IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Solaris Custom Home Inc. v. Trovao,* 2024 BCSC 1831

Date: 20241007
Docket: S46055
Registry: Penticton

Between:

Solaris Custom Homes Inc.

Plaintiff

And

Tony Dias Trovao and Jodi Nicolle Trovao

Defendants

Before: The Honourable Justice Greenwood

Reasons for Judgment

Counsel for Plaintiff:	M. Moorhouse
Counsel for Defendants:	R. Okayama
Place and Date of Trial:	Penticton, B.C. March 26-28, 2024 April 2-5, 2024 June 7, 2024
Place and Date of Judgment:	Penticton, B.C. October 7, 2024

Introduction

[1] This case illustrates the difficulties that can arise when parties enter into an oral contract without reducing any part of the contract to writing, and a dispute arises. The dispute in this case centres around the construction of a custom residential home located at 445 Ritchie Avenue, in Naramata, British Columbia.

[2] The plaintiff alleges breach of contract and maintains that the defendants are liable to pay $304,870.56 in unpaid invoices for work that was completed on the home. The defendants maintain that the contract included a strict budget, and that the plaintiffs are not entitled to any amounts in excess of the agreed budget.

[3] The parties agree that they entered into an oral “cost-plus” contract to construct the house at Ritchie Avenue. The plaintiff would invoice the defendants for all construction costs including labour and material, and charge a 12% fee on top of the construction costs, along with the applicable taxes.

[4] The factual issue at the centre of the dispute is whether, in addition to the cost-plus contract, the parties agreed on a total budget for the project.

[5] In my view, the evidence does not establish on a balance of probabilities that budget formed a term of the contract. I am not satisfied that there was ever a meeting of the minds or an agreement that the house would be built within a specific budget range, or that any estimates that were discussed were firm or clear enough, to have any contractual effect.

[6] Accordingly, I find that the plaintiffs are entitled to enforcement of the contract on a cost-plus basis as agreed by the parties. There is no dispute about the amount of the unpaid invoices, and it follows that the plaintiffs are entitled to judgment in that amount.

Background

[7] Tony and Jodi Trovao acquired the Ritchie avenue property in 2015. At the time, they were living with Mr. Trovao’s parents on a vineyard. They planned to get

out of the vineyard business and build a new home using proceeds from the sale of the vineyard. They anticipated receiving $500,000 in April of 2019, $100,000 in April of 2020, and a further $87,000 upon completion of the sale.

[8] Mr. Trovao was friends with Ross Manning who had coached his son's soccer team. Mr. Manning had been in the construction industry for 17 years, and was a director and project manager for Solaris Custom Homes Inc ["Solaris"].

[9] Mr. Trovao and Mr. Manning would meet from time to time for coffee, or at the local firehall where Mr. Trovao worked as the fire chief. Around 2018, they began to discuss the possibility of having Mr. Manning build a house for the Trovaos.

[10] The decision to proceed with construction was based primarily on conversations that took place between Mr. Manning and Mr. Trovao, and to a lesser extent Ms. Trovao.

Evidence of the discussions leading up to the cost-plus contract

[11] Mr. Manning and Mr. Trovao disagree about what took place between them. Both testified about various conversations they had leading up to the formation of the contract, but their accounts are largely irreconcilable.

[12] Mr. Manning testified that he was told that Ms. Trovao wanted to build a house for $400,000. He said he did not think that was possible, and they would have to get a proper set of drawings so they could obtain estimates and work out a budget forecast. He acknowledged that Mr. Trovao "threw some figures at him," including a $250 to $300 per square foot price range, but he never agreed to complete the project within that range. He explained that he could not have provided an overall cost at that stage, because the Trovaos had not yet decided on the finishings for the house which he needed in order to prepare a budget forecast.

[13] According to Mr. Manning, he explained to Mr. Trovao that he could not tell him what the cost of the house would be until all the selections were made. As a result, no budget was ever prepared or agreed to.

[14] Mr. Trovao, on the other hand, testified that they discussed a $250-$300 per square foot budget in December 2018, and at least five to six times thereafter before construction began. He said that on one occasion when he brought it up, Mr. Manning “hummed and hawed”, but Mr. Trovao told him they needed to know if he could do it. According to Mr. Trovao, Mr. Manning “nodded and said he could do it.” He testified that Ms. Trovao wanted a quote, but it never happened.

[15] Mr. Trovao’s understanding was that Mr. Manning had agreed to the $250-$300 per square foot budget that they had discussed. He told Mr. Manning that he would not have much money left over after paying for the house, but he could put an additional $50,000 toward the detached garage. Mr. Manning was to operate within the budget and let them know if there were any “red flags.”

[16] Ms. Trovao testified that she was not involved in the initial discussions. She was only involved once they had hired an architect. However, her understanding was that they had agreed upon a budget of $250-$300 per square foot and an additional $50,000 for a garage. She recalled discussing the budget with her architect at a meeting at Starbucks. Mr Manning had attended the meeting, and did not state any disagreement with the budget figures that were discussed.

[17] Ms. Trovao testified that Mr. Manning said from the beginning that if things went over budget, he would advise them so they could make corrections. She denied every mentioning a figure of $400,000 for the build.

[18] Both Mr. and Ms. Trovao agreed in cross-examination that the $250-$300 per square foot numbers came from them and were presented to Solaris. Mr. Trovao explained that Solaris would not provide him with “anything,” which I took to be a reference to any budget numbers. He acknowledged that Solaris refused to commit to an overall cost for the house, but he was adamant that Mr. Manning had agreed to the budget range he suggested.

[19] Mr. Trovao testified that he never put the budget in writing, but that he had mentioned the budget figures 30 or 40 times orally. If he knew that Solaris would not have met the budget, he never would have agreed to have the house built.

