

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

KAREWAY HOMES LTD.

PLAINTIFF

AND:

DOUGLAS LEO GONDER and  
LEONA NATALIE GONDER

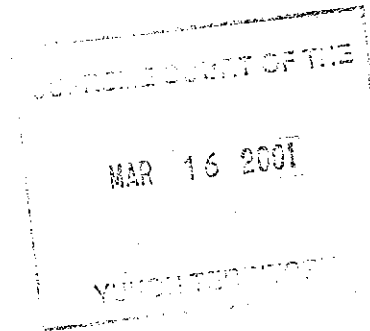
DEFENDANTS

ROBERT PITZEL

KEITH PARKKARI

For the Plaintiff

For the Defendants



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**MEMORANDUM OF JUDGMENT  
DELIVERED FROM THE BENCH**

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[1] WONG J. (Oral): This is a contractual dispute between two former friends about the construction of a residence. During the spring and summer months of 1998, Mr. Douglas Gonder and Mr. Wayne Cunningham, the principal of the plaintiff, Kareway Homes Ltd., discussed building a new residence for Mr. Gonder on his property, which was to be attached to an already-existing garage shop.

[2] On September 3, 1998, Mr. Gonder, through his wife, made application to the City of Whitehorse for a building permit to construct the residential addition to the garage on his property. A building permit with permission to build was issued on September 14, 1998. Eleven pages of drawings of the location and basic details of the residence to be built were also filed with the City of Whitehorse on September 3, 1998. These drawings were commissioned by Mr. Gonder and produced by one Ian Stallabrass, dated June 8, 1998.

[3] Mr. Cunningham, through his company, was requested to construct the residence for which the permit had been applied, and Mr. Cunningham commenced to do so on September 14, 1998.

[4] There was no written contract for the construction and its cost. However, for bank financing purposes, in August of 1988 Mr. Gonder had requested Mr. Cunningham to prepare a rough estimate of costs. This was estimated to be \$220,000, including labour time at 1,100 hours.

[5] There was, however, an oral agreement that Mr. Cunningham, on behalf of Kareway, would build Mr. Gonder's house at cost of supplies to Kareway, plus labour at \$28 per hour per employee.

[6] This agreement was beneficial to both parties. Mr. Gonder would obtain a high-end, customized home worth over \$400,000 at, basically, cost to Kareway.

[7] The only benefit to Kareway and Mr. Cunningham was retention of his work crew without his usual seasonal layoff during late fall and winter months; otherwise, that same work crew might not be available the following spring because of taking employment elsewhere. This would also provide some income for Mr. Cunningham for his time spent superintending the project.

[8] The City of Whitehorse placed a stop-work order on the building of the residence from October 28, 1998 to February 12, 1999, 107 days, due to the building encroaching onto lands not owned by Mr. Gonder, which encroachment was in contravention of city bylaws.

[9] As a result, there was no construction by Kareway during that period, except to secure the building from weather during the shutdown.

[10] Kareway recommenced construction of the building, which was done partly in accordance with the drawings and partly in accordance with verbal instructions received from Mr. Gonder from time to time.

[11] Mr. Gonder alleges certain deficiencies with the construction, which deficiencies Mr. Cunningham, on behalf of Kareway, denies.

[12] The City of Whitehorse made a final inspection on July 2, 1999, and on that same date granted an occupancy permit for the residence.

[13] Kareway submitted seven invoices for labour, materials and services, for \$250,698.91, and a further amount of \$17,548.94, as 7 percent Goods and Services Tax, for a total amount of \$268,247.85.

[14] Seven invoices were presented on the following dates: October 20, 1998; January 31, 1999; March 25, 1999; March 31, 1999; May 18, 1999; June 15, 1999; and August 15, 1999.

[15] Each invoice contained the following material: one, invoice showing current invoices, labour, and Goods and Services Tax; two, a summary of the invoices from suppliers; three, a summary of own-forces labour; and four, copies of invoices from suppliers.

[16] Total payments received from Mr. Gonder were dated October 27, 1998; March 4, 1999; March 29, 1999; July 9, 1999; May 12, 1999; and August 11, 1999. If one includes, also, a set-off for work done by Mr. Gonder through his company, which was excavation work for Kareway on other construction projects, of \$16,838.35, the payments total \$194,500.84. On that basis, Kareway is advancing a claim of the outstanding balance of \$73,747.01.

[17] Mr. Gonder was quite candid in the giving of his evidence during the course of this trial. Basically, he has no dispute regarding the cost of supplies supplied by Kareway. However, he does takes issue with the labour charges.

[18] The original estimate, mentioned earlier, in August of 1998, indicated 1,100 hours. The final tally came out to 2,800 hours. Of the difference of 1,700 hours, Mr. Gonder has basically complained that some of those extra hours are excessive, due to inadequate supervision of employee activity by Mr. Cunningham and possible transfer of some of those hours from the remaining, or tail-end of other projects undertaken by Kareway, for which days the same employees attended at both Mr. Gonder's project site and the other projects of Kareway.

