

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *JCB Contracting Ltd. v. Blackett*,
2024 BCSC 2091

Date: 20241118
Docket: S58291
Registry: Vernon

Between:

JCB Contracting Ltd.

Plaintiff

And

Damon Blackett and Suzanne April Andrews Greer

Defendants

Before: The Honourable Justice Kirchner

Reasons for Judgment

Counsel for the Plaintiff:

C.T. Hart

Counsel for the Defendants:

C. Hartnett

Place and Date of Hearing:

Vernon, B.C.
October 16, 2024

Place and Date of Judgment:

Vernon, B.C.
November 18, 2024

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I. Introduction

[1] The plaintiff, JCB Contracting Ltd. (“JCB”), applies for judgment by summary trial for payments on a contract to build a home in Kelowna for the defendants, Damon Blackett and Suzanne Greer. JCB argues it substantially completed construction on the home and is entitled to payment of an outstanding progress draw and the final draw under the contract plus payment for some invoiced extras. It concedes there are some deficiencies and is willing to address those so once defendants make the required payments. However, it maintains these are minor and since payment on properly invoiced work is outstanding, it was entitled under the contract to stop work pending payment.

[2] The defendants deny they wrongfully stopped making progress payments. They acknowledge they did not make the disputed payments but maintain they were not obligated to do so because JCB failed to complete the work required to trigger those payments. They argue JCB wrongfully stopped work and thereby abandoned the project. They also argue the home is not substantially complete because the deficiencies prevent them from obtaining an occupancy permit. They argue JCB’s abandonment of the project amounts to a repudiation of the contract which the defendants have accepted and they have no further obligations to pay JCB. They argue the claim should be dismissed.

[3] The parties agree the matter is suitable for summary trial disposition.

II. Background

A. The Contract

[4] JCB is a general contractor and construction project management company based in Vernon, B.C. On July 19, 2022 it entered into a written agreement (the “Contract”) with the defendants to build them a home in Kelowna, in accordance with plans and specifications agreed upon by the defendants. The contract price was \$462,881.51, plus GST and subject to extras as defined in the Contract.

[5] Section 4.1 of the Contract provides for certain progress payments to be made as follows:

- a) \$46,200.00, plus GST at the time of execution of the Contract;
- b) \$95,500.00, plus GST at the time of completion of the foundations;
- c) \$138,800.00, plus GST, at the time of lock-up (i.e. when windows and doors were installed and the roof was on);
- d) \$138,800.00, plus GST, at the time of completion of the rough-in of the electrical, plumbing, insulation, and drywall; and
- e) the balance of \$43,581.51, plus GST, less the statutory Builders Lien Holdback and subject to further adjustments under Section 2.1 of the Contract for Allowances, due upon substantial completion of the project.

[6] Pursuant to s. 4.1(g) of the Contract, if a progress payment is not made within five days of receipt of JCB's invoice, JCB may suspend work on the project until the full amount is paid with interest.

[7] Pursuant to s. 4.2 of the Contract and ss. 4 and 5 of the *Builders Lien Act*, S.B.C. 1997, c. 45, the defendants are to withhold 10% from each progress payment and keep that amount in a holdback account. The contract provides that the account will be in the name of defendants but, consistent with s. 5(1)(c) of the *Builders Lien Act*, it is to be administered jointly by the parties.

[8] The defendant Damon Blackett, who is a finishing carpenter, wished to do some of the finishing work on the home himself. Thus, the parties came to an understanding that JCB would complete the home without interior finishing work and would credit the defendants for that part of the Contract. Thus, JCB would complete the foundation, the framing and exterior, the plumbing, electrical work, the insulation, and drywall but leave things like flooring, cabinetry, and painting to the defendants.

[9] At the time the Contract was made, JCB provided a set of building plans to the defendants dated June 14, 2021. However, the parties verbally agreed to a number of changes before they signed the Contract and after the Contract was signed, JCB provided a revised set of plans dated September 29, 2022 reflecting those changes.

B. Paid and Unpaid Invoices

[10] JCB started work in January 2023. It issued invoices for the first three progress draws on July 26, 2022 (signing), January 19, 2023 (foundation), and March 31, 2023 (Lock-up) as each stage completed. The defendants paid those invoices as required. JCB also issued invoices dated January 30, 2023, March 6, 2023, and two dated May 10, 2023 for certain extras. Those were also were paid but, as I will discuss later, they now dispute parts of the March 6, 2023 and May 10, 2023 invoices.

[11] The defendants did not hold back the required 10% from any of these payments as called for in s. 4.2 of the Contract and the *Builders Lien Act*. Nor is there evidence that the defendants established a holdback account.

[12] On June 30, 2023 JCB issued an invoice for \$42,867.98 for the progress draw due upon completion of the electrical, plumbing, insulation and drywall. It consisted of the \$138,800 progress payment stipulated in the s. 4.1(e) of the Contract, \$4,599.67 in extras, and credits totalling \$102,573.02 for finishing work that Mr. Blackett would complete. That resulted in an invoice for \$40,826.64 plus GST for a total of \$42,867.98. The defendants did not pay this invoice within five days of receipt or at all.

