

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

TRANSCONA ROOFING LTD.,) Jamie A. Kagan
) Kosta L. Vartsakis
 plaintiff,) for the plaintiff
)
 - and -) Timothy J. Fry
) for the defendant Marrbeck
 MARRBECK CONSTRUCTION LTD.,) Construction Ltd.
 WINNIPEG CONDOMINIUM CORPORATION)
 NO. 40 and BOB FOTHERINGHAM,) Dave G. Hill
) Brett A. Steidl
 defendants,) for the defendants Winnipeg
) Condominium Corporation No. 40 and
) Bob Fotheringham
)
)
) JUDGMENT DELIVERED:
) JUNE 15, 2023

CHARTIER J.

INTRODUCTION

[1] Marrbeck Construction Ltd. ("Marrbeck"), a contractor at a construction project at a condominium complex, commenced an action for breach of contract against Winnipeg Condominium Corporation No. 40 ("WCC 40" or the "owner"), on July 8, 2020. This action was consolidated with an action commenced against Marrbeck by its subcontractor,

Transcona Roofing Ltd. ("Transcona") on July 9, 2020. Transcona also claimed against WCC 40, and against WCC 40's principal, Bob Fotheringham. Marrbeck and Transcona both claim sums they allege are owing to them by WCC 40 for work performed and materials provided on the construction project. WCC 40 has filed a counterclaim against Marrbeck for breach of contract.

[2] Marrbeck is seeking summary judgment against WCC 40. Transcona seeks summary judgment against Marrbeck, WCC 40 and Mr. Fotheringham. There is also a dispute between Transcona and Marrbeck regarding whether any amounts are owing in relation to the subcontract until there is a determination pursuant to the principal contract between Marrbeck and WCC 40. The defendants oppose these summary judgment motions on the basis that deficiencies in the work are greater in value than the work Marrbeck and Transcona have completed and on which they are seeking to be paid, and that this matter is not an appropriate matter to be determined by way of summary judgment giving the competing expert evidence.

[3] The construction project involved an envelope remediation of a condominium complex located at 1726 – 1742 St. Mary's Road in Winnipeg, Manitoba, commonly known as Water's Edge Townhomes (the "property"). The property consists of nine separate buildings and 132 separate condominium units and is operated and maintained by WCC 40.

[4] On July 18, 2017, Marrbeck and WCC 40 entered into a contract (the "contract" or "principal contract") pursuant to which Marrbeck was to supply certain materials and provide certain services at the property concerning building envelope remediation. On or

about September 15, 2017, Marrbeck entered into a fixed-price subcontract with the plaintiff, Transcona, to provide certain construction services in relation to the envelope and roofing remediation work with respect to buildings 1 and 2 on the property (the "subcontract").

[5] Transcona is one of the subcontractors that completed the majority of the remediation work at the property between September 2017 and March 2020. Transcona has brought the within action against the defendant Marrbeck for breach of contract as a result of Marrbeck's failure to pay Transcona for work it completed to the property, as well as WCC 40 and Mr. Fotheringham for unjust enrichment and breach of trust.

[6] Transcona alleges that invoices that have not been paid by WCC 40 were substantially certified by the project consultant, Crosier Kilgour & Partners Ltd. ("CKP" or the "consultant"), an engineering firm in Winnipeg, and \$1,128,762.64 remains owing to Transcona.

[7] Marrbeck acknowledges the amounts are owed to Transcona but relies on a "pay when paid" clause in its subcontract and says that since there is a dispute with WCC 40, and it has not been paid by WCC 40, it has no legal obligation to pay Transcona. WCC 40 refuses to pay on the basis that the work completed to the property was deficient, and says that the value of the deficiencies are higher than the value of the work completed by Marrbeck and Transcona.

[8] Marrbeck says the contract between WCC 40 and Marrbeck contained standard Canadian Construction Documents Committee ("CCDC") 2-2008 contract terms and required any dispute of CKP's determinations to be raised by WCC 40 or Marrbeck within

15 days of the determination. CKP made determinations regarding WCC 40's deficiency allegations and found that the deficiencies attributable to Transcona's scope of work were relatively minor and mostly the result of Transcona having to stop work on the property because of WCC 40's refusal to continue payments.

BACKGROUND FACTS

[9] Transcona relied on the affidavit evidence of Rich Marchetti, President of Transcona, sworn May 14, 2021, September 16, 2021, and September 1, 2022 and on which he was cross-examined. Transcona also relied on expert opinion evidence.

[10] Marrbeck relied on the affidavit evidence of Terry Hanstead, President of Marrbeck, affirmed October 19, 2021, on which he was cross-examined.

[11] WCC 40 relied on the affidavit evidence of Robert Fotheringham, President and Chairman of the Board of WCC 40, who has power of attorney and voting control in respect of the large majority of the condominium units, affirmed April 19, 2022, on which he was cross-examined. WCC 40 also relied on expert opinion evidence.

[12] The discovery transcript of John Andrew Wells was also filed. Mr. Wells was examined as a representative of CKP which is not a party in the proceedings, but which was, as previously indicated, the consultant in the contract between Marrbeck and WCC 40. Mr. Wells also provided comments in response to the Samson Engineering Inc. ("Samson") reports relied on by WCC 40 as well as very limited comments on the KGS Group ("KGS") report relied on by Transcona. CKP had prepared a Work-To-Be-Completed analysis of the property which included remediation of deficiency work to be done and quantified it in the amount of \$91,138.09 in May of 2021. CKP also

provided a report on June 13, 2022 and further answers in a letter dated July 8, 2022 and quantified the value to remediate the deficiencies at \$243,500.00.

[13] WCC 40 relied on the expert opinion evidence of Phil Dorn, who filed an affidavit affirmed November 10, 2021, and the expert opinion evidence of Peter Parkman, who filed an affidavit affirmed November 16, 2021.

[14] Mr. Dorn is an engineer and President of Samson and provided opinion evidence as to the deficiencies on the project and was asked to identify and inventory deficient or defective work, generate a scope of remediation and provide a cost opinion to remedy the deficient or defective work and bring the project back in alignment with the contract. Mr. Dorn produced two reports, the latter of which totals the deficiencies with respect to the entirety of the work, in the amount of \$4,740,854.40.