[20] For her part, Ms. Trovao also acknowledged that Solaris never explicitly agreed not to exceed the budget, but she testified that it was understood all along that they would not exceed the budget. Nobody from Solaris ever said it could not be done for that price.

[21] Ms. Trovao testified that she discussed budget concerns with Mr. Manning in person and in writing throughout the project, and relied on him to stick to the budget. For example, she sent him a text on January 22, 2019, asking him if they could afford a cooktop and a separate wall oven “given our strict budget.”

Evidence about the reason why there was no written contract

[22] The parties did not follow the normal process employed by Solaris in virtually all of the builds they have undertaken in the past.

[23] Mr. Manning testified that the first step would normally be to obtain a proper set of drawings, and have the client select such items as flooring, counters, doors, windows, and interior and exterior finishes. Solaris would then request quotations, prepare a budget forecast, and review it with the client. They would then enter into a written contract that included a 5% deposit.

[24] According to Mr. Manning, Ms. Trovao was slow to select finishes, and the process continued well into the build. As a result, he could not develop a forecast or a budget in advance. He testified that he explained this, but Mr. Trovao was anxious to start the build so that the house would be ready when he had to move the following October.

Preparation of drawings and preliminary work

[25] The initial drawings for the house were prepared in early 2019, but over time there were changes to the initial drawings due to the failure to account for a required set-back and certain design changes requested by the Trovaos.

[26] In March 2019, an engineer was hired and test holes were drilled to test the soil compaction and water table, and aid in the design of an appropriate septic system. There was a high-water table and organic material that would have to be removed.

The oral contract for cost plus 12%

[27] In April 2019, the parties entered into an oral cost-plus contract that included a 12% management fee. The house was to be approximately 2000 square feet and would include a detached garage.

Construction begins and two invoices are issued and paid

[28] Construction began in July 2019. By that time, the water table had risen which required the foundation to be raised. Organics were removed, the lot was raised and leveled, and a retaining wall was built.

[29] In order to keep clients up to date on the costs of a project, Solaris kept a binder of estimates, quotes and invoices at their office. The binder would be made available for review whenever a client requested it.

[30] Solaris' invoices were based on the binder. Once subcontractor and supplier invoices were received, they would be assigned a cost code and entered into accounting software. They would then be printed and added to the binder. The Solaris invoices were itemized in accordance with the assigned cost codes and sent to the clients for payment.

[31] Solaris issued its first invoice to the Trovaos on August 16, 2019, and it was paid in full. The amount of the invoice after adjustments was $72,310.86.

[32] Foundations were poured in August 2019. After they were well into framing, a new architect was hired to provide revised drawings. The drawings included a number of changes to the design of the house. Some additional changes arose after the last set of drawings.

[33] Solaris issued its second invoice on October 4, 2019, and it was paid in full. The amount of the invoice after adjustments was $161,284.71.

[34] By the 17th of November, exterior membranes, windows and doors had been installed. Insulation had been installed, and they were at the “lock-up” stage.

The third invoice is issued and cost concerns arise

[35] Solaris issued its third invoice on December 5, 2019, for $397,004.81. The Trovaos paid $310,000.00 the following day.

[36] Disagreement between the parties began shortly after the third invoice was delivered. By that stage, the cost of the project was already over $600,000 and the house was not complete. The Trovaos were upset. Mr. Trovao described being shocked. Ms. Trovao said she was stunned.

[37] On December 8, 2019, Ms. Trovao sent Mr. Manning an email listing things that needed to be done and items that had not yet been paid for, and requesting prices “before we can move forward.” She wanted to see if they could cut costs or eliminate items. She also requested a meeting to review the binder of invoices.

[38] Mr. Manning testified that Mr. Trovao came to see him and was upset. He asked why he was not told about the high cost, and Mr. Manning advised him that he would have been aware if he had periodically checked the binder of invoices.

[39] Mr. Manning testified that it was at a subsequent meeting with the Trovaos and his partner Rocky Los, that there was a discussion about whether to proceed with the project. The Trovaos were concerned whether they had sufficient funds to complete the project. They advised they would be receiving additional funds in March and instructed Solaris to proceed. Mr. Manning could not provide them with a

final figure for the cost of the house because there were still decisions for them to make.

[40] Mr. Los also recalled the meeting with the Trovaos. He testified that he asked if they wanted to continue, and was told that they (Solaris) would be paid in March when the Trovaos received additional funds.

[41] Mr. Trovao testified that during the initial meeting with Mr. Manning he told him they would have additional funds in April, but he denied saying that they would pay Solaris. Coming out of the meetings, Mr. Manning was to look into why the bill was so high and get back to the Trovaos.

[42] Ms. Trovao testified that Mr. Trovao and Mr. Manning met personally to discuss the issue before the Trovaos attended Solaris' office to go over the invoices. She was aware that Mr. Trovao had asked Solaris to continue construction. When they went to look over the invoices, there was not a lot of conversation.

Construction continues after the third invoice

[43] Construction continued after the December 2019 meetings. The work still to be done included dry wall, finishing work, interior doors, flooring, the exterior deck, and work on the detached garage.

[44] Between December 9, 2020 and April 24, 2020, there was email correspondence between the parties addressing things like paint, options for hardware, tiles, appliances and closets. Some of the emails include quotes for various items, but none of the emails during this period make any reference to costs or budget constraints.

[45] Mr. Trovao had several conversations with Mr. Manning at the building site or the firehall, but nothing specific was discussed about a budget. At this time, Mr. Trovao was concerned about occupancy as he had sold his only other property.

[46] By March 5, 2020, the building inspector had approved the house for occupancy, and the Trovaos were able to move in, subject to a final inspection once the exterior was completed.