[13] On August 2, 2023, JCB emailed Mr. Blackett inquiring about payment for the June 30, 2023 invoice and on August 11, 2023 Mr. Blackett responded stating: “The Drywall is still not complete.”

[14] On August 15, 2023, JCB issued an invoice dated July 31, 2023 for \$933.66 for certain extras being 14 dimmer switches and two plugs not included in the

original scope of work. That invoice remains unpaid. The defendants accept the extra for the 14 dimmer switches but now deny there was agreement for the two plugs, although that was not communicated to JCB at the time the invoice was issued.

[15] On August 22, 2023, JCB issued an invoice for \$50,255.64 being the balance owing on the project upon substantial completion plus certain extras and GST. There is a credit on the invoice for \$450 relating to finishing materials the defendants would obtain themselves. During submissions, counsel for JCB conceded that a charge of \$3,135 for a fireplace should be deducted from this invoice as the fireplace was already charged as an extra on the (unpaid) July 30, 2023 invoice. Apart from that, the defendants have not taken issue with the extras charged in the August 22, 2023 invoice but they dispute that the final draw is due.

[16] On August 27, 2023, Mr. Blackett emailed Jason Barnett at JCB with a list of 21 deficiencies which he said needed to be addressed before he would make the progress draw payment for the plumbing, electrical, insulation, and drywall work. Among the listed deficiencies were:

Rocks sliding down the bank damaging patio railings and (as it appears in Mr. Blackett's email):

Bathroom in garage not finished plumbing coming out of the middle of the ceiling and not being run through mechanical room wall pipes will freeze.

[17] The first of these relates to an issue of the stability of a rock slope behind the house that I will address later. The second concerns two matters in the garage. One is a pipe from the upper level bathroom that is exposed in the garage ceiling. That pipe must be insulated and enclosed in drywall to prevent freezing. Mr. Blackett messaged Mr. Barnett about this incomplete work on July 21, 2023 and again on August 9, 2023. In response Mr. Barnett said that he would call the drywaller and find out why this work was not yet done but apparently it is still unfinished. JCB agrees it is responsible for this work but did not complete it before stopping work on the project.

[18] Mr. Blackett also asserts in his affidavit that there were spots in the kitchen and garage where drywall had not been sanded. He asserts this also makes the drywall work incomplete, although this was not previously communicated in Mr. Blackett.

[19] The other matter in the garage relates to a disputed bathroom. The defendants claim JCB agreed to frame and drywall a bathroom in the garage as part of the overall Contract price (i.e. not as an extra). Mr. Barnett denies this. He says he agreed to rough in plumbing for a future bathroom but Mr. Blackett was to build the bathroom himself.

C. JCB’s Work Stoppage

[20] Since the defendants refused to pay the invoices, JCB purported to exercise its right under the Contract to stop work. Consequently, it has not been back to the site to inspect or correct any of the alleged deficiencies. JCB maintains the construction was substantially complete before it stopped work and it has only refused to address deficiencies due to non-payment.

D. The Building Inspection and Occupancy Permit

[21] On May 3, 2024, Adam Bednarski, a building inspector with the Central Okanagan Regional District, inspected the home for purposes of an occupancy permit. He identified five material deficiencies that precluded him from issuing the permit:

1. Non-vented soffits required to the North side
2. Seal/silicone and paint siding
3. Furnace room requires self-closing door
4. Garage drywall ceiling below to be completed above the future bathroom
5. Flooring inside the house is not complete.

[22] In an affidavit, Mr. Bednarski deposes that non-vented soffits are a fire safety hazard. These were noted on the original drawings but evidently the requirement was not followed. Mr. Blackett deposes that this defect is being repaired under the

defendants' new home warranty but he estimates the cost would otherwise be around \$2,500. He provides no quotes to support this.

[23] On the second item, Mr. Bednarski deposes that seal/silicone and paint on the siding is necessary to prevent the risk of water ingress. Mr. Blackett deposes that he was quoted \$11,000 to complete the sealing and painting of the siding. He attaches a quote from V-Line Paint for this amount.

[24] Mr. Barnett of JCB says he is unable to comment on the first and second of these deficiencies without inspecting the home to assess what must be done but he suggests they are minor.

[25] Mr. Barnett confirms JCB is responsible for the self-closing door in the furnace room, but says this is usually done at the end of construction and JCB had not reached that point when it stopped work. He suggests it is minor, requiring less than \$200 in labour costs. Mr. Blackett deposes that he has since completed this item himself at cost of \$50 for hinges and two hours of time.

[26] The fourth item on Mr. Bednarski's list relates to the exposed pipe in the garage bathroom mentioned earlier.

[27] The fifth item is the defendants' responsibility based on the understanding between JCB and the defendants that Mr. Blackett would do the finishing work himself. Apparently that work has now been done.

