IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mitsui Home Canada Inc. v. Elevate Development Corp.,* 2024 BCSC 1549

Date: 20240823
Docket: S240455
Registry: Vancouver

Between:

Mitsui Home Canada Inc.

Plaintiff

And

Elevate Development Corp. and 1018532 B.C. Ltd.

Defendants

Before: The Honourable Justice Latimer

Reasons for Judgment

Counsel for the Plaintiff:	M.B. Morgan A. Fortin
Counsel for the Defendants:	D.A. Garner
Place and Date of Hearing:	Vancouver, B.C. August 16, 2024
Place and Date of Judgment:	Vancouver, B.C. August 23, 2024

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Introduction

[1] This is an application by the plaintiff to strike certain portions of the affidavit #1 of Scott Bearss made August 15, 2024 ("Affidavit"). The plaintiff argues that portions of the Affidavit are inadmissible hearsay, inadmissible expert opinion, documentary evidence that has not been listed or produced under Rule 7-1(21) of the *Supreme Court Civil Rules* or inadmissible argument.

[2] The defendants concede that certain portions of the Affidavit are inadmissible argument and/or opinion but otherwise oppose the application.

Background Facts

[3] Given the narrow issues before the Court on this application, I will provide only the barest account of the facts underlying this dispute. In so doing, I do not attempt to resolve any of the factual controversies between the parties.

[4] The defendant 1018532 B.C. Ltd. ("NumberCo") is the registered owner of real property in Mission BC.

[5] By way of Canadian Construction Documents Committee Contract between the plaintiff and Elevate Development Corp. ("Elevate") signed November 21, 2021, the plaintiff agreed to perform turnkey framing ("Work") with respect to Blocks 2 and 3 (of eight) of a multi-use development relating to the Wren and Raven Project ("Project"). The contract price was $4,017,109.65 and there was a 10% holdback ("Holdback").

[6] The Work was overseen by the project construction manager, Yorkbuilt Projects Ltd. ("Yorkbuilt"). The plaintiff retained a sub-contractor, Giglio Construction Ltd. ("Giglio"), to perform some of the Work.

[7] The plaintiff says they performed the Work and were paid in full; the only payment outstanding is the Holdback. On January 23, 2024, the plaintiff filed the notice of civil claim seeking, amongst other things, a declaration that it was entitled

to a builders lien and an order requiring payment of the sum of $401,680.95 plus costs and interest.

[8] On March 7, 2024, the defendants filed the response to civil claim. The defendants dispute that the Work was performed in accordance with the contract or at all. They say the Work performed by the plaintiff was wholly inadequate and a breach of the plaintiff's obligations under the contract. They allege others were required to remedy the Work at the expense of the defendants. They say the Holdback is not owing as a result of the back charges properly to be set off against it.

[9] On June 11, 2024, the plaintiff served its list of documents and advised that it intended to bring an application for summary trial in this matter. Counsel advised that one day in chambers had been reserved for that purpose in August 2024.

[10] On July 16, 2024, the plaintiff served an amended list of documents.

[11] On July 26, 2024, the plaintiff served and filed its notice of application for summary trial and supporting material. The summary trial was set for August 16, 2024.

[12] On August 15, 2024, the defendant served and filed its response to application and the Affidavit.

[13] When the matter came before this Court on August 16, 2024, the plaintiff objected to the defendant's application response and to the Affidavit being put before the Court on the basis that the materials were delivered late. In the alternative, the plaintiff argued that portions of the Affidavit were not admissible.

[14] These reasons for judgment address only the admissibility issues.

Legal Principles

[15] The purpose of an affidavit is to present factual evidence to the court. The general rule is that an affidavit should contain only facts which would be admissible

as evidence at trial: R. 22-2(12). It should be based on personal knowledge. Where it is not based on personal knowledge, the affiant should set out the source of their knowledge and depose that they believe the fact to be true: R. 22-2(13). Statements based on information and belief are not admissible in support of a final order: R. 22-2(13).

[16] An affidavit should not contain opinion evidence, conclusions of fact or law, legal argument, or evidence that is not relevant to the issues before the court: *British Columbia Investment Management Corporation v. Canada (Attorney General*), 2016 BCSC 2554 at para. 7.

[17] Rule 7-1(21) provides that unless the court otherwise orders, if a party fails to make discovery of or produce for inspection or copying a document as required by this rule, the party may not put the document in evidence in the proceeding or use it for the purpose of examination or cross-examination. The purpose of the rule is to prevent trial by ambush: *Cambie Surgeries Corporation v. British Columbia (Attorney General),* 2019 BCSC 1221 at para. 13.