The fourth invoice – the dispute over budget crystallizes and a meeting takes place

[47] Solaris issued its fourth and final invoice for $280,225.28 by email on April 24, 2020. Mr. Trovao testified that he was totally stunned. No payments were made on that invoice. However, a credit memo for $26,460 was later applied against the outstanding invoices as a result of an error in the original invoice. In addition, the Trovaos paid one of the subcontractors directly in the amount of $35,659.

[48] There was a contentious meeting between the parties on or about May 1, 2020 at the offices of Solaris. Unbeknownst to Mr. Manning and Mr. Los, Mr. Trovao surreptitiously recorded the meeting on his i-phone.

[49] The defendants place a fair degree of reliance on this meeting, so I will review it in some detail. What follows is a description of what was said at the meeting, although, much of it consists of prior consistent statements that would not be admissible in support of the testimony of any of the parties. However, it is necessary to set out the facts in order to understand what are said to be admissions, and portions of the meeting that were used to argue credibility issues.

[50] It is important to outline not only what was said at the meeting, but the tone of the meeting and the nature of the conversation. Both of the Trovaos knew it was being recorded, and neither Mr. Manning nor Mr. Los had any idea. In my view, the nature of the discussion that took place reflects that reality.

[51] The meeting began with questions about various specific invoices. Mr. Trovao then introduced the topic of a budget. He asserted quite forcefully that their discussions from the outset were for a budget of $250-$300 per square foot, and that he needed an explanation for the cost, because he had never once been told the house could not be completed for the allotted price.

[52] Mr. Los stated (referring to Mr. Manning and Mr. Trovao), “did you guys not meet in December?” Mr. Trovao said they had, but then steered the conversation back to the costs of the project and the additional amount that was now owing. He stated “we discussed 250 to 300 and if there were outages, let us know, then we can deal with it.”

[53] Mr. Manning began by trying to explain that excavation costs had been higher than anticipated. He estimated four times more.

[54] Mr. Trovao returned to the topic of budget and made a more specific allegation. He asserted that they had discussed the budget range of $250-$300 per square foot, and Mr. Manning was to tell him if he couldn’t do it, but he never did. Mr. Manning began to respond, and said “actually…” but he was unable to finish that sentence as Mr. Trovao continued.

[55] Mr. Trovao said that no red flags had been brought to his attention. He described his shock at the price in December and again in April. Mr. Manning said that maybe they should have shut it down in December. Mr. Trovao said “maybe we should have,” and added that “there should have been a contract from the start.” He then said “we didn’t have any contract at all. We had us talking about 250 to 300.” He then said he had put his trust in Mr. Manning.

[56] Mr. Manning said the only thing he was told was that they wanted a house built for $400,000 and he said he could not do it. He then said, “this 250 300 discussion, we had this in December.” Mr. Trovao said they had the conversation “multiple times,” but Mr. Manning said “no. You never said a square footage cost.”

[57] Mr. Trovao challenged Mr. Manning. He said “when did you ever give me a square footage cost? Ever, ever. You didn’t?” Mr. Manning agreed, saying “I didn’t.” Mr. Trovao then said “I know you didn’t. I gave you one and you nodded your head.”

[58] Mr. Trovao raised the fact that he had advised them, he was tapped out in December. Mr. Los then responded and said “we should have stopped.” Mr. Trovao said they never stopped because they had no end price.

[59] Ms Trovao alleged that Mr. Manning knew what their maximum budget was. She said “we told you over and over and over and over again. This is how much money we have to spend.” Mr. Trovao added “we have a text even that said we have to make sure we stay on budget,” and that they had “transactions going back and forth saying are we on budget?” I have interpreted these last comments of Mr. Trovao as a reference to the correspondence that was led in evidence.

[60] Mr. Trovao said that December was the first time they realized they were not going to be able to get the house within their budget. Mr. Los said he should have stopped and Mr. Trovao said “exactly.” Ms. Trovao questioned how they could have stopped. Mr. Trovao said they had to finish the house to get into it.

[61] Ms. Trovao said that Solaris knew “what our cap was,” and knew that was all the money they had to spend. Mr. Trovao added that “you were supposed to keep us on track.”

[62] Ms. Trovao said to Mr. Manning, “you told us you were going to have this budget done. We never ever had, like, a budget and everybody I’ve talked to has said, well, how much did they budget for window coverings, for example? None. There’s no budget for window coverings. There’s no budget for anything.” She decried the lack of “an overall budget,” and pointed out that other people have an overall budget before breaking ground and all the costs are laid out.

[63] Mr. Los said that when the project first started, no one ever set up a budget. Ms. Trovao said they asked for it, and that they had negotiated $250-$300 per square foot. Mr. Manning denied there was a bottom line or maximum budget.

[64] Mr. Trovao said that in December it was the “max of all maxes already” and they still had to finish the inside. Mr. Los said that $300,000 was owed to them, and that he did not sign up for that. If they did not have the money, they should have stopped the construction. Mr. Trovao responded that it was Solaris who ran the show and they should have advised him to stop.

[65] Mr. Trovao said he had planned for a maximum of $600,000 and $50,000 for a roughed in garage. Both Mr. Manning and Mr. Los said they had not heard that, and if they had, they would never have started the project.

[66] The parties continued to rehash the initial meetings, and what was said or not said. Suffice to say, they did not agree whether any budget had been agreed to. Mr. Trovao and Ms. Trovao said it had been agreed to. Mr. Manning and Mr. Los said it had not.

[67] The tone of the May 1, 2020, meeting was confrontational. On a number of occasions, Mr. Trovao put his version of past events and discussions to Mr. Manning in a leading fashion and presented them as undisputed facts, all while surreptitiously recording.

