IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ellcar Ventures Ltd. v. MacLeod,*
2023 BCSC 2095

Date: 20231129
Docket: S44070
Registry: Penticton

Between:

Ellcar Ventures Ltd.

Plaintiff

And

Carol Elizabeth MacLeod

Defendant

Before: The Honourable Mr Justice Crerar

Reasons for Judgment

Counsel for the Plaintiff:	R. Okayama
The Defendant, appearing on her own behalf:	C.E. MacLeod
Place and Dates of Trial:	Penticton May 5, 8-10, 12, 2023 September 25-29, 2023 October 5-6, 2023 November 6, 2023
Place and Date of Judgment:	Penticton November 29, 2023

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I. INTRODUCTION

[1] The defendant, Carol MacLeod, a retired college anthropology instructor and Ph.D, owns a tasteful, two-storey, custom-build house in the golf-centred strata community of St Andrews By The Lake ("**St Andrews**"), located at the southwest end of Skaha Lake. That house was built by the plaintiff Ellcar Ventures Ltd. under the supervision of its principals, the father-daughter team of Hart Buckendahl and Penny Potts[1], pursuant to an agreement dated March 4 and signed on March 6, 2017 (the "**contract**"). Section XV of the contract sets out a total contract price of $391,643.28 ($372,993.60 plus GST).[2]

[2] Unfortunately, the construction was plagued with various complications. The foundation excavation revealed shallow bedrock, necessitating blasting. The sloped lot necessitated the incorporation of a retaining wall into the foundation, jutting slightly into the floor plan at the back and partially on a side of the house. Local restrictions due to the upslope presence of an astrophysical observatory necessitated electrical adaptations. Specific aspects of the construction, some necessary and some requested by Ms MacLeod, cost more than expressly anticipated in the contract. Whether these additional costs should be borne by the plaintiff or by Ms MacLeod is the central issue in this case.

[3] There were harbingers that the lot and other factors might make the project expensive and difficult. Before contacting the plaintiff, Ms MacLeod had sought an estimate from another builder, who demurred, stating that her house could cost between $300,000 and $600,000, depending on variables. In a pre-contract September 2016 email to Mr Buckendahl, Ms MacLeod presaged potential problems with the lot: "[i]t is a difficult lot on which to build, and that is probably why was for sale…". In October 2016, she told Mr Buckendahl that "[b]uying the lot turned out to be quite traumatic. There was nondisclosure of important information from Brian [her realtor] and from the sellers, but when I found out 'the dirt' on the lot, it was too late…".

[4] The plaintiff downed tools in January 2018, after Ms MacLeod refused to pay her third draw invoice in full, including extra charges. The third draw invoice was due and demanded in November 2017, upon reaching the "lock up" stage of construction, as per section XVI ("Payment Schedule") of the contract. After negotiations, Ms MacLeod paid the third draw to the plaintiff to complete construction sufficient for her to move in, which she did in late January 2018. She then refused to pay the fourth and essentially final invoice, dated March 12, 2018. At that, the plaintiff and its contractors departed for good and filed a lien on the property. Ms MacLeod hired her own contractors to complete a few aspects of the construction, to fix alleged deficiencies, and to make minor additions as required by the Regional District of Okanagan Similkameen for issuance of the final permit.

[5] To date, Ms MacLeod has paid the plaintiff $294,082.47.

[6] The plaintiff sues Ms MacLeod for $101,654.84, as money owed under the contract, along with a declaration of a lien for that amount. This amount represents the remainder claimed to be owed, based on a calculation of cost underages and overages above and below the allowances (that is, estimated budgets) set out in the contract for items the plaintiff was obliged to provide under the contract; plus special or new items requested by Ms MacLeod not covered by the contract; plus the cost of unexpected items not covered by the contract, such as blasting the bedrock for the foundation and utility lines. These amounts and calculations are supported by invoices confirming that the plaintiff paid these amounts to third-party contractors and suppliers. Ms MacLeod does not challenge these invoices or provide evidence, expert or otherwise, challenging their authenticity, necessity, or reasonableness.

[7] It is to be noted that the amount claimed, added to Ms MacLeod's past payments, only exceeds the contract price of $391,643.28 by a few thousand dollars. One must take into account, however, that Ms MacLeod purchased some $57,338.54 of items (such as windows) directly herself, as was her right under the contract. These amounts have been deducted in the plaintiff's underage/overage

summary, and must count as conceptual credits when assessing how much Ms MacLeod is out of pocket at the end of this litigation.

[8] Ms MacLeod counterclaims for an unspecified amount under various heads of damage and claims, including negligence and breach of contract, as a claim or set off. Put broadly, she takes the position that the contract was a strict fixed price contract, and that the builder plaintiff must bear the cost of most of the items for which it claims. She concedes that she is responsible to pay some of the remaining amounts, but disputes some of those calculations and charges. She also sues for $12,561, representing square footage lost to the retaining wall. She claims $25,807 in deficiencies, the remediation of which she coordinated and paid for after the plaintiff's departure. She also sues for expenses, such as Airbnb, moving, and storage costs, occasioned by what she claims as impermissible delay from September 2017, when she wished to move into the house, through January 2018.

II. CREDIBILITY

[9] Mr Buckendahl was a credible and reliable witness. He was careful to delineate matters that he did not specifically remember, or did not directly know, and conceded points that were adverse to his case. Equally importantly, he was a reliable witness. His testimony evidenced a keen eye for and recall of detail, as one would expect from a builder with 50 years' experience dealing with the physical and fiscal measurements and calculations critical to construction projects and his own business. As an example, he was able to remember minute details of the construction and house, as well as the topography and foliage of Ms MacLeod's lot, despite the passage of five years since the project, and despite his construction of over 1800 other houses in his career. His testimony was clear and concise, and was for the most part corroborated by both documents and other witnesses.

[10] Ms MacLeod's testimony inspired less faith. I do not attribute this to dishonesty. Rather, in contrast to Mr Buckendahl, she is not a details-oriented person, particularly with respect to house construction, of which, as she repeatedly emphasised, she had limited comprehension and experience. This was repeatedly

exhibited at trial, both in her testimony, as well as in her self-representation; these two roles frequently blurred together. Her argument, testimony, and contemporaneous communications revealed her to be both confused and confusing, indecisive and hesitant, and to be the source of many of the misunderstandings and miscommunications leading to this protracted dispute and trial. The trial record alone included 183 emails that she wrote to the plaintiff and the contractors and others about the construction project, with many more communications listed but unused at trial. Many of these emails combine multiple topics or aspects of the construction, with decisions or requests buried in paragraphs full of variegated rumination and perky chattiness. A brief enquiry from a contractor or Ms Potts seeking her simple decision on a discrete item would be met with a convoluted and protracted response. Many emails exhibit her changes of mind on colours, products, and locations. It is not surprising and indeed fully expected that these communications would sow confusion.[3]

[11] At times during her cross examination of Mr Buckendahl, Ms MacLeod showed herself to be unsure of certain facts; when Mr Buckendahl corrected her, she would often accept his version of the facts, admitting that she must have misremembered matters. On multiple occasions, her trial testimony was contradicted by her examination for discovery evidence, and at times by her own contemporaneous emails drafted during the construction project. For example, she at first denied meeting Mr Peterman, the contractor in charge of railings, only to resile when confronted with her contemporaneous email confirming that meeting. Similarly, she alleged that she did not receive the final summary of owed amounts until just before her August 2020 examination for discovery, when she had in fact received it over a year earlier. While these examples of assertions, followed by corrections, perhaps exhibit candour, they do not instil confidence in her testimony or argument on matters of conflicting evidence.

[12] On a related point, on the stand Ms MacLeod frequently veered from testimony to argument, and provided verbose and self-serving reiterations and reconstructions of the facts in a manner unresponsive to the questions posed. While

these traits are common in self-represented litigants, this argument and evasion by Ms MacLeod, an intelligent and well-educated person, was not entirely inadvertent.

[13] As canvassed below, her unfounded, and at times unbelievable, testimony, arguments, and contemporaneous emails also undermined her credibility. She hyperbolically accused the principals of the plaintiff and certain contractors of taking advantage of her gender and age; trying to “blackmail”, “trap”, and “cheat” her; and holding her “hostage.” She accused Mr Buckendahl and Ms Potts of “lying” and “fabricating”.

[14] As set out below, the Court rejects these allegations in their entirety, and finds no objective basis for them. The Court is satisfied that Mr Buckendahl acted in good faith throughout the piece, ranging from amiable and enthusiastic and helpful at the beginning, to reasonably reticent when Ms MacLeod started making accusations, and then refused to pay certain charges under the contract.

[15] The body of the testimony and emails establish a persistent pattern: Ms MacLeod would emit sweetness and light in seeking assistance, often gratuitous, from individuals—including all manner of engineering, construction, and design advice from Mr Buckendahl and her former realtor, and services and assistance from the various trades and suppliers—only to turn on them and accuse them of incompetence and dishonesty if anything went wrong. There is not a scintilla of self-reflection that the common element in these failed interactions — herself — may be largely to blame. Her communications and testimony also revealed a lack of self-awareness with respect to the clarity of her communications, her impressions and effects on other persons, the patience and focus of others when she vacillated or changed her mind, and her verbose ruminations on house options.

[16] The overwhelming impression arising from her testimony, and from the entire body of evidence, is that she desperately wished to build her dream home, with unrealistic views of what could be achieved for her budget, coupled with unrealistic views about the effects of changing specifications on the cost and efficiency of the construction. This combination of desperation and delusion continued through

litigation and trial, where she threw up every possible resistance to the plaintiff's contractual charges, no matter how unfounded, *de minimis,* or consumptive of valuable court time, not only to avoid payment, but also, in her words, to show that she was "not going to kow tow to someone who thinks they can push me around."

