COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Highridge Homes Ltd. v. de Boer,* 2023 BCCA 74

Date: 20230216
Docket: CA47589

Between:

Highridge Homes Ltd.

Appellant/
Respondent on Cross Appeal
(Plaintiff)

And

Vanessa Marilyn de Boer and Dirk Johannes de Boer

Respondents/
Appellants on Cross Appeal
(Defendants)

Before: The Honourable Mr. Justice Harris
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated June 9, 2021 (*Highridge Homes Ltd. v. de Boer*, 2021 BCSC 1112, Vernon Docket S53879).

Counsel for the Appellant:	R.P. Barton
Counsel for the Respondents:	C.T. Hart
Place and Date of Hearing:	Kelowna, British Columbia October 11, 2022
Place and Date of Judgment:	Vancouver, British Columbia February 16, 2023

Written Reasons by:
The Honourable Madam Justice Fenlon

Concurred in by:
The Honourable Mr. Justice Harris
The Honourable Mr. Justice Grauer

Summary:

The appellant, a building company, and the respondents, the owners, had a falling out after entering into a contract to build a home. After the owners refused to pay the final invoice, the builder sued for payment and lost profit, filing a builders lien. The lien was removed by agreement when the owners paid an amount equivalent to the disputed sum into their lawyer's trust account on November 9, 2016. The builder was largely successful at trial but the judge declined to order the owners to pay contractual interest on the over-due amount after the payment in. The builder appeals that decision and the owners cross-appeal.

Held: Appeal allowed and cross-appeal dismissed. The builder was entitled to contractual interest after November 9, 2016 for two reasons. First, the contract stipulated that payment was made when the money was received by the builder's lawyer and second, money paid into court or into a trust account in order to cancel a lien is not a payment to contractors. The judge did not err in concluding that the inclusion of a cost estimate sheet in the building contract did not alter the underlying nature of the cost-plus contract, nor was he required to consider whether the owners had authorized costs exceeding the estimate sheet. He also did not err in concluding that there was a mutual termination of the contract and in determining that the owners were liable for the three specific charges on the final invoice that they challenge on cross-appeal.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

[1] This appeal concerns a contract the appellant, Highridge Homes Ltd. (the "Builder") entered into with the respondents, Vanessa and Dirk de Boer (the "Owners"), to build a home at the Predator Ridge Golf Course development in Vernon. After the parties had a falling out over excavation costs and went their separate ways, the Owners refused to pay the third and final invoice. The Builder sued for payment and for lost profit, filing a builders lien against title. The Owners filed a counterclaim, seeking to recover additional costs incurred when they had to hire a new contractor to take over and complete construction of their home.

[2] At trial, the Builder was largely successful. The judge found the parties had mutually agreed to terminate the contract and he ordered the Owners to pay most, although not all, of the outstanding costs invoiced. He declined to order the Owners to pay contractual interest of 12% per annum on the overdue amount from the date on which the Owners made a payment into their lawyer's trust account under a security agreement to remove the builders lien (the "Security Agreement"),

concluding that this constituted payment under the contract. The Builder appeals that order.

[3] The Owners cross-appeal, raising three issues:

a) whether the judge applied the correct law concerning the legal effect of a cost estimate sheet that formed part of the construction contract;

b) whether the trial judge correctly found that the parties had mutually terminated the contract; and

c) whether the trial judge improperly refused to make certain deductions from the Builder's claim.

[4] For the reasons that follow, I would allow the appeal and dismiss the cross-appeal.

I. Issue on Appeal

A. The Judge's Conclusion that Payment into the Trust Account of the Owners' Lawyer Constituted Payment under the Contract

[5] The judge concluded the Builder was not entitled to contractual interest on the disputed sum because the Owners had paid that sum into their lawyer's trust account, and were therefore out of pocket for the full amount, saying:

> [148] The defendants paid the plaintiff's invoice, after some adjustments as agreed, into trust on November 9, 2016. Although the plaintiff had not received funds, the defendants were out the full amount of the third invoice.
>
> [149] The Building Contract does not stipulate that "part of the Price" be "paid" to the builder. The Building Contract is silent on whether the parties intended "paid" to mean that the plaintiff had actually received the funds invoiced.