[28] At issue in this summary trial is whether JCB is entitled to payment for some or all of the outstanding invoices. Central to that issue is whether the work covered by those invoices was complete. From the defendants' perspective, the issue is whether JCB has repudiated the Contract such that their obligations to JCB have come to an end. That includes any obligation to pay the outstanding invoices.

III. Legal Principles

[29] Absent an express term in the contract stipulating otherwise, a construction contractor is not entitled to payment until the work on the project is substantially

complete. Once the work is substantially complete, the contractor is entitled to be paid even if there are defects in the work. The owner may have the right to a counterclaim for damages or to set off the amount paid to remedy any defects, but it cannot escape liability for payment of the agreed upon price for the work: *London Eco-Roof Manufacturing Inc. v. Syson*, 2020 ONSC 1338 at para. 16; *Belfor (Canada) Inc. v. Drescher*, 2021 BCSC 2403 at para. 16; *Epic Restoration Services Inc. v. Fuller et. al*, 2023 BCSC 232 at para. 40; *McVie v. Lombard Insurance Co.* 2010 SCC 1025 at paras. 184-185. In Thomas G. Heintzman, *Heintzman, West and Goldsmith on Canadian Building Contracts*, 5th ed., the authors state the matter this way at § 5:4.60:

...an owner will not be able to resist payment because of some minor or inconsequential failure to complete, although the owner may have a counterclaim against the contractor for damages for non-completion, which will generally be the cost of finishing the non-completed items or remedying any defects.

[30] Where there are deficiencies or defects in the work, the owner must give the contractor a reasonable opportunity to repair the deficiency before seeking to recover the cost of having it done by another contractor: *Rocksolid v. Bertolissi*, 2013 ONSC 7343 at paras. 78-81. Wherever it is reasonable, the owner has a positive obligation to afford the contractor an early opportunity to examine the alleged deficiency and rectify it: *Connolly v. Greater Homes Inc.*, 2011 NSSC 291 at para. 48.

[31] It is a question of fact whether a project is substantially complete. The court will consider the terms of the contract and the nature of the work involved, and make a reasonable appraisal of the work already carried out: *London Eco-Roof*.

[32] The parties disagree on whether these principles apply to the progress draws under s. 4.1 of the Contract. As discussed, JCB is entitled to progress payments upon completion of certain stages of project as set out in the Contract. JCB argues it is entitled to payment upon substantial completion of each step. The defendants submit the principle of substantial completion only applies to the overall project and

not to the progress draws. They maintain that if any amount of the work required to complete a state is unfinished, JCB is not entitled to payment. Counsel advise that they were unable to locate any authority that directly addresses whether substantial completion applies to progress draws.

[33] I see no reason to treat a progress draw that is due upon the completion of a stage of a project more rigorously than a final payment upon completion of the overall project. The concept of substantial completion is widely used and understood in construction law and has been applied in the context of progress draws: *Heinstzman, West and Goldsmith on Canadian Building Contracts*, 5th ed. at § 5:5.60; *Song v. Yongfeng Enterprises Inc.*, 2023 BCSC 1228 at para. 89. I have been given no principled reason why some other standard should apply to progress draws.

[34] Thus, in my view, the principal questions in this summary trial are whether the electrical, plumbing, insulation, and drywall stage of the project was substantially complete such that the related progress draw was due and whether the overall project was substantially complete such that the final payment was due.

IV. Analysis

A. Was JCB Entitled to Receive the Fourth Progress Payment?

[35] Since I have concluded that the principle of substantial completion applies to progress draws, it is necessary for me to decide whether the roughing in of the plumbing, electrical, insulation, and drywall was substantially complete such that JCB was entitled to payment of its June 30, 2023 invoice. In argument, counsel referred to this as the “Drywall Progress Draw” so I will adopt the same definition. However, I observe that it does not fully capture the work to be substantially completed for this progress draw which also includes plumbing, electrical, and insulation.

[36] The defendants say JCB was not entitled to payment for the Drywall Progress Draw because that work was incomplete when JCB issued the June 30, 2023

invoice. They point to the exposed pipe in the garage, the sanding that was needed in the kitchen and garage, and the failure to frame and insulate the garage bathroom. I will address each of these in a moment.

[37] The defendants also argue since JCB was not entitled to the Drywall Progress Draw, it wrongfully stopped work on the project when the defendants refused to pay the invoice. Further, they argue the wrongful termination of work constitutes an abandonment of the project and a repudiation of the contract by JCB. They argue the consequences of this are the defendants are released from their obligations under the Contract, including the obligation to make any further payments to JCB. Thus, despite the fact that JCB completed all the plumbing and electrical work throughout entire house and garage and completed the insulation and drywall with the exception of the alleged deficiencies, the defendants maintain JCB has foregone its right to be paid for that and any other further work and materials for the project.

