COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *601 Main Partnership v. Centura Building Systems (2013) Ltd.,* 2024 BCCA 76

Date: 20240301
Dockets: CA48186; CA48863
Docket: CA48186

Between:

601 Main Partnership and 5264 Investments Ltd.

Appellants
(Defendants / Plaintiffs by Counterclaim)

And

Centura Building Systems (2013) Ltd.

Respondent
(Plaintiff / Defendant by Counterclaim)

- and -

Docket: CA48863

Between:

Centura Building Systems (2013) Ltd.

Appellant
(Plaintiff / Defendant by Counterclaim)

And

601 Main Partnership and 5264 Investments Ltd.

Respondent
(Defendants / Plaintiffs by Counterclaim)

Before: The Honourable Mr. Justice Harris
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Hunter

On appeal from: Orders of the Supreme Court of British Columbia, dated February 25, 2022 and January 12, 2023
(*Centura Building Systems (2013) Ltd. v. 601 Main Partnership*, 2022 BCSC 295 and 2023 BCSC 60, Vancouver Docket S164499).

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Place and Date of Hearing:	Vancouver, British Columbia December 12, 2023
Place and Date of Judgment:	Vancouver, British Columbia March 1, 2024

Written Reasons by:
The Honourable Mr. Justice Willcock

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

Summary:

This is (1) an appeal from an award made in favour of a contractor in respect of work completed on a construction project prior to the contractor's termination, and (2) a cross appeal from the trial judge's costs and interest order.

The owners of the project engaged the contractor and the parties entered into a modified form of stipulated price contract. The contractor fell behind the construction schedule. As a result, the owners exercised a contractual right to demand a recovery trade schedule. A recovery schedule was proposed by the contractor and accepted by the owners. Delays continued, however, and the owners terminated the contract in January 2016. Termination was said to be pursuant to a clause in the contract, or, alternatively, for repudiatory breach at common law. The contractor submitted an invoice for work performed to the date of termination. In March 2016, the contractor filed a builders lien in support of a claim of $1.136 million. The lien was subsequently cancelled on consent and security in that amount was paid into court. In May 2016, the contractor commenced an action against the owners seeking damages on several grounds, including for the value of work performed to the date of termination and for alleged interference with the contractor's work. The owners counterclaimed, arguing the contractor had breached the contract. The owners also sought damages for abuse of process, asserting the amount claimed in respect of the builders lien was knowingly inflated.

The judge dismissed the contractor's interference claim but awarded the contractor $575,576 for work performed. She did not award pre-judgment interest on that award, either contractual or statutory. The judge found no significant merit in the owners' breach of contract claim. She also rejected their abuse of process claim as she was not persuaded the contractor had knowingly overstated the amount of its lien claim. In respect of costs, the judge determined the "substantial success" approach was appropriate but that neither party had achieved substantial success. However, she made a costs award in favour of the owners on the basis that the contractor's principal witness had given deliberately false evidence on a central issue related to the interference claim.

On appeal, the owners argue the judge: misapprehended their submissions with respect to their repudiatory breach claim and as a result failed to make the necessary findings; applied the incorrect legal test for repudiation; and applied incorrect legal principles in respect of the abuse of process claim. Held: Appeal allowed in part. The judge found there was no continuing repudiation after the owners' election to affirm the contract by accepting the recovery schedule. Accordingly, it was not open to the owners to terminate the contract by accepting a repudiatory breach, and any failure to make findings regarding delay prior to acceptance was immaterial. Further, the judge did not misapply the legal test for repudiation. However, the judge failed to impute the knowledge of the contractor's principal witness to the contractor and thus erred in respect of the abuse of process claim. By filing a lien, the value of which was overstated, the contractor abused the legal process to secure funds to which it knew or ought to have known it was not

entitled, thereby causing the owners damage. The owners are entitled to compensatory damages.

On cross appeal, the contractor argues the judge erred in failing to award pre-judgment interest at a contractual rate, or alternatively at court order rates, and in making a costs award inconsistent with established principles. Held: Cross appeal allowed in part. The judge made no error in concluding that a contractual interest provision did not apply. She did err, however, in failing to award pre-judgment interest at court order rates. In respect of costs, the judge made no error in her analysis and divided success on appeal does not disturb her conclusion.

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Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

[1] This appeal is from an award made in favour of a contractor for work performed on a construction project prior to the contractor being dismissed as a result of delay in the completion of its work. The award was made for reasons indexed at 2022 BCSC 295. The principal issues on appeal are whether the trial judge erred:

a) in failing to find the contractor responsible for delay and in breach of the contract; and/or

b) in addressing the project owners' counterclaim, in failing to find a builders lien claim made by the contractor to have been an abuse of the legal process.

[2] The contractor also cross appeals: (i) the judge's failure to award interest at contractual rates (or at all) on its claim from the date the contract was terminated to the date of judgment, and (ii) the judge's costs award, both made for supplemental reasons indexed at 2023 BCSC 60.

Background

[3] 601 Main Partnership and 5264 Investments Ltd. (the "Owners") were the developers of a multi-storey mixed-use construction project located at the corner of Main Street and Keefer Street in Vancouver. In late 2013, the Owners (through an agent) put out a call to tender for drywall, insulation and steel stud work. Centura Building Systems (2013) Ltd. (the "Contractor") submitted a bid to complete this scope of work. The Contractor's bid was selected and, in or around August 2014, the parties entered into a standard form stipulated price contract (CCDC-17) modified to meet their needs (the "Contract"). Pursuant to the Contract—which included a construction schedule and a detailed scope of work—the Contractor would be the initial framer, drywall installer, and insulation installer for the project.

[4] The Contractor fell behind the construction schedule. On October 28, 2015, the Owners gave the Contractor a notice of default which required the Contractor to propose a recovery trade schedule that would permit the project to get back on track. The recovery schedule was demanded pursuant to GC 3.5.8 of the Contract which provides:

> Subject to GC 6.5, if the Trade Contractor does not maintain the progress necessary to comply with the Contract and the Project Schedule, the Owner, in addition to those rights and remedies provided by law and under the Contract Documents (including those rights specifically set forth in GC 7.1) may … order that the Trade Contractor take such actions as the Owner … deems necessary to maintain the progress required by the Contract Documents and the Project Schedule, which actions may include, but will not be limited to: the provision of a recovery Trade Schedule, the supply of additional labour, the provision of additional hours of work or the furnishing of additional plant, all at the Trade Contractor's expense.
>
> [Emphasis added.]

[5] The highlighted reference in GC 3.5.8 to the Owners' rights "specifically set forth in GC 7.1" is a reference to the following CCDC-17 general conditions, as amended and incorporated into the Contract:

> **GC 7.1 OWNER'S RIGHT TO PERFORM THE WORK, TERMINATE THE TRADE CONTRACTOR'S RIGHT TO CONTINUE WITH THE WORK OR TERMINATE THE CONTRACT**
>
> …
>
> 7.1.2 If the Trade Contractor should neglect to prosecute the Work in accordance with the Contract, the Owner may, without prejudice to any other right or remedy the Owner may have, notify or have the Consultant notify' the Trade Contractor in writing that the Trade Contractor is in default of the Trade Contractor's contractual obligations and instruct the Trade Contractor to correct the default in the 5 Working Days immediately following receipt of such notice.
>
> …
>
> 7.1.4 If the *Trade Contractor* fails to correct the default in the time specified or in such other time period as may be subsequently agreed in writing by the parties, without prejudice to any other right or remedy the *Owner* may have, the *Owner* may:
>
> …
>
> .2 terminate the *Trade Contractor's* right to continue with the *Work* in whole or in part or terminate the *Contract.*

> 7.1.5 If the *Owner* terminates the *Trade Contractor's* right to continue with the *Work* as provided in paragraphs 7.1.1 and 7.1.4, the *Owner* shall be entitled to:
>
> .1 take possession of the *Work* and *Products* at the *Place of the Project;* subject to the rights of third parties, utilize the *Construction Equipment* at the *Place of the Project;* finish the *Work* by whatever method the *Construction Manager* may consider expedient, but without undue delay or expense, and
>
> .2 withhold further payment to the *Trade Contractor* until a final certificate for payment is issued, and
>
> .3 charge the *Trade Contractor* the amount by which the full cost of finishing the *Work* as certified by the *Payment Certifier …* however, if such cost of finishing the *Work* is less than the unpaid balance of the *Contract Price,* the *Owner* shall pay the *Trade Contractor* the difference, and
>
> .4 on expiry of the warranty period, charge the *Trade Contractor* the amount by which the cost of corrections … exceeds the allowance provided for such corrections, or if the cost of such corrections is less than the allowance, pay the *Trade Contractor the* difference.
>
> 7.1.6 The *Trade Contractor's* obligation under the *Contract* as to quality, correction and warranty of the work performed by the *Trade Contractor* up to the time of termination shall continue in force after such termination of the *Contract.*
>
> 7.1.7 The Owner may terminate this Contract for its convenience at any time and without cause, upon giving not less than 30 days prior notice to the Trade Contractor. In this event, the Owner shall pay to the Trade Contractor all amounts due to the Trade Contractor on account of the Contract Price earned to that date.
>
> …
>
> 7.1.10 The Trade Contractor acknowledges that, in the event that Owner terminates this Contract *for* any reason, the Owner shall pay the Trade Contractor for all work performed to date.
>
> [Emphasis added.]

[6] On October 30, 2015, the Contractor presented a proposed recovery schedule (the "Recovery Schedule"). On November 4, 2015, the Owners accepted the Recovery Schedule, pursuant to which the Contractor was to complete all its work by January 20, 2016. However, by mid-January 2016, the Contractor was again behind schedule. As a result, the Owners terminated the Contract on January 23, 2016. The Owners then engaged another firm, Crystal Consulting Inc. ("Crystal"), to complete the Contractor's work.

[7] When the Contract was terminated, the Contractor had been paid $455,879 of the total contract price of $1,367,000. On February 29, 2016, the Contractor submitted an invoice for all work performed up to the date of termination.

The Lien, the Claim and the Counterclaim

[8] On March 4, 2016, the Contractor filed a lien pursuant to the *Builders Lien Act*, S.B.C. 1997, c. 45, in support of a claim in the total amount of $1,136,593. On April 14, 2016, by consent, the lien was cancelled and security in that amount was paid into court.

[9] On May 19, 2016, the Contractor commenced an action against the Owners. The Contractor's original position, maintained through to its original closing submissions at trial, was that:

a) it was owed for the value of the work it performed and materials it delivered under the Contract to the date of termination (the "Contract Value Claim");

b) the Owners termination of the Contract was wrongful and, if not for that wrongful termination, the Contractor would have earned further profit (the "Lost Profit Claim"); and

c) the Owners had delayed construction and thereby increased the cost of the contracted work and decreased the Contractor's profit margins on the work that had been completed (the "Interference Claim").

[10] In their amended response to civil claim, the Owners responded to the Contractor's claim as follows:

> 28. As a result of the Plaintiffs ongoing default in the performance of the Contract, on about October 28, 2015, 601 Main provided written notice of default pursuant to §3.5.8 and §7.1.2 of the CCDC17 and provided the Plaintiff with 5 working day notice to cure its default ("Notice").
>
> 29. On or about November 3, 2105, the Plaintiff furnished a recovery schedule ("Recovery Schedule") and agreed to provide sufficient manpower and materials to maintain progress in accordance with the Recovery Schedule.

> 30. Despite the Notice, the Recovery Schedule, and the Plaintiffs commitment to provide sufficient manpower, the Plaintiff failed to diligently carry out the Work or correct the Deficiencies and Delays in a timely manner and, by mid-January, 2016, was approximately 60 days behind its own Recovery Schedule.
>
> 31. As a result of the Plaintiffs ongoing refusal and failure to cure its default in performance of the Contract, 601Main terminated the Contract on or around January 23, 2016 pursuant to Part 7 of the CCDC 17, as modified.
>
> [Emphasis added.]

[11] The Owners brought a counterclaim in which they alleged breach of contract on the part of the Contractor, resulting in delay in the construction of the project, increased costs and lost profit. The total amount claimed by the Owners as damages for breach of contract was $707,216. The Owners also sought damages for abuse of process, asserting the amount claimed in respect of the builders lien was known by the Contractor to be in excess of any claim it could legitimately establish.

[12] The alleged contractual breach, associated with delays and deficiencies in the Contractor's work, was pleaded as follows:

> 2. The Delays and Deficiencies constitute a breach of the Contract entitling the Defendant to terminate pursuant to section 6.5.10, 7.1.2 and 7.1.7 of the Contract.
>
> 3. In the alternative, if the Defendant is found not to have terminated the Contract pursuant to the terms contained therein … the Defendant states that the Contract was terminated pursuant to the common law doctrine of Fundamental Breach.
>
> 4. It was a fundamental term of the contract that the Work must be performed in a good and workmanlike manner and that it must be completed in accordance with the deadlines set out in the Recovery Schedule.
>
> 5. The fact is, the Delays and Deficiencies in the Work, and the Plaintiff's inability to prosecute the Work in the timely manner, or in a good and workmanlike manner, or to complete it in accordance with the deadlines set out in the Recovery Schedule, constitute a fundamental breach of the Contract giving rise to the right at common law to terminate the Contract and sue for damages.
>
> 6. Further, the Delays and Deficiencies in the Work, the Plaintiff's inability to prosecute the Work in a timely manner or in a good and workmanlike manner, and the breakdown in the relationship between the Plaintiff and the Defendant, whether considered cumulatively or each on its own, caused the Defendant to lose all confidence in the Plaintiff's ability to

> perform the Work, which loss of confidence constitutes a fundamental breach of the Contract giving rise to the right at common law to terminate and sue for damages.
>
> [Emphasis added.]

[13] The Owners' position in their counterclaim was thus that the Contract had been terminated pursuant to GC 6.5.10, among other provisions, and, alternatively, for "fundamental breach". GC 6.5.10 provides:

> Notwithstanding anything to the contrary in GC 6.5, if the Trade Contractor is delayed in the performance of the Work for more than 30 days, the Owner shall have the right to terminate the Contract and engage another party to finish the Work. Upon such termination, the Trade Contractor will be entitled to payment only in respect of the Work completed up to the date of termination.