[17] Ms Potts, for the plaintiff, was generally a credible and reliable witness. She had a less acute memory of the events of five years earlier, but that is not unreasonable given the number of projects she has managed since then. Her testimony was generally consistent with the evidence set out in contemporaneous emails, spreadsheets, and other documents, as well as the testimony of other witnesses. Her credibility was partly undermined by at times argumentative answers, and her obvious antipathy for Ms MacLeod, whom she called "the worst person we have ever built for."

[18] The various trades people (Ms Sara (electrical)), and Messrs Martin (electrical), Rowney (siding), and Peterman (glass, deck, and railings)) who testified as part of the plaintiff's case were credible and reliable. They gave careful and responsible answers, in a non-argumentative way. They conceded points that were appropriately conceded, and admitted that they had no recall of certain facts. Like Mr Buckendahl, their vocations turn on carefully hearing, understanding, and recording the orders and directions of their many construction clients, but to an even more profound extent given their greater specialisation. All were highly experienced in their trades at the time of the project.

[19] I reach this conclusion with a guarded eye to the fact that Ms MacLeod complained about most of those individuals, and that most of them complained about her, during the project and during the trial. Specifically, each of the trades witnesses testified that Ms MacLeod impeded their work by hovering around them on the job site, being indecisive, changing her mind (often multiple times), second-guessing and complaining about their work and those of other trades, panicking mid-task that work was being done incorrectly, and generally attempting to micromanage the construction process; a process of which, again, she had little knowledge or

experience. Ms Sara described her as “top two in the most difficult customers to work with”. Mr Rowney had encountered “very few clients this difficult.” The more diplomatic Mr Peterman put it as she was “more difficult and more different than most people,” noting her indecisiveness and propensity to complain about other trades behind their backs. Ms MacLeod of course disputes their accounts. The combined effect of the trades witnesses’ testimony, corroborated and reflected in the tone and contents of Ms MacLeod’s own emails, indicate that the allegations of her hovering, hectoring, and melodrama were largely true.

[20] I also consider the trades witnesses’ testimony with the guarded eye that all had long-term relationships with Mr Buckendahl, who is a powerful and influential local figure, both in the construction industry and generally (he served, for example, as mayor of Oliver).

[21] In any case, based on the positive attributes of these trades witnesses, contrasted to Ms MacLeod’s problematic testimony as set out above and below, the Court prefers their testimony, and that of Mr Buckendahl and Ms Potts, where it contradicts that of the defendant.

III. LAW

[22] *Kei-Ron Holdings Ltd. v. Coquihalla Motor Inn Ltd*., (1996) 29 CLR (2d) 9 (BCSC), a decision of Madam Justice Levine while on this Court, sets out the law with respect to claims for extra expenses under a strict fixed-price contract (which the present contract, as set out below, is not).

[23] In *Kei-Ron,* the plaintiff builder claimed for the cost of various extra goods and services. The defendant had accepted some extras and denied others on the basis that the work was included in the contract or, in the alternative, that there was no written change order as required by the contract: para. 19.

[24] Levine J canvasses the governing cases and sets out a four-part framework:

> 41 The cases employ different wording and approach the problem of extras from different angles, but share common underlying principles. In determining liability for the cost of extra work, ***the first question to be***

> ***answered is whether the work performed was, in fact, extra work; that is, it did not fall within the scope of work originally contemplated by the contract. If so, did the owner give instructions, either express or implied, that the work be done or was the work otherwise authorized by the owner? Next, was the owner informed or necessarily aware that the extra work would increase the cost? Finally, did the owner waive the provision requiring changes to be made in writing or acquiesce in ignoring these provisions? If the plaintiff can establish these elements, the defendant is liable to pay a reasonable amount for the extra work.*** These elements must be proved with respect to each extra claimed.
>
> [emphasis added]

[25] Applying that framework, Levine J found that the contractual requirement that changes be made in writing did not bar the plaintiff's claims, as both parties "were aware of the contractual terms relating to changes, and both chose to ignore them": para. 42. Levine J then individually considered the claimed extras, finding that some were indeed compensable extras as they were requested by the defendant knowing there would be additional costs: paras. 45, 48–49, 52, 61, 66, 77, 86, 102–03, 107, 115.

[26] Amongst the cases surveyed in *Kei-Ron* was the oft-cited *Sargent Douglas & Co. Ltd. v. Kozic Holdings Ltd.* (1985), 17 CLR 13 (BCSC). At p. 21, Perry J emphasises that the owner will be liable for work not covered by the original contract where that work is necessary and unforeseen, or where the owner knows that the work is being performed, and thereby consents to the cost of that work by implication:

> The general principles of law applicable to extras and to be applied in the present case, may be briefly stated. Firstly, ***it must clearly appear that the work for which extra compensation is demanded was not embraced by the original contract***. Work cannot be recovered for as an extra which must have been contemplated by both parties when the contract was entered into. Though where, as here, the contract gives the owner right to order extras, ***the contractor's right to payment for any changes or extras so ordered will depend upon his establishing that an express or implied agreement was in fact made covering each order as a result of the owner's instructions under his power to order extras***. An implied contract may be inferred from the conduct of the parties, but in all such cases an essential element is that ***the owner at least knew that the work was going on and acquiesced in the contractor doing it***. In some cases it may be presumed that the owner consented to such extra work ***if so great that it must have been done with his knowledge, or was necessary and not foreseen.*** Finally, the contractor

> must prove conclusively that the work done was not a part of the main contract: see *Deminico v. Earls*, [1945] O.W.N. 375 at 376 (Ont. H.C.).
>
> [emphasis added]

[27] As set out below, the contracts on which these precedents are based were conventional and clear strict fixed-price contracts, in contrast to the present contract, which expressly anticipated extra charges over the allowances, and limited the scope of the work to that specified in the contract: see *Kei-Ron* at para. 28; *Sargent Douglas* at pp.17, 19–20; see also *Shafazand v. Whitestone Management Ltd*., 2014 BCSC 21 (which applies both *Kei-Ron* and *Sargent Douglas*) at paras. 2, 65.

IV. DISCUSSION AND DECISION

[28] Despite the granularity of the evidence and arguments, and a few factual disputes necessitating credibility findings, both sides agree that this dispute largely turns on contractual interpretation.

[29] These reasons will proceed from general to specific issues, starting with the interpretation of the contract, and then resolving the myriad individual issues in dispute, in rough order of the sequence of house construction. Most of the individual issues below address both the claim and the counterclaim. Issues focussing more or solely on the counterclaim, and arguments advanced by Ms MacLeod, come at the end.

A. Was the contract a strict fixed-price contract?

[30] Ms MacLeod testified and argued that the contract was a strict fixed price contract, arguing that but for certain express exceptions, she should pay no more than the stated price of $391,643.

[31] The plaintiff argues that it is not a strict fixed price contract, and that it expressly anticipates departure from the overall contract price, as well as its components. While section XV sets out a “total contract price” of $391,643.28, that section expressly qualifies that price as “excluding options as outlined previously”: that is, expenses over and under the stated anticipated amount for individual items.

Further, that price only covers “the material and/or labour as described in this general contract for this proposed new home”: any necessary or requested additions or extras or goods or services not listed or specified in the contract, expressly or by necessary implication, would be at the owner’s expense.

[32] The Court agrees with the plaintiff’s interpretation of the contract, which is succinct (8 pages of provisions), and written in simple and clear language that anyone, let alone an academic such as Ms MacLeod, could understand.

[33] Section I (“General”) of the contract sets out the key terms:

> 1. This specification has been prepared ***to assist in selecting optional labour, finishes and materials*** for your new Kaleden home.
>
> 2. All work shall be done in a thorough and workmanlike manner, as per blueprints provided, reductions of which are attached hereto as Schedule "A". ***Should there be a discrepancy between the blueprints and the specifications, the specifications will rule.***
>
> 3. ***The Owner may order changes in the work or specifications without voiding the contract but adjustments in price*** for making such ***changes shall be agreed to in writing before such changes are executed***. A handling charge may apply on changes and payment for it must be approved at the time of the request. ***All change orders will be adjusted at the time of the completion payment.***
>
> 4. ***An allowance shall be deemed to represent a reasonable estimate (excluding GST) for a particular item not yet chosen or for an item we are unable to set a price to. The Owner is to pay for costs in excess of the allowance. A credit to the Owner will be issued for the difference between the cost and the allowance if the price is less than allowance.***
>
> 5. ***Ellcar is responsible for completion of all items listed***, except for those that are individually noted.
>
> 6. There may be times ***during the course of construction that it becomes obvious that some of the items and/or specifications contained in this Contract may become impractical (i.e. either because of conditions or excessive costs). If this should happen, these item(s) will be brought to the Owner’s attention so that a suitable resolution can be agreed upon.***
>
> 7. Prior to occupancy the Owner and Ellcar will agree upon a list of deficiencies. These deficiencies are to be corrected by Ellcar prior to occupancy. ***At this time final payment will be due.***[4]
>
> [emphasis added]

[34] The bulk of the remainder of the contract sets out specific items that would be provided with respect to different aspects of the project. For example, section V ("Foundation") lists 10 specific tasks to be done by the plaintiff. Section VI ("Special Items") sets out particulars with respect to windows, roofing, soffits, and the like. Section IX ("Electrical") sets out specific services and items to be done by the plaintiff. The contract ends with two pages of further "Specifications". Some of the specifications listed in the contract and the "Specifications" section reflect the plaintiff's suggested reasonable cost for a baseline good or service; some come from Ms MacLeod's stated preferences.

[35] As indicated in section I(4), above, an "allowance" is provided for certain aspects of the construction. For example, the allowance for all cabinets, tops and vanities is $20,000. Mr Buckendahl based the contract price and allowances on an Excel spreadsheet of prices of goods and services, developed in-house and based upon his many past and ongoing construction projects. He is able to input the units and measurements of a given project, and provide a price and presumptive allowances in the resulting contract.