[68] Mr. Manning testified that he was trying to explain that the binder of invoices and estimates would have made them aware of the costs and that there were unforeseen issues that came up during the build. Tempers were raised, and he was trying to keep things calm.

The outstanding account and continuation of the dispute

[69] The total amount owing on all of the corrected invoices issued by Solaris was $884,365.66. The total amount paid by the Trovaos, including the subcontractor that was paid directly, is $579,495.10. The difference between the total billed and the total paid is $304,870.56.

[70] The parties continued to communicate in writing after the May 1, 2020 meeting. Both parties outlined their position. Solaris maintained that the outstanding invoice amounts were due. The Trovaos maintained that they were not obliged to pay any amount beyond the agreed upon budget.

[71] On May 25, 2020, then counsel for Solaris filed a builder’s lien for improvements made to the property.

Position of the Parties

[72] The plaintiffs contend that they have established the existence of a contract for cost plus 12%, and a breach of contract resulting from the non-payment of legitimate invoices.

[73] The defendants contend that the contract entered into included a term that the plaintiff would complete the project in accordance with a budget range of $250-$300 per square foot, and $50,000 for the detached garage. They maintain that there was a fixed price element to the contract that should be enforced in their favour.

[74] In the alternative, the defendants say that even if it was a cost-plus contract, the $250-$300 per square foot number should be construed as an estimate, provided by Solaris Custom Home Inc., and should be enforced.

[75] In the further alternative, the defendants say the plaintiff's conduct constitutes negligent misrepresentation, because they relied on Solaris' promise to stay within budget to their detriment.

Legal Framework

[76] To prove any contract, oral or written, the party seeking to rely on the contractual term in question must establish a meeting of the minds that is sufficient to give rise to a legally binding agreement. The test is "whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract" (*Ethiopian Orthodox Tewahedo Church St. Mary Cathedral v. Aga*, 2021 SCC 22, [2021] 1 S.C.R. 868 at para. 36).

[77] In *Voitchovsky v. Gibson*, 2022 BCCA 428, the Court of Appeal summarized the principles that are relevant to oral agreements in the following terms:

> [32] The following principles regarding oral agreements emerge from the jurisprudence. When the court is faced with an alleged oral agreement, it is necessary to look not only at the words used, but also at whether the parties' *conduct* is consistent with the oral agreement. The test for a binding

> and enforceable agreement is "whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract" (*Rudyak v. Bekturova*, 2018 BCCA 414, at para. 23 [*Rudyak*], citing G.H.L. Fridman, *The Law of Contract in Canada* (6th ed., 2011) at 15; see also *Berthin v. Berthin*, 2016 BCCA 104, at para. 46). In other words, courts must examine how the parties' conduct would appear to a reasonable person in the position of the other party (*Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22, at para. 35 [*Ethiopian Orthodox*]).
>
> [33] The determination of the outward manifestation of the parties' intentions is contextual and takes into account the parties' communications as well as their conduct before and after the agreement is made (*Oswald v. Start Up SRL*, 2021 BCCA 352, at para. 34). The parties must have reached consensus on the essential terms of their agreement and failure to reach this "meeting of the minds" means the agreement will fail for lack of certainty (*Rudyak*, at para. 24). This inquiry is an objective one, such that the actual state of mind and personal knowledge of the parties is not relevant (*Hammerton v. MGM Ford-Lincoln Sales Ltd.*, 2007 BCCA 188, at para. 23, citing S.M. Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book Inc., 2005) at 103).
>
> [34] The question is "not what the parties subjectively had in mind but whether their conduct was such that a reasonable person would conclude that they intended to be bound" and in analyzing this conduct, courts can consider the surrounding circumstances (*Ethiopian Orthodox*, at para. 37). Every case poses the question of "what intention is objectively manifest in the parties' conduct" (*Ethiopian Orthodox*, at para. 38).

[78] In seeking to enforce a building contract, the plaintiff must prove the amounts it claims are properly owing, and bears the onus to establish the terms of the contract it relies upon and has the burden to prove that the defendants owe it money (*C.J. Smith Contracting Ltd. v. Kazem-Pour*, 2014 BCSC 689 at para. 84).

[79] Estimates, even when they are given, may or may not have contractual effect. The court must determine, if any estimates are made in circumstances which imbue them with contractual effect and, if so, what margin of error may limit the extent to which the estimates are binding (*Dunn v. Vicars*, 2007 BCSC 1598 at para. 85, varied on other grounds 2009 BCCA 477, citing *Golder Associates Ltd. v. Mill Creek Developments Ltd*. et al., 2004 BCSC 665 at paras. 20-24)

[80] The courts have considered a variety of factors when assessing the terms of a building contract, and deciding whether the parties agreed on a fixed-price, or

whether a budget was intended to have contractual effect. Drawing on the authorities, I would summarize the relevant factors as including:

a) Whether the agreement provided a percentage of the project cost as a fee to the contractor;

b) Whether price was of overriding importance for the owner and whether that was communicated to the contractor?

c) Whether the contractor provided an estimate and whether the owner relied on it;

d) The knowledge and expertise of the party providing the estimate;

e) Whether the owner required the contractor to design a project at a specified cost or sought assurances as to what the project would cost?

f) Whether the contractor paid for materials and labour and then billed the owner on a regular basis?

g) Whether the contractor provided information about the cost of labour and materials;

h) Whether the contractor made it clear they were not assuming any of the risk that the final price would exceed the estimate; and

i) Whether the owner encouraged the contractor to proceed with construction despite actual or constructive knowledge that the estimate would be exceeded (*C.J. Smith* at para. 79, *Strait Construction Ltd. v. Odar*, 2006 BCSC 690 at para. 18, aff'd 2007 BCCA 437, *Infinity Construction Inc. v. Skyline Executive Acquisitions Inc*., 2020 ONSC 77 at para. 114(e)).