[14] In reply to the counterclaim, the Contractor argued delay was a result of the acts of the Owners; the Contract was terminated as a result of animus, rather than a loss of confidence; and the doctrine of fundamental breach does not give rise to a cause of action. Further, the Contractor argued, there could be no fundamental breach because the Contract had been repudiated.

[15] The Contractor's prosecution of its claim took a turn on the last day of the trial, as described in the judge's reasons for judgment on interest and costs:

> [16] On the last day of the trial, during reply submissions, Centura changed its position with respect to the validity of the termination of the Contract. It maintained that it was not at fault for any delay, but submitted that 601 Main was entitled to terminate the Contract for delay pursuant to GC 6.5.10 irrespective of fault. As a result, it abandoned the Lost Profits Claim.

[16] While it was thus conceded that the Owners were entitled to terminate the Contract under GC 6.5.10, it was unclear whether GC 6.5.10 was a "no fault" provision. The judge determined it was: the Owners were entitled to terminate the Contract for delay pursuant to GC 6.5.10 irrespective of fault. Upon exercising the right to terminate pursuant to that clause, the Owners became obliged, pursuant to the provision, to pay the Contractor for the "Work" completed up to the date of termination.

[17] In light of that conclusion, the judge addressed competing estimates of the value of the "Work" completed to that point. She concluded the Contractor had established the value of base contract work at $794,000 and the value of work performed as extras, pursuant to change orders, at $194,200. That totalled $1,037,692, from which needed to be deducted both: (a) $6,237 to reflect deficiencies in the work performed by the Contractor, and (b) $455,879 to reflect the amount which the Contractor already been paid. That left $575,576 due and owing to the Contractor in respect of the value of the "Work" performed up to the termination of the Contract. Thus, the Contractor was entitled to be paid $575,576.62 pursuant to GC 6.5.10 in respect of the Contract Value Claim.

[18] The judge then turned to the Interference Claim. She dismissed this claim for reasons discussed further below.

[19] Next, she considered the Owners' counterclaim and, specifically, the question of whether the Contractor had breached the Contract and thereby caused the Owners to incur (i) additional costs to complete the Contractor's work over and above what the Owners would have had to pay the Contractor, and (ii) additional cost to complete the project and loss of profit and additional expenses as a result of delay caused by the Contractor. The judge appears to have considered it to be common ground that the Owners' acceptance and adoption of the Recovery Schedule precluded it from claiming damages arising from delay which occurred *prior to* the adoption of the Recovery Schedule.

[20] The judge found the Recovery Schedule itself was not adhered to, but held that it ceased to apply once it became apparent to the parties that it could not be met. As explained further below, delay in completion of the mechanical and electrical work that had to be finished before drywall could be installed precluded the Contractor from meeting the new deadlines. The drywalling schedule was expressly conditional upon the preparatory work being completed on time. Because the Recovery Schedule imposed deadlines the Contractor could not possibly meet,

non-compliance with the Recovery Schedule did not constitute a breach of the Contract.

[21] The Owners took the position that their termination of the Contract pursuant to GC 6.5.10 did not preclude them from claiming damages for breach of contract. The breach of contract claim advanced was for $707,216, calculated by the Owners as follows:

a) the difference between the amount the Owners ultimately spent on the steel stud, drywall, and insulation scope of work on the project (most of which was paid to Crystal, the Contractor's replacement), and the amount they said they would have had to pay the Contractor to complete the work: $157,341 plus GST; and

b) the additional costs incurred as a result of a four-month delay in completing the project which the Owners said was caused by the Contractor: $516,198 plus GST.

[22] The judge first considered whether the Contractor had breached the Contract, either as a result of deficiencies or delay. She found that to the extent there were deficiencies in its work, the Contractor breached the implied term of the Contract that its work would be done in a good and workmanlike manner: at para. 167.

[23] Turning to whether delay on the part of the Contractor amounted to a breach of the Contract, the judge considered the Owners' position to be "that the Recovery Schedule was the governing schedule from November 4, 2015 to the date of termination, and it wiped the slate clean so to speak": at para. 168. She referenced what she characterized as defence submissions that "the whole point of the Recovery Schedule was to get Centura back on track and, accordingly, delays prior to the Recovery Schedule became irrelevant": at para. 168. The Contractor's position was that the Recovery Schedule had been abandoned soon after it was established for reasons that were not its fault and, as a result, completion times had been put "at large": at para. 170.

[24] At para. 171, the judge held that cases in which one contracting party had precluded the other from complying with its obligations were not applicable because it had not been established that the Owner had caused the Contractor's failure to meet the dates stipulated in the Recovery Schedule. In any event, the judge's view was that the Contractor's failure to meet those dates did not amount to a breach of the Contract, "because … the Recovery Schedule ceased to apply once it became apparent that the schedule for the mechanical and electrical rough-in could not be met". She noted that "very soon after the Recovery Schedule was established it became apparent to both parties that the mechanical and electrical rough-in schedule was not feasible": at para. 174.

[25] Without addressing whether the delay that *preceded* the Owners' demand for the Recovery Schedule was relevant to the breach of contract claim, the judge concluded:

> [175] … As discussed below, the evidence does not support the conclusion that in the period after the Recovery Schedule was established, Centura breached any remaining obligation to complete its work within a reasonable time.
>
> [176] For these reasons, the delay in the progress of Centura's work in the period after the Recovery Schedule was established did not constitute a breach of the Contract.

[26] The conclusion that the only breach of contract established, the breach of the obligation to perform in a good and workmanlike manner, had minimal and almost inconsequential consequences, meant there was no significant merit in the Owners' counterclaim.

[27] Nevertheless, in the event she was wrong to find the Contractor had not breached the Contract by delay in the performance of its work, the judge went on to consider whether the Owners had proven that damages actually flowed from one or the other of the alleged breaches of contract (i.e., deficiencies or delay). She held:

> [178] The increased costs to complete the steel stud, drywall, and insulation scope of work on the Project (the first category of damages claimed) were incurred as a result of the decision by 601 Main to terminate the Contract and engage Crystal as a replacement for Centura. The Contract was terminated under GC 6.5.10, which I have found is a no-fault provision. Accordingly, the

> basis actually relied on by the defendants as justifying the termination of the Contract precludes them from recovering the first category of damages because those damages flowed not from any breach of the Contract by Centura, but from 601 Main's choice to exercise its termination right under GC 6.5.10.
>
> [Emphasis added.]

[28] As noted above, the Owners also argued, alternatively, that the Contractor's breaches of contract amounted to "fundamental breach". The judge described the Owners' "fundamental breach" claim as follows:

> [179] The defendants argued that Centura's breaches of contract amounted to "fundamental breach" which provided an alternative justification for termination. If that is so then the incremental increased costs of completing Centura's work might, subject to mitigation arguments, be recoverable as damages flowing from the breach.

[29] She considered the Owners, in advancing this argument, to be taking the position the Contractor had breached the Contract in a fundamental respect and thereby repudiated the Contract, permitting the Owners to terminate the Contract and still pursue the available remedies for the breach. This course of action is available when there is a breach of a contractual condition or of some other sufficiently important term of the contract that amounts to "a substantial failure of performance" or conduct that, in all the circumstances, shows that the breaching party does not intend to be bound by important terms of the contract in the future: see *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 at paras. 144–48.

[30] The judge held that neither of the Contractor's alleged breaches amounted to a fundamental breach:

> [183] ... [T]he damage the defendants established in relation to the claimed deficiencies is almost insignificant. While Centura's failure to meet the good and workmanlike standard amounted to a breach of contract, it clearly did not amount to a substantial failure of performance.
>
> [184] Similarly, even if Centura's failure to meet the Recovery Schedule was a breach of the Contract, it could not be characterized as a substantial failure of performance because Centura contributed in only a minor way, if at all, to the delays that occurred after the Recovery Schedule was established.

[31] Turning to the filing of the builders lien, the judge found that while the lien was filed in support of a claim that was substantially larger than the amount ultimately found to be due and owing at trial, she was of the view there was an arguable case in support of the claim described in the builders lien. The Contractor had not filed the lien for an improper purpose and it was not an abuse of process to have done so.

[32] Conveniently, in her supplemental reasons addressing the claims for interest and costs, the judge summarized the principal judgment as follows (at para. 18):

> 1. GC 6.5.10 is a no-fault termination provision; in other words, pursuant to GC 6.5.10, 601 Main had the right to terminate the Contract for a delay in the performance of Centura's work of more than 30 days irrespective of the cause of or fault for the delay (Trial Reasons, paras. 56–62).
>
> 2. Centura established that, before accounting for deficiencies, the work it completed up to the termination of the Contract had a value of $1,037,692.95 including GST ($794,000 plus five percent GST for Base Contract Work and $194,279 plus five percent GST for Extras). From that amount $6,237 had to be deducted to reflect deficiencies, and the $455,879.33 Centura had already been paid … leaving $575,576.62 owing to Centura under GC 6.5.10 … (Trial Reasons, paras. 63–143).
>
> 3. The Interference Claim was dismissed for reasons that included Centura's failure to give the notice required by GC 6.5.4 (Trial Reasons, paras.144–164).
>
> 4. The defendants established that Centura breached the Contract as a result of deficiencies … that … decreased the value of Centura's work by $6,237. I found that the delay in the progress of Centura's work did not constitute a breach of the Contract by Centura. In case I was wrong about that and because of the significance of the fundamental breach allegation, I went on to analyze the defendants' claim for damages as if both breaches of contract (deficiencies and delay) had been established. … [T]he increased costs incurred by the defendants to complete Centura's scope of work flowed not from any breach of contract by Centura but rather from 601 Main's decision to exercise its right of termination under GC 6.5.10. … [E]ven if both breaches of contract had been established by the defendants, they would not have amounted to repudiatory breach. … [E]ven if delay in Centura's work amounted to a breach of the Contract, that breach did not cause any overall delay in completing the Project (Trial Reasons, paras. 165–194).
>
> 5. I was not persuaded that Centura knowingly overstated the amount of its lien claim and, accordingly, I dismissed the defendants' claim for damages for abuse of process (Trial Reasons, paras. 195–216).

[33] As the foregoing illustrates, the Contractor was substantially successful in establishing its claim, as finally amended, and in defending the counterclaim made against it by the Owners.

Costs and Interest

[34] The judge heard further submissions with respect to the Contractor's claim for interest on the amount awarded to it, and both parties' claims for costs.

[35] The Contractor's position was that it was entitled to pre-judgment contractual interest pursuant to clause A 5.3.1 of the Contract, which provides:

> 5.3. Interest
>
> .1 Should either party fail to make payments as they become due under the terms of the Contract or in an award by arbitration or court, interest at the following rates on such unpaid amounts shall also become due and payable until payment:
>
> (1) 2% per annum above the prime rate for the first 60 days.
>
> (2) 4% per annum above the prime rate after the first 60 days.
>
> Such interest shall be compounded on a monthly basis. The prime rate shall be the rate of interest quoted by HSBC for prime business loans as it may change from time to time.

[36] The judge held that contractual pre-judgment interest on the sum awarded to the Contractor for work completed up to the termination of the Contract was not payable under clause A 5.3.1 because payment of that amount did not "become due under the terms of the Contract", as required by the terms of that provision.

[37] The trial judge did not expressly address the Contractor's entitlement to pre-judgment interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79. In her reasons for judgment she noted:

> [22] The defendants take no issue with Centura's entitlement to interest pursuant to the *Court Order Interest Act*. The defendants dispute Centura's claim for pre-judgment contractual interest.
>
> [Emphasis added.]

[38] She did not describe the Owners' position with respect to pre-judgment interest pursuant to the *Court Order Interest Act*. After dismissing the claim to

pre-judgment interest at contractual rates pursuant to clause A 5.3.1, she simply stated:

> [49] As mentioned, there is no dispute that Centura is entitled to post-judgment interest under the *Court Order Interest Act*.

[39] She did not differentiate between pre-judgment and post-judgment interest under the *Court Order Interest Act*, nor consider whether such an award can or should be made in relation to a pecuniary award that does not attract interest at contractual rates.

[40] In support of its claim for costs, the Contractor argued it had successfully established liability and obtained a remedy. It argued the fact the amount awarded was less than it sought was not a basis upon which the court could deprive it of its costs. The judge concluded the Contractor would come out marginally ahead on an evaluation of success on "the major factual issues that occupied most of the evidentiary phase of the trial", but that the Owners had succeeded on the interest issue which, although it did not feature in the evidentiary phase of the trial, was "a substantial [issue] in terms of quantum". She therefore concluded there was divided success, and neither party was substantially successful: at paras. 76–77.

[41] The costs award did not turn on the finding of divided success, however, but rather on the fact the judge found the Contractor's principal witness, Mr. Bowie, had given deliberately false evidence on a central issue (the allegation that the Owners had made expensive changes, demanded extras and delayed and interfered with the Contractor's ability to do its work). She held:

> [92] It is not an easy task to determine what portion of the total costs relates to Mr. Bowie's evidence. His evidence was relevant to several of the issues and it provided a considerable part of the foundation of Centura's case from the commencement of the litigation. The portion of [the Contractor's expert] Mr. Stregger's evidence relating to the Interference Claim was based on the accuracy of Mr. Bowie's memorandum.
>
> [93] I consider it fair to use the portion of the trial time occupied by Mr. Bowie's testimony plus 50 percent of the time occupied by Mr. Stregger's testimony as a guide. Mr. Bowie was on the stand for nine of the 35 days of trial while Mr. Stregger testified for about two and a half days. Counting 50 percent of Mr. Stregger's time, this is 10.25 days or almost 30 percent of the

> total trial. On this basis, I award the defendants 30 percent of their total costs at Scale C.

Grounds of Appeal

[42] The Owners say the judge erred in law:

a) in misapprehending their submission in respect of the common law repudiatory breach claim and, accordingly, in failing to consider all the evidence and make all the necessary findings relevant to that claim;

b) in applying the incorrect legal test for repudiation to the facts of the case; and

c) in failing to apply the correct legal principles when considering their claim for abuse of process, specifically in failing to address the Contractor's vicarious liability for the acts of Mr. Bowie.

[43] On the cross appeal, the Contractor says the judge erred in law in not awarding contractual pre-judgment interest under clause A 5.3.1, insofar as she: "misconstrued" the Contract; failed to find interest was due on termination or at a reasonable time thereafter; failed to find any date on which payment was due, contrary to the *Court Order Interest Act*; and failed to recognize that business efficacy required the implication of a payment date.

