbally approved the paving of the whole lot for the price quoted. It is uncontradicted that the price quoted was $59,896 plus GST. This was the same amount quoted by Mobile to do only a portion of the lot. Mr. Yano testified that he thought this quote included site grading and the new culvert. The Court does not find Mr. Yano's testimony credible on this point. At his examination for discovery on March 7, 2002, Mr. Yano testified (question 308) that he did not discuss the grading or the culvert with Mr. McDougall at the April 7, 2000 meeting. Moreover, in cross-examination Mr. Yano acknowledged that he had not received a copy of Mobile Paving's quote when he had the discussion with Mr. McDougall on April 7, 2000 and did not know at that point that Mobile Paving was installing the approach and culvert or doing the balance of the grading. If he did not know this, how could he assume it was included in the quote of $59,896? It is also noted that in both the November 16, 1999 estimate and the April 6, 2000 quote, site grading and the new culvert/approach were always listed separately from the paving. I find as a fact that the $59,896 quoted did not include site grading or the installation of the new culvert/approach.

45 On May 10, 2000 Melhoff Electric provided their new quote of $18,232 plus GST to Domco. Randy Ludwar then prepared a "revised quote" for site development. This revised quote was for $111,976 plus GST. It differs from the April 6, 2000 quote as follows:

1. Site electrical and site lights were combined into one line entry entitled "site electrical" for $18,232 as per Melhoff Electric's revised quote.

2. A new line entry was added for concrete light bases of $195.

3. A new line entry was added for pylon sign footings of $3,227.

4. Overhead and markup were adjusted to reflect the new amount quoted.

46 Lorraine Jansen-Unrau testified that she hand delivered a copy of this quote to Randy Yano on April 18, 2000. Mr. Yano acknowledges receiving the quote but denies ever approving it. This is inconsistent with the evidence given at his examination for discovery on March 7, 2002 where Mr. Yano testified as follows:

270 Q Certainly, Mr. Yano, on April 18th, 2000 you were aware that Domco was quoting to you the sum of $11,976 [sic] plus GST for site work?

A Correct.

271 Q And Lorraine Jansen told you that on April 18th?

A I believe the letter was delivered to me.

. . .

277 Q And what price then did you agree to for the total package for site development?

A My verbal agreement would have been close to that 111,000.

278 Q $111,976 plus --

A -- GST, yes.

Based on this evidence, I am satisfied that Mr. Yano accepted the April 17, 2000 quote for $111,976 plus GST and that as of April 18, 2000 the March 21, 2000 contract was verbally amended to include an agreement that Domco would provide all labour and materials necessary to do the site development for a cost of $111,976 plus GST. This view is supported by the fact that when the March 21, 2000 contract was signed the parties knew Domco would be handling both aspects of the project, that is, the construction of the restaurant and the site development. This is clearly what was anticipated by the January 6, 2000 letter awarding Domco the contract. While the two aspects of the project were billed separately because each had its own stipulated price, they were handled by the parties in exactly the same fashion. Changes to site development and construction of the restaurant were dealt with together. For example, Exhibit D-1 (change order No. 6) refers to the relocating of parking stalls and softening the corners of curbs which is site development work. On the other hand, that same change order refers to matters which pertain to the construction of the restaurant itself such as washrooms and millwork. This is only one of many documents entered in these proceedings which dealt with both aspects of the project at the same time. Other examples are Exhibits P-22 through P-25 and Exhibit P-49. Meetings held with regard to the project dealt with both site work and construction work. For example, at the May 9, 2000 meeting between Lorraine Jansen-Unrau and Randy Yano, matters pertaining to the construction of the restaurant were discussed as well as site work including the third colour of stucco. At their April 6, 2000 meeting they dealt with site electrical work as well as things such as toilet partitions and baby change tables. Progress reports and billings were handled in the same fashion and interest on both aspects was charged at the rate of 8% which was the amount stipulated in the contract (See Exhibit P-63).

47 There is no dispute that Domco performed the site development work and that Mr. Yano was happy with it. The defendants have an obligation to pay the amount quoted for that work. As per the agreement filed by the parties, I find the amount outstanding on the contract, exclusive of interest but including GST to be $75,942.03.

3. Interest

48 Domco argues 8% interest should be charged on the amount outstanding from November 22, 2000 which was when the last payment on account was received to the date of judgment. They argue the 8% interest was provided for in the March 21, 2000 written contract and that was the rate both parties understood would apply to their dealings. In the alternative, Domco claims pre-judgment interest in accordance with *The Pre-Judgment Interest Act*, S.S. 1984-85-86, c. P-22.2.

49 Article A4(c) of the March 21, 2000 written contract provides as follows:

> If the owner fails to make payments to the Contractor as they become due under the terms of this Contract, or in an award by arbitration or court, interest of Eight percent (8%) per annum on such unpaid amounts shall also become due and payable until payment. Such interest shall be calculated and added to any unpaid amounts monthly.

50 As indicated earlier in this judgment, this Court finds the March 21, 2000 contract applied to both the construction of the restaurant and the site development work. As such, there was an agreement between the parties that interest at the rate of 8% per annum would apply to any unpaid amounts under the contract. This was accepted by both parties. Exhibit P-63 which sets out the bills rendered for the site development work seems to support this finding. Interest was charged on the site development work beginning in August, 2000. There is no evidence that Mr. Yano ever raised a concern about interest being charged at the rate of 8% prior to the commencement of the court action.