[6] Interpretation of a contract is a question of mixed fact and law; an appellate court may intervene only when the judge has made a palpable and overriding error or his interpretation discloses an inextricable error of law: *Sattva* at paras. 50 and 53. I respectfully conclude that the judge made reviewable errors in this case.

[7] First, the judge erred in concluding that the contract was silent on whether payments had to be made to the Builder, because he failed to read the contract as a whole: *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 at para. 64; *Amberber v. IBM Canada Ltd.*, 2018 ONCA 571 at para 59. The payment clause reads:

> **5. PAYMENT OF PURCHASE PRICE**
>
> 5.1 The Price will be paid by the Owner to the Builder as follows:
>
> a) The Owner will make an initial deposit in the amount of $50,568.00 (5% of total estimated cost[,] plus management fee plus GST) upon the execution of this Agreement.
>
> b) The Builder will invoice the Owner monthly during the course of the Work, with the invoiced amount being calculated in accordance with section 2.1 in respect of the portion of the Work performed to the invoice cut-off date.
>
> c) All monies will be paid by bank draft to [the Builder's lawyer] in trust. Lawyers will execute a Title Search prior to forwarding any funds to [the Builder] to ensure the property is free of any liens.
>
> 5.2 The Owner agrees to pay interest at a rate of 12% per annum on any part of the Price that is not paid within 30 days of the invoice date. The Builder may waive this condition from time to time.
>
> [Emphasis added.]

[8] Clause 5.1(c) specifies that payment of invoices is to be by way of a bank draft to the Builder's lawyer in trust, who is then to forward the funds to the Builder after determining that the property is free of liens. Contrary to what the judge understood, then, the building contract was not silent as to whether the parties intended "paid" to mean received by the Builder—"paid" meant received by the Builder's lawyer. It follows that when the Owners sent a cheque to their own lawyer for the amount in dispute, they had not paid the Builder in accordance with clause 5.1 of the contract and as required under clause 5.2 to prevent the accrual of interest.

[9] The judge also erred in principle by failing to consider that the payment was made pursuant to the Security Agreement entered into by the parties to enable the Owners to clear the builders lien registered on title by the Builder. Even if the issue

could be framed as whether the Owners were “out the full amount” of the disputed invoice (at para. 148), the Owners had not relinquished control of the funds. To the contrary, the Security Agreement preserved the parties’ mutual *in personam* rights *vis-à-vis* their contractual dispute. The funds paid into trust by the Owners were deemed to be security in substitution for the land and premises against which the builders lien had been registered; the parties’ legal dispute over whether those funds were due and owing remained unresolved. Indeed, at the hearing before us, counsel for the Owners conceded that, if the builders lien had been left on the property pending resolution of these proceedings, no argument could be made that the Owners had paid the outstanding invoice.

[10] I conclude that the sum the Owners paid under the Security Agreement—to enable them to remove the lien pending resolution of their dispute over whether the sums were owed—cannot be equated with payment of the invoice. Simply put, money paid into court or into a trust account in order to cancel a lien is not a payment to contractors: *Norwood Construction v. Post 83 Co-Operative Housing Assn.*, [1988] B.C.J. No. 1602, 30 C.L.R. 231 (C.A.).

[11] Finally, I turn to the Owners’ argument that no interest was payable because the invoice claiming the disputed sum was issued after the contract had been terminated. The Owners contend, as they did at trial, that rights that have not matured at the time of termination of a contract are extinguished, relying on *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at para. 40, 1999 CanLII 664. In my view, the judge was correct to dismiss this argument summarily (at para. 146). The Owners’ obligation to pay for work done had matured at the time the contract came to an end. As the judge observed, there is no principled basis to distinguish between the obligation to pay an invoice that is received after the contract ends for work done prior to the termination of the contract (which was not disputed by the Owners), and the obligation to pay interest on the sums invoiced if the amount due is not paid.

[12] In summary on the appeal, the Builder is entitled to contractual interest of 12% per annum from November 9, 2016 to the date of judgment below, June 9, 2021, in addition to the contractual interest awarded by the judge between October 8 and November 9, 2016.