[44] In the alternative, the Contractor says the judge erred in law in failing to award pre-judgment interest pursuant to the *Court Order Interest Act*.

[45] Finally, the Contractor says the judge erred in law in making a costs award inconsistent with established principles.

The Award to the Contractor

Misapprehension of the Owners' submission

[46] The Owners contend the judge proceeded on the mistaken premise they had conceded that the delays preceding the acceptance of the Recovery Schedule were irrelevant to the analysis of repudiation (or "fundamental breach"). More specifically,

the Owners say the judge erroneously considered them to have acknowledged that the Recovery Schedule relieved the Contractor from the consequences of the preceding delays for the purposes of determining whether the Contractor had committed a repudiatory breach at common law. They say, to the contrary, they argued that "the cumulative effect of [the Contractor's] deficient, delayed, and inattentive work — from the commencement of the Contract until the day it was terminated" constituted a repudiatory breach that gave the Owners the right at common law to terminate the Contract and recover damages.

[47] Relying on *Ogden v. Canadian Imperial Bank of Commerce*, 2015 BCCA 175, the Owners characterize the judge's alleged misapprehension of the evidence and legal arguments as a palpable and overriding error warranting an order for a new trial. Accordingly, this ground of appeal does not turn on the standard of review applicable to issues of contractual interpretation.

[48] The Owners acknowledge the Recovery Schedule was the "governing schedule" after November 4, 2015. They say agreeing to that schedule had the effect of establishing the date from which delays were to be calculated for the purposes of termination pursuant to GC 6.5.10 (i.e., whether the Contractor was "delayed in the performance of the Work for more than 30 days"). However, the fact they could only terminate the Contract pursuant to that provision after non-compliance with the Recovery Schedule amounting to more than 30 days of delay did not, they argue, preclude them from regarding continuing delay (inclusive of pre-November 4, 2015 delay) as a repudiatory breach, and from terminating the Contract on that basis.

[49] It must be borne in mind that the Owners' written submissions were drafted and addressed at trial before the Contractor abandoned the argument that the Contract had been wrongfully terminated. The Owners' argument therefore focused upon whether they had established sufficient cause for termination. The Owners are correct to say their submissions described delay prior to the agreement to adopt the

Recovery Schedule as a basis for both termination of the Contract and a claim for damages.

[50] In their written submissions, the Owners argued that:

> 8. The Defendant's decision to terminate was not made in haste. The Plaintiff was given countless notices of their delays and deficient work and countless opportunities to bring their performance into compliance, but they simply could not do it. They had too many projects on the go and not enough manpower to keep up. By the time Plaintiff finally was terminated, it was 60 days behind schedule and had declined the final opportunity the Defendants had offered to get the project back on track and avoid termination.
>
> …
>
> 19. The problems with Centura began almost immediately [after the commencement of work].
>
> 20. Within two weeks, ICON [the Owners' agent] began complaining about Centura's slow progress, poor quality and lack of manpower. Those complaints continued every few weeks until the first site foreman, Kevin Booth, was removed at the end of July and replaced with Mr. Bowie.
>
> 21. According to Mr. Bowie, Mr. Booth was replaced because it had been determined that he was not able to handle the project. In fact, when Mr. Bowie got there, he discovered that Mr. Booth had been using part time workers.
>
> 22. The problems Centura was experiencing on this project were significant enough to attract the attention of the owner of Niradia, the Plaintiff's parent company, Gerry Nichelle. Mr. Bowie told us that Mr. Nichelle, personally told him to go to this site and "get the job done no matter the cost", because he wanted to avoid litigation. …
>
> …
>
> 24. However, the manpower did not materialize and ICON's complaints continued. By October, Centura's delayed and incomplete work had gotten so bad that ICON had to hold them at Level 10 in an effort to force them to focus on completing work on the lower floors so that other trades could progress.
>
> 25. The problems were significant enough during this period that ICON and the Defendants seriously considered terminating the contract with Centura in October. …
>
> 26. Ultimately, however, the ownership decided not to terminate the Plaintiff but to give them another chance to get back on track. This led to the Recovery Schedule, prepared by Centura and agreed to by the parties on November 4, 2015.

[51] In a passage that might have given rise to misapprehension of their position, the Owners submitted that delay preceding November 4, 2015 could not be used by the Contractor to justify its failure to comply with the Recovery Schedule. It was in that sense that the slate had been cleaned:

> 144. There can be no dispute that the governing schedule at the time of termination was the Recovery Schedule.
>
> 145. In their closing, the Plaintiff argues that the Recovery Schedule was immediately abandoned by ICON because Centura was behind it from the outset. … [T]his logic is flawed.
>
> 146. To suggest that a party is relieved from its obligations to comply with an agreed upon project schedule simply because it has fallen behind that schedule, defeats the purpose of having a schedule in the first place. Mr. Bowie and Mr. Pengelly both agreed that construction progresses in ebbs and flows; a contractor can be delayed at one point, but recover later. That is precisely why the Owner can only terminate the contract if the delays exceed 30 days, and precisely why the Contract allows the Trade Contactor to make a delay claim in respect of any Owner Caused delay (GC 6.5.3).
>
> 147. If a schedule was simply deemed to have been abandoned the second the Trade Contractor is delayed for any reason, then these provisions would be meaningless.
>
> 148. There can be no question that the Recovery Schedule was the governing schedule from November 4, 2015 to the date of termination. <u>The real questions are whether or not the Plaintiff was delayed by more than 30 days, and if so, who caused those delays</u>.
>
> [Emphasis added.]

[52] However, they argue that it was clearly <u>not</u> their position that prior non-performance was irrelevant to the repudiation issue. In their written argument, they submitted:

> 154. … [T]hat the evidence established that all of the delays leading up to the Recovery Schedule were caused by Centura's lack of manpower and the poor quality of its work.
>
> …
>
> 179. … Centura was entirely responsible for all of the delay leading up to the demand for the Recovery Schedule, and their delays were causing … a "ripple effect" that would haunt this project until the very end.
>
> …
>
> 218. … [T]he Plaintiff was clearly the cause of the delays, both pre and post Recovery Schedule and as such the Petitioner was entitled to terminate the contract.

> …
>
> 231. In the circumstances, it is submitted that the Plaintiff's inattention to this project and the significant deficiencies in the quality of its work, caused the Defendants to lose confidence in their abilities to such a degree that it constituted a fundamental breach entitled the Defendant to terminate the contract.

[53] Counsel for the Owners argued at trial that the Contractor's delay had to be considered cumulatively; that all delay was "knock on delay". When asked by the judge whether she had to look at delay prior to the agreement to adopt a Recovery Schedule, counsel took the position that delay both before and after November 4, 2015 was relevant to repudiation. There was a strict construction schedule and there was a lot riding on the compliance of the trades with that schedule. For instance, there were pre-sale purchasers of residences in the building waiting to close their units. Counsel argued that the Contractor's continual inattentive delay resulted in a loss of confidence and justified termination of the Contract.

[54] In one somewhat confusing exchange in respect of a similar issue to that canvassed in the submissions reproduced above, which may have given rise to a misapprehension, counsel for the Owners argued that it was not open to the Contractor to argue that construction delays prior to November 4, 2015 excused its failure to meet the Recovery Schedule. On the other hand, he argued, the Contractor's prior failure to comply with the construction schedule before drafting the Recovery Schedule, together with continuing delay thereafter, could lead the Owners to lose faith in the Contractor and serve as the basis for termination:

> CNSL S. COBLIN (for the Owners): … Centura was entirely responsible for all these delays leading up to the demand for the recovery schedule. And their delays were causing, as Mr. Brezovski described it, a ripple effect that would haunt this project until the very end.
>
> THE COURT: But if I am with you, if I find that the recovery schedule was agreed to, does it matter what happened before the recovery schedule?
>
> CNSL S. COBLIN: I say it doesn't. … this is really only in response to the arguments my friend's making … there's this argument … that I couldn't have applied spray foam anyways or I couldn't have … done my boarding because we couldn't get past firestop, which was prior -- or the mechanical wasn't in. I think … the complete answer is we all

> agreed that this would account for all that stuff, we're going to start afresh from this point forward, I completely agree with that. …
>
> THE COURT: No, the point is … I don't think you can have it both ways. You can't say the recovery schedule was a reset but then if we couldn't -- if -- if we caused further delay because of changes to the ceiling or other things, we don't have to wear that because of something that happened before the recovery schedule. I mean, it's either a reset or it's not.
>
> …
>
> CNSL S. COBLIN: Right. … I'm trying to answer your question when I -- in a different way than I should, which is you're absolutely right, I -- you don't need to consider the delay that led up to the construction schedule -- the recovery schedule because the whole idea behind it was let's get back on track. But to the extent that you don't agree with that –
>
> THE COURT: Right.
>
> CNSL S. COBLIN: -- we do have a fundamental breach argument which this relates to, so if you say that that contract didn't -- didn't bind, we can still refer to the delays that Centura has caused leading up to this as part of our fundamental breach argument, … so it's more relevant to that.
>
> THE COURT: Okay.
>
> [Emphasis added.]

[55] The Owners argue that their position—that acceptance of the Recovery Schedule did not preclude them from seeking relief founded upon the conduct of the Contractor which preceded that acceptance—is consistent with the Contract. As noted above, the Contract provides that a demand that the Contractor produce and comply with a Recovery Schedule is in addition to, and not a limitation on, "those rights and remedies provided by law": GC 3.5.8.

[56] The Owners cite *Dosanjh v. Liang*, 2015 BCCA 18 at para. 42; *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. – Canada*, 2007 BCCA 88; and the cases cited by Lowry J.A., writing for the majority in *Doman*, in support of their position that ongoing refusal to perform contractual obligations constitutes continuing repudiation, and that prior affirmation of the contract by the innocent counterparty does not preclude later acceptance of that continuing repudiation (i.e., termination). They say that in this case, as in *Fox v. Rindje*, [1995] B.C.J. No 773, 1995 CanLII 755 (C.A.), the Owners were entitled to terminate the Contract because they

lost confidence in the Contractor as a result of its continual delay, its inattention to the project, and the deficiencies in the quality of its work.

[57] The Owners also contend the judge's misapprehension of their position resulted in a failure to make any findings with respect to delays preceding the Recovery Schedule. It follows that, when she addressed the repudiation claim, she only considered the relative size of the "minor" delays after the Recovery Schedule (such minor delays having been referred to at para. 184, where the judge wrote "Centura contributed in only a minor way, if at all, to the delays that occurred after the Recovery Schedule was established").

[58] The Contractor says whether or not the Owners acknowledged that the Recovery Schedule wiped the slate clean for all purposes, repudiation included, accepting the Recovery Schedule had that effect at law. It argues that by agreeing to the Recovery Schedule and accepting it as the "governing schedule", the Owners affirmed the Contract. As a result of the Owners' election to affirm, any delays prior to that election are irrelevant to a subsequent repudiation claim and to any common law right to terminate.

[59] In support of its argument, the Contractor contends that, as a matter of law, an election by a contracting party to affirm a contract, where there is an option for that party to terminate it (by accepting a counterparty's repudiation), waives or abandons the right to terminate the contract. For this it refers to *Motor Oil Hellas (Corinth) Refineries S.A. v. Shipping Corporation of India (The Kanchenjunga),* [1990] 1 Lloyd's Rep. 391 (H.L.) at p. 398 [*The Kanchenjunga*]; *Charter Building Company v. 1540957 Ontario Inc. (Mademoiselle Women's Fitness & Day Spa),* 2011 ONCA 487 at para. 25; and *Morrison-Knudsen Co., Inc. v. British Columbia Hydro and Power Authority* (1978), 85 D.L.R. (3d) 186 at 224, 1978 CanLII 1977 (B.C.C.A.).

[60] The Contractor draws our attention to Lord Goff's observation, in his description of the principles of common law election in *The Kanchenjunga*, that,

where one party repudiates its contractual obligations, the innocent party has a choice:

> In all cases, he has in the end to make his election, not as a matter of obligation, but in the sense that, if he does not do so, the time may come when the law takes the decision out of his hands, either by holding him to have elected not to exercise the right which has become available to him, or sometimes by holding him to have elected to exercise it. . . . Once an election is made, however, it is final and binding …

[61] In *Dosanjh*, at para. 35, Groberman J.A. cited with approval a passage from *Chitty on Contracts*, 31st ed. (London, UK: Sweet & Maxwell Ltd., 2012) vol 1 at 1696–97, that reads in part:

> The mere fact that the innocent party has called on the party in breach to change his mind, accept his obligations and perform the contract will not generally, of itself, amount to an affirmation …

[62] However, he concluded:

> [37] I accept that, where a party has repudiated a contract, the opposite party is entitled to a reasonable period of time in which to decide whether to affirm the contract or accept the repudiation. I also accept that, at least until that reasonable period of time has elapsed, a court should be slow to treat equivocal statements or acts as affirmations of the contract. The court's solicitude toward the innocent party, however, must not extend to ignoring unequivocal acts or statements of affirmation made by a party that is aware of its legal rights.
>
> [Emphasis added.]

[63] The jurisprudence cited by the Owners supports the proposition that a continuing course of conduct may amount to repudiation. As I see it, the appeal on this ground turns upon whether there was continuing repudiation after the Owners' acceptance of the Recovery Schedule.

[64] If there was no continuing or recurring repudiatory breach, it did not remain open to the Owners to accept the repudiation they had previously waived by their acceptance of the Recovery Schedule. In that case, it matters not that the judge failed to weigh past non-compliance in the balance. It would make no commercial sense to interpret GC 3.5.8 in such a manner as to permit the Owners to demand and agree to a Recovery Schedule and then to terminate the Contract on the

grounds that the Contractor's non-compliance with the prior existing construction schedule amounted to repudiation of the Contract by the Contractor.

[65] It is correct to say that GC 3.5.8 permitted the Owners to demand the Recovery Schedule from the Contractor and then to later terminate the Contract for cause if there was continuing non-compliance with the project schedule, as revised. It had that right "in addition to those rights and remedies provided by law and under the Contract Documents". However, acceptance of the proposed Recovery Schedule was clearly an unequivocal act of affirmation made by the Owners, who were aware of their legal rights and their right to terminate the Contract as repudiated as a result of the delay preceding the demand for a Recovery Schedule. The right to terminate for pre-November 4, 2015 delay is not preserved after the Recovery Schedule is accepted. Thereafter, the Owners had no common law right to terminate the contract for a breach they had expressly elected to waive.