[36] If in fact less is spent than the stated allowance, through economy, the customer opting for less expensive items than those suggested by the plaintiff, or the customer purchasing the item herself, the customer receives a credit and a discount from the contract price. Conversely, if the customer selects an item or work that is more expensive than the default, such expenses are extra charges to be borne by the customer. Section I(3) expressly contemplates such flexibility, and expressly states that the final payment will reflect the adjustments up and down, based upon the customer's changes.

[37] Mr Buckendahl and Ms MacLeod went over the contract line by line, before signing it at the March 6, 2017 meeting. That meeting lasted two or three hours. Mr Buckendahl read out and explained, and answered questions, on almost every section. Ms MacLeod acknowledged that she did not feel pressure to sign the

contract. She contemplated but decided that she had no need to consult with her lawyer before signing the contract, even though he was readily available for a call.[5]

[38] The Court is satisfied that Mr Buckendahl and Ms MacLeod discussed these principles of the contract, not only at the March 6 meeting, but also during many of their pre-contract discussions between August 2016 and March 2017, and throughout the post-contract construction, and that she understood them.

[39] While arguing that the contract was a strict fixed-price contract, requiring the plaintiff to build all aspects of the house for the stipulated price, Ms MacLeod recognises that the contract expressly anticipates changes to the work provided, and that she made various requests for changes and additions, which she was obliged to pay and did pay. For example, while the original draft and price of the contract anticipated Starline windows, Ms MacLeod opted to select more ecologically-friendly European windows herself. She also selected some of her own lights, cabinets, plumbing fixtures, tiles, and flooring that were higher in price than the contractual allowance.

[40] She also acknowledges that she was responsible for certain charges related to the house construction on which the contract was silent. For example, she acknowledges that she was responsible for procuring and paying for a requisite septic system, not mentioned in the contract.

[41] While Ms MacLeod argued that the contract is a fixed price contract for all aspects of the house, as shown in the blueprints,[6] neither proposition is supported in the wording of the contract. Nor does the contract state or indicate that any unexpected expenses would be the builder's risk and responsibility. Rather, the contract requires the plaintiff to supply the items specified in the contract and its specifications under section I:

> 5. Ellcar is responsible for completion of all items listed, except for those that are individually noted.

[42] Section XV (“Contract Price”) does not state that the total contract price is for all aspects of the new home. Instead, it limits the plaintiff’s obligations to those specified in the contract:

> Ellcar hereby agrees to supply the material and/or labour as described in this general contract for this proposed new home, excluding options as outlined previously.

[43] As set out below, the bulk of the contested charges arise from Ms MacLeod’s specific requests for goods and services different from and more expensive than those specified in the contract, and necessary goods and services that the contract did not list as the plaintiff’s responsibility. Ms MacLeod either expressly authorised this work, or knew that it was being performed, and did not object. On the plain wording of the contract, informed by the authorities above, Ms MacLeod and not the plaintiff is responsible for these expenses.

[44] While most of the issues in dispute may be determined based on the plain wording of the contract itself, Ms MacLeod’s case suffered from several recurring problems. First, she did not call any witnesses. Accordingly, many of her assertions, based on what she understood other people to have done, were inadmissible hearsay. Second, more specifically, she called no witnesses, expert or otherwise, to establish that the steps taken by the plaintiff, or the costs of those goods and services, were unreasonable, in the face of the plaintiff’s witnesses’ confirmation of their necessity and reasonableness (and, apart from that, their reasonableness on their face). Third, many of her assertions were unsupported or contradicted by contemporaneous documents. Fourth, several material aspects of her evidence involving the actions and statements of other persons arose for the first time in her self-directed direct examination: she did not put these propositions to Mr Buckendahl, Ms Potts, and other plaintiff witnesses in cross-examination, for their comment, acceptance, or rebuttal, in breach of the rule in *Browne v. Dunn* (1893), 6 R 67 (UKHL) in a material and unfair manner. For example, Ms MacLeod did not put to Mr Peterman her recollection of her communications with him about her preferred railing colour: facts central to that issue.

B. Was the plaintiff required to build the house as set out in the plans?

[45] Ms MacLeod argues that the plaintiff was obliged to build the house exactly as indicated in the blueprints, for the set price. Ms MacLeod had a non-architect designer put together blueprints, including elevation images of each of the four sides of the house. She complains that certain aspects of the construction did not match the blueprints and images provided.

[46] Those blueprints are conceptual, visual, and generally lack specificity as to the final type and quality of materials. They also are designed absent full information about the complicated geology and topography of the site, as well as the inevitable complications that will arise during construction. In pre-contractual communications, such as a January 26, 2017 email, Ms MacLeod noted that the blueprints were not completely accurate or comprehensive. Many aspects of the blueprints were not transferred to the specifications in the contract, or implemented in the final construction of the house.

[47] Ms MacLeod specifically complains that the blueprints show the house with external stonework cladding, that the plaintiff was obliged to provide stonework within the fixed stated price, and that she is not obliged to pay its $20,450 cost.

[48] This position is undermined by both the wording of the contract, as well as the specific evidence as to its creation.

[49] In pre-contract communications, Ms MacLeod initially indicated that she desired the stonework. Mr Buckendahl warned her that it would be expensive, and provided an initial quotation. He also raised the possibility of a synthetic rock product. As a recurring theme, Ms MacLeod asked him to find ways of reducing the construction cost, and emphasised her limited budget. Mr Buckendahl proposed removing the stonework. The Court is satisfied that he confirmed with Ms MacLeod that stonework would not be included in the contract, but that they could evaluate the state of the budget towards the end of the construction, and potentially add the stonework if she wished. He accordingly removed stonework from his internal Excel

budget spreadsheet, and discussed its removal with Ms Potts, who specifically questioned its absence.

[50] Accordingly, stonework is not listed in the contract, under section VI ("Special Items"), the "Specifications" section, or anywhere, and no allowance is provided. No stonework is amongst the seven items listed under "exterior walls" in the "Specifications" section: "Exterior Walls: → Certainteed[7] or equivalent and wood trims…".

[51] Apart from the deliberate and conspicuous absence of stonework in the contract, the second provision in the contract (section I(2)) states clearly that the specifications will trump the blueprints: "[s]hould there be a discrepancy between the blueprints and the specifications, the specifications will rule." And, as noted in the previous section, the builder is only obliged to build those items specified in the contract.

[52] Finally, Ms MacLeod's actions reflect her understanding that stonework would not be included in the contractual services. She did not express concern about the absence of stonework in the two or three hour line-by-line review of the contract on March 6. In August 2017, Ms MacLeod told Ms Potts that she wished stonework. Ms Potts stated that stonework was not included in the contract. Ms MacLeod said that she was willing to pay the costs, at which point Ms Potts arranged for a contractor to install the stonework. As one of the final items completed, this significant expense falls under the final draw invoice unpaid by Ms MacLeod.

[53] In addition to the credibility parameters set out above, I prefer the evidence of Mr Buckendahl and Ms Potts on this issue, as it is consistent with the absence of stonework in the budget and the contract specifications, as well as Ms MacLeod's consistently expressed desire to save money on the project, which Ms MacLeod emphasised herself in her own testimony and argument. As a particularly expensive and purely aesthetic component of the construction, it would make sense to economise through the early removal of this item from the contract.

C. Can the plaintiff charge for changes not confirmed in written change orders?

[54] As a preliminary matter addressing many of the disputed items, Ms MacLeod makes the somewhat audacious argument that because the plaintiff implemented her requested changes without a formal written request or confirmation, she should not be obliged to pay for them. She cites section I(3) of the contract: "… adjustments in price for making such changes shall be agreed to in writing before such changes are executed."

[55] An owner cannot insist upon strict compliance with a contractual provision requiring written change orders where the owner has waived the provision or acquiesced in ignoring it: *Kei-Ron* at para. 41. Neither party provided or demanded that any of the many changes to the project be affected through a written change order: not a single one. These include the many changes without a written change order requested by Ms MacLeod, who watched contently as the plaintiff performed her requested work. There is no merit to this argument.

D. Hammering and blasting

[56] As set out above, the diggers hit bedrock soon after the start of excavation for the house foundation. In an attempt to avoid the higher cost of blasting, the contractor first attached a hammer mechanism to the arm of the excavator, in effect jack-hammering the rock. When that proved insufficient, blasting was the only option. These additional expenses totalled $13,783.

[57] The blasting generated considerable rock debris: roughly 15 to 20 truckloads, creating a small rubble mountain in front of the house before most of it was hauled away.

[58] The plaintiff accepts that it was responsible for, and does not charge for, steps and processes of ordinary foundation excavation: the initial digging, clearing and removal of soil and gravel, and the placement of backfill around the eventual foundation. It charges only for the extraordinary cost of hammering and blasting.

[59] Ms MacLeod argues that she should not bear these costs. She argues that the plaintiff must bear them, as they are included under "[d]igging foundation, backfill and rough grade with allowances" (section V: "Foundation"). She cites websites and texts providing broad definitions of "construction project" and "excavation", but no authorities providing such a broad definition of "digging", the word actually used in the contract.

[60] Again, her argument fails as a matter of both contractual interpretation and evidence.

[61] I agree with the plaintiff that hammering or blasting through bedrock, due to the idiosyncratic solidity of the lot chosen by Ms MacLeod, does not comprise "digging." One cannot "dig" solid rock: the essential notion of "dig" is the removal of earth or soil, as with a shovel. As defined in *The Canadian Oxford Dictionary* (2nd ed., 2004):

> v. 1 intr. break up and remove or turn over soil, ground, etc., with a tool, one's hands, (of an animal) claws, etc. 2 tr. a break up and displace (the ground etc.) in this way. b (foll. by up) break up the soil of (a piece of land) (dug up the lawn and planted flowers). 3 tr. make (a hole, grave, tunnel, etc.) by digging. 4 tr. (often foll. by up, out) a obtain or remove by digging or by an action similar to digging (dug the puck out of the corner; dug a lipstick out of her purse). b find or discover after searching. 5 tr. & intr. excavate (an archaeological site). 6 tr. dated slang like, appreciate or understand. 7 tr. & intr. (often foll. by in, into) thrust or poke into or down into (dig the manure into the soil; the collar dug into my neck; dug its teeth into my leg). 8 intr. make one's way by digging (dug through the mountainside). n. 1 the act or an instance of digging. 2 a thrust or poke (a dig in the ribs). 3 informal (often foll. by at) a pointed or critical remark. 4 an archaeological excavation. 5 (in pl.) informal lodgings.