[15] Mr. Parkman is Principal and Project Manager of Arrow Commercial Exteriors Inc. ("Arrow") and an exterior finishings contractor who provided a report and a market value cost opinion to repair the exterior wall assembly of seven of the buildings on the property. His opinion was that the cost would be \$2,812,590.00, and his figures are relied on by Mr. Dorn in arriving at Samson's figure.

[16] Transcona relied on the expert opinion evidence of Ben Postma, contained in an affidavit sworn September 8, 2022 and the expert opinion evidence of Patrick Gloux, Ph. D., P. Eng., contained in an affidavit sworn September 15, 2022. The report of Mr. Gloux of KGS accepted the visual observations of the property contained in the Samson reports, but took into account the changes to the original contract. He

provided an opinion regarding whether the deficiencies identified in the Samson reports were truly deficiencies pursuant to Transcona's scope of work.

[17] Mr. Postma is a professional surveyor with Postma Consulting Ltd. and he prepared an assessment of the cost to complete the outstanding deficiencies pursuant to the KGS report pursuant to the contract documents including the changes to the original contract. The Postma report assessed the amount to remediate the deficiencies in the amount of \$128,333.00.00.

[18] The defendants, Marrbeck and WCC 40, entered into the contract for Marrbeck to act as the general contractor with respect to the envelope and roofing remediation of the nine buildings on the property. CKP was engaged by WCC 40 to be the consultant pursuant to the contract and representative of WCC 40 on the project. Marrbeck subsequently entered into a fixed-price subcontract with the plaintiff, Transcona, to provide certain construction services in relation to the envelope and roofing remediation work with respect to buildings 1 and 2 on the property.

[19] Although the principal contract contemplated the full remediation of the envelope of the nine buildings, the scope of work to be performed by Transcona pursuant to the subcontract only included demolition work, the supply and installation of grade beam insulation, canopy posts, asphalt shingle, rainware, fiber-cement sidings and the installation of windows and doors. Marrbeck engaged Transcona to perform the initial work only in respect of buildings 1 and 2 of the property. The original price that Transcona was to be paid under the subcontract was \$532,200.00.

[20] As project engineer and consultant, CKP's responsibilities included inspecting the work completed on site, reviewing and certifying amounts due and owing by WCC 40 to Marrbeck, and identifying any deficiencies in the work. The position of consultant is a defined role under the contract with specific responsibilities and authorities.

[21] Marrbeck, as general contractor, completed small amounts of the work itself and performed most of the work through subcontractors, the main one being Transcona.

[22] As work commenced, the scope of the work changed, with certain extra work being added, the scope and price of which was known by CKP and WCC 40. This included additional work to be completed by Marrbeck, through Transcona, of additional envelope remediation work on the remaining buildings at the property except on buildings 2 and 8. In addition, other extra work was required on site, which CKP identified as necessary and which it approved during its review process.

[23] Throughout the project, Marrbeck issued monthly invoices to WCC 40. During the early course of the work, WCC 40 paid the invoices in full, less statutory holdbacks, as required. This is what occurred up to and including CKP Certificate of Payment 24. Starting in late 2019, with CKP Certificate for Payment 25, WCC 40 failed to pay Marrbeck the sum owing, even though CKP certified the amounts as due and owing for work completed. There was a meeting on March 12, 2020 at which time CKP issued a memorandum indicating the considerable costs by Transcona and Marrbeck that had been incurred, but not yet reimbursed, and that owner review and approval had been repeatedly requested with confirmation pending. Transcona demobilized on

March 25, 2020 as a result of nonpayment of invoices and WCC 40's refusal to issue a change order or make payments regarding proposed change notice ("PCN") 13.

[24] On April 8, 2020, CKP issued a memorandum to WCC 40 where it observed that "... in general, the vast majority of the work we have observed completed onsite is in general conformance with the drawings and specifications". In a memorandum dated April 21, 2020, CKP reiterated that the vast majority of the work was in general conformance with the drawings and specifications and that it was committed to reaching a resolution to address the outstanding monies owed to the contractor.

[25] Although work had continued and was ongoing, WCC 40 refused to pay the sums owing. WCC 40 had growing concerns about the work done including previous amounts that had been paid on Certificate of Payments. Also, it took the position that, amongst other things, CKP's role was limited to preparing the change orders for WCC 40's approval and that Towers Realty Group ("Towers"), the property manager for Water's Edge, did not have authority to approve any decisions on behalf of WCC 40.

[26] CKP had, in some cases, determined that the amount claimed by Marrbeck was not proportionate to the amount of work performed and Marrbeck issued revised invoices in certain cases. WCC 40 became concerned by February 27, 2020 that Marrbeck was not properly completing or performing the work in accordance with industry standards. Mr. Fotheringham personally commenced an independent due diligence to assess Marrbeck's work and consulted various sources and also went on to the site and noted some concerns with the work and sent emails to CKP identifying some issues. In

November of 2020, WCC 40 gave Marrbeck notice that it was in default of its contractual obligations.

[27] In March 2020, Marrbeck and its subcontractors, including Transcona, ceased working on site in response to WCC 40's non payment. They gave notice that they were demobilizing from the site. At the time Marrbeck demobilized, the project was well toward completion, but the buildings remained in a state of being under construction.

[28] On March 24, 2020, Marrbeck caused a Claim for Lien pursuant to ***The Builders' Liens Act***, C.C.S.M. c. B91 (the "***BLA***") to be registered against title to all properties at the project with respect to its claim for payment of \$1,287,000.00, which was based on the billing and claim information available to Marrbeck at that time.

[29] On this motion Marrbeck claims a total \$1,272,917.20, consisting of the following (which includes sums claimed by Transcona):

- a) \$597,526.39, including GST, for work certified as completed by CKP, but not paid (these include CKP Certification 25 of Invoice J001816 October 31, 2019, Marrbeck Invoice J001872 December 23, 2019 for holdback, CKP Certification 26 of Invoice J001898 December 31, 2019, CKP Certification 28 of Invoice J001920 January 31, 2020, CKP Certification 29 of Invoice J001930 February 28, 2020, and CKP Certification 30 of Invoice J002043 March 31, 2020);
- b) \$193,104.52, including GST, for completed work, including changes in the work not yet certified by CKP at the time work on the project was stopped

(including change order 8, PCN 13, and CKP valuation in its email May 7, 2020);

- c) \$71,191.00, including GST, for additional expenses and costs suffered or incurred by Marrbeck due to the delay and breaches by WCC 40 (including additional rental and fencing costs);
- d) \$183,885.92, including GST, for the statutory holdback; and
- e) \$195,047.90 for interest owing under the contract to October 31 2022, with additional interest thereafter to the date of payment.