[66] In my view, given the findings of the trial judge, any delay following the acceptance of the Recovery Schedule cannot be said to amount to continuing repudiation. The judge found as a fact, at para. 175, that "the evidence does not support the conclusion that in the period after the Recovery Schedule was established, Centura breached any remaining obligation to complete its work within a reasonable time".

[67] That conclusion flowed from the judge's view that the Recovery Schedule was ineffective to impose obligations upon the Contractor because compliance with the Recovery Schedule was impossible. It was in relation to this argument that the judge understood the Owners to be taking the position that pre-Recovery Schedule delay was irrelevant. She apparently understood the Owners to be saying it was not open to the Contractor to say it could not comply with a schedule it had itself proposed because of the state of affairs that existed at the time the Recovery Schedule was drafted. She wrote:

> [168] I turn now to delay. The [Owners'] position is that the Recovery Schedule was the governing schedule from November 4, 2015 to the date of termination, and it wiped the slate clean so to speak. The defence submitted

> that the whole point of the Recovery Schedule was to get Centura back on track and, accordingly, delays prior to the Recovery Schedule became irrelevant. This was also the position adopted by Centura's witnesses, Mr. Bowie and Mr. Pengelly, in their testimony. They said the Recovery Schedule was intended to take into account all delays that had occurred to the point the Recovery Schedule was agreed to, regardless of who caused them.
>
> [Emphasis added.]

[68] The Owners impugn the judge's acceptance of the Contractor's position that the Recovery Schedule was abandoned soon after it was established. The Owners say the Contractor drafted the Recovery Schedule and should have been held to it, and the judge could not attribute delay in the work after the acceptance of the Recovery Schedule to the Owners. However, the judge noted:

> [174] … [T]he Recovery Schedule was expressly conditional on the feasibility of the schedule for the mechanical and electrical rough-in. This was fundamental, as much of Centura's work (insulation, drywall or boarding, and tape and fill) follows completion of the mechanical and electrical rough-in. Mr. Brezovski, the Icon representative with the most knowledge of what was happening on site, testified that he was not consulted by the defendants about the dates in the Recovery Schedule.
>
> [Emphasis added.]

[69] In my view, this amounted to a conclusion on the part of the trial judge that the Recovery Schedule only required the Contractor to meet such deadlines as were consistent with the completion of the mechanical and electrical rough-in.

[70] I agree with the Contractor's submission that the evidence supported the conclusion that the alleged repudiation did not continue and that a finding of continuing repudiation cannot be reconciled with the judge's findings of fact. The trial judge found the deficiencies in the Contractor's work to be minimal, and the continuing delay to be due to problems encountered by mechanical and electrical trades, not due to fault of the Contractor.

[71] Seeing no basis to interfere with the judge's description of the Contractor's obligations, I can see no basis to set aside her conclusion that the Contractor did not breach an obligation to meet the applicable construction schedule after the Owner's election to accept the Recovery Schedule. That being the case, there is no basis

upon which to find the Contractor continued to repudiate the Contract after November 4, 2015.

[72] In my view, these conclusions mean that any failure to make findings with respect to responsibility for the pre-November 4, 2015 delays was immaterial to the judgment below.

[73] Therefore, I would not accede to the argument that the judgment was affected by a misapprehension with respect to whether the Owners considered pre-November 4, 2015 delay to be material to their decision to terminate the Contractor on the basis of alleged repudiation.

The judge's application of the legal test for repudiation

[74] It follows, from the foregoing, that I would not accede to the Owners' argument that the judge erroneously considered whether the Contractor's conduct evinced an intention to breach a fundamental term in the future, rather than whether it had in fact already breached a fundamental term.

[75] In my view, the Contractor's post-November 4, 2015 intentions were canvassed as part of a thorough analysis of the fundamental breach claim. The Owners say the following passage in the judge's reasons wrongly looks to intentions:

> [192] Although there were deficiencies in Centura's work at the time of the termination, I accept Mr. Adlington's evidence to the effect that his pre-board and post-board inspections were a form of quality control. In other words, Centura intended to correct the deficiencies. In addition, irrespective of the delays Centura may have caused before the Recovery Schedule was established, once the Recovery Schedule was in place Centura intended to complete its work promptly. I have already found that Centura played a minor role in the delay that occurred after the Recovery Schedule was established. According to Mr. Brezovski, once the Recovery Schedule was in place, Centura's complaints virtually stopped, Mr. Bowie displayed a sense of urgency, and Centura's manpower increased. In all the circumstances, it cannot be said that at the time the Contract was terminated, Centura's conduct suggested that it did not intend to be bound by important terms of the Contract in the future.
>
> [Emphasis added.]

[76] However, it is clear from this passage that the judge only turned to the Contractor's intentions after addressing its "minor role in the delay that occurred after the Recovery Schedule". It must be read together with the judge's findings, at paras. 183–84, that the Contractor's failure to meet the good and workmanlike standard "clearly did not amount to a substantial failure of performance", and even if its failure to meet the Recovery Schedule was a breach of the Contract, the breach contributed in only a minor way, if at all, to the delays that occurred after the Recovery Schedule was established.

[77] In my view, the judge's careful assessment of the nature and extent of the alleged post-November 4, 2015 breaches of the Contract is an answer to the Owners' argument that the judge erroneously addressed anticipatory repudiation, rather than what the Owners refer to as "repudiation *simpliciter*" (or existing conduct amounting to repudiation). The judge addressed both.

The Dismissal of the Abuse of Process Claim

[78] The filing and maintaining of a lien for an amount utterly disproportionate to any amount the filing party could reasonably hope to recover through litigation may constitute an abuse of process: see, e.g., *A.H.H. Construction Services Ltd. v. Washington Properties (QEP) Inc*., 2021 BCSC 1912 at paras. 91–97 [*A.H.H.*].

[79] Whether there was an abuse of process in this case hinges primarily upon an assessment of the merits (more properly, the absence of merit) of the Interference Claim and its inclusion in the claim of lien filed by the Contractor.

Centrality of the evidence of Mr. Bowie

[80] The history of the lien claim in this case in complicated. As I noted at the outset of these reasons, a lien for $1,136,593 was filed on March 4, 2016. On or about April 14, 2016, security was posted and the lien was discharged from title. In March 2017, the Owners applied for an order pursuant to s. 25(2) of the *Builders Lien Act* that the lien claim be cancelled as an abuse of process or, alternatively, that the amount of security posted be reduced. Section 25(2) enables, among other

things, certain parties to apply to the court for cancellation of a lien on the basis that the claim of lien is an abuse of process.

[81] The application was heard on August 11, 2017. For reasons indexed as 2017 BCSC 1727, Abrioux J. (as he then was) dismissed the application, but reduced the amount to be held as security to $550,000. He described the lien claim as follows:

> [17] The lien claim amount was based on an internal Centura analysis referred to as "the Lien Summary" or "the Summary" on this application and which is described this way in the affidavit of Scott Bowie, the plaintiff's site foreman:
>
> > 15. I am informed by James Hu, Legal Administration Manager of Centura and believe, that the amount of the claims of lien that Centura filed against the 601 Main project was based Centura's actual costs of completion of its work up to the date of its termination, on the theory that this would include the cost of all contract work, work for extras (approved and pending), materials delivered, and impact costs.
> >
> > 16. Mr. Hu has provided me with a document which he informs me, and I believe, contains the estimated value of Centura work at the Project, calculated in January 2016. This document shows that Centura's total actual cost for the Project, plus overhead and profit, was $1,567,273. Mr. Hu also informs me, and I believe, that the numbers set out on that document were used to calculate the amount of Centura's lien claim against the Project.
>
> [18] 601 was required, as a term of its construction loan facility agreement with the project lender, to vacate all liens and other charges on title to the Lands prior to the release of any pending construction loan advances. On April 22, 2016, 601 had the lien discharged through the payment of security into court for the entire amount of the lien claim. The order provided that a party could apply to reduce the amount posted as security.
>
> [Emphasis added.]

[82] The evidence relied upon by the Contractor in support of the amount claimed was summarized by Abrioux J. as follows:

> [21] Mr. Evan Stregger, for Centura, initially concluded that Centura's contract was 70% complete as at the date of termination. When he factored in what he was instructed were approved and pending change orders, he calculated that the amount still owed to the plaintiff was $1,161,916.83. This did not include Centura's claim for damages arising from 601's alleged contractual interference.
>
> [22] Based on additional photographs disclosed by 601 after his initial report, Mr. Stregger then revised some of his estimates of the amount of work

> completed. This reduced his estimate of the unpaid work to a range of between $1.051 million to $1.091 million.
>
> [Emphasis added.]

[83] It is unclear from the reasons of Abrioux J. whether the claim secured by the lien included any amount in respect of the Interference Claim. The Bowie affidavit relied upon by the Contractor refers to the inclusion of "impact costs" but, at para. 21 of his reasons (as reproduced above), Abrioux J. expressed his understanding that contractual interference claims were not reflected in the amount secured. He reduced the amount held as security from $1,136,000 to $550,000, in part for the following reason:

> [40] The differences between the wip reports of Messrs. Breadmore and Stregger is not as significant as first appears when the claims for lost profits and other assumptions made by Mr. Stregger are deducted.
>
> [41] I am of the view that a significant portion of the difference between the two wip reports relates to items which, although properly claimable at the trial of the underlying action, should not be secured by this "powerful pre judgment weapon".
>
> [Emphasis added.]

[84] The items which Abrioux J. considered to be "properly claimable at the trial of the underlying action" but which "should not be secured" were not specifically identified. They were considered on appeal, however, where Savage J.A., writing for the Court, concluded:

a) the Interference Claim *was* included in the amount secured (see para. 10);

b) that claim was what Abrioux J. had discounted (see para. 35);

c) he had erred in doing so; and

d) the full amount of the lien should continue to be secured.

See Centura Building Systems (2013) Ltd. v. 601 Main Partnership, 2018 BCCA 172.

[85] Justice Savage found support for the Interference Claim in the evidence of Mr. Bowie. He wrote:

> [7] At the hearing of the application, Centura relied on an affidavit from its project manager, Scott Bowie, who said he was on site throughout Centura's involvement in the Project, and an expert witness, Evan Stregger. Mr. Bowie attested to delays and increased costs to perform Centura's work caused by interference from the contractors and mismanagement by the Developer's consultants. His affidavit referred to various documents, including contemporaneous emails and correspondence with the Developer about ongoing issues Centura said were occasioned by mismanagement, causing delay.
>
> …
>
> [9] Centura's expert, Mr. Stregger, reviewed progress photographs and photographs from the final date Centura was on site, and concluded that the amount owing under the base contract, including change orders approved or pending at the time of termination, was $706,037.50. He estimated that, due to interference and delays for which the Developer was responsible, Centura had incurred additional costs of $412,409.44, factoring in a 15-25% discount for any inefficiencies in Centura's work. The Developer's expert, Mr. Breadmore, critiqued Mr. Stregger's report. The Developer subsequently disclosed additional photographs, which led Mr. Stregger to reassess the amount of the contract completed. He also reduced his assessment of the amount owing by just over $20,000.
>
> [10] The amount of the builders lien claim filed by Centura was analyzed as having three components: (1) the unpaid base contract work, including the costs of work performed and material delivered to the site; (2) change orders submitted prior to the termination of the contract; and (3) the interference or delay claim, being the increased costs to perform the work due to the Developer's interference.
>
> [Emphasis added.]

[86] The evidence of Mr. Bowie was key to the conclusion that there was a *prima facie* case for the Interference Claim. Justice Savage wrote:

> [41] Mr. Bowie deposed: that on numerous occasions the project manager, Icon, failed to turn over work to Centura in a ready state; there were numerous areas on each floor that could not be completed in initial production work; there were material substitutions affecting the ability to complete the work; the skip used to deliver materials and workers initially only went partway up the building which added to the workload; the project manager directed that priority be assigned to different work to accommodate an early commercial tenant; there was delay in the installation of windows (by third parties) which affected the work; and other issues at the job site contributed to delays. He further indicated there were numerous outstanding change requests which were rejected one day before the contract was terminated by the Developer. This evidence went uncontroverted.

[87] As indicated above, the Interference Claim was advanced at trial, even after the allegation of wrongful termination of the Contract and the Lost Profit Claim were abandoned. In its submissions at trial, the Contractor asserted it was owed about $310,000 in respect of the Interference Claim.

Rejection of Mr. Bowie's evidence

[88] In her reasons, the judge found Mr. Bowie "had a tendency to exaggerate" and that "a memorandum he prepared to record the facts related to several particular problems that he claimed interfered with Centura's work was misleading in some respects and based, in part, on an email that he altered to align with his narrative": at para. 54. The judge did not believe his testimony at trial that the memorandum was correct to the best of his knowledge. She concluded she could not rely on any of his uncorroborated testimony. She evidently accepted the Owners' argument that she should reject Mr. Bowie's evidence that the Owners' mismanagement of the site caused the problems leading to delay and extra expense.

[89] The Owners say Mr. Bowie's memorandum was "the blueprint for the Plaintiff's case" (referring in particular to the Interference Claim), and that it was given to the Contractor's expert, Mr. Stregger, who relied upon it in providing the opinions in his various reports.

[90] The judge gave three reasons for dismissing the Interference Claim, the latter two of which she considered to be "fatal" to it:

> [150] First, proof of the complaints of interference and delay underlying Centura's Interference Claim depends heavily on the testimony or Mr. Bowie (and the accuracy of his memorandum). For reasons already expressed, the credibility of his testimony was seriously undermined and the memorandum is unreliable.
>
> [151] Second, proof of the damages said to have flowed from the complaints of interference and delay depends heavily on Mr. Stregger's Impact Report and it does not provide a reliable basis upon which I could assess the cost impacts of any of the complaints that may have been established.
>
> …

> [154] Third, and in any event … Centura failed to provide the notice required by GC 6.5.4 [applicable to claims for compensation for costs incurred as a result of an Excusable or Owner Caused Event] and, as a result of that failure, Centura is precluded from recovering compensation for cost impacts.