Onus of Proof

[81] The parties agree that while the plaintiffs bear the burden of establishing the existence of a contract to be enforced, it is the defendants who seek to establish the

disputed budget term and therefore they bear the onus of proving the existence of that term on a balance of probabilities.

Credibility

[82] As will be apparent from the summary of evidence in this case, the plaintiffs and the defendants have given versions of the dealings between them that are irreconcilable on the key issue – whether budget was agreed to as a term of the contract.

[83] My task is to weigh the competing evidence and make findings of fact. I would adopt the the well-known passage from *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, which provides guidance on how to assess credibility:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet* (Township) (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [Farnya]; *R. v. S.(R.D*.), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).

[84] I would observe that while some specific aspects of each witness' testimony might be unreliable, there were no glaring internal inconsistencies or obvious untruths. Accordingly, the most important factor is the degree to which each of the accounts is consistent with the probability of the case as a whole.

[85] There are some aspects of the evidence that I have either not accepted, or not accepted fully. Where I have done that, it is on the basis of my concern over the credibility or reliability of the evidence on its face, in light of other evidence, or where

I find it is not consistent with the "preponderance of probabilities" (*Faryna v. Chorny*, [1952] 2 D.L.R. 354 at p. 357 (B.C.C.A.). I will highlight those aspects of the evidence in the course of these reasons.

Analysis

[86] I am not satisfied based on the discussions between the parties, the manner in which the project proceeded, or the parties conduct, that a specific budget or estimate was ever agreed to as a term of the contract. I conclude, quite simply, that the parties were never *ad idem* with respect to any final price, or price per square foot for the building of the house on Ritchie Avenue.

[87] In my view, what happened in this case, was that the Trovaos had a set budget in their minds that they wished to spend on construction of a custom home. They trusted Mr. Manning, who was a friend, and were content to proceed on a cost-plus basis in the hope and expectation that the $687,000 they expected to receive would be sufficient to pay for the new house, but they never took any steps to ensure that they obtained an estimate, or secured a commitment from Mr. Manning or Solaris not to exceed their budget.

[88] It was only later when costs began to mount, that they realized the cost of the house would exceed what they hoped to spend. It was at that point that they sought to impose a budget on Solaris that it had never agreed to. I fully understand their shock and disappointment when they received the third invoice and realized the cost of the house would far exceed what they hoped to spend. However, in my view, that desperation and disappointment has coloured their perception of how the contract was formed, and their view of the clarity of the discussions that took place regarding the cost of the project, and whether Solaris ever agreed to a total budget.

[89] From Solaris' point of view, it would make little sense to agree to a total price of $500,000 to $600,000 and an extra $50,000 for a detached garage in the context of a cost-plus contract. Had they agreed to those figures, or intended to agree to those figures, it would have made more sense to enter into a fixed price contract.

[90] The law is not really in dispute in this case. The factual issues that were argued before me include:

a) whether a budget of $250-$300 per square foot was an enforceable term of the contract;

b) whether Mr. Manning's evidence on behalf of the plaintiff was credible;

c) the effect of the surreptitiously recorded meeting on May 1, 2020;

d) whether the defendants established negligent misrepresentation; and

e) whether the plaintiff has established its case.

I will address each of these areas in turn.

(A) Was budget an enforceable term of the contract?

[91] On the whole of the evidence, I find that the budget proposed by the defendants was not a term of the oral contract that they entered into with the plaintiff. There was no agreement with respect to budget, no estimate was provided, no assurances were sought by the Trovaos, and when the project exceeded their budget, they instructed Solaris to continue with the project, knowing they were subject to a cost plus 12% agreement. My findings are summarized in more detail below.

There was no agreement with respect to a maximum budget

[92] In my view, the evidence does not establish a meeting of the minds. While I am satisfied that there were some discussions about budgetary matters, they fall far short of establishing an agreement with respect to a maximum budget.

[93] I do not accept Mr. Trovao's evidence that he discussed the $250-$300 per square foot budget 5 or 6 times before construction began, and that Mr. Manning agreed to it. Had they discussed it that many times, one might expect it to be reflected in an email or a text message. In my view, Mr. Trovao demonstrated his

willingness to exaggerate the number of times that budget was purportedly discussed when testified under cross-examination that he had mentioned it 30 or 40 times orally. I do not consider that evidence credible. Had such conversations occurred with anything close to the regularity he described, I would have expected it to generate further discussions that the parties could recall, or some reference to the specific budget amounts in writing.

[94] Ms. Trovao had little direct evidence to offer about the period of time during which the contract was formed as she was not dealing with Mr. Manning directly. She did testify that he was present when she discussed the budget figures with her architect at Starbucks, but Mr. Manning was not at that meeting for very long. I am not satisfied Mr. Manning heard or was aware of Ms. Trovao's discussion with her architect, but even if he was, it does not suggest an intention on his part to agree to a strict budget.

[95] I accept that Mr. Trovao mentioned the cost per square foot that he wanted to pay, and that the Trovaos asked about the total cost of the project. However, what is missing is any evidence that Mr. Manning or anyone from Solaris ever agreed to any specific figures or an overall cap on the cost of the project.

[96] Mr. Trovao testified that Mr. Manning, on one occasion, nodded his head and indicated he could build the house within budget. I do not think in this case that the evidence of a nod from Mr. Manning and an isolated comment, both of which took place five years ago and are open to interpretation, are sufficiently clear to give rise to a contractual relationship.