Analysis

[18] I will first address the exhibits to the Affidavit and the paragraphs that are related to those exhibits. I will then address the balance of the paragraphs of the Affidavit that have been challenged by the plaintiff.

Exhibits

[19] The plaintiff says the defendants have yet to produce a list of documents so they should not be entitled to rely on any of the exhibits to the Affidavit attached as Exhibits A-G. The defendants argue that Exhibits A, C and E are in the plaintiff's list of documents at documents 57-0001, 70-0001 and 17-0001, respectively. They also say to the extent documents have been exchanged by the parties during the construction, it would be unjust to exclude them when they were required to be listed by both parties.

[20] As a preliminary matter, I conclude that to the extent the documents have already been listed by the plaintiff (Exhibits A, C, and E), I would not exclude those on the sole basis of Rule 7-1(21) provided those documents are otherwise admissible. There is no risk of trial by ambush in approaching these exhibits in this fashion. I will address each exhibit in turn.

[21] Exhibit A is an unsigned, two-page field review report dated July 27, 2023 and authored by Yu Hung Lee, P.Eng, a structural engineer engaged by the defendants. As noted, it has been produced by the plaintiff in this litigation.

[22] Exhibit A purports to identify issues with the framing in Block 2 requiring further review. The plaintiff argues that to the extent the document's author opines about issues with the Work, it is inadmissible expert evidence. It is inadmissible both because none of the requirements of Rules 11-6 or 11-7 have been complied with and because the author is not independent, he is a principal of the defendant Elevate.

[23] The defendants argue that Exhibit A is not expert evidence, that the Court may relax compliance with the rules pertaining to expert evidence, and that Exhibit A is at least admissible for the fact that the report was made which would then result in certain actions needing to be taken before the Project could advance.

[24] I agree with the plaintiff that Exhibit A contains inadmissible expert opinion evidence. The opinion evidence is inadmissible both because of lack of compliance with the *Rules* and lack of impartiality of the expert.

[25] Nevertheless, I agree with the defendants that Exhibit A is admissible for the limited purpose of proving the fact that the report was made and that certain steps were taken in response to it. It is not admissible for the truth of the contents of the report – i.e. to prove that the framing work in Block 2 was deficient. The conclusion that the work was deficient or required remediation is one requiring expert evidence.

[26] Paragraph 8 of the Affidavit describes Exhibit A:

> 8. An example of a field review report from the structural engineers on the Project, Ennova Structural Engineers Inc., is report No. 107 dated July 27, 2023, a true copy of which is now produced and shown to me and marked as Exhibit "A" to this my affidavit. There were and are many such reports showing issues with the framing work of Giglio and documenting the remedying of same. [Emphasis added.]

[27] I conclude the emphasized portion must be struck given that I am advised that none of the reports referred to therein have been produced in this litigation. Those reports were not authored by the affiant and a summary of their conclusions is thus inadmissible as unattributed hearsay evidence. The affiant appears to be tendering the existence of the reports for a hearsay purpose, i.e. to show the truth of the conclusion that the framing work of Giglio had "issues".

[28] Exhibit B is a three-page long document that runs afoul of Rule 7-1(21) and is also not a document that was exchanged by the parties during the construction. It is an e-mail dated August 14, 2024 and authored by Samuel Woo, Associate P.Eng, a structural engineer engaged by the defendants in this case. The e-mail attaches a two-page summary that Mr. Woo says relates to Block 3 framing reviews that were conducted between July 20, 2022 and February 17, 2023.

[29] The defendants rightly concede that the last paragraph of the first page of Exhibit B is inadmissible opinion evidence. The balance of the e-mail simply describes the summary contained at pages 9-10 of the Affidavit.

[30] The summary that is contained at pages 9-10 of the Affidavit raises additional concerns. The summary has not been listed or produced as required by Rule 7-1(21). The plaintiff's submission is that the field reports on which the summary is said to be based have also not been listed or produced under Rule 7-1(21). The author(s) of the summary and the field reports is/are not identified.

[31] The defendants argue Exhibit B is admissible under the business records exception to the hearsay rule.