[62] Blasting and associated expenses are exceptional expenses not listed in the contract or its specifications as being a service to be provided by the plaintiff. Section I(6) of the contract anticipates the reality that every construction project has unexpected complications, and that the owner may be responsible for those costs:

> There may be times during the course of construction that it becomes obvious that some of the items and/or specifications contained in this Contract may become impractical (i.e. either because of conditions or excessive costs). If this should happen, these item(s) will be brought to the Owner's attention so that a suitable resolution can be agreed upon.

[63] Ms MacLeod must bear these expenses. The plaintiff is not required to provide these services under the contract, and is not reasonably expected to act as an insurance company for all increased costs flowing from unexpected problems with her site.

[64] Ms MacLeod's argument also fails on the evidence. Ms MacLeod repeatedly confirmed to Mr Buckendahl that she would pay for blasting, both before and after the contract. At the pre-contract site inspection, and at the time of the signing of the contract, Mr Buckendahl expressly told her that if they hit bedrock during foundation excavation she would have to pay for blasting, and she agreed. She acknowledged this in her final argument: "… because I gave my word to Mr Buckendahl, just before signing the contract, I agreed to pay the blasting." Just before the blasting, after being told by her lawyer that the contract was a fixed-price contract, she told Mr Buckendahl that she should not, would not, and could not pay for blasting. Mr Buckendahl was understandably perturbed by this backsliding, and threatened to down tools. At that point Ms MacLeod once again agreed to pay for the blasting; in a May 2, 2017 email she asked for a quotation, and queried whether it would be possible to save costs by blasting a smaller footprint. At trial, Ms MacLeod did not dispute these communications.

[65] Instead, she quibbled in final argument that while she may be liable for the blasting, she "never agreed to pay the hammering". The Court accepts that it was reasonable to first attempt hammering before resorting to blasting, and that hammering is a less intrusive and conceptually included method of the potentially necessary rock-smashing process that Mr Buckendahl expressly raised with Ms MacLeod pre-contract, and that she agreed to pay. Had hammering succeeded, it would have been a much cheaper solution than the logistically complicated and expensive process of blasting. The hammering option was fully consistent with and supportive of Ms MacLeod's repeatedly stated concerns about costs, generally, and with respect to the excavation specifically.

E. Machine and excavation work for water, sewer, and electrical connection

[66] The plaintiff claims $8,653 for additional machine and excavation work, including blasting required to connect water, power and sewer lines to the house, and for work on Ms MacLeod's septic field.

[67] The contract provided a $1,000 allowance for the first provisions: "Budget includes $1,000 to hook up water, sewer and bring conduits to house for power, telephone and internet, actual connection fees by owner…" (section IV: "Permits and Connection Fees"). The present claim seeks amounts in excess of the $1,000 allowance: the charges total $9,653.89, and the plaintiff deducts the $1,000 contract budget allowance.

[68] The Court awards these amounts to the plaintiff. As in the blasting and hammering discussion, above, the contract required the plaintiff to perform ordinary digging and excavation to connect the various lines. As discussed, the shallow bedrock and other complications made the connection work more expensive and complicated than that expressly contemplated in the contract.

[69] For example, in order to lay the water line, the plaintiff had to blast a trench three feet deep running from the house to the street.

[70] The electrical hookup provided an additional complication apart from the bedrock. Soon after the start of construction, Fortis BC advised that it would not allow Ms MacLeod to connect to the existing transformer near her lot, but that power would have to be directed from a transformer further away, on the other side of the street.

[71] Fortis's dictates about the electrical connection are out of the control of the plaintiff, and were unanticipated and unknown at the time the contract was entered. Section IX ("Electrical") requires the plaintiff to provide "[g]eneral services underground from street": a connection to the house from the street immediately in front. It does not anticipate the lengthened excavation and wiring to connect the

house to a transformer up and across the road, or the additional blasting necessary to run the lines underground: those are extra costs to be borne by Ms MacLeod.

[72] The contract does not list the septic tank, expressly or by implication, as a service the plaintiff was required to provide. Ms MacLeod acknowledged that she was wholly responsible for the septic field costs. The plaintiff nonetheless contributed significantly to the septic project, and completed its necessary connection and installation, and advanced payments to subcontractors for those services. The plaintiff is entitled to charge for those amounts, which, as with all of its claims, are supported through invoices remitted by each of the contractors involved, and confirmation of payment.

[73] Ms MacLeod argues that the bulk of this excavation work was performed by Mr Ronning, rather than the plaintiff. As with much of her testimony, this was hearsay, as Mr Ronning was not called as a witness and Ms MacLeod exhibited incomplete or imprecise first-hand knowledge of the work that he putatively performed.

[74] She also made the odd argument that the more complicated Fortis hookup requirements somehow decreased these construction costs. She was not able to support that argument with any convincing documentary or other evidence. This position was also contradicted by her contemporaneous emails in which she expressed concern about the additional costs imposed by the Fortis requirements, vowing that “[a]s for Fortis, I am not intending to give in so easily” (August 18, 2017). The electrician Mr Martin also affirmatively rejected this thesis.

[75] Finally, Ms MacLeod’s promises to Mr Buckendahl that she would pay for blasting, made pre-contract and during excavation, conceptually extended to this work, necessitated, as with the foundation, by the bedrock.

F. Difference between amounts claimed in March 2018 invoice and at trial

[76] On a related note, Ms MacLeod takes exception to the fact that certain items claimed by the plaintiff at trial were not included in the original March 2018 invoice, whilst other items were higher in the later version than in the March 2018 version.[8] The predominant difference is $17,549 in higher costs for trenching, excavation, machine work, landscaping, tree clearing, and blasting-related extras between the two tallies; these largely relate to the connections to the electrical conduit and the septic tank, discussed above.

[77] Of course, this is not the first time that litigation prompts a party to review the parties' transactional history and supporting documents, and to claim the full amount asserted under an agreement, or previously written off in the spirit of goodwill in the pre-litigation honeymoon days of a business venture. I am satisfied, based on the testimony of Mr Buckendahl and Ms Potts, that that is what has presently occurred, partly as a full assertion of the plaintiff's rights, and partly as a review of all of the documentation and accounting calculations necessitated by litigation. These amounts are allowed. The Court is specifically satisfied that the Rital Enterprises, Twin Lakes Contracting, Incline Contracting, and Randy Gill expenses are properly claimed as extra excavation costs beyond that which the plaintiff was required to provide under the contract, and for which Ms MacLeod is responsible.

G. Electromagnetic insulation charges

[78] As with many items, it was not entirely clear whether Ms MacLeod was in the end contesting her responsibility for paying for the installation of 5/16 Polar Wrap insulation, a metal foil membrane, in the walls of the entire house, to avoid electromagnetic interference with the Dominion Radio Astrophysical Observatory ("**DORA**") upslope and to the south of St Andrew's. In her final argument, she raises the issue under the heading of "breaking of verbal agreements," and under her "Relief sought" seeks unquantified damages for breach of contract by the plaintiff. In the interests of certainty, the Court confirms that Ms MacLeod is obliged to pay this unusual expense, the necessity of which requires some explanation.

[79] In August 2017, an officious neighbour complained that the wiring being installed in Ms MacLeod's house was not sheathed in metal, as she asserted was required. The presence of DORA originally necessitated restrictions on nearby residential wiring, as well as on other electrical-emitting objects, including garage door openers, microwaves, and computers. Since the 1990s, those restrictions have been more honoured in the breach, as current DORA technology no longer requires such restrictions; needless to say, many residents of St Andrew's possess computers, microwaves, and garage door openers. Those electromagnetic restrictions, however, persist in the St Andrew's building scheme, as well as the Regional District bylaws.

[80] Ms MacLeod's information and instructions to the plaintiff vacillated on this issue. At first, in her emails dated August 31 (two emails) and September 9, 2017 to Mr Buckendahl, Ms MacLeod passed on the advice of another neighbour that the officious neighbour was "working with the wrong information", and that the sheathed cable requirement was "obsolete." On September 12, however, based on a communication with the Regional District regarding the building scheme and bylaws, Ms MacLeod advised the plaintiff and its electrician that it appeared that the wiring in fact had to be sheathed.

[81] Rather than removing and reinstalling all of the electrical wiring, and re-sheathing individual wires in metal casing, at considerable cost and delay, Mr Buckendahl obtained approval from the Regional District, the strata council, and DORA to sheath the entire house in a metal foil membrane. In her email dated September 16, Ms MacLeod confirmed her agreement to the proposal, and indicated that she would bear the cost:

> … I just wanted you to know that my lawyer agrees with you, and that he thinks the chances of my house creating any interference would be minimal.
>
> …
>
> I can see your point, that the foil insulation might appease some people. It also looks like it is a stipulation in the letter from the Observatory. We could say that there is some professional opinion that this will work? How much extra money with this be?

[82] Ms MacLeod argues that before the signing of the contract, she gave Mr Buckendahl a copy of the St Andrew's building scheme, among the provisions of which schedule "A" states that cables must be sheathed in metal. She argues that while "[t]he Strata Building Plan, including schedule A about sheathed wiring, was not in the contract," it "…was implicit in the contract because Mr Buckendahl could not obtain a valid work permit to build the house without agreeing to abide by the Strata Building Plan."