II. Issues on the Cross-Appeal

A. Judge's Treatment of the Cost Estimate Sheet

[13] The judge found that the contract consisted of a modified version of the Builder's standard contract, the construction specifications, and the cost estimate sheet: at paras. 16–19. The relevant modification of the standard contract consisted of the Owners' addition to clause 2.4 of the words "as previously agreed to and authorized by the owner" so that the clause read:

> **2. CONSTRUCTION PRICE**
>
> 2.4 Notwithstanding any other provision of this Agreement, the Owner acknowledges and agrees that all costs and expenses, as previously agreed and authorized by the Owner, relating to the Work and the construction of the House shall be for the account of the Owner. The Builder shall not be responsible or liable for any such costs or expenses unless expressly provided for in this Agreement. Without limiting the foregoing, the Owner acknowledges and agrees that it will pay for all permits, utility connections and surveyor's certificates, and will also pay all property taxes and utility charges relating to the Lot during construction of the House, as previously agreed and authorized.
>
> [Emphasis added.]

[14] The judge concluded that the addition of this phrase bound the Builder "to engage in a discussion with the [Owners] if the budget was going to be exceeded to any significant degree" (at para. 29) but he rejected the Owners' assertion, repeated on appeal, that the approach taken in *Patel v. WG Housing Ltd. (Patel)*, 2012 ABQB 734, should be followed. In that case, an estimate provided by the builder was found to have contractual effect, such that the actual prices charged were to be within a range of plus or minus 5% of the estimated costs.

[15] The judge concluded that the underlying nature of the cost-plus contract in the present case was not altered as a result of the amendment to clause 2.4. He

accepted the Builder's evidence that the Owners were free to spend however much they wanted on their home, and that the cost estimate sheet represented a reasonable approximation or estimate to build the house. He concluded that, as a cost-plus contract, the risk of cost overages was assumed by the Owners (at para. 28).

[16] On appeal, the Owners say the judge erred in law by failing to apply the principles identified in *Patel*. I see no error of law in the judge's interpretation of the contract that would warrant interference by this Court. He considered the particular clause in issue in the context of the entire contract. He was not bound to follow the approach adopted by the Alberta court, particularly in the context of an entirely different contract entered into by the parties in their own particular circumstances.

[17] The Owners also argue that, even if the Builder's obligation was limited to discussion and information about cost overruns, the Builder failed to comply with that obligation, and they should accordingly not be liable for any significant excess costs. The Owners say that, based on the cost estimate sheet, the work done up to the point of termination should have cost approximately $350,000, but the Builder was seeking payment of $487,462. They say the judge did not analyze the evidence concerning the Builder's failure to seek authorization from them to exceed the budget. In short, the Owners submit that the judge erred in law by failing to consider whether there was any evidence before him to prove that the Owners authorized costs that exceeded the cost estimate sheet.

[18] I would not accede to this ground of appeal for two reasons. First, the legal and evidentiary burden lies on the party claiming a breach of contract. The Owners' argument that the Builder breached its contractual obligation to seek authorization for cost overages is premised on the assumption that, if charges included in the disputed invoice are greater than those provided in the cost estimate sheet, it must mean that those charges were not authorized absent proof by the Builder that they were. But that is to reverse the onus, which is on the Owners to prove that the Builder did not obtain authorizations. No such proof was proffered. To the contrary,

there was considerable evidence of the Owners and the Builder discussing cost overruns and trade-offs, for example, changing the type of roof to a less expensive method in order to save funds to offset an unexpectedly high cost for windows. Furthermore, the record demonstrated that the Owners and the Builder adopted a flexible and responsive approach to unfolding circumstances, rather than a rigid and formal adherence to the cost estimate sheet.

[19] Second, the Owners' argument that the Builder should be limited to the cost estimate for work done up to the point of termination of the contract ignores the fact that they had paid all of the charges on the first two invoices other than the disputed excavation cost of $30,000. Indeed, as the judge noted, when Mr. de Boer received the second invoice, he sent an email to the Builder stating that he had gone through the invoices and "all are good", other than that the $30,000 excavation cost (at para. 125). The only sums at issue at trial were the excavation portion of the second invoice and the third invoice, issued post-termination. Given that the Owners did not establish that the charges on the third invoice exceeded the cost estimate, let alone without their authorization, it is not surprising that the judge did not make a determination that overall costs had exceeded the overall budget, noting only that it was difficult to evaluate whether costs are, in fact, over budget where a project remains unfinished: at para. 59.