1. *The Exposed Pipe and Drywall Sanding*

[38] The exposed pipe in the garage is a deficiency that JCB was (and is) required to correct. However, I find it is not so significant that it rendered the work required for the Drywall Progress Draw incomplete. As I discuss below, the exposed pipe later became an issue for the overall completion of the project since it was a material deficiency that precluded the Regional District from issuing an occupancy permit. However, for the purposes the Drywall Progress Draw, I find this deficiency is relatively minor compared to the overall work to complete this stage. The payment for the Drywall Progress Draw was \$138,800 (less credits for work done by Mr. Blackett) and, as mentioned, covers the electrical, plumbing, insulation, and drywalling for the whole house and garage. The work involved in insulating and drywalling a single exposed pipe in the garage is relatively miniscule compared to the totality of work required to complete this stage. I find this deficiency, on its own, did not excuse the defendants from making the required payment as invoiced.

[39] I am also satisfied that the deficiency of sanding work on spots of the drywall in the garage and kitchen is very minor and does not make this stage of the project incomplete.

2. *The Garage Bathroom*

[40] The more significant issue with the Drywall Progress Draw is the garage bathroom. The defendants' claim that JCB agreed to frame and drywall this bathroom as part of the overall Contract price. Mr. Barnett denies this. He says if JCB had agreed frame and drywall a bathroom in the garage, it would have shown on the construction plans it prepared and JCB would have provided a quote for the defendants' approval. He says he understood that Mr. Blackett wanted to install a toilet and sink in the garage but JCB was only asked to provide the plumbing rough-ins for these, which it did. He says his understanding was that Mr. Blackett would frame this bathroom himself. If this item was part of the Contract, its incompleteness would certainly be a more significant deficiency than the exposed pipe.

[41] In my view, however, the evidence does not establish an agreement that JCB would frame and drywall this bathroom. Neither the original plans (June 14, 2021) nor the revised plans (September 29, 2022) prepared by JCB include a bathroom in the garage. The scope of work document dated June 9, 2022 does not indicate a garage bathroom. The defendants rest their claim on an email Mr. Blackett sent to Mr. Barnett on January 11, 2023 in which he discussed a number of potential changes to the plans and said he would like to put a bathroom in the garage:

Good morning Jason we've had a chance to go through the plans and make some changes I tried to call you and I've texted you the photos of the plan so that you have them on you. I'm hoping we can talk after work today and work through these plans together and I can let you know all the changes I'm going to email you over the photos of the plans with the changes

...

Garage level: We're going to keep the mechanical room in the back right corner of the garage the long way coming towards the front of the garage I want to add a toilet and a sink on the front side of that mechanical room with a pocket door that I'll order and frame in later. We've drawn hose bib locations, car charger, and gas locations on the plans as well. As for all the exterior hose bibs, I want all on one separate line so I can shut it off in the mechanical room in the winter and drain that system out.

[Emphasis added]

[42] As suggested in the email, Mr. Blackett sent photos of plans to Mr. Barnett by text message on January 11, 2023 but I am not able to see a bathroom in the garage on those photos (even on improved copies provided by counsel after the hearing).

[43] Mr. Barnett responded to this part of the email and text message as follows:

Yes we received the drawings that you sent about mechanical room and bathroom. We have noted hose bib locations, car charger gas locations.

[44] There is nothing in this response by which Mr. Barnett agreed to frame and insulate a garage bathroom. Earlier in this email response he indicated that JCB will do certain framing “as per the drawings that you have attached” but this was before the discussion about the garage bathroom.

[45] JCB roughed in the plumbing for a sink and a toilet in the garage but did not frame in the bathroom. Mr. Blackett messaged Mr. Barnett about that on July 21, 2023:

What’s happening with the garage bathroom nothings been framed in nor dry walled. I thought you were on this.

And again on August 9, 2023:

...what’s happening with the bathroom in the garage that was supposed to be framed in and Drywalled.

...

Why hasn’t my bathroom in the garage been finished. Who’s finishing that?

[46] Mr. Barnett responded to the August 9, 2023 texts as follows:

The bathroom in the lower garage was not part of my quote.

[47] I agree with JCB that it was not within its scope of work or the Contract to frame and drywall a bathroom in the garage. Mr. Blackett’s email, quoted above, was vague about what change he was asking for. He specifically stated that he will frame in the pocket door which could readily be interpreted as him taking responsibly

for framing in the bathroom at some later point. Mr. Barnett says this is how he interpreted the message and that is not an unreasonable interpretation. JCB roughed in the plumbing for the sink and toilet as requested in the email but I find there was no meeting of the minds that JCB would do anything more than that.

3. Conclusion on the Drywall Progress Draw

[48] Having found that JCB was not contractually obligated to frame and drywall a bathroom in the garage, the only deficiencies in completing the drywall work are enclosing the exposed pipe and sanding the spots of drywall in the kitchen and garage. I have found these are relatively minor deficiencies in the overall context of the work required for the Drywall Progress Draw. JCB was obliged to address them but, at that stage, they did not make the electrical, plumbing, insulation, and drywall work incomplete. I am satisfied that the work required for the Drywall Progress Draw was substantially complete when JCB issued its invoice, and JCB was entitled to payment of that invoice. It follows that JCB was within its contractual rights to suspend work on the project pursuant to s. 4.1(g) of the Contract due to the unpaid invoice.