[83] She does not claim that she expressly raised the issue of the metal sheathing with Mr Buckendahl, and he denied any such discussions. I accept that Ms MacLeod did not bring this highly unusual aspect of her lot to his attention before the contract was signed, and that the plaintiff had no affirmative duty to anticipate or investigate that issue in the circumstances.

[84] This highly idiosyncratic requirement of the lot was an objectively unexpected issue that arose during the course of construction. Sheathing cables is not a general construction requirement in the Okanagan area. Even in St Andrew's, near DORA, it is not required or followed as a practical matter. In uncontradicted testimony, Messrs Martin and Buckendahl, both highly experienced in local construction, confirmed that it was not a common issue that builders or electricians would or should be aware of. Ms MacLeod's conflicting instructions to the plaintiff reflect this reality.

[85] On the overarching principle that the plaintiff is only responsible for the goods and services specified in the contract, metal sheathing is not listed among the specifications of the contract, under section IX ("Electrical") or otherwise as a builder obligation.

[86] Ms MacLeod argued, unsupported by contemporaneous evidence, that she would have preferred to have the sheathed cable installed from the start. This implausible argument defied logic, and undermined her credibility. It is uncontested that the metal foil polar wrap solution was considerably cheaper ($2,100 versus $5,000 to $10,000 for sheathed cable), simpler, and less time-consuming than strict insistence on the metal sheathing of individual wires.

H. Window installation

[87] The plaintiff invoiced an additional $6,200 for extra installation costs of the more ecologically-friendly European windows selected by Ms MacLeod. The contract expressly noted that she would purchase and supply the windows herself. As she did purchase them herself, most of the $9,800 contract allowance for windows was credited to Ms MacLeod.

[88] The North American Starline windows that were originally stipulated in the contract, on which the $9,800 allowance was based, are simple to install into their allotted frames, and open only outwards. Ms MacLeod's European windows, which swing 180 degrees, both inwards and outwards, necessitated considerable adaptive work for the interior and exterior sill, frame, and siding. Although Ms MacLeod conveyed to Mr Buckendahl the supplier's promise that a technician would install them, that technician proved to be no help at all, and the plaintiff's contractors had to install the windows. She alleges, through double hearsay, that the technician did in fact provide installation services.

[89] In contrast, in admissible and accepted evidence, the plaintiff's windows contractor Mr Rowney confirmed that he had to perform considerable extra work to accommodate, install, and insulate those windows. Again, Ms MacLeod provided no evidence to the effect that the installation work performed by the plaintiff was unnecessary or unreasonable. These expenses are allowed.

I. Eckert Electric

[90] The plaintiff seeks, and the Court grants, $4,914.26 in additional costs charged by Eckert Electric, the subcontractor for internal wiring.

[91] Section IX ("Electrical") sets out the base budget included in the contract price, as well as the specific work for which the plaintiff is responsible:

> Supply and install, as per plan, 150 amp service, circuit panel, white (or almond – owner's choice) plates and plugs, door chime from main entrance, 30/50 amp garage plug 80CFM bath fans, wire for baseboard in garage, *2 outside ground fault circuits, 4 television outlets, 4 telephone outlets*, microwave plug and all wiring as per code. Allowance is 21,000

> Lighting may be selected by the Owner using an allowance of $2000
> *"Lighting" includes all pot lights selected by the Owner.*
>
> The Contract includes labour to install all light fixtures, provided fixtures are on-site if special order. Wiring will be done as per Provincial Code.
>
> [emphasis and punctuation as in original]

[92] The Court accepts the testimony of Eckert's Ms Sara that she walked through the framed house with Ms MacLeod, taking careful notes of where she wished to place plugs, lights, and other electrical features, that Ms MacLeod made many special requests beyond the contractual specifications, and that she also requested about a dozen changes to and movements of electrical fixtures after they had been installed. It is appropriate that Ms MacLeod pay these additional costs.

[93] A major point of contention—the location of a light for her piano—illustrates Ms MacLeod's changes of mind, complicated and confusing instructions, and second-guessing of the tradespeople. After instructing Ms Sara during the walk-through on the placement of electrical and lighting fixtures, based on which Ms Sara made, as per her practice, careful notes of those instructions, Ms MacLeod changed her mind about the location of a light to better illuminate her piano which, of course, was not present in the house under construction. She emailed Ms Sara on August 13, 2017:

> ***After you left I took some measurements of the space where I want my piano, and might actually put it against the wall between the kitchen and living room.*** So, ***putting a switch potentially behind the piano doesn't work!*** We could just put it with the others outside the living room in the hall. I have also decided that with two fixtures in the living room (both track lights), I really don't need any more overhead light. I will buy one or two floor lamps for indirect light. So please don't make any rough in for the two lights on either side of the living room on the left side.
>
> ***As we discussed, it would be really helpful if you could send me your notes so that I can be reminded of what we actually decided.*** I hope it is not too much trouble.
>
> I met the heating guy from Coppertec just as I was leaving on Friday, and we went through the house for vent placements, etc. He showed me the plan, and there is no way around putting a drywall construction around one of the heating ducts that has to run through my bedroom (above my bed) before going upstairs. Sorry if I am not using technical language! If I am stuck with that, why not put two pot lights above the bed in this space? That way, I will have a light to switch on, but all the other lights will be indirect using plugs in

> the wall, (except for the closet light). Do you think that would work? And not more than 2 - I know you love to put lots of lights in a room, ha.
>
> [emphasis added]

[94] To which Ms Sara laconically replied on August 14, 2017:

> ***I can move the switch for the piano light into the hall***, no problem.
> I don't see an issue with bedroom pots and will limit it to 2.
> I have attached my notes from the walk through.
>
> [emphasis added]

[95] Note that in her email Ms MacLeod focuses on the position of a light switch, rather than the light itself, then provides a real-time rumination of what she *might* decide, and buries several shifting ideas in verbiage. Ms MacLeod is silent when Ms Sara, understandably, also refers to the light switch, rather than the light itself, in her reply email. In her argument, however, Ms MacLeod accepts no blame for the confusion, but denigrates Ms Sara, who cannot be expected to contemplate the idiosyncratic nuances of what Ms MacLeod might in future prefer:

> Ms. Sara, however, kept the light fixture to shine on the east wall. She didn’t think through the fact that this left the light shining in my eyes and not on the music.

[96] Again, a typical client, on which Mr Buckendahl based his contract allowance, would contemplate the position of light and electrical fixtures before the walk-through and give the contractor clear instructions at that time. Any additional expenses due to more lavish or changed electrical installations, are the client’s responsibility.

[97] Ms MacLeod argued but did not prove that some of the overage charges reflect deficiencies rather than her changes and additions. In any case, Mr Martin, while not conceding that several items were deficiencies, nonetheless agreed to change those items free of charge. On a balance of probabilities, Ms MacLeod did not connect these items to any of the changes on which the overage charges were based.

J. Humidifier and kitchen hood fan

[98] The plaintiff seeks $1,602 in additional costs charged for the installation of a humidifier ($750) and kitchen hood fan ($852). These are both special features that Ms MacLeod was fully entitled to request, but also fully responsible for paying.

[99] Section X (“Heating System”) expressly makes the plaintiff responsible for “[l]abour and material to vent kitchen hood”. That section expressly states that “***[i]f a humidifier is required for laminate or hardwood flooring, it will be an extra, but the owner will only be charged Ellcar’s cost***” (emphasis in original).

[100] The plaintiff was obliged to provide “[l]abour and material to vent kitchen hood” in a serviceable and basic manner, based on an ordinary house. The installation, at Ms MacLeod’s request, of a re-circulating hood fan that pushed the air through a charcoal filter was over and above this reasonable baseline for venting. The fan selected and provided by Ms MacLeod also failed to perform as expected, and required further work.

K. Ecologic paint

[101] The plaintiff seeks $500 for the additional cost of more ecologically-sensitive Ecologic paint requested by Ms MacLeod.

[102] Ms MacLeod notes that in contrast to other contract items setting out an allowance, the contract simply sets out the builder’s obligation to provide painting goods and services, with the only specification being “[p]aint colours limited to three with one primer and two coats”.

[103] It cannot be that contractual silence as to the kind or calibre of paint requires the builder to pay for and apply whichever paint the client dictates. In response to a question from the Court, Ms MacLeod properly acknowledged that she could not insist upon gold leaf paint at the builder’s cost under the contract wording. Rather, in the face of silence in contractual specifications, the builder is required to apply a paint of reasonable and typical calibre, price, and kind, and has the right to choose that product. If the client requests a more expensive type of paint, she will be

responsible for that additional cost. This is consistent with the various contractual specification items for which a specific base allowance is provided, and consistent with the overall discussions of the contract between Mr Buckendahl and Ms MacLeod.

L. Fortis BC power charges

[104] The plaintiff charged an overage of $3,343 for Fortis power charges to the site during construction. As with the other overage claims, these claims are backed up by original invoices, confirming that the plaintiff paid these amounts.

[105] Ms MacLeod does not seriously contest her obligation to pay those amounts, although she argues that they are excessive. Evidence confirmed that necessary steps during the construction, such as drying and heating during the winter phase of the construction, can result in high Fortis power charges. Ms MacLeod also alleges, without convincing proof, that the plaintiff may have received a credit or refund, and that there may have been metering problems.

[106] Section IV (“Permits and Connection Fees”) clearly makes Ms MacLeod responsible for this amount: “All power charges during construction paid by owner”. This amount is allowed.

M. Railing re-order

[107] Ms MacLeod objects to a $1,700 charge for re-ordered black railings for her balcony. She insists that she told both Ms Potts and Mr Peterman (the railing contractor) that she wanted black railings, and that he initially ordered and supplied tan-coloured railings in error.