[20] The focus of the Owners' evidence at trial was on whether the charges on the third invoice were properly incurred or had been inflated, not whether the Owners had authorized the expenditures for which they had been invoiced and which they had already paid. I see no error in the judge responding to the evidence presented and the case as argued.

[21] In summary on this ground of the cross-appeal, the Owners have not established any error in the judge's interpretation of the contractual significance of the cost estimate sheet.

B. Mutual Termination of the Contract

[22] The Owners acknowledge that the question of who bears responsibility for termination of a contract is one of fact, and therefore reviewable on a deferential standard. However, they say the judge erred in principle by failing to give sufficient weight to the Builder's threat to increase the price of the contract, contending that he should have treated that conduct as a clear repudiation of the contract by the Builder.

[23] I begin with the judge's description of the meeting:

> [36] The meeting of August 12, 2016, is the key event on the issue of termination because the Building Contract was terminated at or following that meeting.
>
> [37] The plaintiff's evidence with regard to the meeting is set out at paragraph five of [the owner and director of the Builder] Mr. Wensley's affidavit:
>
> > 5. The discussion at the meeting at Highridge's office on August 12, 2016 was as follows:
> >
> > a) Mr. de Boer said he had an issue with the excavation bill.
> >
> > b) In particular, Mr. [d]e Boer told Mr. Glinsbockel and me that our equipment operator and supervisor didn't work hard enough ... "they only work a small percentage of the time", "watch them through my window when they don't know it", and ... "the rock walls could be built much faster".
> >
> > c) Mr. Glinsbockel explained that the equipment operators have to constantly get out of their machine to realign rocks by hand ... they also need to call yard for more fill, arrange dump trucks etc.
> >
> > d) I asked Mr. [d]e Boer what he really wanted from his complaint and he demanded a reduction in the invoice by $10,000.
> >
> > e) I then spoke to Mr. Glinsbockel and said we can go ahead and reduce the bill by $10,000 as long as we can increase it by the amount of free structural material we provided from our own stockpile (an amount in excess of the $10,000 he was demanding).
> >
> > f) Mr. [d]e Boer responded that he "could work with Ron but he couldn't "stand working for'' me.
> >
> > g) Mr. [d]e Boer grew extremely agitated and angry "I can't work with you people".

> h) Mr. de Boer then said “we’re done” and that he “wanted an exit strategy”.
>
> i) I swore at Mr. de Boer in frustration with his abuse and his demand to end our contract as he was leaving our office.
>
> j) Mr. de Boer then stormed out of our office slamming the door behind him.
>
> …
>
> [39] Mr. de Boer does not contradict the plaintiff’s evidence with regard to the meeting — the only difference between the two versions is that each prefers to highlight the behaviour of the other as opposed to their own.

[24] The judge found that while Mr. de Boer was the first person to raise the possibility of an “exit strategy”, that was in response to the Builder’s suggestion that they could reduce the excavation bill from $30,000 to $10,000, but would then bill for the structural fill they had already agreed would be free: at para. 43. The judge continued:

> [44] Following the meeting, Mr. Wensley sent an email to the defendants, which included the following:
>
> > This is to confirm your request to commence “exit strategy” from our contract to construct your new home at Predator Ridge. We are in full agreement with your wishes and will gather remaining invoices as soon as possible and forward these to you for payment (we expect to have these within 30 days).
>
> [45] The de Boers then instructed their lawyer to write a letter to the plaintiff’s lawyer, which letter included the following paragraph:
>
> > We confirm that the Building Contract between Highridge Homes Ltd. and Dirk and Vanessa [d]e Boer, dated February 27, 2016, was terminated by the parties on August 12, 2016. We also confirm that any other contracts between Dirk and Vanessa [d]e Boer in Highridge Homes Ltd., or associated companies (such as Tusk Contracting Ltd.), were also terminated on August 12, 2016. [Emphasis added.]
>
> [46] The letter goes on to confirm that the de Boers intended to hire a new contractor.