B. Did JCB Substantially Complete the Project?

[49] Next I consider whether JCB substantially completed the overall project such that it is entitled to receive the final payment as invoiced on August 22, 2023. JCB argues the project was (and is) substantially complete and that the deficiencies identified by the defendants are minor. JCB does not dispute its obligation to remedy these deficiencies (subject to inspecting them) but argues they do not negate substantial completion.

[50] The defendants argue the deficiencies are material because they prevent the them from obtaining an occupancy permit for the home. They argue a project cannot be substantially complete when the deficiencies prevent the owner from using the work for its intended purpose: *Vallieres v. The Queen*, 2001 CanLII 671 at paras. 18-19 (TCC). Until the deficiencies are remedied to the point that the defendants can secure an occupancy permit, the home cannot be substantially complete.

[51] I find that the project was not substantially complete when JCB issued the final August 22, 2023 invoice. I agree with the defendants that the inability to obtain an occupancy permit is a good indicator of whether a project is substantially complete, although I would not necessarily say it is a determining factor. It may be that a relatively small deficiency (such as the self-closing door in the furnace room) could preclude an occupancy permit but the repair is so minor that it may not negate substantial completion. Regardless, that is not the case here because, cumulatively, the deficiencies are not minor and, for one of them, JCB is unable to say what is required to remedy it.

1. Material Deficiencies Noted by the Regional District

[52] There were at least four items that JCB had not completed that precluded the Regional District from issuing an occupancy permit. One of those was the incomplete insulation and drywalling of the exposed pipe that was still deficient when JCB issued the final invoice. While I found this did not preclude a finding that the drywall stage of the project was substantially complete, I am not able to conclude this finding carries over to the final stage of the whole project being substantially complete. Fixing this deficiency should have been a fairly minor task for JCB but, unlike the furnace room door, it appears to have been out of its hands since it required the attendance of a drywall subcontractor. This may explain the delay in completing it. Regardless, since the defendants could not get an occupancy permit until this deficiency was addressed, I find it became a barrier to substantial completion of the overall project even if it was not a barrier to the substantial completion of an earlier stage.

[53] The non-vented soffits also appear to be a relatively minor fix that JCB might have been able to address. On its own, this may not have precluded substantial completion but in combination with other deficiencies that precluded the occupancy permit, I find it contributes to the overall incomplete state of the project.

[54] The sealing, silicone and painting of the siding and window frames is more substantial and JCB's assertion that it is a minor deficiency is not supported by the

evidence. JCB says it needs to inspect this deficiency to determine what is needed to address it. In my view, JCB cannot reliably say it is a minor fix when it cannot say what is required to fix it. The defendants have tendered a quote of \$11,000 to address this deficiency. If that is a reasonable estimate, it suggests it is more than a minor deficiency but it is difficult for courts to assess the reasonableness of an estimate based only on a single quote: *Hill v. Princess Resort and RV Park Partnership (Princess Resort)*, 2024 BCSC 1081, para. 33. Nevertheless, the evidence does not satisfy me that this is a minor deficiency and, since it precludes an occupancy permit, I find it negates the substantial completion of the overall project.

[55] I therefore conclude that the cumulative effect of the deficiencies identified by the South Okanagan Regional District were sufficiently material that it cannot be said the project was substantially complete while those deficiencies remained unaddressed. I find that the defendants were not obligated to pay JCB's final invoice dated August 22, 2023 until those material deficiencies were fixed.

2. The Back Slope

[56] The defendants also argue the project is not substantially complete until the rock slope behind the home is stabilized. They further argue that the cost of stabilizing the slope more than offsets JCB's entitlement to payment on both the Drywall Progress Draw and the final balance of the contract.

[57] The defendants have tendered an expert report from Dwyane Tennant, a geotechnical engineer who has opined on the stability of the slope. Some features of his opinion include the following:

- a) The whole subdivision where the home is located has been "cut into the hillside, leaving a slope that was marginally stable."
- b) The excavation for the home "made the lower part of the slope even steeper than it already was".

- c) Based on the soil type and steepness, two hazards exist:
 - i. rocks will roll and bounce down the slope and can hit the deck or side of the house; and
 - ii. there is a potential for a shallow-seated landslide in the over-steepened portion of the slope;
- d) There is a 100% probability that additional rocks will roll down the over-steepened slope. The likelihood of a small landslide to occur is hard to estimate. A small landslide could damage the deck and railing. Mr. Tennant does not opine on what, if any, risk there is for damage to the house.
- e) JCB “apparently recognized the slope hazards because they stacked boulders on the backfill behind the garage and placed a thin layer of imported angular rocks on the steep slope behind the boulders.” However, these stacked boulders do not appear to be an “engineered solution and are insufficient to stop rolling and bouncing rocks”;
- f) A Lock Block retaining wall combined with geogrid soil reinforcement can stabilize a slope and capture rolling rocks.