[19] During the course of this trial, there were indications that some of the employee time sheets may not be accurate, and Mr. Cunningham himself did not keep a time sheet to verify his stipulated time of 246 hours, although one does not question that he did attend at the site and, in fact, did superintend this project.

[20] Under those circumstances, I would discount one-quarter of the 1,700 hours, which is 425, and at the rate of \$28, amounts to \$11,900.

[21] There is also a claim by Mr. Gonder of loss of legal expenses because of the encroachment problem. However, when one examines that invoice, much of the time for the services actually predates the encroachment difficulty. In addition, Mr. Cunningham was led to believe, because of the commissioned drawings and comments made by Mr. Gonder, that there was no problem on

setbacks. Therefore, the encroachment responsibility, in my view, cannot be laid at the feet of Mr. Cunningham.

[22] There were deficiencies advanced by Mr. Gonder, and I have had the advantage and opportunity to assess the opinions of both experts, Mr. Verishine, on behalf of Mr. Gonder, and Mr. Lucas, on behalf of the plaintiff.

[23] After consideration of the comments made by these two experts, I am prepared to allow the following deficiencies, as outlined by Mr. Verishine in his report, that is: Item 4, the matter of drip flashing on the starter row of siding, \$900; item 6, the boxing of the exterior exhaust pipe, which is currently exposed, \$400, although Mr. Lucas indicated that, in his mind, that might be \$200, but I will allow for \$400 in the event of some unforeseen difficulties.

[24] Item 8, a matter of a recommendation of membrane material to enclose the exposure at the point of the new roof of the residence with the existing roof of the shop, together with caulking to marry the two roof finishes together and create a seal, \$800. Item 11, repair of the soffits, \$160; item 12, additional blocking and strapping, \$1,400; item 14, replacement of the main kitchen countertops, \$2,000; item 15, repair of the kitchen island top, \$600; item 16, to install additional supports and replace two sagging shelves, \$250; and item 17, the problem of where the Pergo flooring meets with ceramic floor and vinyl floor, the necessity of

regluing and custom-moulding to prevent further separation, \$150, giving an aggregate figure of \$6.660.

[25] The defendant is entitled to an offset, therefore, of \$18,560, leaving a balance for judgment of \$55,187.01.

[26] The plaintiff is also entitled to court-ordered interest, under the *Judicature Act*, R.S.Y. 1986, c. 96, from August 15th, 1999.

[27] I shall hear from counsel on the matter of costs.

[28] MR. PITZEL: Well, My Lord, my submission is that plaintiff should be allowed full costs. It had to go to court to collect anything from the \$55,187.01. Although there was some talk about negotiations, there was never any money paid in. At \$55,000 being paid in, paid directly to the plaintiff, then there may be some reason for considering not giving any costs. But I maintain that plaintiff should be allowed the full amount of its costs, without any costs in counterclaim to the defendant.

[29] There were offers to settle made, but neither one of them was met, so there's no such thing as double costs here. And on that, I have no further submissions. That would be on tariff item 3.

[30] THE COURT: Mr. Parkkari?

[31] MR. PARKKARI: We would ask that the costs be reduced.

As we stated earlier, the plaintiff sought and was not prepared to settle for anything less than the full amount of their claim. There wasn't anything put before for the Court as to how much settlement offers were before the Court. There is a formal settlement offers before the Court -- or not before the Court, but formal settlement offers have been exchanged. Mr. Pitzel's offer to me was for the full amount of their claim, plus interest. Our settlement offer was for \$40,000 plus interest.

[32] Although we haven't met that threshold and costs are not to be ordered in our favour, we would ask that the costs on the trial be reduced, and I believe it's within the jurisdiction of the Court. And there's two ways to do that. Either put a -- the Court to settle the amount of cost or to reduce the tariff from what would be the normal level of level 3.

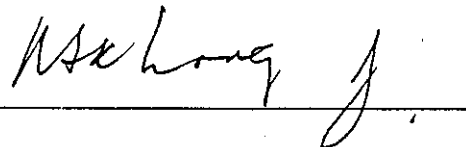
[33] This matter went to trial, we would submit, because the plaintiff wouldn't settle for anything less. They have been ordered; the order is for less than what they claimed.



[34] MR. PITZEL: I don't think my friend is allowed the liberty of saying the plaintiff wouldn't settle for any less. It wouldn't settle for the amount of the offer given, nor would the defendant pay anything into court.

[35] There's a vast amount of preparation required to be done, because every invoice and every hour was questioned. It was not just a simple case. It was quite complex in gathering the evidence, calling experts, and the plaintiff should get costs on scale 3 with all disbursements.

[36] THE COURT: Since the plaintiff achieved substantial success, they are entitled to costs following the event at scale 3.

A handwritten signature in cursive script, appearing to read 'Wong J.', is written above a horizontal line.

WONG J.