(I note that the sums set out in (a) through (e) total \$1,240,755.73.)

[30] Further, Transcona claims additional sums which were not passed along to the owner during the course of work, but have been set forth by Transcona in its evidence. Marrbeck's position is the owner is liable to pay for those sums as well, in addition to Marrbeck's mark-up for that work. These charges were for work that was expressly requested, required or was, in any event, approved by WCC 40 or CKP.

[31] Transcona says the total amount due and properly owing to it as a result of its work on the project is \$1,184,388.01, calculated as follows::

- a) \$781,662.87 – unpaid invoices (exclusive of holdback deducted);
- b) \$193,589.26 – holdback amounts; and
- c) \$209,135.88 – unpaid change order 08 / PCN 013 Work.

[32] Transcona says that of the \$296,393.80 worth of work performed by Transcona relating to PCN 013 and change order 08, \$193,104.52 was reviewed and approved by CKP in various Certificate of Payments. Transcona says of the \$1,184,388.01 owed to

Transcona, only \$103,288.28 was not reviewed or approved by CKP. Transcona, however, had been directed to perform that work by CKP.

[33] In June and July of 2022, CKP issued a report and undertaking letter respectively which were essentially a review of the deficiency reports prepared by Samson, and included some site visits. While CKP found that there were some concerns that required attention in the buildings, it reiterated its original view that it had in the spring of 2020, that Marrbeck and Transcona had been completing the work in general conformity with the contract documents. CKP also found that many of the deficient items would have been resolved in the deficiency walk-through process had the work stoppage not occurred. CKP valued the deficiencies at \$243,500.00.

POSITION OF THE PARTIES

[34] Marrbeck and Transcona's positions on these motions are that this is an appropriate matter to be disposed of by way of summary judgment because there is no credibility contest and the opinion evidence put forward by the defendants is fundamentally flawed because it did not take into account the changes in the scope of work that was approved by the owner, who was aware the work was being done at the direction of the consultant CKP. The bulk of the work was approved by CKP, except for a certain number of deficiencies which would have been remediated by Marrbeck and Transcona had they been given the opportunity to do so. Marrbeck and Transcona says that WCC 40, in the circumstances, approved the change orders either by way of their representative, Towers, or by acquiescence knowing that CKP had authorized the work, WCC 40 allowed the work to continue, but decided it would not to pay for the work.

[35] Marrbeck and Transcona say that CKP had the authority to give instructions to them pursuant to the contract, which required and authorized CKP to provide administration of the contract during construction, including the consideration of applications for payment and the issuance of certificates for payment. The parties, pursuant to the terms of the contract, engaged CKP to resolve all disputes arising out of the contract.

[36] Marrbeck and Transcona say that in the circumstances, WCC 40 ought not to be allowed to set-off any of the amount of the deficiencies found by CKP.

[37] There is a dispute as between Marrbeck and Transcona as to whether the amounts are due and owing as between them regardless of whether there remains a dispute between Marrbeck and WCC 40. Transcona has also raised other grounds for finding of liability against WCC 40.

[38] WCC 40 opposes Marrbeck and Transcona's summary judgment motions on the basis that the deficiencies are greater in value than the work Marrbeck and Transcona have completed and are seeking to be paid. It also says that this is not an appropriate case for summary judgment because of the competing expert opinion evidence.

[39] WCC 40's position in relation to the summary judgment motions is that, on the basis of the record before the Court, summary judgment is not appropriate as it is not possible to make the necessary findings of fact because there are genuine issues requiring a trial, due to the competing nature of the expert evidence in relation to the deficiencies. WCC 40 also says it does not owe any money to Marrbeck because there are significant deficiencies with the construction and related services required under the contract.

WCC 40 has filed a counterclaim against Marrbeck in relation to the significant deficiencies with the work.

[40] WCC 40 says that CKP did not have authority to act on behalf of WCC 40 and did not have authority to sign the change orders. WCC 40 also says that CKP has not made any binding determinations in accordance with the contract.

[41] On the issue of whether Transcona performed the work, and what is the value of the work that remains unpaid, and whether Marrbeck is liable to Transcona for breach of contract, WCC 40 takes no position as it is not a party to that subcontract between those parties.

[42] On the issue of whether WCC 40 failed to mitigate its damages, WCC 40 says that it afforded Marrbeck an opportunity to examine the deficiencies, but Marrbeck disagreed they were deficiencies. WCC 40 says that CKP's determination and quantification of the deficiencies is not binding on WCC 40 and Marrbeck.

[43] Regarding the deficiencies, if CKP's alleged findings are not the appropriate manner in which to determine the deficiencies, then it becomes a matter of competing experts. Transcona relies on the evidence of their experts, Mr. Postma and Mr. Gloux, and WCC 40 relies on their experts, Mr. Dorn and Mr. Parkman. The Court would not be in a position to do this on a summary judgment basis, but a trial would be required to address their evidence.

ISSUES

[44] The issues are as follows:

- a) Is it appropriate to proceed by way of summary judgment in this matter?

- b) Opinion evidence regarding deficiencies;
 - c) Have Marrbeck and Transcona established on the evidence that they performed the work? If so, what is the value of the work that remains unpaid?
 - d) Is WCC 40 entitled to a set-off in respect of the amounts owed to Marrbeck, or is WCC 40 precluded from such set-off as a result of failing to mitigate its damages by allowing Marrbeck and Transcona to address those matters on site?
 - e) Is Marrbeck liable for payment to Transcona for its work on the project and if so, in what amount?
 - f) Are WCC 40 and Mr. Fotheringham liable to Transcona for breach of trust and unjust enrichment?
- a) Is it appropriate to proceed by way of summary judgment in this matter?**

[45] The action involves alleged unpaid sums on a construction project and a dispute regarding deficiencies in the work. The issue is whether Marrbeck and Transcona have performed the work, and the value of the work performed that remains unpaid. On the view that I have taken on this matter, I find that CKP was appointed as consultant pursuant to the terms of the contract and they authorized payments, and also had authority to resolve all disputes arising under the contract. I am satisfied on the evidence that they were on site and performed that function, and that if either of the parties wished to challenge those determinations they should have availed themselves of the provisions of the contract to do so. On that basis, there is no need to consider the additional expert

evidence filed by the parties, except to the extent that any of their opinions have been accepted by CKP. I accept CKP's findings found in the evidence, and also contained in the June 13, 2022 report and the July 8, 2022 undertaking letter, as to the nature and scope of the deficiencies of Marrbeck and Transcona.