[25] Ultimately, the judge concluded there was nothing in the rather heated meeting that would have been clearly sufficient to constitute a repudiation of the building contract by either party, that neither party made any effort to restore a working relationship, and that both sides were content to treat their relationship as at

an end. It was for that reason he found a mutual termination of the building contract had occurred on August 12, 2016.

[26] In assessing whether the parties repudiated the contract, the judge was required to determine whether, viewed objectively, the words or conduct of the parties evinced an intention not to be bound by the contract: *Guarantee Co.*; *Business Depot Ltd. v. Lehndorff Management Ltd.* (1996), 24 B.C.L.R (3d) 322, 1996 CanLII 3336 (C.A.) at para. 67.

[27] In my view, the judge did not err in determining that the Builder had not repudiated the contract. Not every breach of contract amounts to a repudiation. As this Court said in *Poole v. Tomenson Saunders Whitehead Ltd.*, 16 B.C.L.R (2d) 349, 1987 CanLII 2647 (C.A.), repudiation involves a breach "tantamount to the frustration of the contract either as a result of the unequivocal refusal of one party to perform his contractual obligation or as a result of conduct which has destroyed the commercial purpose of the contract". The Builder's threat to charge for the fill that had been promised at no cost related to one relatively small part of the work to be done under the contract, and did not signal an unequivocal intention by the Builder to refuse to perform its contractual obligations.

[28] I see no palpable and overriding error in the judge's conclusion that there was a mutual termination of the building contract. The findings he made were readily available to him on the evidence.

C. The Judge's Refusal to Allow Certain Deductions from the Third Invoice

[29] The Owners argue that they should not be liable for three specific charges on the final invoice. First, although there is no dispute that trusses were obtained and formed part of the construction work, they contend they should not have to pay for an invoice from Lake Country Truss Ltd. for $9,177.95 because the Builder did not put that invoice into evidence.

[30] Although an invoice would have been the best evidence of the cost, it was open to the judge to accept the evidence of the Builder that it had received and paid an invoice from Lake Country Truss Ltd. in that amount.

[31] I turn next to the Owners' argument that the judge erred in allowing charges of $2,625 and $5,500 paid to CK Design Kitchen and Bath Cabinetry Ltd. and Stonecast Indoor Outdoor Impressions Ltd., respectively. They say that those charges should not be recoverable by the Builder because there was no interior work of any type done and because a fireplace was not installed. The judge addressed the same arguments at trial saying:

> [90] However, that no product was received does not necessarily mean that no costs were incurred. For example, the defendants dispute a bill from CK Design Kitchen and Bath Cabinetry Ltd. in the amount of $2,500 plus GST. It is common ground that the Building Contract was terminated before any of the interior finishing work was done. However, a review of the invoice from CK Design indicates that a bill was received for "design & layout 4513 Vardon Lane". A review of the bottom of the invoice shows the payment terms, assuming that a kitchen is ordered:
>
> > All orders are custom & will require a 50% deposit prior to any confirmation. Payment terms: 50% deposit upon ordering – 45% due upon delivery & 5% due upon completion.
>
> [91] As such, CK Design billed the plaintiff for design work for the proposed kitchen, not for delivery of kitchen cabinetry. The fact that the defendants subsequently chose to purchase their kitchen from elsewhere does not render the invoice unrecoverable by the plaintiff.
>
> [92] Similarly, the defendants dispute an invoice from Stonecast Indoor Outdoor Impressions Ltd. related to a fireplace because they argue that no fireplace was ever delivered to the home. However, the invoice, which is dated July 27, 2016, over two weeks before the termination of the Building Contract, is for a deposit for a fireplace. Again, the fact that the defendants chose to get a fireplace from elsewhere does not mean they are not liable to pay the invoice.

[32] The appellants have established no error in the judge's reasoning and I would accordingly not accede to this ground of appeal.

Disposition

[33] The appeal is allowed. Highridge Homes Ltd. is entitled to contractual interest of 12% per annum from October 8, 2016 to June 9, 2021. The cross-appeal is dismissed.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Mr. Justice Grauer"