[91] When she turned to consideration of the abuse of process claim, the judge first addressed whether the Contractor knew its claim was bound to fail due to the failure to provide timely written notice to the Owners. She held: "it cannot be said that Centura knew or ought to have known that the Interference Claim would fail because it had not given formal notice under GC 6.5.4.": at para. 207. That is not disputed.

[92] Turning to the shortcomings in Mr. Stregger's evidence, she held (at paras. 208–11) they were significant but did not "provide an adequate foundation upon which to find that Centura knew or ought to have known the Interference Claim would fail". In doing so, she focused upon the technical problems affecting Mr. Stregger's calculations, rather than the false foundation upon which his opinion stood.

[93] In my view, the judge did not grapple with the glaring and fundamental problem with the lien claim: the fact that the Interference Claim (the alleged value of which informed the value of the lien claim) was based upon the evidence of Mr. Bowie which was found to be exaggerated, misleading and unreliable. When addressing that shortcoming, the judge held:

> [215] … Mr. Bowie's evidence was fundamental to establishing the complaints of interference and delay. His evidence suffered from my concerns about his credibility. The Interference Claim also depended on Mr. Stregger's evidence and I found that it did not provide a reliable basis upon which to assess the actual cost impact of any particular event or circumstance that may have interfered with Centura's work. <u>However, it was not established that the people at Centura who made the decisions with respect to quantifying the lien claim knew or ought to have known that the evidentiary foundation for the Interference Claim was materially inaccurate, untrue, or otherwise unreliable</u>.
>
> [Emphasis added.]

The Owners' argument

[94] The Owners say having found the evidence of Mr. Bowie, a 21-year employee of the Contractor and the project foreman, with respect to the cause of delay to be unworthy of credence, the judge ought to have found the lien claim filed in reliance upon Mr. Bowie's evidence to have been an abuse of process. They say Mr. Bowie was the Contractor's primary source of information about what was happening day-to-day on site, and it was him that they would have held responsible if anything went wrong. Mr. Bowie was providing regular reports to his superiors throughout the project.

[95] They note that, in her supplementary reasons, the judge described Mr. Bowie's conduct as follows:

> [87] It is clear that a corporate party may be held accountable through a costs award for a witness who gives intentionally false evidence in support of the party's case. In *Unternaher v. Wheat Sheaf Inn Ltd.,* [1998] B.C.J. No. 2568 (C.A.), the false evidence of two witnesses for the corporate defendant was held to warrant an award of special costs. One of the witnesses was a shareholder and employee of the corporate defendant and the other was employed by the corporate defendant "from time to time". Although the analysis is brief, it appears that the Court concluded, from the nature of the evidence the witnesses gave, that their misconduct was at the behest of the defendant. In *Concord Pacific Acquisitions Inc. v. Oei*, 2021 BCSC 129, the false evidence of the corporate plaintiff's "principal witness" was found to warrant an award of special costs against the plaintiff. The witness in question was a vice-president of the plaintiff. The fact that the plaintiff appreciated that the success of its case depended on the witness's evidence was a factor in the decision (see para. 65).
>
> [88] Mr. Bowie was Centura's most senior employee on the construction site. Centura appointed Mr. Bowie as its representative for examination for discovery and thereby agreed to be bound by the evidence he gave and admissions he made on discovery. Centura relied heavily on Mr. Bowie's evidence at each stage of the litigation, including by instructing its expert, Evan Stregger, to rely on Mr. Bowie's account of the progress of the Project. Centura clearly appreciated that Mr. Bowie's evidence was a central pillar of the case it advanced at trial. The defendants were forced to challenge and respond to Mr. Bowie's evidence which, because of its broad scope, was a substantial undertaking. In all the circumstances, I am satisfied that fairness requires Centura to bear the consequences of Mr. Bowie's misconduct.

[96] The Owners submit the same logic warrants a finding that the Contractor abused the process by filing a lien for an amount utterly disproportionate to any

amount the Contractor could reasonably hope to achieve through litigation. The Owners established that Mr. Bowie knew the information he provided in support of the lien was inaccurate. He was the senior person from the Contractor on site. Establishing that is sufficient to bring home the abusive conduct to the Contractor. The Owners cannot be made to bear the burden of showing the Contractor knew what Mr. Bowie knew about the lien claim.

Agency and vicarious liability

[97] The Contractor says theories of agency and vicarious liability were not raised at trial, or at the costs hearing, and contends we ought not to consider this "new" issue raised on appeal. In any event, it argues the Owners have not established a sufficient evidentiary record upon which we can address the applicable principles of agency and vicarious liability. We should not consider the argument unless it can be characterized as "a pure legal argument on uncontroverted factual findings or it is clear that, had the question been raised at the proper time, no further light could have been shed upon it": *Hwlitsum First Nation v. Canada (Attorney General)*, 2018 BCCA 276 at para. 36, leave to appeal to SCC ref'd, 38325 (28 March 2019).

[98] I would not accede to that argument. It was clear that the Owners were taking the position at trial that the lien claim was founded upon an internal analysis based upon the evidence of Mr. Bowie. They argued, in their written submissions, that "Centura knowingly misled Mr. Stregger into producing an inflated delay and interference claim in order to support its inflated claim of lien" and that the Contractor "knew, or ought to have known, that he was simply taking Centura's own numbers and presenting them as his own without any independent verification". That argument could only be founded upon the implicit assumption that the Contractor was liable for the errors or omissions of its employees, including Mr. Bowie.

[99] The Owners clearly argued that the misleading evidence of Mr. Bowie was fundamental to the overstatement of the lien claim, and that the Contractor was responsible for that overstatement. Their written submissions made out that case:

> 45. The Plaintiff's primary witness was Scott Bowie. The Plaintiff relied almost exclusively upon him to establish that the delays on site were due to ICON's inability to manage the site or were caused by other trades for which the Defendant is responsible
>
> 46. Mr. Bowie was a wholly incredible and self-interested witness. None of his evidence should be accepted unless it has been independently corroborated by a document not authored or informed by him, or is an admission against interest.
>
> 47. He was shown to be untruthful and inaccurate in his description of what transpired on site and he demonstrated a tendency to exaggerate whenever the opportunity arose.
>
> 48. His actions in this respect did not only arise at trial, but permeated this litigation from the outset and informed Centura's overall understanding of what actually happened.
>
> 49. Mr. Bowie was Centura's primary source of information about what was happening day to day on site, and it was him that they would have held responsible if anything went wrong. Mr. Bowie was providing regular reports to his superiors throughout the project, which each of Mr. Pengelly, Lim and Adlington said they relied upon as being accurate when they were making their own assessments of what was happening on site.
>
> 50. Following termination, Mr. Bowie prepared a 28-page memo setting out in detail how it was ICON's mismanagement of the site caused all the problems, and not anything he had done while site foreman.
>
> 51. This memo is the blueprint for the Plaintiff's case, and it was given to their expert, Mr. Stregger, who relied upon it in providing the opinions in his various reports.
>
> [Emphasis added.]

[100] It was undisputed that Mr. Bowie was the Contractor's site foreman, and that his reports informed the Contractor's case. While it is correct to say the Owners took issue with aspects of the lien claim other than the Interference Claim, it is an overstatement on the Contractor's part to say the arguments at trial were "focused on other matters, which have not been impugned in this appeal". The Owners focused equally upon the essential role of Mr. Bowie in establishing the Contractor's case and expressly challenged his credibility.

[101] The Owners say Mr. Bowie prepared the impugned memorandum and swore the affidavit upon which Savage J.A. relied in restoring the full lien claim as an agent of the Contractor. They rely upon *Equinav Financial Corporation v. Roesslein Estate*, 2020 SKCA 69, where Leurer J.A., writing for the court, said:

> [43] … At common law, the knowledge of an agent is imputed to its principal either when notice is given to the agent or when the agent has gained knowledge in the course of its duties and is under a duty to communicate such knowledge to its principal (Gerald Fridman, *Canadian Agency Law*, 3d ed (Markham: LexisNexis, 2017) at 242–244 [Fridman]). This imputation rule creates a legal fiction; that is, the principal may not have actual knowledge of the information that was given to or acquired by the agent but, for legal purposes, the knowledge of the agent is attributed to the principal. In *Mah v. Wawanesa Mutual Insurance Company*, 2013 ABCA 363 at para. 13, 92 Alta LR (5th) 46, the Court noted that this rule "has been settled English law for over 125 years".

[102] The Owners say these principles were applied to impute the knowledge of a project manager employed to manage a tendering process to his principal in *Tercon Contractors Ltd. v. British Columbia (Ministry of Transportation and Highways)*, 2006 BCSC 499 at para. 133. *Tercon*, in turn, cited *Huxley v. Aquila Air Ltd*. (1995), 5 B.C.L.R. (3d) 94, 1995 CanLII 1008 (S.C.). In *Huxley*, Lowry J. (as he then was) cited with approval Lord Halsbury's statement on this aspect of the law of agency in *Blackburn, Low & Co. v. Thomas Vigors* (1887), 12 A.C. 531 at 537 (H.L.):

> Some agents so far represent the principal that in all respects their acts and intentions and their knowledge may truly be said to be the acts, intentions, and knowledge of the principal. Other agents may have so limited and narrow an authority both in fact and in the common understanding of their form of employment that it would be quite inaccurate to say that such an agent's knowledge or intentions are the knowledge or intentions of his principal; and whether his acts are the acts of his principal depends upon the specific authority he has received.
>
> …
>
> Where the employment of the agent is such that in respect of the particular matter in question he really does represent the principal, the formula that the knowledge of the agent is his knowledge is I think correct, but it is obvious that the formula can only be applied when the words "agent" and "principal" are limited in their application.

[103] The Owners' case that the Interference Claim was founded upon the evidence of Mr. Bowie and that his evidence was untrustworthy was sufficiently

pleaded. The issue of whether the Contractor, by acting upon Mr. Bowie's exaggerated and misleading evidence, abused the process was before the trial judge and was expressly addressed by her. As we have seen, she held at para. 215 that the Contractor was not saddled with knowledge of the weakness of Mr. Bowie's evidence. The issue is clearly not a new one on appeal.

[104] In my view, once the Owners established the extent to which Mr. Bowie represented the Contractor in respect of the particular matter (supervision of the progress of the work), it also established that his acts, intentions, and knowledge were the acts, intentions, and knowledge of the Contractor in relation to that matter. There can be little doubt in this case that all of Mr. Bowie's relevant acts in identifying, quantifying, and testifying to the Interference Claim were undertaken within the scope of his authority and were for the benefit of the Contractor. In my view, the judge erred in failing to give effect to settled law when she held the Owners had not established the Contractor knew or ought to have known that the evidentiary foundation for the Interference Claim was materially inaccurate, untrue, or otherwise unreliable.

[105] Other than arguing that the questions of agency and vicarious liability are not properly before us, the Contractor does not offer a substantive answer to the Owners' assertion that Mr. Bowie's knowledge must be imputed to his principals. The Contractor says only that: "The [Owners] have established no error on the part of the Trial Judge to fail to consider the issues of agency and vicarious liability, since she was never asked to consider them".

[106] The Contractor's substantive response to the abuse of process claim is that, even if Mr. Bowie's knowledge that there was no merit to the Interference Claim is imputed to the Contractor, a case for abuse of process was not made out on the evidence. I turn to that question now.

Overt act and improper purpose

[107] The Contractor says that courts on occasion have rejected abuse of process claims founded upon the filing of inflated liens where the plaintiffs have not

established an improper purpose, relying principally upon *Brent v. Slegg Construction Materials Ltd.*, 2007 BCSC 661; *Zanon Sheet Metal Inc. v. Boffo Bros. Construction Ltd.*, [1993] B.C.W.L.D. 1429, 1993 CanLII 1368 (S.C.); and *Corazzin v. Donovan*, [1993] B.C.W.L.D. 1564, 1993 CanLII 2755 (S.C.).

[108] It says this Court's restatement of the tort of abuse of process in *Oei v. Hui*, 2020 BCCA 214, is useful. As Saunders J.A. observed in that case, the impugned act must be outside the normal incidents of litigation:

> [34] … [T]rial decisions in British Columbia and elsewhere have held that advancing a false claim, for wrongful motives, is not enough to establish the tort of abuse of process: *Teledata Communications Inc. v. Westburne Industrial Enterprises Ltd.* (1990), 65 D.L.R. (4th) 636 (Ont. S.C.) ("factually groundless"); *Scintilore Explorations Ltd. v. Larche*, [1999] O.J. No. 2847 (S.C.) ("a false claim or false evidence"); *Office and Professional Employees Int'l. Union v. Office and Professional Employees Int'l. Union, Local 15*, 2006 BCSC 847 [*OPEIU*] (at para. 15 citing *Teledata*). See also *A.M. v. Matthews*, 2003 ABQB 942 on malicious institution of proceedings.
>
> [35] All of this is not to say that advancing intentionally false pleadings is not odious to the court process. Lawyers, of course, are bound by the ethics of their profession not to promote suits upon frivolous pretences, and they have an obligation as officers of the court not to be false to the court. Apart from serious ethical standards applicable to lawyers, all parties are subject to sanctions by way of costs for misconduct in the court process, are bound by rules designed to expeditiously weed out baseless claims, including an application to dismiss a claim under Rule 9-5(1)(d) for procedural abuse of process, and can be asked to post security for costs. The question before us is not whether intentionally false pleadings, if established, could attract opprobrium in the first action, but whether such pleadings can support a claim in tort for abuse of process by reason of the alleged knowing falsity of the allegations. Such a claim in tort requires a pleaded purpose that is outside the ambit of the first action, whereas procedural abuse of process is more widely discovered.
>
> [36] The tort of abuse of process is narrow, intentionally so to foreclose the spawn of litigation wherein one failed action begets another action, which may beget another action, and so on.
>
> [Emphasis added.]