[97] There were certain frailties in Mr. Trovao's evidence that suggest there was no real agreement. These include the evidence that Mr. Manning "hummed and hawed" about the issue, the fact that no estimate was ever provided, and the largely uncontested evidence that Solaris refused to commit to a total cost for the house. All of this is inconsistent with an agreement to be bound by a specific cost per square foot.

[98] It was always understood that the size of the house would be approximately 2000 square feet. It would make little sense for Mr. Manning to refuse to commit to a total cost for the house, but at the same time agree to be found by a strict budget per square foot. They amount to the same thing.

[99] There was very little evidence of anything that Mr. Manning said that would lead a reasonable person to conclude that he agreed to a budget as a term of the contract. Mr. Trovao alleges he said the house would "probably be more in the range of" $300 a square foot," but even if that statement was made it falls short of demonstrating an agreement. No reasonable person would conclude that a party intended to be bound by saying merely that the cost of a project would "probably" fall within a certain range.

[100] On a number of occasions, both of the Trovaos asserted that Mr. Manning "never said it couldn't be done" or similar phrases. However, there is a great deal of difference between never saying something can't be done and promising that it will be done.

Solaris did not provide an estimate for the cost of the project

[101] Another consideration in the caselaw is whether the contractor provided an estimate. It is clear in my view, that no estimate was provide. Not only did Mr. Manning explain that he was not able to provide one, but the evidence of the Trovaos leads to the same conclusion. They explained their frustration in never receiving a quote or a total cost estimate.

[102] If the total cost of the project was centrally important to the Trovaos, it is reasonable to expect that they would have insisted on receiving a firm estimate from Solaris before proceeding. I can find no evidence that that took place.

[103] The defendants argue that they were relying on the knowledge and expertise of Solaris to meet the budget. However, it is the knowledge and expertise "of the party providing the estimate," that is relevant. In this case, Solaris was not the party

providing an estimate, and they cannot be held responsible for budget numbers that came entirely from the Trovaos and that they never endorsed or agreed to.

[104] The defendants rely on *Willms v. MacDonald Builders (Celtic Homes) Ltd*., 2016 BCSC 1910, but in that case a detailed written estimate was provided and relied on by the homeowner. The trial judge found an agreement between the parties "not to exceed the upper range set out in the estimate under any circumstances" (para. 110). Here, no estimate was provided, much less relied on, and the evidence does not support the inference that the parties agreed on an upper range.

[105] In *Wolski v. Puckett*, 2006 BCSC 977, at para. 51, Johnston J. observed that there is a difference between an expectation held by a homeowner that the cost of construction will be a certain amount, and an agreement that whatever the cost of construction turns out to be, the contractor will be paid no more than a certain amount. In my view, we are dealing with the former situation in this case. In *Wolski*, the homeowner was awarded damages in the amount of $20,000 for an inaccurate estimate, but again the estimate was provided by the contractor to the homeowner in writing.

[106] The defendants argue that it is reasonable to hold Solaris to the budget numbers that were discussed because Mr. Manning never raised any red flags. I agree that Mr. Manning could have and should have been more proactive in making sure that the Trovaos were aware of the costs as they were incurred, but the very concept of a "red flag" presupposes that there was an agreement on a set budget and I am unable to draw that conclusion. The trovaos may have been relying on the expertise of Solaris in relation to building the home, but that alone is not a basis upon which I can conclude that a specific budget formed an enforceable contractual term.

The Trovaos did not seek assurances about the cost of the project

[107] At no time did the Trovaos seek assurances as to what the project would cost. As noted, they testified that they relied on Mr. Manning, and he never advised

them they were over budget or raised any red flags. However, they took very few steps themselves. It may have been understandable for them not to review the binder of invoices before they were aware of a problem, but there is no evidence of any specific communications or discussions, or any direct requests for an assurance that the project would fall within a specific budget. Even after the house was clearly over budget, no specific assurances were sought.

There is no documentary evidence in support of a maximum budget

[108] The defence contends that budget was discussed throughout the build as evidenced in the written correspondence between the parties. However, I think it is important to differentiate between generic use of the term “budget,” and references to a defined budget that is understood by the parties to be a term of the contract. The emails that Ms. Trovao described in her testimony that referred to price, and concerns over price, were not specific to the $250-$300 per square foot budget that is the central issue in these proceedings.

[109] As many clients would be, the Trovaos were cost conscious, and that was reflected in some of their communications with Mr. Manning, but that is not the same as discussing a budget intended to be a cap on the overall cost of the project. In fact, the word “budget” was used only once and was a generic reference to “our strict budget.” I do not interpret that as a reference to a specific cost per square foot that was discussed or agreed upon.

[110] The defendants also rely on two text messages from August of 2019 that they say are consistent with the budget they rely on. One refers to a $498,000 rebuild cost and the other refers to $50,000 for the garage. However, the context of both text messages is important. They related to assigning values for insurance purposes. I am satisfied from all the evidence, that they were never intended to be the basis of, or part of a binding agreement as to price for the construction as between the parties.

The Trovaos encouraged Solaris to continue after the budget had already been exceeded

[111] One of the important factors to consider is whether the owners encouraged the contractor to proceed despite knowledge that the estimate in question would be exceeded.

[112] In my view, the interactions of the parties as a whole in December 2019 and early 2020 when it was clear that the cost of the house would be far more than $600,000 are not consistent with a strict budgetary limit on the cost of construction.

[113] By December 2019, the invoices issued to the Trovaos already totaled over $600,000. If $300 per square foot was the upper end of an agreed upon budget, it had already been exceeded and the house was nowhere near finished. Both of the Trovaos acknowledged knowing that their budget would be exceeded. They looked at ways of cutting costs, but did not mention an agreed budget, and ultimately instructed Solaris to proceed with the project.