[108] I accept Mr Peterman’s evidence that at least at one point, Ms MacLeod indicated that she wished tan-coloured railings. It is critical to Mr Peterman’s vocation, with multiple jobs on the go at any given time, to write down customer requests with care. Ms MacLeod acknowledges that all other components of construction that Mr Peterman provided accurately matched her stated requests, in both colour and size. She predominantly selected tan and earth tones for the house:

the siding, gutters, trim, chimney, soffits, chimney, and drains, for example, were all shades of tan.

[109] At best, Ms MacLeod may have referred to black railings, but in a confusing and unsettled manner, compounded by the fact that the house had different railings, with different specifications, in different areas. The following email exchange, not with Mr Peterman, but with Ms Potts, gives a flavour of the confusing and unsettled essence of Ms MacLeod's written communications; her oral communications were likely more wracked with confusion, compounding the overall confusion:

> On Nov 14, 2017, at 7:16 PM…
>
> Hi Carol
>
> I forgot to ask you ***if you have a preference for railing and gutter colors? Our guy is ready to place the order but doesn't have a color yet. Are you thinking a tan color, or white to match the windows? Black perhaps?***
>
> Penny
>
> --------
>
> Re: railings and gutter colors
>
> Carol Macleod….
>
> Tue, Nov 14, 2017 at 10:15 PM
>
> To: Penny Pendergraft….
>
> Hi Penny,
>
> ***Something that is the same colour as the soffits and the Monterey taupe siding***. How many drain pipes are there going to be?
>
> Not all the flashing is on. You can see bare wood where the trim boards for the roof are, and it looks like it is needed elsewhere. That should be close to the colour of the trim if possible - Autumn tan.
>
> I saw Gordon about the garage door yesterday. I took the samples with me today, but nothing is going to work without being painted. It should be Timberbark. Gordon used to run a body shop, and he explained to me how important the paint prep. is. Darren says he paints garage doors all the time. We do need the painters to finish painting the garage before the door comes. They have done a beautiful job of priming the ceilings. It looks fantastic!
>
> ***Are you getting the guard rails from Oliver or Windsor plywood? In any case, the deck rails are shown clearly in the blueprints. Clear glass, no top rail.*** The rail for the steps should be ***related to the deck rails.*** I know you told me that your dad didn't plan to make the front stair rail fancy, but ***I don't like the busy picket aluminum rail. I will pay for glass on the stairs, but will need to discuss it with the person you are getting it from.***

> It would still entail a round hand rail, posts, etc. in black. Let me know whom I should speak with.
>
> The handrail for the inside stairs needs to be round, unpainted but treated wood. It will be extended 6 feet into the hallway so that I will have place to do my barre every morning, but it will have to go up a jig in the hallway because a dance barre is higher than a railing. Please let me know when they put that up so that I can get them to do it the right height. :)
>
> Get to bed, Penny. You've been working all day!
>
> Cheers,
>
> carol
>
> Sent from my iPad
>
> [emphasis added]

[110] Despite the tenor of this conversation, and the relationship between the parties, indicating an expectation that Ms Potts would convey the order to Mr Peterman, Ms MacLeod then went herself to Mr Peterman's office, as she later reported to Ms Potts:

> Re: Railings
>
> Carol MacLeod…
>
> Dec 12, 2017, 8:55 PM
>
> …
>
> Hi Penny,
>
> ***Yes, Clint and I talked about that, then I talked to you about the railings last week or so.***
>
> I know you have a gadzillion things on your mind, so don't worry, you and I settled on the solution. ***After Clint and I met over two weeks ago, Clint told me that it was $165 PER LINEAR FOOT to do only glass sides on the deck. I couldn't believe how expensive that was. So, I thought it over, and decided to go for the conventional railing. When you and I talked about it, I might have been still considering glass only on the back deck, paying you the difference in price, but pretty well settled on the railing and glass after I went to Oliver that day to pick out the tan coloured round railing.***
>
> So, what you have said below is right. ***Glass and rail for the decks, and I will pay for the glass on the landing in front of the house (with black railing), the difference between pickets only, and my desire to have glass on the landing.*** Pickets on the steps are just fine. I just want glass with round rail on the landing so that you see the rock formation when you step outside, and so that you notice the door from the street.
>
> There you have it - more information than you need, but something in writing for clarity. Let me know if you need to talk, etc.

> Thanks
> carol
>
> [emphasis added]

[111] These confusing communications, as well as Ms MacLeod's frequent changes of mind on this and other matters, were compounded by the fact that Ms MacLeod at times dealt directly with Mr Peterman, as she did with other contractors, and at times with Mr Buckendahl and Ms Potts. It is wholly understandable that confusion could arise, which should be attributed to Ms MacLeod both in blame and cost allocation.

[112] On a related note, although she did not appear to pursue it in her final argument, she complained that the balcony did not have "topless" (that is, without a top railing) glass panels, again complaining that the blueprints were not fully realised in the final construction. Those blueprints do not provide sufficient detail to indicate that the glass panels were indeed rail-free. In any case, once again, by section I(2), the specifications in the contract trump the blueprints.

N. Deficiencies and fundamental breach

[113] Ms MacLeod claims $25,807.81 for amounts she paid in order to fix alleged deficiencies, retaining her own contractors after she balked at the final invoice and the plaintiff downed tools.

[114] The plaintiff argues that Ms MacLeod's refusal to pay the extra amounts with the third draw constituted a fundamental breach and an anticipatory breach of the contract, such that the plaintiff was not obliged to provide further work after March 2018, including correcting any deficiencies.

[115] The Court rejects the plaintiff's argument in this regard. Ms MacLeod's actions with respect to the third draw did not rise to the high level required to find fundamental breach.

[116] In *Limen Forming West Ltd. v. Stuart Olson Dominion Construction Ltd*., 2017 BCSC 1485, Butler J (then of this Court) set out the principles governing repudiation and anticipatory breach:

> [98] In *Guarantee Co. of North America v. Gordon Capital Corp*., [1999] 3 S.C.R. 423, at para 40, the court summarized the doctrine of repudiation in contrast to rescission:
>
> > ***Repudiation, by contrast, occurs "by words or conduct evincing an intention not to be bound by the contract***. It was held by the Privy Council in *Clausen v. Canada Timber & Lands, Ltd*. [1923 4 D.L.R. 751], that such an intention may be evinced by a refusal to perform, even though the party refusing mistakenly thinks that he is exercising a contractual right" (S. M. Waddams, *The Law of Contracts* (4th ed. 1999), at para. 620). Contrary to rescission, which allows the rescinding party to treat the contract as if it were void *ab initio*, ***the effect of a repudiation depends on the election made by the non-repudiating party. If that party treats the contract as still being in full force and effect, the contract "remains in being for the future on both sides.*** Each (party) has a right to sue for damages for *past or future breaches*" (emphasis in original): Cheshire, Fifoot and Furmston's *Law of Contract* (12th ed. 1991), by M. P. Furmston, at p. 541. ***If, however, the non-repudiating party accepts the repudiation, the contract is terminated, and the parties are discharged from future obligations. Rights and obligations that have already matured are not extinguished.*** Furmston, *supra*, at pp. 543-44.
>
> [99] In *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, at paras 144 - 149, Cromwell J., in concurring reasons, summarized the law of repudiation and anticipatory breach in the context of a wrongful dismissal claim. He noted that repudiation refers to a breach of contract by one party that gives rise to the right of the other party to terminate the contract and pursue available remedies. ***The contract must be breached in "some very important respect".*** Such a breach will be of "***a contractual condition or of some other sufficiently important term of the contract so that there is a substantial failure of performance***: S. M. Waddams, *The Law of Contracts* (6th ed. 2010), at para 590; McCamus [*The Law of Contracts* (2nd ed. 2012)], at pp. 676-77." ***Justice Cromwell acknowledged that such breaches are sometimes referred to as "fundamental breaches" but he preferred to refer to such breaches as "breaches of 'sufficiently important terms' or 'repudiatory' breaches".***
>
> [100] At para 149, Cromwell J. acknowledges that repudiatory breaches can be anticipatory and explains when such a breach can occur:
>
> > ***An anticipatory breach "occurs when one party manifests, through words or conduct, an intention not to perform or not to be bound by provisions of the agreement that require performance in the future":*** McCamus, at p. 689; see also A. Swan, with the assistance of J. Adamski, *Canadian Contract Law* (2nd ed.

> 2009), at s. 7.89. When the anticipated future non-observance relates to important terms of the contract or shows an intention not to be bound in the future, the anticipatory breach gives rise to anticipatory repudiation. The focus in such cases is on what the party's words and/or conduct say about future performance of the contract. ***For example, there will be an anticipatory repudiation if the words and conduct evince an intention to breach a term of the contract which, if actually breached, would constitute repudiation of the contract.***

[101] As set out in *Business Depot Ltd. v. Lehndorff Management Ltd.* (1996), 24 B.C.L.R. (3d) 322 (C.A.) at para 67, repudiation is assessed objectively. The court must ask:

> … in accordance with the fundamental principle of the law of contract…, ***whether viewed objectively or, to put it another way, by applying the standard of the reasonable man, the conduct evinces the requisite intention***.

[102] As noted in *Burntwood Holdings Ltd. v. Salt* (1988), 93 A.R. 161 (Q.B.) at para 37:

> ***Repudiation of a contract is "not to be lightly found or inferred". Mere refusal to perform or a breach of some terms of an agreement does not amount to repudiation. To prove repudiation, it must be clear that the defaulting party does not intend to perform its side of the bargain.***
>
> [emphasis added]

[117] In *Limen Forming*, the Court rejected each party's allegation that the other had repudiated the construction contract: by the defendant owner not paying amounts due under the contract, on one hand, and by the plaintiff builder refusing to do work, on the other. With respect to the former, the plaintiff never took the position that non-payment constituted a repudiation of the contract, or accepted the breach. With respect to the latter, the plaintiff had not abandoned the work, but rather simply failed to bring workers to the site on a single day; it demonstrated a continuing ability and willingness to perform the contract: para. 114. The terms of the contract thus continued to apply to the relationship between the parties: para. 70.