[109] After a thorough review of the caselaw addressing the elements of the tort, with a view in particular to settling whether an "overt act" outside the normal

incidents of litigation need be pleaded in support of an abuse of process claim, Saunders J.A. concluded:

> [79] Canvassing these many authorities, it seems plain to me that the original expression of doubt as to the requirement in British Columbia of an overt act rests on shaky ground, but it has been repeated. I consider the reasons of Justice Dillon in *OPEIU* to best state the requirements in British Columbia, and while the extra-provincial authorities cited here are not binding in British Columbia, their nearly unanimous view of the tort is persuasive, absent a reason in principle why the formulation is wrong. We have not had a reasoned decision in British Columbia explaining the error in Professor Fleming's description, which did find its way into the seminal case of *Guilford*, although that aspect of *Guilford* appears to have been overlooked and has created, in the result, confusion. I conclude that absent a reasoned basis to diverge from the law first stated in British Columbia, that the tort conceptually requires more than a collateral and improper purpose, and that the "more" is an overt act or threat.
>
> [Emphasis original.]

[110] The passage from the judgment of Dillon J. in *Office and Professional Employees Int'l. Union v. Office and Professional Employees Int'l. Union, Local 15*, 2006 BCSC 847, to which Saunders J.A. was referring, reads as follows:

> [24] Aside from *Guilford* and *D.K. Investments*, the British Columbia cases have not had to go so far as to find facts to support the overt act element of the tort. However, support is given to the Fleming definition and there is no doubt that the second element, an overt act, is required. Anderson J. accurately described this conduct in *Guilford* as amounting to "legal blackmail." The act cannot be found within the very process complained of because this would not be in furtherance of the improper purpose which is also to be outside the ambit of the action. I agree with Irvine that to focus on improper motive alone would expand the tort and require examination of bad motives alone. It would leave the requirement for an overt act meaningless. To define the act within the scope of the relief available within the lawsuit itself would broaden the tort beyond its classic description from *Grainger v. Hill* (1838), 4 Bing N.C. 212, 132 E.A. 769. In that case, the defendant sued wrongfully on a mortgage in order to force the plaintiff to surrender the register of a vessel to the defendant, a remedy to which he was not entitled in the litigation.
>
> [Emphasis added.]

[111] The Contractor says the appellate judgment in *Oei* is not referred to in *A.H.H.*, and that the judgment in *A.H.H.* is, therefore, an "incomplete" description of the elements of an abuse of process claim. There must be both a "bad" or improper

motive and an overt act outside the ambit of the action. The Contractor contends there is no proof of either in this case.

[112] The application of the abuse of process doctrine to claims of lien was set out in *Guilford Industries Ltd. v. Hankinson Management Services Ltd.* (1973), 40 D.L.R. (3d) 398 at 405–406, 1973 CanLII 1065 (B.C.S.C.):

> While the Courts must protect the right of every resident "to have his day in Court" where there is some evidence, however slight, on which a claim might be supported, the Courts will not will not permit the processes of the law to be used for ulterior purposes. This Court cannot shut its eyes to the fact that mechanics' liens, *lis pendens* and garnishing orders are sometimes, though not often, used by unscrupulous persons to achieve results which could not otherwise be obtained. The Courts will be quick to curb such acts and, hence, protect the sanctity of the Courts and processes provided by law for the achievement of lawful purposes.
>
> [Emphasis added.]

[113] The concerns expressed in *Guilford* are echoed in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, where the Supreme Court of Canada addressed the abuse of process doctrine more generally:

> [35] Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979, at p.1007:
>
> > … abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. *But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.*
>
> …
>
> [37] In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would … bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002

> SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:
>
> > The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel**.** See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
> >
> > …
>
> [Underline emphasis original; italic emphasis added.]

[114] *Guilford* is not, however, of assistance in answering the critical question in this case: whether the fact that a claim of lien is intentionally exaggerated or based upon false or misleading evidence is sufficient to support an abuse of process claim, without more. There was no question that the contractor in that case, Gibraltar, "knew perfectly well that there was not the slightest hope of succeeding on the lien claim and filed the lien for an improper and malicious purpose, namely, to compel Guilford to make a settlement …". Anderson J. further held at 405:

> In the case at bar, the lien proceedings are completely devoid of any legal foundation and were initiated for an unlawful purpose, namely, to obtain a settlement by means of legal "blackmail".

[115] In *Tylon Steepe Homes Ltd. v. Pont*, 2009 BCSC 253, the issue was not whether damages for the tort of abuse of process should be awarded but, rather, whether the claim of lien should be cancelled pursuant to s. 25 of the *Builders Lien Act*. Justice Burnyeat found a lien claimant had abused the process by significantly overstating the lien amount. He held the amount of the lien was "not supportable" (at para. 19), and that it was "far in excess of what was lienable": at para. 27. The difference between what might properly have been claimed and the lien amount (an amount in excess of $200,000) was "so substantial as to amount to an abuse of process": at para. 27.

[116] In so holding, Burnyeat J. relied on *Henderson Land Holdings (Canada) Ltd. v. Micron Construction Ltd.* (1999), 49 C.L.R. (2d) 311, 1999 CanLII 5251 (B.C.S.C.), where a lien was struck as abusive because it was unsupportable. In that case.

Edwards J. found the claim to be abusive because "it showed a callous disregard for the process established by the legislation": at para. 21.

[117] In *Atlas Painting & Restorations Ltd. v. 501 Robson Residential Partnership,* 2016 BCSC 2472, Macintosh J. considered "whether the Plaintiff's builders lien was a proper use of the *Builders Lien Act*, or instead was an abuse of process within the meaning of s. 25 of that legislation": at para. 2. He held:

> [12] … [T]he complexity of the underlying contractual dispute makes a court reluctant to come to a finding of abuse within the meaning of s. 25 of the *Act*, as quoted above. Such a finding is tempting in light of the large gap between the initial lien claim and the amount Atlas now acknowledges to be a proper lien claim. I find, however, admittedly with some hesitation, that Atlas rescued itself from a finding of abusive conduct by its reduction of the lien amount … in February 2016 and its offered further reduction … when it prepared for this application in October ….

[118] In *A.H.H.*, the court found the plaintiff had committed an abuse of process in filing a lien, and awarded the defendant, against whose title the lien was registered, interest on the amount secured by the lien, without expressly finding that the lien had been filed for a malicious purpose. While the trial judge in that case began his analysis by referring to the settled elements of the tort of abuse of process, including use of the processes of the law "for ulterior purposes", the award appears to have been founded solely upon the fact the claimant filed a lien for an amount wholly disproportionate to the underlying claim: see para. 97.

[119] In *Pinnacle Living (Capstan Village) Lands Inc. v. Tarrier Group Inc.,* 2023 BCSC 1315, as in *Tylon Steepe*, the finding that an excessive claim was an abuse of process was made in the context of an application to discharge the lien pursuant to the *Builders Lien Act*, rather than a tort claim. Ross J. drew attention to the distinction between the two remedies:

> [7] I note that in *A.H.H*., the lien was found to amount to an abuse, but the decision did not address cancelling the lien. In *Atlas*, by the time of the hearing, the lien amount had been reduced, and the matter was resolved pursuant to s. 24. In *Tylon*, the lien was found to amount to an abuse, but the matter was resolved under s. 24. I have concluded that is the appropriate approach to adopt in the present case.

[120] As noted above, s. 25 of the *Builders Lien Act* enables an owner, contractor, subcontractor, lien claimant or agent of any of them to apply "at any time" for an order cancelling a lien as vexatious, frivolous or an abuse of process. In the case at bar, as I have noted, the Owners applied for such an order, but were unsuccessful because this Court found the evidence of Mr. Bowie, if believed, established a *prima facie* case for the Interference Claim. The interim relief was, therefore, unavailable, because the Contractor answered the application with evidence the trial judge later considered to be unworthy of belief.

[121] The remedy now sought by the Owners hinges upon whether it can make out the tort of abuse of process, not upon whether the lien should be discharged as an abuse of process pursuant to s. 25 of the *Builders Lien Act*.

[122] The Contractor cites *Slegg Construction Materials* as authority for the proposition that something more than mere exaggeration or misrepresentation is necessary to ground the tort; namely, an ulterior motive. In that case, the court noted:

> [33] According to *Guilford Industries* … in which Anderson J. at para. 26 quoted Fleming on Torts, 4th ed. at page 547, in order to succeed in a claim based on abuse of process the plaintiff must prove two elements:
>
> (a) a collateral and improper purpose, such as extortion; and
>
> (b) a definite act or threat, in furtherance of a purpose not legitimate in the use of the process.
>
> [34] Thus, for example, the filing of a lien completely devoid of any legal foundation in order to extract money by "legal blackmail" may constitute an abuse of civil process (*Guilford Industries*, *supra*).
>
> [35] I am not satisfied the lien in this case was "completely devoid of any legal foundation" or that it was filed as a form of "legal blackmail". It is not suggested that the lien was filed out of time or against the wrong property. There was money owing to the claimant in respect of material supplied to the property. I am not satisfied that the defendant is liable for an abuse of process simply because the amount of the lien included amounts that could not be proven. The defendant was aware of the provisions of the *Builders Lien Act* under which he could have sought a discharge of the lien upon the payment of security and in which case his right to challenge the amount of the lien would have been preserved. Instead he chose the quick route.
>
> [Emphasis added.]

[123] In *Slegg Construction Materials*, however, the whole claim was not devoid of merit, and the claim of lien was small and not grossly inflated. The builder claimed $8,700, and proved a debt of only $6,100. It is not a strong precedent for the Contractor. Nor are the other authorities to which counsel referred us.

[124] In *Zanon Sheet Metal*, Warren J. dismissed a builder's claim and cancelled a lien. The evidence of the contractor in that case with respect to the terms of the relevant contract were rejected. However, the judge did not find that the claim was intentionally exaggerated, that it depended upon false evidence or that the claim of lien was clearly untenable. He held:

> Returning to the defendant's authority, *Guilford Industries Ltd.*, I cannot say the lien proceedings were completely devoid of any legal foundation or that they were initiated for an unlawful purpose to obtain a settlement by means of legal "blackmail" to use the words of Anderson, J. I would add that, in my view, the second lien was not filed for any improper reason. The defendants' claims for damages and for costs are dismissed.

[125] In *Corazzin*, Selbie J. dismissed a builder's claim of lien as unsupported by the evidence. However, he was not prepared to find that the filing of the lien alone amounted to an abuse of process, and dismissed a counterclaim seeking damages which had been made by the homeowner. He held:

> The defendant also seeks damages for abuse of process in the filing of the lien. He claims the plaintiff did so to put pressure on the defendant to pay an outstanding electric bill. The evidence on this is lacking. There are other motives perhaps much more plausible but that is indulging in speculation. Evidence that a lien claimant used the law for improper purposes must be firm and unequivocal in my view before lien privileges, when found wanting, should be subject to claims of exemplary damages. That claim is dismissed.
>
> [Emphasis added.]

[126] *Corazzin* is some authority for the proposition that the filing of an unsupported claim of lien alone is not sufficient to found a claim for damages for abuse of process. It is noteworthy, however, that there was no finding in *Corazzin* that the claim was intentionally exaggerated and no suggestion that the builders' claim had no prospect of success. The dispute centred on whether the builder had abandoned the project before its completion. The judgment is not authority for the proposition

that the filing of an unsupportable lien cannot be abusive in the absence of direct evidence of improper motive. The lien claimant's conduct in that case was not unequivocally improper.

Application to the case at bar

[127] In my opinion, the filing of a lien may be considered to be an act outside the ambit of the action. The *Builders Lien Act* provides:

a) a claim of lien may be enforced by an action (s. 26);

b) an owner may require a claimant to commence an action to enforce the claim (s. 33); and

c) in any event, an action to enforce the claim must be commenced not later than one year from the date of its filing (s. 33).

[128] All of these provisions evidence the fact that the filing and maintaining of a builders lien is conduct which is outside the underlying debt or enforcement action. In that respect, liens resemble certificates of pending litigation, the filing of which for an improper purpose may amount to an abuse of process, even without specific evidence of an ulterior motive. For example, in *Feng et al v. Chan and Woo*, 2007 BCSC 251, the alleged abuse of process consisted of the wrongful filing of a certificate of pending litigation by a party who knew he had no claim in law or at equity to do so. D. Smith J. (as she then was) held that the filing of a certificate founded upon a misleading allegation amounted to an abuse of process.

[129] To use the words employed by Macintosh J. in *Atlas Painting*, liens are "powerful pre-judgment weapons". Their use should be carefully scrutinized. As noted in *Guilford* at 405–406: "mechanics' liens, *lis pendens* and garnishing orders are sometimes, though not often, used by unscrupulous persons to achieve results which could not otherwise be obtained".

[130] As this Court stated in *Oei* at para. 36, the scope of the tort of abuse of process is confined so to as to avoid one failed action begetting another action,

which may beget another action, and so on. This is not such a case because the conduct which constitutes the alleged abuse is not the pleading or prosecuting of an unsuccessful case. The remedy is not sought for the failed action, but for the abuse of the statutory lien remedy. Whether the filing of a lien constitutes an abuse of process is a question that can logically be determined in an action to enforce the lien, or on an application to discharge it, without begetting further litigation.

[131] In some cases, an improper motive on the part of a party that filed a lien may be inferred notwithstanding that the evidence going towards motive is limited to the deficiency in the lien claim itself.

[132] The filing of a lien employs a legal process to tie up funds. The purpose of the *Builders Lien Act* is to provide for the attachment of a lien to improvements, the land on which improvements are located and the materials delivered to the land, in order to secure a claim for the price of the work and materials provided by contractors, subcontractors and workers, to the extent that the price remains unpaid. Where a lien is filed by a person who knows the value of the claim is unsupportable, it is open to a court to find the *Builders Lien Act* is being used for an improper purpose because, in such circumstances, the lien has not been filed to secure a judgment the lienholder has a legitimate prospect of obtaining.

[133] Such an inference was not drawn in *Slegg Construction Materials*, *Zanon Sheet Metal* or *Corazzin*, where claims were simply unsuccessful due to a real conflict in the evidence or a legitimate legal dispute. Where, as here, however, the lien claimant relies upon a misrepresentation in support of the lien, and in opposition to an application pursuant to s. 25 of the *Builders Lien Act* to discharge or reduce the value of that lien, it is open to a court to find the statutory lien process is being used for an improper purpose.

[134] In my opinion, the inclusion of the value of the Interference Claim in the claim of lien amounted to an abuse of process. Mr. Bowie’s recognition that the Owners did not interfere in the Contractor’s work is imputed to the Contractor. The Contractor improperly employed the legal process to secure funds to which it knew

or ought to have known it was not entitled. By doing so, it caused the Owners to suffer damages: the time value of the money held in court as security.