[46] In the alternative, if I am wrong that CKP had that authority and properly exercised it under the terms of the contract, in this case I nevertheless prefer its evidence over that of the opinion evidence of Samson and Mr. Parkman. I am able to make the necessary determinations including any relating to the competing expert opinion evidence without requiring *viva voce* evidence of those experts. I am therefore satisfied that this matter can appropriately be dealt with by summary judgment.

b) Opinion evidence regarding deficiencies

[47] I have found that CKP had the authority to make rulings and determinations in relation to the contract and did so in this case, and that their findings are determinative. Moreover, I find that WCC 40 has not provided credible evidence on these motions to challenge these findings, which is a further basis to accept these findings.

[48] If I am wrong on this issue that CKP had authority to make the determinations which were not challenged by the parties pursuant to the contract, I nonetheless find that CKP's opinion evidence as to the extent and nature of the deficiencies is to be preferred over the other opinion evidence, and particularly the opinion evidence of WCC 40's experts. I so find on the basis that CKP has the most knowledge of the project, and was on site and was familiar with the scope of work and changes to the contract. CKP remained the consultant on the project until not long before the hearing of these

motions. Having considered the opinion evidence of the deficiencies before me I have given the most weight to the evidence of CKP.

[49] CKP's evidence regarding the deficiencies and work to be done was originally assessed in 2021 in the amount of \$91,138.09. CKP provided a further report and undertaking letter in June and July of 2022 respectively, and quantified the deficiencies at \$243,500.00.

i) Evidence of Samson Engineering Inc.

[50] WCC 40 relied on the evidence of Mr. Dorn of Samson to inspect the property and produce a report regarding the deficiencies. Two reports were provided, one in May of 2021 and one in October of 2021. The deficiencies with respect to the work performed by Marrbeck was set out at \$4,740,854.40. WCC 40 also relied on the opinion evidence of Mr. Parkman of Arrow, who quantified the amount of the deficiencies as \$2,812,590.00, which is incorporated in Samson's amount.

[51] I am giving little weight to the opinion evidence of either of these two experts. The principal reason is that their reports and figures took into account work that was not part of the actual contract. In other words, they did not consider Marrbeck and Transcona's scope of work. The fact that there is other work that could have been done, but which is not part of the contract, does not constitute a deficiency. This comes out during the cross-examination of Mr. Dorn where he admitted that he was unaware there were change orders and that there was an agreement to alter the specifications and the requirements to follow the James Hardie ("Hardie") manufacturers' specifications. This is also referred to in the response from CKP to the Samson expert reports. Mr. Parkman

compared the Hardie material installation with the manufacturers' specifications. The parties agreed to abandon the Hardie board manufacturers' installation and void the warranty that comes with it when they decided to issue a change to the work order (set out at p. 16 of the June 13, 2022 response by CKP). Mr. Parkman included in his estimate buildings 2 and 8 which were not part of the contract. The only documents relating to the project that Mr. Dorn reviewed in determining the scope of work and determining the basis for his deficiency opinion was the contract, which included the drawings and specifications, the initial bid form and various product manufacturer guidelines. However, the Samson reports do not consider the numerous change orders and other minutes and correspondence on the project.

[52] They also assumed that the contract work was fully performed by Marrbeck and Transcona when it was not. Marrbeck and Transcona left the site with some of the work incomplete which is a fact in evidence. CKP states that in their rebuttal report as well, so this assumption from WCC 40's experts that the work was all done and that these were all deficiencies is in error. For reasons that I will refer to later, I have found that there were approved changes in the work and WCC 40's experts also did not take that into consideration in coming to their opinion. The quote relied upon by Mr. Dorn to complete one roof on one of the buildings was also not scaled. On these points alone, I cannot rely on this evidence put forward by WCC 40's experts.

[53] The deficiencies alleged with respect to the installation of the fiber-cement siding, which makes up, almost the entire amount of Arrow's \$2,812,590.00 quote to repair, are not deficiencies. Mr. Dorn and Mr. Parkman opine that the entire siding assembly on

each building needs to be removed and replaced. They claim that because the fiber-cement siding was not installed in accordance with the manufacturer specifications or the specifications in the contract.

[54] However, neither Mr. Dorn nor Mr. Parkman were aware that the work changed and new shop drawings were issued. They were not aware that the work was reviewed by CKP and the architectural consultant and was deemed acceptable pursuant to the revised scope of work and shop drawings. With respect to buildings 3, 5 and 9, any deficiencies observed by Mr. Dorn and Mr. Parkman are properly considered incomplete work for which WCC 40 was not charged and are therefore not deficiencies. Transcona performed the fiber-cement siding installation in accordance with the directed changes.

[55] The Samson reports relied on an invoice from True North Roofing regarding the cost to remediate deficiency work related to the attic and roofing work performed by Transcona. Calculations of the cost of that work are \$900,000.00 but there was no documentation to support that cost, except for an invoice of \$8,960.00 which would be the cost of repairing one roof.

[56] Ultimately, the conclusions in the Samson reports and the Arrow report are premised on incorrect assumptions and I reject their conclusions. These reports are based on the scope of work in the original contract and various product manufacturer guidelines, however, Marrbeck and Transcona's scope of work changed significantly throughout the course of the project as directed by the consultant CKP on behalf of WCC 40. What was done essentially amounted to an academic exercise not related to the scope of the required work that was conducted by Marrbeck and Transcona and

authorized by CKP on behalf of WCC 40. These are not minor flaws in the opinions but foundational ones and account for the extremely large discrepancy in the respective parties' experts' opinions. I am only accepting the evidence contained in these reports to the extent that any information in them contained observations that were accepted by CKP in its June 13, 2022 report and July 8, 2022 undertaking letter.

ii) Opinion evidence of CKP

[57] CKP re-attended the project site and provided a report on June 13, 2022, which provides comments on the opinions presented in the Samson reports regarding their opinion on the contractor deficiencies. That report also addresses to a much lesser extent points raised in the KGS report. CKP, on p. 30 of the June 13, 2022 report, states that:

"With the exceptions noted herein, Marrbeck Construction and Transcona Roofing were completing the work in general conformance with the contract documents. With the exception of Building 1, final deficiency walk-throughs were pending. Four of the buildings were work in progress and 2 were substantially complete; however, all were subject to final deficiency review. To this end, items deemed deficient are partially attributable to work in progress and the deficiency list should not be considered exhaustive. It should be noted that during construction, CKP found the contractor to be cooperative with respect to acknowledging and attending to identified issues and deficiencies. It is our opinion that a number of these items would have been resolved in due course had the work stoppage not occurred."