[58] In addition to arguing that the slope instability renders the project incomplete and that the costs of remediation offset what is owed to JCB, the defendants now dispute JCB’s March 6, 2023 invoice for extras. While the defendants have already paid that invoice, they now claim they are not responsible for additional excavation work on the slope. Specifically, Mr. Blackett now disputes \$16,394 in connection with additional excavation, backfill, and trucking charges. He explains his disagreement as follows:

During construction, JCB did not properly support the slope behind the property. Mr. Barnett advised me and I verily believe that he brought in additional rocks to support the slope. The additional costs [\$16,394] beyond the original budgeted amount of \$10,170 should be the responsibility of JCB, as they arose from JCB's remediation of their own error.

[59] He also takes issue with \$1,600 in labour costs for extras billed on March 6, 2023 as he says he “never received any explanation for what this labour relates to.” He says if it relates to the slope issue, this should be JCB’s responsibility because the extra cost “arose from JCB’s remediation of their own error”.

[60] Mr. Blackett provides a quote from T&A Rock Works Inc. for slope stabilization. Their quote is \$90,000 to \$117,000 for the slope stability work and another \$16,000 to \$19,000 for a rockfall fence. The quote states that a crane and large rental compressor would also be needed at an unspecified additional cost.

[61] I am not able to conclude on this application whether JCB bears responsibility for the slope issue. It is apparent from Mr. Tennant’s report that a geotechnical engineer surveyed and signed off on the lot in a “standard Schedule B form” which has a checklist that includes: “Structural considerations of soil, including stability and seismic loading”. Mr. Tennant states:

The geotechnical engineer signing this form for this lot checked this item as a commitment to review the slope stability. Given the location and topography of the lot, it would have been appropriate for the geotechnical engineer of record to check this item on the form.

[62] In response to whether it would have been appropriate for the geotechnical engineer of record to sign off on the Schedule B, Mr. Tennant states:

Schedule B is typically submitted **before** the commencement of construction activities and signifies a commitment to address items that have been checked on the form. The item related to slope stability was checked. Thus, the geotechnical engineer of record should have followed through with a slope stability assessment and identified issues that needed to be addressed, especially given the excavation into the toe of the hillside. I received and reviewed a Schedule C-B signed by the geotechnical engineer for this lot. This form is submitted **after** completion of the project but prior to final inspection by the authority having jurisdiction. I infer from seeing a signed and sealed Schedule C-B that the geotechnical engineer fulfilled their obligation for field reviews. However, I have not seen any documentation of field reviews or recommendations that arose from these reviews.

[bold/italics are Mr. Tennant’s, underlining emphasis added]

[63] Nothing in this report or in any of the other evidence or submissions of counsel assist the Court in determining whether JCB has professional responsibility

for ensuring slope stability or whether this falls on others such as the geotechnical engineer of record, the original developer of the subdivision, or perhaps the approving government authority. Simply put, I am not in a position to assess whether JCB has done anything outside of its contractual or professional obligations or breached a duty of care it may owe as the general contractor.

[64] I therefore find this issue would not preclude a finding of substantial completion and I am not able to determine whether the defendants are entitled to a set-off against what is owed to JCB or a credit for the March 6, 2024 extras invoice. To the extent JCB might be liable for issues relating to the stability of the slope, that will need to be taken up by the defendants through other proceedings. They have not shown on this application that they are entitled to set off the cost of stabilizing the slope against what is owed to JCB.

3. Conclusion on Substantial Completion

[65] While I am not able to find that the slope stability issue precludes substantial completion, I am satisfied the deficiencies identified by the South Okanagan Regional District are sufficiently material that it cannot be said that the project was substantially complete when JCB issued its final invoice of August 22, 2023. JCB was responsible for four of those five deficiencies (excluding the flooring). Thus, I find that the defendants were not obligated to pay the August 22, 2023 invoice.

V. Remedying the Deficiencies

[66] I have found that JCB was within its contractual rights to suspend work for non-payment of the June 30, 2023 invoice for the Drywall Progress Draw. I therefore reject the defendants' submission that JCB abandoned the project and repudiated the Contract. I have found the defendants are not presently obligated to pay the final August 22, 2023 invoice because the project is not substantially complete due to outstanding deficiencies. JCB is entitled to a reasonable opportunity to correct those deficiencies: *Rocksolid* at paras. 78-81; *Connolly* at para. 48. The non-payment of the June 30, 2024 invoice and this litigation has interfered with it doing so.

[67] I would therefore grant the alternative relief sought by JCB with some variation. Specifically, upon payment of the June 30, 2023 invoice and (as I discuss below) the establishment of a holdback account pursuant to s. 4.2 of the Contract, JCB will be permitted an opportunity to attend at the home to remedy the deficiencies. I would order that it attend to inspect the deficiencies within 14 days of receiving payment and confirmation that the holdback account has been established with the required deposits. Once JCB has that confirmation, it seems to me that another 45 days after inspection is a reasonable time in which to complete the deficiencies. If the defendants do not pay the June 30, 2023 invoice and establish the holdback account within 60 days of this judgment, JCB will be at liberty to pursue payment of the full amounts owing to it, including for the August 22, 2023 invoice, since non-payment by the defendants would deprive JCB of a reasonable opportunity to fix the deficiencies that prevent substantial completion.