[135] The Owners seek a compensatory order they calculate as “interest on $586,593 paid into court in April 2016, to be calculated based on the contractual interest rate set out in the Contract (prime plus two percent for the first 60 days and prime plus four percent thereafter)”.

[136] In my opinion, the abuse of process claim is made out only in relation to that portion of the value of the lien representing losses alleged to have been caused by interference and delays for which the Owners were responsible. That portion of the amount paid into court to discharge the lien was identified by Savage J.A. as $412,409.44: see 2018 BCCA 172 at para. 9.

[137] The Owners’ compensatory claim is limited to interest on that amount at pre-judgment rates from April 14, 2016, the date security was posted, to the date of judgment: February 25, 2022. The damages are founded in tort and are not contractual in nature. For that reason, the contractual interest rate has no application. No evidence having been led with respect to the actual interest costs incurred by the Owners, we are left with only the statutory rate of interest as a measure of the Owners’ loss.

Pre-Judgment Interest on the Award to the Contractor

[138] The order under appeal makes no provision for the payment of pre-judgment interest on the sum awarded to the Contractor, either at contractual or statutory rates.

Contractual pre-judgment interest

Standard of review

[139] The judge dismissed the Contractor’s claim to pre-judgment interest on the amount awarded pursuant to GC 6.5.10, at the rate specified in clause A 5.3.1 of the Contract. She did so because she was of the view that, while GC 6.5.10 describes the Contractor’s entitlement to payment for “Work” completed prior to termination,

the provision does not specify a date upon which payment becomes due. For ease of reference, I repeat the material words of the provision:

> 5.3. Interest
>
> .1 Should either party fail to make payments as they become due under the terms of the Contract or in an award by arbitration or court, interest at the following rates on such unpaid amounts shall also become due and payable until payment:
>
> (1) 2% per annum above the prime rate for the first 60 days.
>
> (2) 4% per annum above the prime rate after the first 60 days.
>
> Such interest shall be compounded on a monthly basis. The prime rate shall be the rate of interest quoted by HSBC for prime business loans as it may change from time to time.

[140] The Contractor argues the judge erred in her interpretation of the provision, and thus the Contract. It submits that, because she was interpreting a standard form stipulated price contract, we should treat the question before us as an extricable question of law, reviewable on a standard of correctness. To this end, the Contractor relies upon *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co*., 2016 SCC 37, and particularly the statement (at para. 24) that: “where an appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix specific to the parties to assist the interpretation process, this interpretation is a question of law subject to correctness review”.

[141] The Owners say the impugned decision is a question of mixed fact and law attracting deference. They say the Contract was not a contract of adhesion; in fact, there was negotiation and revision of certain standard contract (CCDC-17) terms. They say, as a result of such negotiation, there is no other contract quite like this one. They draw our attention to the following passage in *Ledcor*:

> [48] Depending on the circumstances, however, the interpretation of a standard form contract may be a question of mixed fact and law, subject to deferential review on appeal. For instance, deference will be warranted if the factual matrix of a standard form contract that is specific to the particular parties assists in the interpretation. Deference will also be warranted if the parties negotiated and modified what was initially a standard form contract, because the interpretation will likely be of little or no precedential value. There may be other cases where deferential review remains appropriate. As

> Iacobucci J. recognized in *Southam Inc.*, the line between questions of law and those of mixed fact and law is not always easily drawn. Appellate courts should consider whether "the dispute is over a general proposition" or "a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future" (para. 37).

[142] The template document used by the parties to draft the Contract is the "Stipulated Price Contract between Owner and Trade Contractor for Construction Management Contracts 2010", apparently prepared by the "Canadian Construction Documents Committee". The document bears the following description:

> CCDC 17 and CCDC 5A 'Construction Management Contract-For Services' are complimentary documents. CCDC 17 is the product of a consensus-building process aimed at balancing the interests of all parties on the construction project. It reflects recommended industry practices. CCDC 17 can have important consequences. The CCDC and its constituent member organizations do not accept any responsibility or/liability for loss or damage which may be suffered as a result of the use or interpretation of CCDC 17.

[143] The template is clearly a standard industry contract. Its wording is applicable in Quebec and the common law provinces. Its interpretation is of precedential value. The interpretative question in this case is how to read the clauses referred to by the trial judge: A-5 (Payment); GC 5 (Payment); GC 6.5 (Delays); GC 7 (Default Notice) and GC 13 (Miscellaneous).

[144] One significant provision was added to the standard form CCDC-17 template and altered by hand. The parties, by addendum, added article 7.1.10. In its typed, standard form version, this clause reads as follows:

> 7.1.10 The Trade Contractor acknowledges that, in the event that Owner terminates this Contract for any reason, Owner shall not have any liability to the Trade Contractor as a result of the termination except to the extent that Owner is able to recover compensation or damages from a third party in connection therewith was terminated because of a default by Owner and not the Trade Contractor.

[145] This provision was modified by striking out passages and adding, in manuscript, the words underlined in the following version:

> 7.1.10 The Trade Contractor acknowledges that, in the event that Owner terminates this Contract for any reason, Owner shall <u>pay the contractor for all Work performed to date</u>. ~~not have any liability to the~~

> ~~Trade Contractor as a result of the termination except to the extent that Owner is able to recover compensation or damages from a third party in connection therewith was terminated because of a default by Owner and not the Trade Contractor.~~

[146] This modification, applicable where the Owner terminates the contract with notice pursuant to GC 7.1.7, brings GC 7.1.10 into harmony with the clause in the case at bar, GC 6.5.10, which is applicable where the Owner terminates the contract without notice where there has been delay. Both clauses provide that the Contractor will be entitled to payment in respect of the work "completed" (GC 6.5.10) or "performed" (GC 7.1.10) up to the date of termination.

[147] The provisions relevant to the interest issue, A 5.3.1 and GC 6.5.10, are in the standard form and are unaffected by the revisions and amendments specific to the parties. There is no meaningful factual matrix that is specific to the parties to assist the interpretation of the provisions that determine when a payment becomes due under the terms of the Contract. For that reason, the judgment with respect to contractual interest is reviewable on the standard of correctness.

Substantive issues

[148] The judge reasoned as follows:

a) The contractual interest provision is in a section of the Contract titled "Article A-5 Payment", the first clause of which, A 5.1, identifies three types of payments the Owner must make and specifies the dates upon which such payments become due. Those payments are:

    i) "progress payments": expressly required to be made, pursuant to GC 5.2 and 5.3, on or before 50 calendar days after receipt by the "construction manager" of an application for payment date made by the contractor;

    i) the "holdback": expressly "due and payable", per GC 5.5, in common law jurisdictions on the first calendar day following expiration of the applicable statutory holdback period after the

issuance of a certificate for payment of the holdback by the "payment certifier"; and

ii) the "final payment": expressly due, per GC 5.7, upon issuance of a final certificate for payment by the "payment certifier".

b) Clause A 5.3.1 calls for the payment of interest at contract rates in the event either party fail to make payments as they become due under the terms of the Contract. Contrary to the Owners' position, its application is not expressly limited to the three kinds of payments mentioned in A 5.1. This could not be so as, by its express terms, the provision applies where "either party" fails to make payments; each of the three types of payment noted in A 5.1 is payable only by the Owner.

c) Clause A 5.3.2 clarifies that interest is payable on disputed claims from the date the amount would have been due and payable under the Contract, had it not been in dispute. The fact a claim is disputed does not postpone interest if the payment is "due".

d) GC 6.5.10 and GC 7.1.10 establish a contractual entitlement to payment for work performed up to the date of termination that is triggered "upon", or contemporaneously with, termination of the Contract under GC 6.5.10. However, these provisions do not describe a "due date"; that is, there is no express statement of when payment of the amount to which the Contractor is entitled thereunder is "due".

e) It would have been easy to include language in the Contract to the effect that the amount the Contractor is entitled to be paid under GC 6.5.10 is due within 30 days (or some other period) of the date that an invoice is submitted by the Contractor for the work completed up to the date of termination.

f) The significance of the omission of an express statement as to when the payment is due is heightened by the fact that other provisions in the Contract do expressly provide when amounts claimed are "due". This suggests that

when the parties intended to impose an obligation to pay by a particular time they did so expressly.

g) It cannot be said that it is obvious the parties intended the payment contemplated by GC 6.5.10 to become due concurrently with termination. Such a construction does not meet the requirements for implying a contractual term stated in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 at para. 29: "a contractual term may be implied on the basis of presumed intentions of the parties where necessary to give business efficacy to the contract or where it meets the 'officious bystander' test".

h) A construction reflecting an intention of the parties not to stipulate a due date for the payment to which the Contractor was entitled under GC 6.5.10 could not be characterized as inefficacious given that on termination of the Contract under that provision (which is effective immediately, without notice) neither party would know the amount to be paid.

[149] The Contractor says, first, that the judge misconstrued the Contract. It argues that a plain reading of GC 6.5.10 supports the view that payment is in fact "due" to it upon termination. In my view, a "plain reading" is not of assistance to the Contractor. As the judge noted, GC 6.5.10 provides that upon termination the Contractor is "entitled to payment only in respect of the Work completed up to the date of termination". She observed this language could be contrasted with other provisions of the Contract which do expressly describe dates upon which contractual entitlements become due.

[150] The Contractor also claims the judge reasoned that the payment it was entitled to pursuant to GC 6.5.10 never became due, which, as a matter of logic and business efficacy, cannot be correct. In my view, it is not correct to say payment of the amount to which a contractor is entitled pursuant to GC 6.5.10 is never due. The contract provides for application for payments (GC 5.2), certification of progress payments and the date upon which certified progress payments are due. To the

extent that the Contractor is entitled to payments pursuant to GC 6.5.10, for which it cannot apply pursuant to GC 5.2, it can have resort to Part 8, the dispute resolution provisions of the Contract. It can seek an arbitral award for payment of disputed claims or obtain judgment in court for such claims. Those processes would result in the setting of a due date, from which date interest would run at contract rates.

[151] In my opinion, the Contract may fairly be read to provide that the relatively high contractual rates of interest provided for by clause A 5.3.1 run on amounts found to be due to the Contractor through a process of certification (pursuant to the express terms of the Contract) or by adjudication. I agree with the Owners' characterization of arbitral or court judgments as a second trigger for contractual interest where a payment is not expressly "due under the terms of the Contract". Neither termination of the Contract alone, nor the making of a claim for payment by the Contractor generally, is equivalent to certification or adjudication.

[152] An interpretation of the Contract which renders payments under GC 6.5.10 due and payable simply upon termination of the Contract is also difficult to reconcile with the language in clause A 5.3.1 that makes contract interest payable after "an award by arbitration or court". The Contractor's interpretation of clause A 5.3.1 would make these words superfluous. A party who succeeds at arbitration or in court will, logically, always have been entitled to payment under the Contract (having established a right to payment). If, as the Contractor suggests, the payment "becomes due under the terms of the Contract" upon the entitlement arising (and before certification or adjudication), then the Contractor has a right to contract interest from the outset and nothing would hinge on the obtaining of an award or order through adjudication.

[153] The Contractor further contends the judgment below creates a "perverse incentive" for developers and builders to delay payment to contractors after terminating contracts, and it takes issue with the judge's conclusion that it is not necessary to construe the Contract as providing that a payment under GC 6.5.10 is due "upon termination" in order to give the Contract business efficacy. This

argument hinges, in part, upon the premise that no pre-judgment interest (of any kind) is payable on amounts to which the Contractor is entitled upon termination of the Contract. For reasons set out below, I am of the view that pre-judgment interest at court order rates runs on the Contractor's claim for such amounts from the date a cause of action arises; that date being the date the Contractor could reasonably have expected payment for the work it completed prior to termination.

[154] While pre-judgment interest is awarded at a lower rate than the contract rate, it is nevertheless a disincentive to non-payment and it affords some compensation to a creditor for being kept out of money. The Contractor itself acknowledges this fact, arguing in support of at least an award for pre-judgment interest at court order rates:

> The policy of the law is that a debtor is not entitled to benefit from the use of money to which a creditor is entitled. The creditor is to be made whole. This is also reflected and consistent with the *Court Order Interest Act*, s. 1.

[155] A contract, like this one, that provides for interest to run at a rate higher than court order rates after a claim for payment is certified or adjudicated upon, but which makes no provision for interest to be paid at contract rates on unverified or uncertified claims, thereby leaving the parties to the statutory rate of pre-judgment interest on those claims, does not evidently offend logic nor business efficacy.

[156] As it did below, the Contractor relies upon *First Queensborough Shopping Centres Limited v. Wales McLelland Construction Company (1988) Ltd.*, 2014 BCSC 764 at paras. 85–88, as authority for the proposition that where an owner has an obligation to pay a contractor, no commercial or sound reason justifies denying the contractor interest on the amounts it would have otherwise been paid, especially in light of an objective intention for interest to become due under the relevant contract and accrue until the balance is paid.

[157] The issue in *First Queensborough* was whether a waiver in the contract at issue precluded a contractor from seeking interest on payments that were not made on stipulated due dates after receiving a final payment. In my view, the trial judge correctly concluded that *First Queensborough* is of no assistance in determining

whether the Contract stipulated that the payment to which the Contractor was entitled under GC 6.5.10 became due upon, or contemporaneously with, the termination of the Contract.

[158] The Contractor also says, if the Contract is silent with respect to when payments under GC 6.5.10 are due, the Owner is nevertheless obliged to pay to the Contractor the amount which it is entitled to on termination within a reasonable time of the presentation of an invoice for such amounts. Payment is “due” on that date, and clause A 5.3.1 is applicable.

[159] In furtherance of this position, it contends that if a contract does not provide a deadline for a payment which a party is obligated to make thereunder, the law will imply that payment must occur within a reasonable time: *Muller v. O'Flynn*, 2019 BCSC 1674. In *Muller*, Wilson J. held:

> [46] The timing of payment is not necessarily an essential term. In the absence of a specific date, the inference may be that payment be made within a reasonable time. In *Illidge v. Sona Resources Corporation*, 2017 BCSC 1326, Justice Gray held the following:
>
> > [171] Where a contract does not stipulate a time for performance, and such a term is necessary to give business efficacy to the contract, the court should imply a term that the obligations be performed in a reasonable time. Determination of a "reasonable time" must be made on a case-by-case basis, based on the presumed intention of the parties (*Karim v. Seo*, 2010 BCSC 746 at para. 40ff.; see also *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd*., [1999] 1 S.C.R. 619 at para. 27). Determination of a "reasonable time" can depend on a number of factors, including the course of dealings between the parties leading up the formation of the contract; the nature of the obligations under the contract; the financial position of the relevant party, here Sona; the value of what is at issue; and the state of the market (see *524991 B.C. Ltd. v. Wells*, 2001 BCSC 50 at para. 23).
>
> [Emphasis added.]