[58] In answer to undertakings dated July 8, 2022, the deficiencies in the June 13, 2022 report were quantified and CKP revised its opinion of the deficiencies from its May 2021 analysis which was \$91,138.09, to an amount of \$243,500.00 in deficiencies.

[59] I find that CKP was familiar with the project as it was the consultant on it, they were on site regularly throughout the project and did more site visits after the court proceedings began. CKP had an accurate understanding of the scope of work that was agreed upon and needed to be done, including the changes that were required as the

project progressed. This familiarity with the scope of work, what was considered at the outset, what was subsequently decided upon, as well as the ongoing changes that were made, allowed CKP to more accurately determine what was properly done at the site in terms of Marrbeck and Transcona's work. It knew what remained outstanding under the scope of work and what is not properly considered a deficiency because it is not part of the scope of work. I also found Mr. Wells' answers to counsel's questions in relation to the report to be responsive.

iii) Opinion evidence of Patrick Gloux and KGS Group

[60] Transcona filed expert evidence in response to the two Samson reports – a report from Mr. Gloux of KGS on June 3, 2022. KGS was tasked to review all of the applicable contract documents including the change orders, site instructions and correspondence.

[61] On August 18, 2022, Mr. Postma prepared his own assessment of the cost to complete the outstanding deficiencies. Mr. Postma's estimate to remediate the deficiencies in Transcona's scope of work, (based on the KGS report) was \$128,333.00.

[62] I note that the opinion of Mr. Posta is relatively close to the CKP opinion of deficiencies which is unsurprising given that they also followed the same and proper scope of work. However, I prefer the opinion of CKP because of its intimate knowledge of the project as project consultant.

iv) Applicable legal principles

[63] In ***North Perimeter v. 6625844 Manitoba Ltd. et al.***, 2021 MBQB 94 (CanLII), Martin J. cited some principles from two Ontario decisions relating to construction contracts which have applicability in the circumstances of this case:

[11] ...

- as to extra work, or change orders, beyond that agreed to in the base contract, in *2016637 Ontario Inc. o/a Balkan Construction v. Catan Canada Inc. et al.*, 2013 ONSC 4727, at para 10 – 13, the court explained:

[10] It is well-established that in a lump sum contract, the contractor is entitled to the whole of the price, but to no more, irrespective of whether the work actually carried out is more or less than anticipated. However, extras to the contract must be paid for in addition to the contract price, and the parties may agree to make a deduction for work omitted ...

...

[12] Whether a particular item of work is an extra or not must be determined by reference to the terms of the contract, the nature of the work, and the surrounding circumstances. ...

[13] ... when the contractor performs work or supplies materials not called for by the contract on the instructions, express or implied, of the owner, it is entitled to charge for additional work or materials as an "extra". What amounts to instructions from the owner depends on the circumstances relating to each item. If the owner, without giving definite instructions, knows that the contractor is doing extra work or supplying extra materials, and stands by and approves of what is being done and encourages the contractor to do it, that will amount to an implied instruction to the contractor, and the owner is liable ...

- as to breach of contract, such as an owner's failure to pay an invoice or defects in a contractor's workmanship, and conduct constituting a fundamental breach of contract, the court in *D & M Steel Ltd. v. 51 Construction Ltd.*, 2018 ONSC 2171, observed at paras 49 – 52:

[49] Owner breach: if the owner without justification ceases to make required payments under the contract, cancels it, or through some act without cause makes it impossible for the contractor to complete its work, then the owner has breached

the contract and it has no claim for damages, and the contractor is justified in abandoning the work and the contractor is entitled to enforce its claim for lien to the extent of the actual value of the work performed and materials supplied up until that time, and the court may award the innocent contractor damages for breach of contract or damages on a *quantum meruit* basis in lieu of or in addition to damages for breach of contract.

...

[51] Contractor breach: mere bad or defective work or insignificant non-completion will not, in general, entitle an owner to terminate a contract, but the owner will have an obligation to pay for the work and make a claim for damages for the defective work. An owner will not be able to terminate the contract because of some minor or inconsequential failure to complete, although the owner may have a claim against the contractor for damages for non-completion or for defective workmanship, which will generally be the cost of completing the non-completed items or remedying any defects. If the contractor breaches the contract, an owner who alleges that the work performed or the materials supplied are defective must provide proper evidence on the basis of which his or her damages can be assessed.

[52] If there are defects in a contractor's workmanship, but not enough to amount to a fundamental breach entitling the owner to terminate the contract, the contractor should be permitted to remedy the defects and failure by the owner to permit such corrections will disentitle or reduce the amount of damages the owner can claim to remedy the defects as a result of its failure to mitigate.

[64] Some of the material provisions of the CCDC 2-2008 contract in relation to the role of the consultant are as follows:

PART 2 ADMINISTRATION OF THE CONTRACT

GC 2.2. ROLE OF THE CONSULTANT

...

2.2.5 Based on the *Consultant's* observations and evaluation of the *Contractor's* applications for payment, the *Consultant* will determine the amounts owing to the *Contractor* under the *Contract* and will issue certificates for payment...

...

- 2.2.7 ...the *Consultant* will be, in the first instance, the interpreter of the requirements of the *Contract Documents*.
- 2.2.8 Matters in question relating to the performance of the *Work* or the interpretation of the *Contract Documents* shall be initially referred in writing to the *Consultant* by the party raising the question for interpretations and findings and copied to the other party.
- 2.2.9 Interpretations and findings of the *Consultant* shall be consistent with the intent of the *Contract Documents*. In making such interpretations and findings the *Consultant* will not show partiality to either the *Owner* or the *Contractor*.
- 2.2.10 The *Consultant's* interpretations and findings will be given in writing to the parties within a reasonable time.
- ...
- 2.2.12 The *Consultant* will have authority to reject work which in the *Consultant's* opinion does not conform to the requirements of the *Contract Documents*.
- ...
- ...
- 2.2.17 All certificates issued by the *Consultant* will be to the best of the *Consultant's* knowledge, information and belief. By issuing any certificate, the *Consultant* does not guarantee the *Work* is correct or complete.
- ...