[118] Ms MacLeod's stated position on payment of the third draw fell short of the high level required for a finding of fundamental or anticipatory breach, and did not clearly evince an intention not to make further payments. At all times, she indicated that she would pay some amounts on the third draw: specifically, $41,240 (representing the contractual third draw amount, less the payments that she made

directly for certain goods and services for items she selected, plus blasting expenses). She never indicated that she would pay nothing for the third draw; rather, she sought credit in the third draw payment for items that she had paid, and also sought to extract from the plaintiff confirmations and concessions on some of the disputed items. The plaintiff, as well, was demanding confirmation and concessions from Ms MacLeod that she would pay all extra costs. Both sides were engaged in hardball brinkmanship, which led to the plaintiff downing tools, the resumption of construction through the negotiation of lawyers, a second downing of tools, and this eventual litigation.

[119] As Ms MacLeod wrote to Ms Potts on January 4, 2018:

> I just got your e-mail now, and want to reiterate that ***I have no problem with paying the third draw immediately***. ***I didn't realize that the issue was whether I could put the budget items on the third draw, when it is obvious to me that you wanted me to put them on the fourth draw.*** We need to talk to each other more, that's for sure.
>
> As per phone conversation, I need my subcontractors back, and gather from your email that you will do so when you receive payment. Please let me know how to get the money to you as soon as possible.
>
> ***In all fairness to myself, Hart told me a few weeks ago that he wouldn't accept any payment for the third draw until I had agreed to the list of extra charges. Some of these have been discussed, and are expected. However, some are unexpected, and the remains some discussion with you at our legal representatives about their validity re-the contract.***
>
> I am glad you wrote me the e-mail today. ***It is important to distinguish between draws for the original contract, something that I agree with unequivocally, and extra charges as shown in your dossier.*** We really are on the same page with the draws.
>
> [emphasis added]

[120] Both sides' positions stretched their rights under the contract. The contract anticipates that extra charges and adjustments (whether credits to the owner where she purchased her own items, or extra costs above the contract allowances or due to unexpected work) will be adjusted not on the third draw, but on the fourth and final draw. Section I(3) states:

> 3. The Owner may order changes in the work or specifications without voiding the contract but adjustments in price for making such changes shall be agreed to in writing before such changes are executed. A handling charge

> may apply on changes and payment for it must be approved at the time of the request. ***All change orders will be adjusted at the time of the completion payment.***
>
> [emphasis added]

[121] The final sentence of section XVI (“Payment Schedule”) confirms that:

> It is hereby agreed that any changes to the above contract will be agreed to on a change order by both parties and that ***any and all extras will be paid for with the final draw after the house is completed.***
>
> [emphasis added]

[122] Given the ongoing difficulties with Ms MacLeod, and her stated protests at some of the charges, it was not unreasonable for the plaintiff to demand reassurances before proceeding. At the same time, Ms MacLeod had an arguable position that she was not obliged to pay the full amount demanded by the plaintiff on the third draw. Her stated position and actions fell far short of a repudiation of the contract.

[123] In any case, the plaintiff did not convey its acceptance of Ms MacLeod’s putative fundamental breach with the clarity required: *Limen Forming* at para. 98. Instead, after the brinkmanship and the negotiations, the plaintiff returned to the work site.

[124] Further, and in any case, even where an owner repudiates a contract, the owner may still counterclaim for defective work, as that right crystallised before the termination of the agreement: *Bridgewater Tile Ltd. v. Copa Development Corporation*, 2022 BCSC 310 at para. 224; *Jozsa v. Charlwood-Sebazco*, 2016 BCSC 78 at para. 73, citing Stephen Furst et al., *Keating on Construction Contracts,* 8th ed. (London, U.K.: Sweet & Maxwell, 2006) at 293. The contractor is entitled to remedy any defects in the work himself, and if he is disallowed from doing so, then the owner’s right of set off may be curtailed: *Wiebe v. Braun*, 2011 MBQB 157 at para. 32; *Obad v. Ontario Housing Corp.*, [1981] OJ No. 282 at paras. 47-48 (HCJ).

[125] That said, Ms MacLeod's claim for compensation for deficiencies suffers from several problems.

[126] First, she never provided the plaintiff with a list of deficiencies prior to final payment, as required under section I of the contract:

> 7. Prior to occupancy the Owner and Ellcar will agree upon a list of deficiencies. These deficiencies are to be corrected by Ellcar prior to occupancy. ***At this time final payment will be due.***

[127] Second, on a related note, she never consulted with the plaintiff as to whether it would perform the work (admittedly a foregone conclusion) or had more practical or cost-effective solutions than those provided by the contractors that she retained. As set out below, Mr Buckendahl disputes the necessity and cost of some of Ms MacLeod's contracted services; as Ms MacLeod called no opinion evidence to the contrary, Mr Buckendahl's experienced opinion about the cost and necessity of some of these items will result in their disallowance or reduction.

[128] Third, some of the alleged deficiencies are not in fact deficiencies but new work, or work that the contract and its specifications did not oblige the plaintiff to perform: costs for which Ms MacLeod would be responsible. Examples are various electrical fixtures later supplied by Eckert Electric ($614): a bathroom towel warmer, a foyer fixture, and additional switches and fixtures. These items were either not in the contract, or would appropriately have been requested by Ms MacLeod at the time of the electrician walk-through. For the same reason, the installation of "clear bevel mirrors" ($700) cannot be considered a compensable deficiency. The parging[9] ($840) was fresh parging not specified in the contract, rather than remediation of deficient parging. Nor has Ms MacLeod established that the pressure-relieving valve ($523); the water softener and other plumbing work ($255 and $148); the yard excavation work ($1,002); or other alleged deficiencies were included specifications under the contract: they are not present on the face of the contract. The yard excavation work dates from September 2018, the pressure-relieving valve dates from October 2018, and two of the three plumbing work invoices date from August

and December 2020, all well after the completion of the house: more likely new items or maintenance.

[129] Fourth, for other matters, it is not clear based on the evidence that the items were deficient, or that the costs of their remediation were reasonable. Again, Ms MacLeod summoned no expert witnesses, in the broadest sense: any tradespeople to confirm the necessity and reasonableness of fixing the alleged deficiencies at the invoiced prices. Further, the photographs provided do not make clear how or whether or to what extent the items were deficient.

[130] On all but the following noted items, Ms MacLeod has failed in her persuasive burden to establish her entitlement to compensation for deficiencies, and that the plaintiff was obliged under the contract to provide the work performed by her contractors.

[131] The plaintiff concedes that even on the limited evidence, some of the alleged deficiencies are “classic deficiencies” requiring correction. The Court allows a set-off for plumbing corrections to a bath spout inadequately affixed to a tub, a cracked toilet ring, and other minor items ($490). Similarly, the photographs show some paint chipping and imperfections that are typical deficiencies, and reasonably compensable. Mr Buckendahl disputes the reasonableness of the invoice ($5,250 work; $140 supplies) and notes that the May 2019 date of the painting invoice indicates that at least some of the work was likely unconnected to the construction. The Court agrees. The Court allows $2,000 for painting and patching.

[132] The gutter and downpipe work ($551) is allowed as work specified under the contract, and as a deficiency: without it, water dripped off the deck into the window frame below.

[133] Under section VI (“Special Items”), the plaintiff was obliged to provide a driveway, for which Ms MacLeod seeks compensation of $6,512 plus $8,388 based on the invoices of the companies that eventually provided that service.

[134] The plaintiff acknowledges it was responsible for a limited upper driveway: a simple concrete pad outside the garage. The Court agrees that this was the driveway contemplated by the parties and the contract. It was unwise to pave the longer, lower, sloped portion of the driveway, as a car could slide on winter ice: Mr Buckendahl recommended, and Ms MacLeod agreed, to a gravel surface, which would also save costs. Ms MacLeod's lot plan accordingly shows this arrangement. The amount sought by Ms MacLeod is excessive, being a longer and more elaborate driveway, curbed and paved, than that the plaintiff was required to provide under the contract. The Court also accepts Mr Buckendahl's evidence that the amount charged was excessive (in his words, "a rip off") for the services required under the contract. The Court permits $4,000 for this amount.

[135] The Court accordingly allows Ms MacLeod $7,041 for the amounts she spent to correct deficiencies, as a set off.

O. Construction delay

[136] Ms MacLeod complains that the project was not completed in time, and counterclaims for an unspecified amount representing the cost of Airbnb rental accommodations, storage, moving, and other expenses occasioned by her inability to move into the house when she wished.

[137] In support, she relies primarily on two schedules generated by the plaintiff. These set out projected timelines for the various steps in the construction, and provide provisional completion dates at the end of October and (in the later-generated schedule), the end of November. While such schedules are prepared solely for the in-house use of the plaintiff in project planning and coordination, Ms Potts acknowledges that she gave copies of these documents to Ms MacLeod in August and September 2017, as a means of explaining the remaining steps in construction. Ms MacLeod also points to various emails where Mr Buckendahl spoke of possible completion by Christmas 2017.

[138] The simple answer to this claim is that the contract contains no completion date, let alone a "time is of the essence" clause. Mr Buckendahl and Ms Potts

explained that the plaintiff never provides completion dates in contracts, given the myriad variables outside of its control, particularly the availability of trades in necessary sequence, and weather.

[139] Nor were the schedules presented as providing a contractually-binding completion date, either expressly or orally. Ms MacLeod acknowledged that Ms Potts expressly indicated that the schedules were not binding, but were only provided as an overview of the remaining steps.