[160] A distinction is made in this Contract between payments that “become due under the terms of the Contract” and “award[s] by arbitration or court”. The parties themselves thereby contracted for a high interest rate on payments that must be made on dates stipulated in the Contract. They did not contract to pay interest on

payments found to be due and owing by arbitration or judgment, such as payments that are adjudged to have become due as a result of implied obligations.

[161] Importantly, however, that due date is implied for the purposes of establishing a cause of action and establishing a limitation date. I cannot say that it was the parties' intention to bring all obligations to make payments under the Contract—even those payments not due on dates ascertainable by reference to the express terms of the Contract—into the ambit clause A 5.3.1, so as to attract relatively higher rates of interest to the sums in respect of which there is a payment obligation.

[162] It is also my view that the conclusion that "the terms of the Contract" do not specify a date by which amounts payable under GC 6.5.10 become due is not inconsistent with the provisions of the *Court Order Interest Act.* That *Act* provides, in part:

> 1 (1) Subject to section 2, a court must add to a pecuniary judgment an amount of interest calculated on the amount ordered to be paid at a rate the court considers appropriate in the circumstances from the date on which the cause of action arose to the date of the order.
>
> …
>
> 2 The court must not award interest under section 1
>
> (a) on that part of an order that represents pecuniary loss arising after the date of the order,
>
> (b) if there is an agreement about interest between the parties
>
> [Emphasis added.]

[163] For reasons set out further below, it is my opinion that the refusal to make an award of pre-judgment interest at contract rates did not preclude the judge from finding that a cause of action arose when the payment required by GC 6.5.10 was not made by the Owners within a reasonable time of the Contractor invoicing for work performed to the date of termination of the Contract, and that pre-judgment interest at court order rates is payable on the award.

[164] In short, I would not accede to any of the arguments made by the Contractor. To the contrary, I agree with the Owners that the trial judge reviewed the entire Contract, including all of those provisions where the parties expressly stipulated how

and when an amount becomes “due”, and determined that the parties did not intend for amounts to which the Contractor might become entitled under GC 6.5.10 to accrue as a debt “due” simply because the Contract was terminated. In arriving at this conclusion, the trial judge considered the words of the Contract as a whole and the commercial and factual context in which those words were chosen. She made no error in doing so.

Court order interest

[165] In the alternative, the Contractor argues that a cause of action arose upon termination of the Contract, or shortly thereafter when its claim was not paid, and that interest at court order rates, at least, should run from an early date.

[166] As noted above, s. 1 of the *Court Order Interest Act* provides that a court must add interest to the amount ordered to be paid as a pecuniary judgment from the date on which the cause of action arose to the date of the order. I am of the view that, notwithstanding the fact that a due date was not specified in the Contract, a cause of action on the debt established by GC 6.5.10 arose when the Owners did not pay the Contractor’s claim within a reasonable period. As discussed above, the law will imply upon a contracting party an obligation to make payments required under a contract within a reasonable time. If payment is not made in accordance with that implied obligation, a cause of action arises. That is, in my opinion, what happened here.

[167] The Owners say, citing s. 2(b) of the *Court Order Interest Act*, that s. 1 does not apply where there is an agreement between the parties about interest, and that there is such an agreement in this case.

[168] I would not accede to that argument. A contractual provision that requires interest to be paid at a rate that differs from that mandated by the *Court Order Interest Act* rates on some, but not all, amounts payable under the contract within which the provision is situated does not constitute an agreement that court ordered interest will not run, at all, on any amounts payable under that contract.

[169] Section 2 of the *Court Order Interest Act* is intended to give priority to agreements about interest between the parties. While it might be arguable that a contract providing that pre-judgment interest is only payable on certain claims is, by implication, an agreement about pre-judgment interest on all claims, the Contract is not such an agreement. Rather, the Contract describes exceptional contractual debts to which a higher rate of negotiated contractual interest applies. There is no clear agreement regarding the Contractor's right to an award of interest on claims which do not fall within the ambit of clause A 5.3.1. I cannot imply such a term.

[170] In my view, s. 2 of the *Court Order Interest Act* is inapplicable, and an award of pre-judgment interest ought to have been made pursuant to s. 1 of that *Act*. The judge was required to add interest on the amount ordered to be paid ($575,576) at a rate the court considers appropriate (in my view, the rates fixed from time to time by the Registrar), from the date on which the cause of action arose to the date of the order.

[171] In light of the time periods specified in the Contract for payment of claims certified as payable (which range from 5 to 55 calendar days), I am of the view that it would be reasonable to imply an obligation into the Contract on the part of the Owners to pay to the Contractor the amount to which it was entitled under GC 6.5.10 within 60 calendar days of the Contractor's invoice for work performed to the date of termination; that is, by April 29, 2016.

Costs at Trial

[172] The trial judge was evidently in a privileged position to determine whether the issues at trial were distinct, intertwined and time-consuming. She reached two critical conclusions with respect to costs based on her familiarity with the case at trial. First:

> [59] I have no difficulty concluding that the more flexible "substantial success" test is appropriate in this case.

[173] And, second:

> [77] In all the circumstances, it cannot be said that either party achieved substantial success on a global basis.

[174] The first conclusion led to the application of the approach to costs described in *Fotheringham v. Fotheringham*, 2001 BCSC 1321, where Bouck J. held:

> [46] … [A] decision to award or not award costs after a trial might follow a four step inquiry.
>
> 1. First, by focusing on the "matters in dispute" at the trial. These may or may not include "issues" explicitly mentioned in the pleadings.
> 2. Second, by assessing the weight or importance of those "matters" to the parties.
> 3. Third, by doing a global determination with respect to all the matters in dispute and determining which party "substantially succeeded," overall and therefore won the event.
> 4. Fourth, where one party "substantially succeeded," a consideration of whether there are reasons to "otherwise order" that the winning party be deprived of his or her costs and each side then bear their own costs.

[175] The judge's second conclusion meant she proceeded on the basis that she would order each party to bear their own costs pursuant to R. 14-1(14) of the *Supreme Court Civil Rules*, so long as there was no reason to depart from that result.

[176] However, the judge did find a reason to depart from R. 14-1(14): what she referred to as Mr. Bowie's reprehensible conduct. As I explained above, Mr. Bowie was held to have knowingly given testimony that was not truthful and to have sought to mislead the court. The judge considered this to have been an improper act by or on behalf of a party. The appropriate order, in her view, was for the Contractor to pay costs at Scale C for that portion of the proceedings that related to Mr. Bowie's evidence: at para. 91. Mr. Bowie's testimony plus half of the time consumed by the Contractor's expert testimony amounted to almost 30 percent of the total trial. On this basis, she awarded the Owners 30 percent of their total costs at Scale C: at para. 93.

[177] At issue is whether the trial judge was erred in applying the *Fotheringham* "substantial success" approach in these circumstances, and whether she incorrectly determined that neither party was substantially successful.

[178] The Contractor says the *Fotheringham* analysis, focusing upon "matters in dispute" rather than issues or results, is apt in matrimonial cases, where there are often discrete issues the resolution of which will give rise to a remedy to one party or the other and often, if not always, mixed success. That perspective is described in the judgment of Southin J.A. refusing leave to appeal the costs order made in *Fotheringham*: see 2002 BCCA 454 at paras. 8–9. Justice Southin noted that Bouck J.'s refusal to strictly apply the rule that costs follow the event was particularly appropriate in matrimonial litigation which gives rise often to discrete questions arising from statute.

[179] The Contractor, instead, urges upon us the approach taken in *Loft v. Nat*, 2014 BCCA 108. In that case, this Court noted that the general rule—that costs in a proceeding must be awarded to the successful party unless the court otherwise orders—rewards a plaintiff who establishes liability under a cause of action and obtains a remedy, or a defendant who obtains a dismissal of the plaintiff's case: at para. 46. The Court also stated that the fact a plaintiff obtained a judgment in an amount less than the amount sought is not, by itself, a proper reason for depriving that plaintiff of costs: at para. 47. However, as Goepel J.A. observed:

> [49] The fact that a party has been successful at trial does not … necessarily mean that the trial judge must award costs in its favour. The rule empowers the court to otherwise order. The court may make a contrary order for many reasons. One example is misconduct in the course of the litigation: *Brown v. Lowe*, 2002 BCCA 7, 97 B.C.L.R. (3d) 246 Another is a failure to accept an offer to settle under Rule 9-1. A third arises when the court rules against the successful party on one or more issues that took a discrete amount of time at trial. In such a case the judge may award costs in respect to those issues to the other party under Rule 14-1(15): *Lee v. Jarvie*, 2013 BCCA 515. Such an order is not a regular part of litigation and should be confined to relatively rare cases*: Sutherland v. Canada (Attorney General),* 2008 BCCA 27, 77 B.C.L.R. (4th) 142*; Lewis v. Lehigh Northwest Cement Limited,* 2009 BCCA 424, 97 B.C.L.R. (4th) 256. Whether a judge will order

> otherwise in any particular case will be dependent upon the circumstances of that individual action.
>
> [Emphasis added.]

[180] The Contractor also contends this case cannot be distinguished from *Lewis v. Lehigh Northwest Cement Limited*, 2009 BCCA 424. In that case, the plaintiff failed on several of his damage claims. The trial judge awarded 35% of the costs to the plaintiff and 65% of costs to the defendant. This Court set aside that costs award, concluding it was not "a rare case" where such an order should be made; the plaintiff had simply failed to prove all of the damages he claimed. Having recovered a substantial judgment, there was "no sound reason in principle" why he should be disentitled to costs: at para. 39.

[181] For their part, the Owners rely upon *Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.,* 2017 BCCA 346. In that case, Goepel J.A., again addressing costs for the Court, held that while the substantial success formula is particularly well-suited to family cases in which the court has to wrestle with several separate and distinct causes of action, the principles in *Fotheringham* may be applicable in any case in which there are multiple causes of action: at para. 92.

[182] In discussing *Sze Hang*, I note that, at the outset of his consideration of the costs appeal in that case, Goepel J.A. reminds us of the standard of review:

> [80] Trial judges have a broad discretion in awarding costs. An appellate court may only interfere with an award of costs if it can be demonstrated that "the trial judge has made an error in principle or if the costs award is plainly wrong": *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27.

[183] Finding that the trial judge had erred in describing the relative success of the parties, and thereby erred in principle, the Court set aside the costs award. In the course of its analysis, the Court took an approach similar to that taken by the trial judge in the case at bar—establishing at the outset that neither party had been substantially successful. In *Sze Hang*, the claim and counterclaim were described as mirror images of each other, also not unlike the case at bar. The Court held:

> [96] ... Although in many cases, it may be appropriate to determine the costs of a counterclaim separately from the main action (*Litt v. Gill*, 2016

> BCCA 288), this is not one of those cases. ... In the circumstances, with respect, I am of the view that neither party can be said to have been substantially successful. Given that result, the trial judge should have ordered that each side pay their own costs, other than the special costs for 10 days of trial. I would so order.

[184] The special costs order in *Sze Hang* was made with a view toward addressing certain reckless and unsubstantiated accusations of serious wrongdoing. Justice Goepel found there was no error in the trial judge's analysis, and the appeal against the award for special costs was dismissed.

[185] In this case, I similarly can see no error in the trial judge's analysis. As is clear from *Sze Hang*, the principles stated in *Fotheringham* may be applicable in any case in which there are multiple causes of action. It was open to the judge to conclude that she had been required to address multiple causes of action and distinct "matters in dispute", and that the costs analysis, and ultimately the costs award, should reflect that fact.

[186] There is a specific reason why the approach taken in *Fotheringham* was appropriate in this case: at the conclusion of trial, the Contractor expressly abandoned its allegation that the termination of the Contract was wrongful, having already required the Owners (and the court) to expend considerable resources responding to and assessing that claim. As noted in *Loft*, departure from the rule that costs follow the event may be warranted where, as here, the court rules against the successful party on one or more issues that took a discrete amount of time at trial.

[187] Further, I see no reason to interfere with the judge's conclusion that neither party was substantially successful. Her analysis in this respect is set forth at paras. 63–77 of her supplemental reasons. I see no error in that analysis.

[188] As I have indicated, I would allow the appeal and cross appeal to a limited extent by finding: (i) the Contractor abused the process by filing a lien based in part upon misleading evidence; and (ii) the Contractor is entitled to court order pre-judgment interest on the amount ordered to be paid pursuant to GC 6.5.10.

These awards are not completely offsetting but, in my view, they do not materially disturb the trial judge's conclusion that neither party was substantially successful.

[189] For these reasons, I would dismiss the cross appeal of the costs award.

Conclusion

[190] I would allow the Owners' appeal in part:

a) I would dismiss the appeal from the order requiring the Owners to pay the Contractor the sum of $575,576 pursuant to GC 6.5.10.

b) I would allow the appeal from the order dismissing the Owners' claim for damages for the tort of abuse of process, and would order the Contractor to pay compensatory damages to the Owners in an amount equivalent to interest on $412,409.44 at court order pre-judgment interest rates in accordance with the *Court Order Interest Act* from April 14, 2016 (the date security was paid in place of the lien) to February 25, 2022 (the date of judgment), that amount to be settled by the parties or assessed by the Registrar.

[191] I would also allow the Contractor's cross appeal in part:

a) I would allow the cross appeal from the order dismissing the claim for pre-judgment interest on the award made to the Contractor pursuant to GC 6.5.10, and would order the Owners to pay the Contractor interest on the sum of $575,576 at court order pre-judgment rates in accordance with the *Court Order Interest Act* from April 29, 2016 to February 25, 2022.

b) I would dismiss the cross appeal from the trial judge's order in respect of trial costs.

[192] I would order each party to bear their own costs of the appeal in light of the divided success in this Court.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Mr. Justice Hunter"