PART 5 PAYMENT

GC 5.2 APPLICATIONS FOR PROGRESS PAYMENT

- ...
- 5.2.3 The amount claimed shall be for the value, proportionate to the amount of the *Contract*, of *Work* performed and *Products* delivered to the *Place of the Work* as of the last day of the payment period.
- ...

GC 5.3 PROGRESS PAYMENT

- 5.3.1 After receipt by the *Consultant* of an application for payment submitted by the *Contractor*...:
- .1 the *Consultant* will promptly inform the *Owner* of the date of receipt of the *Contractor's* application for payment,
 - .2 the *Consultant* will issue to the *Owner* and copy to the *Contractor*, no later than 10 calendar days after the receipt of the application

for payment, a certificate for payment in the amount applied for, or in such other amount as the *Consultant* determines to be properly due. If the *Consultant* amends the application, the *Consultant* will promptly advise the *Contractor* in writing giving reasons for the amendment,

- .3 The *Owner* shall make payment to the *Contractor* ... on or before 20 calendar days after the later of:
- receipt by the *Consultant* of the application for payment, or
 - the last day of the monthly payment period for which the application for payment is made.

...

PART 8 DISPUTE RESOLUTION

GC 8.2 NEGOTIATION, MEDIATION AND ARBITRATION

...

- 8.2.2. A party shall be conclusively deemed to have accepted a finding of the *Consultant* under GC 2.2 – ROLE OF THE CONSULTANT and to have expressly waived and released the other party from any claims in respect of the particular matter dealt with in that finding unless, within 5 *Working Days* after receipt of that finding, the party sends a *Notice in Writing* of dispute to the other party and to the *Consultant*, which contains the particulars of the matter in dispute and the relevant provisions of the *Contract Documents*. The responding party shall send a *Notice in Writing* of reply to the dispute within 5 *Working Days* after receipt of such *Notice in Writing* setting out particulars of this response and any relevant provisions of the *Contract Documents*.

...

Supplementary Conditions

3.3 Section GD 2.3. – REVIEW AND INSPECTION OF THE WORK

...

- .4 Add a new Paragraph 2.3.10 which shall read as follows:

2.3.10 Instructions at the *Place of Work* will be given only by the *Consultant*. The *Contractor* shall not take any direct instructions from the *Owner*, or any representatives of the *Owner* other than from the *Consultant*.

- Article A-5.1.1 Less statutory holdback, the *Owner* shall make progress payments to the *Contractor* on account of the *Contract Price* when due in the amount certified by the *Consultant*.

c) Have Marrbeck and Transcona established on the evidence that they performed the work? If so, what is the value of the work that remains unpaid?

[65] With respect to payment, pursuant to the terms of the contract, Marrbeck was to submit progress claims on a monthly basis to CKP for approval and due processing. Each progress claim was to cover the cost of materials and the work performed up to the last day of the month. The amount claimed by Marrbeck was to be the value, proportionate to the amount of the contract, for work performed and products incorporated into the project during each particular payment period.

[66] Upon receipt of the application for payment, CKP was to review the claim and issue a Certificate of Payment in the amount applied for, or in such other amount as they determined to be properly due at that time. Once the Certificate of Payment had been issued, WCC 40 was mandated to pay Marrbeck on or before 20 calendar days after the later of receipt by CKP of the application for payment, or the last day of the monthly payment period for which the application was made.

[67] Article 2.4.1 of the contract provides that Marrbeck is to correct any defective work at its own cost. It is only where, in the opinion of CKP, it is not expedient to correct the defective work that WCC 40 is entitled to make a deduction from the amount otherwise due. The contract stipulates the payment of progress claims without deduction for deficiencies and for the repair of those deficiencies by Marrbeck at its expense.

[68] All of the invoices and certificates up to CKP Certificate of Payment 24 were paid by WCC 40. However, WCC 40 did not pay CKP Certificate of Payments 25, 26, 28, 29 and 30, despite the fact the sums in those Certificate of Payments were certified by CKP as due and owing. (It would appear that there was no Certificate of Payment 27.)

WCC 40 refused to sign documentation to formalize approval for certain additional work, though that work was necessary on site and directed for completion by CKP. WCC 40 refused to make the full required payments starting in late 2019.

[69] WCC 40 says that certain change orders and PCNs were not signed off by WCC 40. A contractor who performs work or supplies material not called for by the contract, without instructions express or implied from the owner or the consent of the owner, is not entitled to charge for additional work or materials as an “extra”. It can do so, however, when there are express or implied instructions. If the owner, without giving definite instructions, knows that the contractor is doing extra work or supplying extra material and acquiesces, that will amount to an implied instruction to the contractor (see ***2016637 Ontario Inc. o/a Balkan Construction v. Catan Canada Inc. et al***, 2013 ONSC 4727 (CanLII)).

[70] I find that WCC 40 acquiesced in the provision of extras, and consented to the changes. WCC 40 delegated, pursuant to the terms of the contract, the right to give instructions on the project to CKP. CKP, in its capacity as the consultant, specifically requested Marrbeck perform the work in question. It was represented to Marrbeck at one of the first start-up meetings on the project that Towers also had authority to bind WCC 40. Towers did in fact sign off on certain change orders, thereby indicating that it had actual authority to do so. Tower’s name is also on the contract. In relation to a question regarding the contractual provision 8.2.2 regarding how disputes were to be resolved, Mr. Fotheringham answered that he relied on Mr. Wells to resolve the differences.

[71] Because WCC 40 was aware that Marrbeck was doing extra work or supplying extra materials for work that was required on the project, and WCC 40 stood by, approved and took the benefit of what was being done, WCC 40 is liable for giving such implied instructions to complete the work and is required to pay for that work. Since WCC 40 and Marrbeck designated CKP as the decision-maker regarding entitlement to payment under the contract, I have accepted its findings. CKP did not find that it was not expedient to correct defective work. Therefore, WCC 40 is not entitled to withhold any portion of the certified amounts.