[32] As the Court explained in *Oswald v. Start Up SRL*, 2020 BCSC 205:

[16] The business records exception to the hearsay rule is a common law rule and is also set out in s. 42 of the *Evidence Act*, R.S.B.C. 1996, c. 124. The *Evidence Act* provision:

> 42(1) In this section:
>
> "business" includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise;
>
> "document" includes any device by means of which information is recorded or stored;
>
> "statement" includes any representation of fact, whether made in words or otherwise.
>
> (2) In proceedings in which direct oral evidence of a fact would be admissible, a statement of a fact in a document is admissible as evidence of the fact if
>
> (a) the document was made or kept in the usual and ordinary course of business, and
>
> (b) it was in the usual and ordinary course of the business to record in that document a statement of the fact at the time it occurred or within a reasonable time after that.
>
> (3) Subject to subsection (4), the circumstances of the making of the statement, including lack of personal knowledge by the person who made the statement, may be shown to affect the statement's weight but not its admissibility.
>
> (4) Nothing in this section makes admissible as evidence a statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to a fact that the statement might tend to establish.
>
> (5) For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible by this section must not be treated as corroboration of evidence given by the maker of the statement.

[17] For a document to be admitted into evidence under the business records exception of the *Evidence Act*, the party tendering the document must prove all of the elements in s. 42, namely, that the document was:

> a) made contemporaneously;
>
> b) by someone having a personal knowledge of the matters being recorded;
>
> c) by someone who has a duty himself or herself to record the notes or to communicate the notes to someone else to record as part of the usual and ordinary course of their business; and
>
> d) that the matters which are being recorded must be of the kind that would ordinarily be recorded in the usual and ordinary course of that business.

[33] There is no evidentiary basis on which I can conclude that the elements of s. 42 of the *Evidence Act* have been met. In particular, the summary appears to have been prepared in August 2024 although it relates to events that transpired in 2022 and 2023. It was thus not made contemporaneously. The author of the summary is not identified and the Court is therefore unable to conclude it was prepared by someone having any personal knowledge or a duty to record things in the usual and ordinary course of their business. The source documents have also not been provided and their author(s) is/are not identified which only compounds these same issues.

[34] Even if Exhibit B was not comprised of a mix of inadmissible opinion evidence and inadmissible hearsay (and possibly double hearsay) evidence (and it is), permitting admission of Exhibit B when it has not been listed or produced would result in substantial unfairness to the plaintiff who has had no notice of the document and no opportunity to test the evidence. This is precisely what rule 7-1(21) aims to prevent. Exhibit B is struck. For the same reasons, para. 9 of the Affidavit which describes Exhibit B is struck.

[35] Exhibits C and D are a series of e-mails sent on dates between August 31, 2022 and September 19, 2023.

[36] As noted above, Exhibit C has been listed by the plaintiff but Exhibit D has so far not been listed by any party. Exhibit D is a two-page document that contains an e-mail dated August 31, 2022 from Yorkbuilt's president to the plaintiff's officers and others. It is a document that should have been listed. If it was otherwise admissible (and it is not), I would note exclude it on the sole basis of non-compliance with Rule 7-1(21).

[37] The affiant is neither an author nor a recipient of Exhibits C or D. The defendants argue that these e-mails are nevertheless admissible under the business records exception to the hearsay rule.

[38] Paragraph 12 of the Affidavit provides:

> 12 Now produced and shown to me and marked as Exhibit "C" to this my affidavit is a true copy of an email string between Darren York of Yorkbuild and, inter alia, the Plaintiff's Christopher Naychuk and James Schick and William Campbell of Giglio indicating all were aware of Yorkbuilt's work to remedy the deficient Work of Giglio. A true copy of a further email from Darren York to, inter alia, Rob Vos and James Schick of the plaintiff and Ben Gigliotti of Giglio dated August 31, 2022, is now produced and shown to me and marked as Exhibit "D" to this my affidavit. These are examples of the communication between the parties respecting the Work taken over by Yorkbuilt.

[39] Again, there is no evidentiary basis on which I can conclude that the elements of s. 42 of the *Evidence Act* have been met. There is no basis to conclude the authors of Exhibits C and D had personal knowledge of the matters being recorded. Indeed, some of the e-mails refer to third-party sources for that knowledge. There is no evidence about the duties of the authors or what would have been within the usual and ordinary course of their business.

[40] I conclude that Exhibits C and D and para. 12 must be struck.