51 Counsel for the defendants argue that interest should not be allowed in this case because Domco did not provide the defendants with the documentation necessary to establish their claim. I cannot agree. In an effort to settle this matter, Randy Ludwar on behalf of Domco offered to decrease the amount owing for the site development work by $5,000. This is slightly less than the cost of the site grading ($3,800) and the new culvert/approach ($1,650). Randy Yano's response to this offer was totally negative. He took Mr. Ludwar's offer as an acknowledgment that the defendants were paying too much for the work done. It is clear Mr. Yano had lost trust in Domco. It is a truism that while trust takes a long time to build, it can be destroyed overnight by suspicion, not proof. That is what happened in this case. Mr. Yano's suspicions had no basis. In a stipulated price contract, the contractor does not provide unit prices for approval. They provide a contract price and they adhere to that price. The evidence supports the fact that the prices quoted were indeed the prices charged Domco by their subcontractors and that Mr. Yano was provided with the documentation to verify this. Domco did everything in their power to reassure Mr. Yano as to the fairness and correctness of the contract price. Nothing they did or provided was sufficient.

52 Moreover, the uncontradicted evidence of Lorraine Jansen-Unrau and of Randy Yano himself is that all the site development charges were acknowledged as due and owing by Mr. Yano in August of 2000 except for the costs associated with the site grading and the new culvert/approach. In spite of this, Mr. Yano has made no effort to make any payment to Domco since November 22, 2000. It is clear the defendants knew and accepted a large portion of the account outstanding was valid. In spite of this, they took no steps to tender payment for the portion they agreed with. In the circumstances, it is only fair that Domco receive interest on the amounts outstanding at the rate of 8% per annum from November 22, 2000 to the date of judgment. I have used the date of November 22, 2000 at the request of the solicitors for Domco. This date was not objected to by the defendants. This Court has not considered the appropriateness of the start date or the fact that the agreed interest rate should terminate with judgment as this was not raised by either party.

CONCLUSION

53 The defendants shall pay to the plaintiff the balance outstanding on the contract in the sum of $75,942.03 together with interest at the agreed rate of 8% per annum from November 22, 2000 to the date of judgment.

4. Costs

54 Counsel requested the right to make further submissions with regard to costs once judgment has been rendered. Counsel shall be given leave to return this matter to me within 30 days for argument on the issue of costs. If the matter is not returned to me within that time, the defendants shall pay to Domco costs of the within action to be assessed in accordance with the Queen's Bench Rules of Court.

Action allowed; application dismissed.

TAB 7

1914 CarswellBC 374
British Columbia Supreme Court [Court of Appeal]

Spadafora v. Welch

1914 CarswellBC 374, 20 B.C.R. 475

Spadafora et al. v. Griffin & Welch et al.

Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips, JJ.A.

Judgment: December 3, 1914

Counsel: *Armour*, for defendant the Canadian Northern Pacific Railway Company.
Killam, for appellants (plaintiffs).
Stockton, for defendants Griffin & Welch.
R. M. Macdonald, for defendants Werdenhoff & Company.
Gibson, for defendant Northern Construction Company.

Subject: Contracts

Headnote

Construction Law --- Payment of contractors and subcontractors — Entire contract — Conditions precedent to payment — Certificate of completion — Form and validity

Final certificate of principal contractor's engineer to bind subcontractors — Certificate issued by owner's engineer.

It was held that where, in a contract for the doing of work on a railway, the subcontractors agreed that the final certificate of the principal contractor's engineer should be binding as to the quantity and classification of the work done, they were bound by such certificate but not by the final certificate of the railway company's engineers, even though they had accepted interim payments based on the progress certificates of such engineers.

The judgment of the Court was delivered by

***Macdonald, C.J.A.*:**

1 We think the Canadian Northern Pacific Railway Company should be dismissed from this appeal, and we can see no reason why they should not have the costs occasioned by their being brought here, the charges of fraud having failed. The plaintiffs, therefore, must pay such costs. We think the learned trial judge was wrong. It seems to us that the plaintiffs were to be bound only by the estimate of the engineer of the Construction Company. The Construction Company, however, had no engineer. There was, therefore, no person qualified to give the certificate which the defendants are relying upon. It is one thing to submit to the decision of an engineer to whose employer's interest it is to secure a fair if not a generous classification, and quite another to submit to the classification of one to whose employer's interest it is to keep down the cost of construction to the lowest possible notch.

2 A number of other questions arise out of the joining of the several parties, but it seems to us that these questions can be disposed of below if the result of this appeal be an order for a new trial, as we think it must be. The judgment appealed from was pronounced at the close of the plaintiffs' case. The defendants have not been put to their defence — that is to say, they have not been called upon to prove that the classification which the plaintiffs are insisting upon was not a proper classification. In our judgment, therefore, there should be a new trial, with leave to all parties to amend.

3 Mr. *Macdonald* claims that his clients, Werdenhoff & Company, should not have been made parties to the appeal — that when the issue of fraud was disposed of, they were no longer proper or necessary parties. We think this contention is right, and that his client's costs of appeal should be paid by the plaintiffs.

4 The plaintiffs should have their costs of the appeal against Griffin & Welch and the Northern Construction Company.

5 As to the costs thrown away by reason of the dismissal of plaintiff's action, which necessitates a new trial, we think these should be paid by the said defendants Griffin & Welch and the Construction Company to the plaintiffs.

6 As to the other costs of the action, they should abide the result of the new trial.

Appeal allowed and new trial ordered.

Solicitors of record:
Solicitors for appellants: *Killam & Beck.*
Solicitors for the various respondents: *Taylor, Harvey, Grant, Stockton & Smith; Macneill, Bird, Macdonald & Darling; Davis, Marshall, Macneill & Pugh; Bowser, Reid & Wallbridge.*