[114] It is not necessary to resolve exactly when or at what meeting the decision to move forward was made. It is clear that the Trovaos agreed that Solaris should keep working.

[115] Mr. Trovao testified that he never said he would pay for completion of the project. However, it is clear on the facts, that he did advise Solaris he would be getting additional funds in the spring. There would be no reason to tell Solaris that he had additional funds, unless it was in anticipation of his being able to pay for the additional work that was required to complete the project.

(B) Was Mr. Manning a credible witness?

[116] Mr. Manning testified in a straightforward manner, and in general I found him to be a credible witness. He denied any specific discussion about a specific cost per square foot or any agreement to hold the cost within a specific range. I accept that evidence.

[117] I do not agree with the defendants that Mr. Manning's evidence was "wildly inconsistent." There is nothing inherently inconsistent between his assertion that Ms. Trovao initially wanted the house built for $400,000 and the Trovao's decision to proceed without a budget. Mr. Manning may have been mistaken with respect to the $400,000 figure, but nothing much turns on the exact figure he was told, because his answer to the Trovaos was that he did not think it was achievable for the price suggested.

[118] The defendants argue that there were misrepresentations and exaggerations in Mr. Manning's testimony about changes made in the course of the construction. In particular, they point out that a pot filler and potential for a suite and a lift in the detached garage were contemplated early on in the project. While it is clear that some of the changes that took place had been in the contemplation of the parties from an early stage, that has to be balanced against many other changes that were not.

[119] Over the course of the entire construction project, there were a number of changes that took place that had either not been anticipated and became necessary, or were specifically requested by the Trovaos. These changes included increased excavation costs, the need to build a retaining wall and level the lot due to the higher than anticipated water table, encroachments on required set backs in the original drawings that required moving a mechanical room to the inside of the attached garage, an added closet, an enlarged shower, changes to a fireplace, changes to the roofline, an enlarged deck, a covered area to unload groceries in rain, adjustments to the laundry room, an enlarged closet, rough-ins for future additions to the garage, additional fees for a structural engineer, and changes to the configuration of the garage doors.

[120] Looking at all of the evidence, it may be that Mr. Manning was mistaken about a few of the specific changes that were made, and when they arose, but overall he did not misrepresent or exaggerate the number of changes.

[121] Given this was a custom home, the fact that there were changes as the project went along is unremarkable. However, some of the changes did lead to additional costs for labour and material. If there had been a hard limit on construction costs, or a defined budget as a term of the contract, then there would likely have been communication between the parties as to whether the increased costs from these changes fit within the defined budget. However, neither party ever addressed that issue.

[122] The defendants argue that the assertion that there was no budget whatsoever was inherently incredible, and they point out that Mr. Manning had never proceeded without a budget for any of his other construction projects. However, Mr. Manning explained in his testimony why the usual process was not followed. I see no reason to reject his explanation. It was not possible to create a budget forecast until the finishes had been selected by the Trovaos. That happens to be consistent with what transpired. The budget forecast would normally go hand in hand with a written contract, and neither document exists.

[123] That is not to say that the Trovaos were doing anything wrong in relation to choosing finishings, or the timing of the choices made. Ms. Trovao essentially explained that she made the choices as they were presented to her, and that is consistent with the emails and the general progress of the construction project over time. My finding is that the Trovaos elected to proceed without a firm estimate or budget as part of the agreement, not that they should be faulted for doing so.

[124] Counsel for the defence says it is highly improbable that the Trovaos would have proceeded with no budget given their situation. However, while it may have been ill advised, I do not find it to be inherently plausible. They were friends with Mr. Manning and wanted him to build the house. They were anxious to start the build. I consider it more likely than not, that had they been insisting on a budget, they would not have proceeded without obtaining a clear assurance from Solaris.

(C) The effect of the surreptitiously recorded meeting

[125] In a *voir dire* ruling during the trial, I found that the surreptitious recording of the May 1, 2020 meeting was admissible both as a source of possible admissions, and as a record of statements made by Mr. Manning or Mr. Los that might be relevant to their credibility. The weight of the evidence and the ultimate effect of any admissions would be subject to argument.

[126] Having heard all the evidence at trial, I find the statements as “admissions” are of limited utility. In essence, by the time of the May 1st meeting, the disagreement between the parties was clear. The statements of both Mr. Manning and Mr. Los largely echo the positions they adopted at trial, and their testimony. The same can be said for the statements of the Trovaos. I have not relied on any of the statements to bolster the testimony of any party, as they are not admissible for that purpose, being prior consistent statements.

[127] The plaintiff placed no reliance on the recording in attempting to prove her case. The defendants rely on the statements made by Mr. Manning to support various specific submissions about his credibility.

[128] In my view, neither the statements made by Mr. Manning at the recorded meeting, nor the manner in which they were made, would lead me to reject his evidence or give it less weight.

[129] The defendant relies on the fact that during the May 1, 2020 meeting, Mr. Manning did not refute the budget figures for approximately 12 minutes. While that is technically true, I would observe that he scarcely had a chance. After the first reference to budget, the conversation turned to other matters. When it was raised again, Mr. Manning began to respond with “actually” and did not get a chance to finish that thought. When it came up again, he essentially stated that they had never agreed on a square footage cost.

[130] Looking at the conversation as a whole, I do not find that it negatively affects Mr. Manning’s credibility. Mr. Manning was faced with an angry client who was

confronting him about cost overruns. As he explained, he was trying to understand the clients concerns and respond. The defence argues that Mr. Manning's inaccurate estimate of the increased excavation costs is further evidence of his lack of credibility, but in my view that was simply part of a general attempt on Mr. Manning's part to explain the increased costs. It is not reasonable to expect that he would have had a forensically accurate recollection of the costs in his attempt to placate an angry client.