[140] In her August 20, 2017 email, Ms MacLeod concedes this point:

> It is also the case that nothing goes smoothly in construction, and you shouldn't have to worry about keeping to your promises re timing. But it will be really helpful if you just give me your best estimates. Frankly, I was going on our discussion of a couple of months ago and even 2 or 3 weeks ago when you told me I could get into the house in September, even if it wasn't finished. Things go the way they go. Just keep me posted after you give me the next estimate for arrival so that I can be prepared.

[141] In any case, until the rupture of the relationship between the parties, the project was proceeding at a reasonable rate, particularly in light of the idiosyncratic difficulties posed by Ms MacLeod's lot, her various changes and additions, the contractual dispute over payment of the third draw, and other impeding behaviour, as set out above.

P. Supervision and clean-up

[142] Ms MacLeod seeks unspecified compensation for the time she said she spent "supervising and directing" the tradespeople, and for coordinating and carrying out clean up of the site, particularly in December 2017 and January 2018, by herself, and with the assistance of neighbours. She alleges that Ms Potts was rarely on site. Ms Potts replied that she trusts the subcontractors, whom she and her father know and work with frequently, to do their jobs; that they do not need constant supervision and prodding; and that they comply with the plaintiff's stated expectation that worksites be kept clean and tidy.

[143] As indicated above, the overwhelming evidence of the testifying contractors was that Ms MacLeod's efforts at coordination and supervision were unwelcome and unhelpful, and that they delayed, confused, and hindered the construction project.

[144] Further, Ms MacLeod provides no evidence, in the form of hours, or hourly rates, on which to quantify her claim. Much of the evidence was hearsay: none of the helpful neighbours were named or called as witnesses.

[145] Further, if there was any delay in clean-up during the contractual dispute occasioned by the dispute over the third draw, that delay was reasonable.

[146] In any case, section VI, cited by Ms MacLeod, does not impose any time specifications with respect to "Cleaning – including windows and floors where required;" or "Site clean up and removal of construction debris." While Ms Potts testified that it was the plaintiff's practice to keep its job sites immaculate, and that it directed its trades accordingly, under the contract clean-up could have occurred at any reasonable time: even at the end of the project.

Q. Internal retaining wall

[147] As mentioned in the introduction, the siting of the foundation, on a steep slope, necessitated the incorporation of a retaining wall into the foundation, at the back and partly on one side of the house, to guard against landslides and water flow (including water flow from an underground spring that was only discovered after the blasting). The thicker base of those internal retaining walls jutted roughly seven inches into the floor plan of the dining room, kitchen, bathroom, and bedroom, and garage, beyond that anticipated in the blueprints, as a form of half-wall sill or ledge. As such, the retaining wall did not entirely jut into the floor plan: the sill could still be usefully employed for books, plants, decor, toiletries, and the like. Nor did it affect every room.

[148] In April 2017, Mr Buckendahl told Ms MacLeod that the retaining wall was necessary, but did not highlight the issue of the ledge.

[149] Ms MacLeod claims $12,561 against the plaintiff, based on her rough and ready calculation: the difference between the total contract price of the 2170 square foot house ($391,643.28 with GST) and the proportionately reduced value of the 2100 square foot house (deducting the lost footage at floor level, if not ceiling level).

[150] There are two fundamental problems with this claim.

[151] The first is the absence of any expert valuator report or reference to an objective and principled industry basis for damages, in support of Ms MacLeod's method of calculating damages.

[152] The second is that, as a recurring theme, the idiosyncratic difficulties of the lot selected by Ms MacLeod, for which the builder is not responsible, made the retaining wall necessary. There were no other reasonable options available.

[153] Ms MacLeod argues that the builder was obliged to anticipate the need for a retaining wall. She says that the plaintiff ought to have blasted a larger foundation, to allow the retaining wall to jut outwards, rather than inwards. She claims that she then would have had her draftsman re-draft the blueprints, making the floor plan and the entire house larger in order to incorporate the requisite internal retaining wall while still preserving the internal floor plan size.

[154] As with the blasting itself, the retaining wall was a post-contract complication that arose in the course of construction. Further, having to re-draft the blueprints and recalculate all measurements would have imposed significant additional costs on Ms MacLeod, particularly with respect to supporting walls, beams, floor joists, and trusses, some of which had already been ordered. The parties would have had to re-draft and re-price the contract, to reflect the larger house. It would have necessitated a larger blasting footprint, at greater cost. It would have delayed the construction considerably.

[155] All of these additional steps would have contradicted Ms MacLeod's recurring stated theme and instruction that she wished to keep costs as low as possible, and avoid delay. It would have contradicted the objectives set out in Ms MacLeod's May

2, 2017 email to Mr Buckendahl, where she contemplates blasting a *smaller* footprint, with a *smaller* house, in order to save costs. Mr Buckendahl's decision to proceed with the necessary internal retaining wall was a permissible good faith exercise of professional discretion, consistent with the overall tenor of the contract and the blueprints, that only modestly cut into the floor plan space.

[156] Ms MacLeod's claim is denied.

R. Gratuitous $9,000 discount

[157] While she did not pursue it with vigour in her closing argument, Ms MacLeod argues that Mr Buckendahl agreed to give her a gratuitous $9,000 discount in relation to windows, a few weeks after the contract was signed. Mr Buckendahl denies this promise, or any similar conversation.

[158] It does not make sense that Mr Buckendahl would adjust the price so soon after the contract was signed. No consideration is alleged for this gratuitous promise. Ms MacLeod has failed to establish this item on a balance of probabilities.

S. GST charges on items bought by Ms MacLeod

[159] Ms MacLeod seeks a credit of $3,515 for "GST paid by owner not Ellcar". She observes that the plaintiff's summary of extra charges includes items (such as the European windows) that she paid for herself, and for which she herself, and not the plaintiff, paid the GST.

[160] Ms MacLeod fails to consider that for the most part the plaintiff did install those items, even if she bought them herself. Accordingly, the plaintiff was obliged to collect and remit GST for those services, if not the goods. There is no merit to this argument.

T. Door swing change

[161] As a reflection of the pettiness of this dispute, and the inability of either side to see the forest for the trees, Ms MacLeod disputes a $89 extra charge based on her request to change the direction the door under the stairs opened. She argues that

the blueprints and door installation notes show an outward swing on the utility closet door, and that as a matter of common sense, an inward-swinging door would cut into the space of the storage room. The Court agrees with Ms MacLeod on both counts and allows $89 as a set-off.

U. Negligence

[162] In final argument, Ms MacLeod sought to advance a claim in what she describes as “negligence” and “fraudulent negligence.” She describes its proposed basis:

> 1. Harm was done to me when I was caught in the trap of Ellcar’s refusal to accept the third draw as presented in the invoice of November 3, 2017…
>
> …
>
> 2. Harm was done to me when Ellcar made finishing the house contingent upon my acceptance of their double-billing scheme.

[163] Specifically, she argues under the rubric of “negligence” that the plaintiff behaved unfairly in refusing to complete the house unless she paid the third draw invoice, including the extras incurred to date.

[164] These claims are not negligence claims. Nor are they proven as a matter of law or fact. As set out above, the plaintiff was entitled to insist on timely payment of the draws, and that any adjustments would occur on the final draw.

[165] In any case, Ms MacLeod did not plead negligence in her counterclaim, although she makes passing reference to some of the allegations on which she now bases the proposed claim. She argues that she ought nonetheless to be allowed to advance the claim: she filed the counterclaim when “the pleadings period was relatively early.” Yet she made no attempt to amend the counterclaim in the four-and-a-half years between its filing in March 2019 and the end of trial.

[166] Ms MacLeod’s proposed negligence claim is dismissed, both as a matter of procedure and substance. Insofar as she made passing reference to negligence with respect to other issues (for example, the blasting, the polar wrap insulation, and the construction delay), for greater certainty, those claims, if she intended to advance

them as negligence claims, are dismissed for the reasons set out above, under the discussions of those individual claims.

V. CONCLUSION

[167] The plaintiff is entitled to judgment for $94,524.84, which represents the amount remaining due under the contract price, including the full net amount of extras set out in its summary of overages ($101,654.84), less $7,041 for the deficiencies completion work successfully established by Ms MacLeod, and $89 for the closet door. The Court also declares that the plaintiff is entitled to a lien over Ms MacLeod's property for $94,524.84.

[168] The plaintiff has been almost completely successful. It is presumptively entitled to its costs at Scale B. If either party wishes to dislodge this presumption, that party will advise the other within 15 days of these reasons, and schedule with the Registry a date as soon as reasonably practicable to argue the matter. Each side will provide a written argument to the other side and to the Court at least seven days before the hearing date.

[169] The Court does not know whether the plaintiff issued a formal offer to settle. If so, and in any case, Ms MacLeod is strongly encouraged to seek legal advice about the risk of attracting further costs awards through the unmeritorious defence of a costs application.

[170] The Court also encourages both parties to strive for a negotiated costs settlement, possibly with Ms MacLeod agreeing to a secured payment schedule in exchange for a reduced costs payment, as a way of avoiding further prolongation of this grotesquely disproportionate litigation, with attendant taxation of scarce judicial resources.

"Crerar J"

[1] Some documents quoted refer to her former name of Penny Pendergraft.

[2] For the most part, with the exception of figures set out in the contract, values will be rounded down to the nearest dollar, omitting pennies.
[3] Quoted emails and documents will redact unnecessary and personal information, such as addresses and numbers.
[4] All quotations as in original contract, except bolded italics. *Sic erat scriptum.*
[5] And, based on the statements and evidence at trial, her (unnamed) lawyer was readily available and assisting Ms MacLeod throughout the piece. The Court repeatedly cautioned Ms MacLeod against risking waiver of privilege through her repeated references to her conversations with her lawyer.
[6] These reasons will address the blueprints argument in the next section.
[7] Polymer-based siding resembling cedar and other woods.
[8] A 2019 version of the final invoice was also higher than the original March 2018 invoice.
[9] Coating, like stucco, applied to the visible (above-grade) portion of the foundation walls.