[41] Exhibit E is an invoice from Elevate to the plaintiff dated May 31, 2023 which attaches a list of chargeback invoices from a variety of vendors on dates between September 2022 and April 2023. The affiant describes Exhibit E as "A true copy of that invoice, detailing the efforts of Yorkbuilt and its team to complete the Work…"

[42] Exhibit G is the same invoice from Elevate to the plaintiff dated May 31, 2023 which attaches the same list of chargeback invoices. Exhibit G additionally attaches the vendor invoices which are said to be reflected in the list of chargebacks.

[43] As noted, Exhibit E has been listed and produced by the plaintiff but the additional vendor invoices attached to Exhibit G have not been listed to date by either party. They should be so listed.

[44] Both parties had knowledge of these documents and are not prejudiced by reliance on them in these proceedings. If they are otherwise admissible, I would admit Exhibits E and G even though Exhibit G has not yet been listed under Rule 7-1(21).

[45] The plaintiff says Exhibit E is incorrectly described by the affiant. The plaintiff argues this misdescription is evidence that the affiant is giving hearsay evidence because the affiant does not understand what is being deposed to and attached. The plaintiff further argues that the invoice attached at Exhibits E and G is not supported by the additional vendor invoices attached at Exhibit G. The plaintiff says the evidence is so unreliable that it should not be admitted at all.

[46] I do not exclude Exhibits E and G on these bases. If the documents are misdescribed or the vendor invoices do not match the list of chargebacks, these may be issues affecting reliability and/or the weight to be given to the evidence offered. Those are matters for the presider on the summary trial to determine. These issues do not render the documents inadmissible.

[47] For the same reasons, I reject the plaintiff's arguments that paras. 22-23 are inadmissible.

[48] Exhibit F is twelve pages of photographs with commentary written upon them. The affiant deposes:

> 20 Now produced and shown to me are true copies of photographs of deficient work performed by the Plaintiff and/or its subcontractor, Giglio, demonstrating a sampling of the deficient Work provided under the Contract, marked collectively as Exhibit "F".
>
> 21 These photographs demonstrate several of the issues with the deficiencies experienced on the Project framing due to the work of Giglio and the Plaintiff. The photographs were taken by Yorkbuilt personnel as a record of the work undertaken by the Yorkbuilt team, the problems encountered in the framing work of Giglio, and to document remediation for engineering oversight. The descriptions noted on each photograph were placed there by Yorkbuilt staff to indicate the reason for the photograph and identify the particular deficiency as the photographs were taken in the ordinary course of Yorkbuilt's work on the Project. I was provided with these and other photographs to document the problems left by Giglio and the Remediation Work performed.

[49] The photographs are undated hearsay evidence and the affiant has not identified either the photographer or the author of the remarks on the photographs.

[50] I reject the defendants' submissions that Exhibit F meets the business records exception to the hearsay rule. There is no evidence before me on which I can be satisfied that the requirements set out above have been met. In particular, the photographs and the remarks placed upon them are undated so I cannot determine that they are contemporaneous. I do not know who took the photographs or who wrote the comments so cannot determine that the person had personal knowledge or a duty to record or communicate the things recorded in the usual and ordinary course of their business. There is also an insufficient basis on which I can conclude that this affiant, who is a principal of Elevate, has knowledge of the matters that Yorkbuilt would ordinarily record in the course of its business.

[51] Given these documents were created by a third party to this litigation, I cannot conclude that the plaintiff had any prior notice of them. I consider that admission of these documents that have not been listed or produced before August 15, 2024 would be unfairly prejudicial to the plaintiff who has had no notice of the document and no opportunity to test the evidence. The fact that they run afoul of s. 7-1(21) is thus yet another reason to strike them. For all these reasons, paras. 20-21 and Exhibit F are inadmissible.

Additional Inadmissible Hearsay Evidence

[52] The plaintiff argues that paras. 7, 10-11 are also inadmissible hearsay evidence. Those paragraphs provide:

> 7. Giglio's performance of the Work on behalf of the Plaintiff was poor and was frequently complained of by Yorkbuilt, Elevate, and others on the Project, including trades that had to work around Giglio and its work, and trades whose work depended upon proper execution of this Work by the Plaintiff and its subcontractor.
>
> …
>
> 10. After repeated requests to Giglio to complete properly and/or repair deficient Work, it became dear that they were unwilling or unable to perform the Work properly. Eventually Giglio agreed that Yorkbuilt would take over and correctly perform its portion of the Work.
>
> 11. The Plaintiff did not object to this agreement and indicated to Yorkbuilt and Elevate that Yorkbuilt should proceed in this regard. The Plaintiff knew at all times that Yorkbuilt was carrying out this work and did not object nor offer

> to provide either a new subcontractor or the Plaintiffs own forces to complete the Work Giglio had in essence abandoned. [Emphasis added.]