[68] I next turn to what amounts must be paid.

VI. The Defendants' Claimed Deductions

[69] The defendants claim that whatever is owed to JCB, they are entitled to certain deductions for items they have already paid for and for the 10% *Builders Lien Act* holdbacks that they did not deduct from previous progress draws.

A. Credits for Disputed Extras

[70] The defendants dispute part of the May 10, 2023 invoice for extras connected with enhancing the weight-bearing load for the back deck, even though they have already paid this invoice. Mr. Blackett explains his disagreement with these extras as follows in his affidavit:

When JCB commenced construction, it was referring to the wrong set of plans in terms of roofing design. This was going to result in a post in the middle of the deck to accommodate the change in design. I noticed this and corrected JCB, resulting in a revision to the construction without a post in the middle of the deck, as it appeared in the plans. This required JCB to add a solid beam along the width of the roof, which JCB attempted to pass onto us as an extra.

[71] Mr. Blackett does not explain why he paid the May 10, 2023 invoice if he did not consider these to be proper extras. However, JCB has not replied to this part of Mr. Blackett's affidavit.

[72] The defendants also now dispute an extra cost for steel beams charged in the March 6, 2023 invoice which they have also paid. While the Mr. Blackett agrees this is an extra, he says "I do not appear to have been given credit for items removed due to the addition of the steel beam". He generally identifies timber beams, post footings, hangers and brackets as being items for which the defendants should have received a credit but he does not identify those in the original quote or state what the credit should be. Again, JCB has not replied to this evidence.

[73] The defendants have not sought an order in this proceeding setting off prior and now disputed payments from what they owe JCB. They have only sought an order dismissing the plaintiffs' claim. Further, these specific issues were not spoken to by counsel in argument. Given the state of the pleadings and the evidence as well as the lack of specific arguments on these points, I decline to order a set-off for the May 10, 2023 and March 6, 2023 invoices. If there is an issue with respect to these matters, the parties will need to reconcile it through the final invoice.

[74] The defendants dispute a very small part of the outstanding extras invoice of July 31, 2023 for 14 dimmer switches and two plugs. The total amount of the invoice is \$933.66. The defendants acknowledge the dimmer switches are legitimate extras but not the plugs. JCB has not shown the defendant's written approval for the plugs. The cost of the plugs is \$171 plus GST. I would therefore deduct \$179.55 from this invoice and otherwise find the defendants must pay \$754.11 less the 10% *Builders Lien Act* holdback for this invoice.

[75] The defendants acknowledge that charges for extra gas lines and exterior hot and cold taps in the July 31, 2023 final invoice are legitimate extras but say the outside taps do not function. As this was charged in the final invoice which I have found is not due since the project is not substantially complete, the issue of the outside water lines should be addressed by JCB as a deficiency. Further, while JCB

now acknowledges that the fireplace extra should be removed from this invoice as it was already charged in the June 30, 2023 invoice, the defendants say they cannot use the fireplace because there is no remote control. If that is correct, that is another deficiency for JCB to address.

B. Claimed Overpayment due to *Builders Lien Act* Holdback

[76] The defendants submit they have overpaid on the Contract because they did not hold back 10% of the progress draw payments as required by s. 4.2 of the Contract. Thus, they argue, they are entitled to a credit for 10% of the payments they have already made.

[77] While the failure to hold back the required 10% resulted in an overpayment to JCB, the defendants are not free to keep the overpayment for themselves. Rather, under s. 4.2, they are required to deposit it into a holdback account to be jointly administered by the parties. They have not done this.

[78] Section 4.2 is mandatory. It states that 10% *shall* be held back from “each payment and progress draw”. It states this must be done “in accordance with the *Builders Lien Act*” which also requires the holdback as a matter of law. I find the holdbacks were required and, since the project is not substantially complete, the holdback omission must now be corrected.

[79] I have found the defendants must pay the June 30, 2023 invoice for the Drywall Progress Draw which is \$42,867.98 and \$754.11 of the July 31, 2023 invoice for dimmer switches. The 10% holdback of \$4,362.21 must deducted from these amounts and placed in a holdback account as required by s. 4.2 of the Contract and the *Builders Lien Act*. Thus, \$39,259.88 is due to JCB for the unpaid invoices and \$4,362.21 is due to the holdback account for those invoices.

[80] However, a further deduction from the amount owing to JCB must be made to bring the holdback account into compliance. By my assessment of the paid invoices, the defendants have paid a total of \$349,665 to JCB to date (see the table attached as an appendix to these reasons). The defendants say they have paid \$333,771.37

to date. Thus, counsel may need to work out the precise amounts before they enter an order but for the purposes of these reasons, I will use the numbers in the invoices and in the attached table. Counsel have liberty to correct them for the final order.