[72] CKP instructed Marrbeck and its subcontractors to carry out work. Some of that work did not get certified because WCC 40 refused to sign the appropriate documents to formalize the changes in work. CKP confirms that the work was directed to be completed, and Marrbeck and Transcona's evidence is the work was done. WCC 40 has adduced no reliable evidence in relation to the deficiencies in opposition to the evidence of CKP which I have accepted. I have rejected the opinion evidence adduced by WCC 40.

[73] If WCC 40 or Mr. Fotheringham were dissatisfied with any of the work being performed on the project or the amounts claimed by Marrbeck or Transcona related to same, there were specific contractual notice and dispute resolution provisions that WCC 40 could have availed itself to. WCC 40 chose not to. Instead, WCC 40 simply ceased payment to Marrbeck, breaching the contract. WCC 40 relies on the decision in **1023436 Ontario Ltd. v. Noblestar Properties (Central) Inc.**, 2004 CanLII 1531 (ON SC), and says that there was no agreement to be bound by any determinations by CKP because no determinations were made by CKP. The decision of **West Shore**

Constructors Ltd. v. Sandspit Harbour Society, 1999 Carswell BC 2274, is a relevant case in this regard. If WCC 40 was disputing the work, they had to have recourse to their dispute resolution mechanism under the contract, but it did not do so (see paras. 11 and 15; see also ***1023436 Ontario***, at para. 50).

[74] In a memorandum dated April 21, 2020, CKP observed:

We conclude that Crosier Kilgour is committed to assisting in reaching a resolution to address the outstanding monies currently owed to the contractor. We would like to acknowledge that in general, the vast majority of the work we have observed completed on-site is in general conformance with the drawings and specifications.

[75] CKP conducted additional site reviews in November 2021, as well as June and July of 2022, to review the deficiency claims of WCC 40, all the while reviewing the work actually completed on site along with the invoices submitted by Marrbeck in order to determine the value of work completed, any deficiencies and any overbilling on the invoicing. CKP's July 2022 undertaking letter summarized the deficiencies at \$243,500.00 (\$42,000.00 of which had been previously set-off in Certificate for Payment 30), and \$35,654.41 for invoicing beyond the value of what was completed on site.

[76] I find WCC 40 is liable to Marrbeck for the amounts claimed by Marrbeck. Further, I find WCC 40 is obligated to pay all additional sums for work completed by Marrbeck and Transcona on the site as that work was directed by CKP and authorized by WCC 40.

d) Is WWC 40 entitled to a set-off in respect of the amounts owed to Marrbeck, or is WCC 40 precluded from such set-off as a result of failing to mitigate its damages by allowing Marrbeck and Transcona to address those matters on site?

[77] The duty to mitigate required WCC 40 to take proactive steps to protect the property's buildings once Marrbeck and Transcona demobilized. I find it did not do so, and except for some minor remediation, has not done so to date.

[78] The duty to mitigate, both at law and under the contract, required WCC 40 to allow Marrbeck and its subcontractors, including Transcona, the opportunity to rectify any deficiencies.

[79] In *Wilson v Hodson and Gates*, 2011 MBQB 187 (CanLII), Menzies J. quoted with approval a passage from an Ontario decision in relation to the owner's obligation to mitigate:

75. It is accepted law that an owner is entitled to set off the costs of remedying deficiencies under a construction contract. The contractor has the corresponding right to have the occasion to remedy any defects in the work himself. As was stated in *Obad v. Ontario Housing Corp.*, [1981] O. J. No. 282 (Ont. H. C.) at paragraphs [*sic*] 48:

With respect to the claim for damages resting on expenditures to correct the plaintiff's work, it would seem that, although the defendant, Ducharme, is entitled to have a set-off for defective work, its obligation to mitigate its damages would require that it allow the plaintiff to continue, having in mind the reasonable probability that the plaintiff would correct its own work in order to obtain payment of the price. On that basis the defendant, Ducharme, is not entitled to have damages based on its own costs of correction.

(See also *North Perimeter* at para. 11.)

[80] Subsection 2.4 of the contract specifically addresses defective work and stipulated that deductions by an owner can only be made for deficiencies where the consultant has found that repair is not practical. That was not done in this case. CKP stated that the

matters would mostly have been addressed during the ordinary course of construction. Marrbeck and Transcona could have addressed the items if WCC 40 would have allowed them to do so.

[81] WCC 40 had to provide Marrbeck the opportunity to mitigate because mitigation would have come at no additional cost to WCC 40 and less cost to the subcontractors. Marrbeck's only investment in the deficiency work would have been its own supervision of the subcontractors, which would not have been passed on to WCC 40. That cost to Marrbeck would have been much reduced. Transcona would have been able to complete the work while on site addressing other matters, which would eliminate many costs that an outside contractor would charge, such as mobilization and demobilization. Further, the subcontractors can receive replacement materials from their suppliers where the cause of deficiency is insufficient materials. On large projects, there are always matters that need to be addressed and corrected.

[82] Transcona offered to go back to remediate the work with a condition that the amounts owing would be paid in trust and that the work would be supervised by CKP. The work stopped in March of 2020 and as of the date of these motions in December of 2022, there was basically no remediation done pursuant to any of the reports. It was not unreasonable in the circumstances for Transcona to require payment of the outstanding amounts be paid in trust as a prior condition to doing so.

[83] In order to mitigate its damages, WCC 40 had to allow Marrbeck and Transcona back on site to remediate the deficiencies identified by CKP. If Marrbeck or Transcona had refused to come back to the site, then WCC 40 could have engaged a third-party

contractor to remediate the deficiencies identified by CKP within a reasonable period of time and seek a set-off for the amount of the third-party contractor. Also, if WCC 40 no longer trusted CKP's identification or quantification of the deficiencies, which it did not do pursuant to the dispute mechanism provisions in the contract, it could have engaged a third party engineer to provide a second opinion and then have the work identified done by Marrbeck or Transcona. However, WCC 40 did not do any of those things. The property was left without any remediation despite the fact that Marrbeck and Transcona left the property with the work and buildings in a partially completed state.