[131] It is also important to recognize that the conversation was surreptitiously recorded at a time when the dispute between the parties was at an advanced stage. Mr. Trovao knew he was speaking for posterity, whereas Mr. Manning had no idea. Despite that disadvantage, when he was confronted with Mr. Trovao's version of events, Mr. Manning never did acknowledge that the contract included a budget per square foot.

(D) Have the defendants establish negligent misrepresentation?

[132] The defendants argue that the plaintiffs are also liable under the doctrine of negligent misrepresentation. As I understand the argument, they contend that there was a special relationship between the parties as a result of the contract, and Solaris made a false, inaccurate or misleading representation when it agreed to complete the project within a specific budget range.

[133] I would not give effect to that argument, because it is based on the same factual assertions as their argument with respect to the contractual terms – namely that Mr. Manning agreed to a specific budget or capped price. However, for the reasons I have already given, I am not satisfied that has been established in the evidence. In short, I do not find that there has been a false, inaccurate or misleading representation by Mr. Manning or any other representative of Solaris.

[134] In that respect, this case is similar to *Hodder Construction (1993) Ltd. v. Topolnisky,* 2021 BCSC 666, where Riley J. found that the evidence was not sufficient to establish that the contractor "made any legally binding representations amounting to an agreed-upon cap…" He found it more likely than not that the

contractor never committed his company to complete the scope of work for a fixed price (para. 173). I draw the same conclusion in this case.

(E) Has the plaintiff established its case?

[135] There is no dispute that the parties entered into an oral contract whereby Solaris was entitled to charge the defendants for all costs incurred on the project plus a 12% fee.

[136] All of the Solaris invoices are in evidence, and include the back-up invoices from suppliers and subcontractors such that it is clear how the amounts owing were calculated. The defendants do not challenge the accuracy of the invoices, and I am satisfied they accurately represent work done and the amounts owing pursuant to the contract the parties entered into.

[137] There is no dispute that all of the work that led to the invoices was done, and that the defendants received the benefit of the completed house. All of the work done was done with the knowledge and consent of the defendants.

[138] I am satisfied that the plaintiff has proven its case on a balance of probabilities, and they are entitled to the unpaid invoices for work done on the custom home they built for the defendants.

[139] In my view, the plaintiff incurred significant costs to complete the project, and it would be unjust to effectively force Solaris to carry those costs based on a budget that was never agreed to, and in the face of a clear contractual term under which they could legitimately expect payment and a 12% fee.

[140] The defendants claim that the plaintiffs breached the contract themselves, and should not be entitled to claim the 12% fee on top of the invoices from Rock Solid Construction Ltd., because of Mr. Los' association with both Rock Solid and Solaris. This amounts to $20,875.90. The defendants say that failing to disclose that Mr. Los was a stakeholder in both companies was improper, and suggests that the

invoices should be approached with “suspicion” and “potentially ignored or discounted in their entirety.”

[141] I would not give effect to this submission. There was very little evidence to support a breach of contract in this respect. There were no discussions during the formation of the contract about Rock Solid, or any suggestion or agreement that Rock Solid’s invoices should be treated differently than any other invoices from subcontractors.

[142] The defence suggests that the breach of contract arises from a failure to disclose the role of Mr. Los, but Ms. Trovao testified in chief that Mr. Manning advised her at the beginning of the project that Mr. Los was the co-owner of Solaris and the lead construction person for Rock Solid who would be doing the framing. She understood from discussions with Mr. Manning that Mr. Los owned Rock Solid and that he owned Solaris.

[143] I would also note that the conduct of the parties is inconsistent with the notion that inclusion of Rock Solid invoices was a breach of their agreement. When the first invoice from Solaris arrived, it included an invoice from Rock Solid and a 12% fee, both of which were paid without objection.

[144] Finally, there is no evidence of any fraudulent or improper billing on the part of Rock Solid or any subcontractors. There was one accidental incident of double billing, but it was corrected.

[145] I am unable to conclude that there was any breach of contract, or conflict of interest based on corporate ownership that would amount to a breach, and I find the evidence in this regard insufficient.

[146] Solaris registered a builder’s lien against the title to the Ritchie Avenue property on May 25, 2020. No arguments were advanced alleging invalidity of the lien or non-compliance with the requirements of the *Builders Lien Act*. I am satisfied that Solaris has proven the value of the work and service done on the Ritchie

avenue property and are entitled to a lien in the amount of $304,870.56 for the work done and improvements made to the property.

Conclusion

[147] I am satisfied that the plaintiffs have made out their case against the defendants for the amounts of the unpaid invoices under the contract.

[148] I would summarize the terms of the resulting order as follows:

a) The plaintiffs are granted judgement for $304,870.56;

b) Pre-judgement interest at the registrar's rate is ordered on $86,764.28 (being the unpaid amount after issuance of the third invoice) from the date when payment could reasonably be expected to the date of the final invoice, namely March 6, 2020 to April 24, 2020;

c) Pre-judgement interest at the registrar's rate on the total unpaid amount of $304,870.56 from April 24, 2020 to the date of judgment;

d) Post-judgement interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79;

e) A declaration in favour of the plaintiffs under s. 31(1) the *Builder's Lien Act* of a lien in the amount of $304,870.56 against the title to the Ritchie Avenue property;

f) An order for the sale of the Ritchie Avenue property pursuant to s. 31(2) of the *Builders Lien Act* if the full amount of the lien is not paid within 90 days of release of this judgement.

[149] The plaintiffs are entitled to their ordinary costs on scale B. If there are facts I am unaware of and the parties wish to make additional submissions on costs, they may do so in writing within 30 days of the release of this judgment.

"Greenwood J."