[81] Based on the paid invoices, the defendants should have held back a total of \$34,966.60 and placed it in the holdback account. This amount must now be deducted from what is owed to JCB and placed in the holdback account. Thus, by my assessment and subject to counsel confirming or correcting the numbers, as a result of my judgment, the defendants must pay JCB \$4,293.28 and pay a total of \$39,328.81 into a holdback account. Once that is done, JCB must continue work on the project, including assessing and addressing the deficiencies to substantially complete the overall project.

VII. Summary and Conclusion

[82] In summary, I find that the June 30, 2023 invoice for the Drywall Progress Draw was properly issued because that stage of the project was substantially complete despite the deficiency of the exposed pipe in the garage and the spots of drywall in the kitchen and garage that needed sanding. I find there was no agreement that JCB would frame and drywall a bathroom in the garage.

[83] I find the July 31, 2023 extras invoice for dimmer switches was properly issued but a deduction must be made to exclude the two plugs.

[84] While the stage of roughing in electrical, plumbing, insulation and drywall was substantially complete, I find the overall project was not substantially complete and thus the July 31, 2023 invoice for the final draw was not properly issued and is not presently due. JCB must now be given a reasonable opportunity to remedy the deficiencies once payment is made on the June 30, 2023 and the holdback account is established with the required amount.

[85] I find that a 10% holdback should have been deducted from all payments the defendants made to JCB and that must now be deducted from what is owed to JCB. Ten per cent must also be held back from the payments for the June 30, 2023

Drywall Progress Draw invoice and the July 31, 2023 dimmer switch extras invoice. The defendants must establish a holdback account in accordance with s. 4.2 of the Contract and ss. 5 and 6 of the *Builders Lien Act* and deposit all the holdback monies into that account. By my assessment of the paid and unpaid invoices (and subject to counsel's confirmation or correction), the defendants must pay a total of \$39,328.81 into a holdback account to cover the full holdbacks on all invoices that have been paid and that are now due. That leaves \$4,293.28 that is presently owing to JCB.

[86] Once the defendants pay JCB what is owed under this judgment and establish the holdback account with the required amount and in conformity with s. 4.2 of the Contract and the *Builders Lien Act*, JCB will have 14 days to inspect the property for deficiencies and another 45 days from the date of inspection to remedy all deficiencies. This does not include the back slope stability because I am not able to determine on this application whether that is JCB's responsibility.

[87] Once the deficiencies are addressed to the point the project is substantially complete, JCB may then issue a new invoice for the final draw and the holdback account should then be dealt with in accordance with s. 4.4 of the Contract. If the defendants do not pay JCB what is owed under this judgment and pay the required amount into a holdback account within 60 days of this judgment, JCB will be free to pursue what is owed to it, including for the final draw.

[88] Subject to hearing from counsel, I am inclined to award JCB its costs of this application at scale B as it has been largely successful. However, if the parties wish to address costs, they may provide written submissions of not less than five pages double-spaced within 30 days of this judgment. Those should be submitted electronically through Supreme Court Scheduling.

"Kirchner J."

Appendix – Payments Made and Payments Due¹

Account Date	Re	Amount	Due to JCB	Paid to JCB	Due to Holdback
<i>Paid Invoices</i>					
2022-07-26	Signing	\$48,510.00	\$43,659.00	\$48,510.00	\$4,851.00
2023-01-19	Foundation	\$100,275.00	\$90,247.45	\$100,275.00	\$10,027.55
2023-01-30	Extras	\$2,212.35	\$1,991.11	\$2,212.35	\$221.24
2023-03-06	Extras	\$37,039.16	\$33,335.24	\$37,039.16	\$3,703.92
2023-03-31	Lock-up	\$145,740.00	\$131,166.00	\$145,740.00	\$14,574
2023-05-10	Extras	\$1,378.94	\$1,241.05	\$1,378.94	\$137.89
2023-05-10	Extras	\$14,510.04	\$13,059.04	\$14,510.04	\$1,451.00
Subtotal		\$349,665.49	\$314,698.89	\$349,665.49	\$34,966.60
Overpayment to JCB				\$34,966.60	
<i>Unpaid Invoices</i>					
2023-06-30	Drywall Draw	\$42,867.98	\$38,581.18		\$4,286.80
2023-07-31	Dimmer Extra	\$933.66	\$678.70 ²		\$75.41
Now Due from unpaid invoices			\$39,259.88		\$4,362.21
<i>Invoices not yet due</i>					
2023-07-31	Final Draw	\$50,255.64 ³	Not yet due as project is not substantially complete		
<i>Due as a result of Judgment</i>					
Due to JCB			\$39,259.88		
(Less overpayment)			(\$34,966.60)		
Now due to JCB and Holdback Account			\$4,293.28		\$39,328.81

¹ Specific amounts are subject to correction or clarification by counsel

² Reduced by \$179.55 (\$171.00 + 5% GST) to exclude plugs and by 10% of \$754.11 for holdback.

³ Reduce by \$3,291.75 (\$3,135 + 5% GST) to exclude duplicated fireplace.