[84] In the circumstances, WCC 40 has failed to properly mitigate its damages and is not entitled to a set-off except for overbilling in the amount of \$35,654.41 which is set out in CKP's July 8, 2022 undertaking letter.

i) CKP's assessment of deficiencies

[85] I have determined that WCC 40 is not entitled to advance a set-off in the circumstances of this case. If I am wrong on that issue, I find that an appropriate amount for the deficiencies in the circumstances is the most recent quantification of those deficiencies by CKP in its July 8, 2022 undertaking letter which quantified the deficiencies identified in its June 13, 2022 report. I find that the report and undertaking letter are a proper basis to value the amount of the deficiencies subject to the following adjustments.

[86] I have already noted that one of the conclusions in the report and undertaking letter was that Marrbeck and Transcona were completing the work in general conformity with the contract documents. I am also noting that the deficiency amount, which is set out by CKP, is partially attributable to work in progress, and that a number of the items

listed in the report and undertaking letter would have been resolved had the work stoppage not occurred.

[87] CKP quantified the deficiencies at \$243,500.00. There ought to be a deduction for \$42,000.00 in relation to a duplication of the deficiency holdback related to Certificate of Payment 30. The amount should therefore be reduced to \$201,500.00.

[88] Transcona submitted that there should not be a 15% cost escalation as set out in the CKP July 8, 2022 undertaking letter given that the deficiencies could have been addressed earlier in 2020 and they were not because of WCC 40's conduct. However, I am finding that interest is payable on the amounts outstanding by WCC 40 to Marrbeck and Transcona. It is appropriate that there also be a mark-up for the costs of deficiencies that reflect the current actual costs. Therefore, the amount of the set-off should be \$201,500.00. I would also have apportioned those costs based on Marrbeck and Transcona's respective deficient work.

e) Is Marrbeck liable for payment to Transcona for its work on the project and if so, in what amount?

[89] I am in agreement with Marrbeck's position that Marrbeck's liability to pay Transcona only arises once the court has made a determination relating to matters concerning the work performed on the project, which was in dispute in this matter and on which I have now made a ruling. As a result of the findings I have made, Marrbeck is now indebted to Transcona for the entire amount claimed by Transcona, based on both breach of contract and unjust enrichment.

[90] In relation to the statutory holdback, I find that the principal contract is terminated given that WCC 40 is in breach of its payment obligations.

f) Are WCC 40 and Mr. Fotheringham liable to Transcona for breach of trust and unjust enrichment?

[91] Additionally, Transcona alleges that WCC 40 used, appropriated or converted the funds it obtained to finance construction of the project in manners not authorized pursuant to the trust provisions in the **BLA**, or has otherwise failed to account or provide any evidence as to how the funds were used. Transcona further alleges that Mr. Fotheringham, as the Chairman of the Board of WCC 40, owner of 124 of 132 units of the property, and sole controlling mind of WCC 40, is also liable to Transcona at common law for the “knowing assistance or facilitation” of WCC 40’s breach of trust.

[92] Subsection 5(1) of the **BLA** only applies to funds received by the owner, not the owner’s own funds.

[93] I agree with WCC 40’s submission that ss. 5(2) of the **BLA** only applies to third-party funds. In this case, there were no sums received by WCC 40. The funds were WCC 40’s own funds, therefore ss. 5(2) of the **BLA** is not applicable. It was never the intention of the Legislature to impose a trust on the owner’s own monies that were not received from some third party. An owner cannot impose a trust upon itself.

[94] Therefore, there has been no breach of ss. 5(1) and 5(2) of the **BLA** by WCC 40 and consequently, by Mr. Fotheringham, and therefore, neither of them are liable for breach of trust.

[95] I find that there is no unjust enrichment claim by Transcona against WCC 40. Transcona’s remedy is against Marrbeck, who it had contracted with, and not WCC 40 with which it does not have a contract. There is an absence of a juristic reason for the enrichment as there is no contractual relationship between those parties.

CONCLUSION

[96] I accept the evidence from Marrbeck and Transcona relating to the amounts owing.

[97] Relating to the Marrbeck claim against WCC 40, I find that WCC 40 is to pay Marrbeck the following amounts based on breach of contract, unjust enrichment and quantum meruit:

- a) I accept that the certified amounts totalling \$597,526.39 as certificates for these payments were issued by CKP and they were not paid by WCC 40. That amount is payable because CKP found the work was completed and found that Marrbeck was entitled to be paid for it;
- b) I also find that the second sum to be paid is the additional work that was confirmed by CKP and that is set out at Exhibit K of Mr. Marchetti's affidavit, containing an April 2020 email from CKP confirming that it had approved a further \$193,104.52 for work done under change order 8 and PCN 13. This sum is payable as the work was completed and verified (see email dated May 7, 2020 from CKP);
- c) The third item sought by Marrbeck is the statutory holdback of \$183,885.92. There is no basis for the statutory holdback to be maintained as the contract is at an end and that this amount ought to be paid;
- d) The fourth amount to be paid is the interest due and is set at the rate in the contract. The amount, which is set out in the materials before me, shows that that interest was \$195,047.90 until October 27, 2022, and that

includes the interest from the holdback funds. The interest continues to run on these amounts pursuant to the contract;

- e) I also find that the additional costs should be paid by WCC 40 totalling \$71,191.00; and
- f) The total amount owing is \$1,240,755.73. I am also allowing the entirety of Marrbeck's claim of \$1,497,929.01 set out in their statement of claim because I find that the work was performed and was authorized by WCC 40.

[98] Relating to the claim of Transcona, I find that Marrbeck owes Transcona the amounts that follow based on breach of contract and unjust enrichment. The invoices submitted to Marrbeck by Transcona were paid, less statutory holdbacks in the cumulative amount of \$133,229.29, up to September 24, 2019. Since October 2019, Transcona has not been paid for work it performed up to March 2020. The total amount of the unpaid invoices submitted to Marrbeck by Transcona, which Marrbeck has failed to pay, is \$781,662.87 in addition to the holdback amount of \$60,359.97.

[99] Accordingly, the total amount due and properly owing to Transcona as a result of Transcona's work on the project is \$1,184,388.01, calculated as follows:

- a) \$781,662.87 – unpaid invoices (exclusive of holdback deducted):
- b) \$193,589.26 – holdback amounts; and
- c) \$209,135.88 – unpaid change order 08 / PCN 013 Work.

[100] Although there was originally a dispute as to the rate of interest between Transcona and Marrbeck, they have agreed that the interest payable will bear the interest at the rate set out in the contract between Marrbeck and WCC 40.

[101] Marrbeck and Transcona's motions for summary judgment are allowed with costs.

_____ J.