[53] I cannot conclude on the record before me that these paragraphs are hearsay evidence. That the affiant received complaints is not hearsay if it is offered merely for the fact that those complaints were made, not for the truth of their contents.

[54] The affiant does not identify the source of his knowledge for the balance of these paragraphs; however, at para. 1, he deposes that the facts and matters set out in the affidavit are based on personal knowledge unless expressly stated otherwise. The weight to be given to this evidence will be for the presider at the summary trial to determine.

[55] The plaintiff argues that paras. 13 and 15, 17-19 are inadmissible hearsay evidence. Those paragraphs provide:

> 13. As a result of the framing problems of Giglio, Yorkbuilt engaged its own team to complete the deficient Work left by Giglio and to finish the Work to keep the Project on track as best it could after the delays caused by Giglio.
>
> …
>
> 15. I was kept apprised of the problems the Plaintiff and Giglio were having with the Work as described above, and the remedial steps and work done by Yorkbuilt and its team, as evidenced by the invoices and descriptions set out below. The deficiencies described to me by Yorkbuilt's personnel from time to time, as I personally observed from time to time, and as represented in photographs of the Plaintiff's/Giglio's work and set out below, as well as in the project structural engineer's inspection reports, were serious both in individual instances - the Work was not being performed correctly - and in the aggregate - the deficient Work caused interference with other trades whose tasks on the Project were delayed or disrupted. [Emphasis added.]
>
> …
>
> 17. The Project Work of the Plaintiff was to have been completed by July 30, 2022 pursuant to the Contract (Article 1.3.3), but was delayed well over 5 months and was still being completed in January of 2023. This was due to problems with the Work caused by the deficient work of the Plaintiff through Giglo and the time it took to remedy the deficiencies by the Yorkbuilt team (the "Delay"). I note that while the Contract required the Work to be completed by July 30, 2022 the project was not declared complete by Yorkbuilt as the project certifier until November 27, 2023 (see Exhibit "F" to the Affidavit #1 of Christopher Naychuk filed in these proceedings).
>
> 18. Once Yorkbuilt had completed the repair, remediation and completion of the Plaintiff/Giglio Work (the "Remediation Work"), it rendered an invoice

> which I, on behalf of Elevate, Instructed Yorkbuilt to send to the Plaintiff for payment. A true copy of that invoice, detailing the efforts of Yorkbuilt and its team to complete the Work, is now produced and shown to me and marked as Exhibit "E" to this my affidavit.
>
> 19. Elevate has paid this invoice rendered by Yorkbuiit for the Remediation Work as the Plaintiff refused to honour it.

[56] The emphasized portion of para. 15 is inadmissible evidence for the same reasons that Exhibit F and portions of para. 8 are inadmissible. The balance of this evidence is not inadmissible hearsay evidence. It describes the affiant's own observations and actions he took in response to information from third parties. The weight to be given to that evidence will be for the presider at the summary trial to determine.

Additional Inadmissible Expert Evidence

[57] At paras. 24-33, the affiant sets out his opinion that the allegedly deficient work by the plaintiff and its subcontractor caused delay and additional expenses to the defendants. The plaintiff argues that this is inadmissible opinion evidence and also that the affiant has failed to attach any of the source documentation relating to the costs claimed.

[58] The defendants argue that if expert opinion evidence is required, then the Court should relax the rules pertaining to expert evidence and this evidence should be admitted. However, the defendants also argue that if the Court can make out the subject matter without expert opinion evidence then this is simply factual evidence that can likewise be relied on.

[59] As the Ontario Superior Court of Justice explained in *Walsh Construction Co. of Canada v. Toronto Transit Commission et al*, 2024 ONSC 2782 [*Walsh Construction*]:

> [88] In construction law, delay is categorized as excusable or non-excusable and compensable or non-compensable. Non-excusable delay is delay for which Walsh is not entitled to any time extension or compensation because it is a delay within its control. An example of this would be a delay resulting from Walsh's failure to perform its own obligations. Excusable delay

> is generally viewed as delay that is beyond Walsh's control and for which it may be entitled to compensation.
>
> [89] However, this is complicated by the fact that there may be concurrent delays for which Walsh is responsible; these would make an excusable delay non-compensable. Concurrent delay on a project is often difficult to evaluate, since it involves evaluating how each event delayed completion of the project, which is a more involved and speculative assessment process compared to an isolated or singular cause of delay. Analysis of concurrent delay requires breaking the overall delay into its component parts and apportioning time, responsibility and costs: see *Schindler Elevator Corporation v. Walsh Construction Company of Canada*, 2021 ONSC 283, 17 C.L.R. (5th) 253, at paras. 301-303.
>
> [90] The other issue to consider is whether the delay was on the Project's critical path, the series of connected tasks that define the minimum overall duration for completion of a project, also known as the longest path.
>
> [91] The difficulty, certainly for the court, lies in calculating with any precision the impact of one event on the timing of a project, let alone the impact of a multitude of events on a massive project such as this one. These events are closely intertwined, overlap with one another, and may be excusable or non-excusable, concurrent or isolated, or on or off the critical path.
>
> [92] TTC argues that for Walsh to be compensated for delay, Walsh must prove that the delay was the sole responsibility of the TTC, on the critical path, and without any concurrent delay. The onus on Walsh to prove this is on a balance of probabilities, or the typical civil onus of proof. Walsh says that it has met this onus through the evidence of Richard Ott, who prepared a detailed delay impact analysis and who concluded that Walsh was entitled to a total of 1,047 days of excusable and compensable delay.

[60] I am satisfied that paras. 24-32 stray into areas requiring expert opinion evidence. In particular, the various costs outlined are only relevant to quantify the defendants' claim for "damages caused to the defendants by the delay to the Project caused by the plaintiff's defective work and the remedial work necessitated by such defective work". That is, their relevance requires a finding that the delay was both compensable and in the Project's critical path. In this case, like in *Walsh Construction*, the Court could not draw such a conclusion without the assistance of expert evidence because of the large size of the project and the fact that the plaintiff was only participating in 2 out of 8 blocks of it.

[61] I do not admit these paragraphs as expert evidence because the affiant is the principal of the defendant Elevate and therefore lacks the independence required of

an expert. As well, none of the rules pertaining to the production of expert reports has been complied with.

[62] Paragraph 33 is not expert evidence. While there is a dispute between the parties as to whether fascia work was within the scope of the contract, that dispute does not make the evidence inadmissible.

Inadmissible Argument

[63] Paragraph 35 provides:

> As a result of the deficient Work performed by the Plaintiff and its subcontractor, Giglio, in breach of the standards required by the Contract terms and conditions, Elevate incurred the expenses set out in Exhibit E of $185,293.79 plus the Additional Costs of $342,434.14. The total of Exhibit C [sic] costs and Additional Costs is $5525,727.93. This amount should be set off against the amount claimed by the Plaintiff. [Emphasis added.]

[64] The defendants properly concede that the emphasized portions of this paragraph are inadmissible argument. Those portions of the paragraph are struck.

[65] Paragraph 37 provides:

> 37. I have reviewed the invoices of the Plaintiff respecting the Work on the Project which were paid by Elevate and are set out as Exhibit "C" to Affidavit #1 of Christopher Naychuk filed in these proceedings. I have determined that notwithstanding that the plaintiff knew that Yorkbuilt was performing the Remediation Work and would be billing the Plaintiff for such work, the Plaintiff did not adjust its claim for the Contract price in its submissions for approval and payment by Elevate. Elevate paid these submissions of the Plaintiff as the Work was done (while Yorkbuilt continued the Remediation Work at additional expense), on the understanding that at the end of the project the additional costs associated with the Yorkbuilt Remediation Work and increased expenses incurred by Elevate due to the Delay would be part of an adjustment and reconciliation in favour of Elevate.

[66] The plaintiff argues this is inadmissible argument. I agree with the defendants that the evidence is admissible for the purpose of explaining the affiant's understanding of why the plaintiff's invoices were paid.

[67] The defendants properly concede that paragraph 38 is inadmissible legal argument and that paragraph is struck.

Conclusion

[68] For the reasons explained above, the following portions of the Affidavit #1 of Scott Bearss are struck:

a) Exhibits B, C, D, F.

b) Paragraphs 9, 12, 20-21, 24-32, 38.

c) Those portions of paragraphs 8, 15 and 35 identified above.

[69] Exhibit A is admitted for the limited purpose of proving the fact that it was made and that certain steps were taken in response to it. It is not admissible for the truth of the contents of the report – i.e. to prove that the framing work in Block 2 was deficient.

[70] The plaintiff has been substantially successful on this application and will have its costs in the cause.

"Latimer J."