SUPREME COURT OF YUKON

Citation: *Kareway Homes Ltd. v. 37889 Yukon Inc.,* 2012 YKSC 10

Date: 20120217
S.C. No. 09-A0095
Registry: Whitehorse

Between:

KAREWAY HOMES LTD.

Plaintiff

And

37889 YUKON INC.

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

James R. Tucker — Counsel for the Plaintiff
Michael D. Tatchell — Counsel for the Defendant

REASONS FOR JUDGMENT

1. INTRODUCTION

[1] This is a dispute involving the construction of a two-building condominium complex in Whitehorse over the period from 2006 to 2009 ("the project"). Wayne Cunningham is the principal of Kareway Homes Ltd., the builder, and Alex Shaman is the principal of 37889 Yukon Inc., the owner. I will be referring to the parties interchangeably as owner and builder, or by the surnames of their respective principals.

[2] Mr. Cunningham and Mr. Shaman began their dealings together on the project on the basis of a verbal arrangement and a written cost estimate prepared by Mr. Cunningham in the late summer of 2006 (the "'06 estimate"). Mr. Shaman soon

insisted that they enter into a written agreement. That was done in early February 2007, when the parties signed a Development Agreement. This Agreement set out what the respective responsibilities of the parties were, how the project's costs would be accounted for, and specified that the project's anticipated profit was to be divided equally. The Development Agreement did not include a cost estimate for the project, but rather committed the parties to approving a "Project pre-budget" and a "Project working budget". When this was to be done was not specified.

[3] The owner invested approximately $1.9 million of its own money into the project and the rest was obtained through bank financing. In order to obtain that financing, Mr. Shaman prepared an updated cost estimate for the project in September 2007, based on information provided by Mr. Cunningham (the "'07 estimate"). A number of additional changes ("extras") were agreed to over the ensuing months.

[4] The project was originally supposed to be completed by the end of December 2007, but in fact substantial completion did not occur until late 2009. The owner maintains that the total cost of the project was significantly in excess of the '07 estimate plus the agreed-upon extras. As a result of a disagreement between the parties about this alleged cost overrun, the builder ceased working on the project on September 28, 2009, and gave notice to the owner that it was terminating the contract and suing for damages.

[5] The builder maintains that the terms of the Development Agreement were amended by the subsequent course of conduct of the parties, resulting in an agreement which was partly in writing and partly oral, and was in the nature of a 'cost plus' contract. Mr. Cunningham also says that all of the extras on the project were agreed to

by Mr. Shaman, for which he claims to be owed over $600,000, plus his share of the profits, which pursuant to the Development Agreement were to be divided equally.

[6] The owner maintains that the Development Agreement, read together with the ’06 and ’07 estimates, resulted in a ‘fixed price’ contract, and that the builder significantly exceeded the ultimate fixed price agreed upon. Mr. Shaman also claims that he has overpaid the builder by more than $750,000.

[7] Thus, the main issue in this trial is whether the agreement between the parties was a ‘cost plus’ or a ‘fixed price’ contract. As will quickly become evident, the assessment of the relative credibility of Mr. Cunningham, Mr. Shaman, and the owner’s bookkeeper, Chris Johnson, is central to this determination.

[8] There are also a number of sub-issues relating to the question of damages, which I will address later, after dealing with liability.

2. CREDIBILITY

(a) Wayne Cunningham

1. Interest on builder’s invoices?

[9] Through the course of the project, the builder submitted weekly invoices to the owner, and the owner provided periodic advances to pay down the balance owing to the builder. Initially, the owner’s advances roughly kept pace with the builder’s invoices, but eventually the balance owing became significant. For example, as of December 31, 2007, it was over $1 million. Mr. Cunningham maintains that Mr. Shaman agreed to reimburse the builder for the interest charges it was carrying on the outstanding balance. Accordingly, the builder factored these charges into its weekly invoices. Mr. Shaman denies any such agreement.

[10] Mr. Cunningham was cross-examined about the interest issue in the context of a meeting between him, Mr. Shaman and Ms. Johnson on June 25, 2008. Ms. Johnson made notes of this meeting and a number of others between the parties over the course of the project. She made her notes shortly after each meeting. Mr. Cunningham was asked about Ms. Johnson's notes of the meeting on June 25, 2008, and testified as follows[1]:

> "Q Let's go on. This goes on to say:
>
> > - Alex said he was not going to pay for the interest he charged. Wayne said that this was costing him. Alex wanted to see documentation as to how much he was actually charged. …
>
> Now, let me just pause there. Do you agree that that conversation took place?
> A Yes, he told me that. Sometime around -- into the summer of 2008, as he was looking at costs, and he said to me he shouldn't have to pay it.
> Q Well, he's not saying he shouldn't have to pay it. He's saying he won't pay it. It's a big difference.
> A Yeah.
> Q Right?
> A Okay." (my emphasis)

[11] Mr. Cunningham was also cross-examined about his evidence at his examination for discovery on the topic of interest. He acknowledged that in June of 2008, Mr. Shaman had told him a few times that he "shouldn't have charged interest." He further acknowledged that Mr. Shaman had never assured him that he would pay the interest claimed. And finally, when asked about whether he knew that there was a challenge to the builder's interest charges, he responded "They would bring it up all the time…"[2]

[1] Transcript, October 4, 2011 p. 46.
[2] Transcript, October 4, 2011, pages 48 – 51.

[12] Mr. Cunningham's assertion that Mr. Shaman verbally agreed to pay the builder's interest charges was further contradicted by one of the builder's own witnesses, Carol Cunningham, Mr. Cunningham's wife, who testified that she knew there was a dispute between the parties about the builder's claim for interest.

[13] The inconsistency is obvious.

2. All extras agreed upon?

[14] The builder pled that "all changes to the plan of construction of the project" were discussed with Mr. Shaman in advance, and that "on each and every occasion" Mr. Shaman agreed.[3] However, in cross-examination, Mr. Cunningham implicitly admitted that he knew Mr. Shaman was frustrated because he did not know how much the extras were costing. He testified as follows[4]:

> "Q And let me just stop there. Will you agree with me that you were aware of a great frustration from Chris Johnson and Mr. Shaman about not understanding or knowing how much these extras or any changes in the budget were costing?
> A This is why I made this up, to give them an idea where things were.
> Q Mr. Cunningham, you made this document up in March of 2011?[5]
> A Yes.
> Q And they've been asking you for this information through the entirety of the project, is what I'm suggesting to you.
> A Yeah. The other information was all on the cost sheets, but for some reason they couldn't pull it off there."[6] (my emphasis)

[15] I find this to be an implicit admission that Mr. Cunningham was aware, during the course of the project, that the owner had not agreed to "each and every" extra.

3. Builder would have stopped work?

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[3] Amended Statement of Defence to Counterclaim, para. 10.
[4] Transcript, October 4, 2011, p.41.
[5] The document Mr. Cunningham made in March 2011 was for the purposes of this litigation.
[6] The document referred to by Mr. Cunningham is Exhibit 1, Vol. 2, Tab. 22.

[16] A couple of times in his testimony Mr. Cunningham emphasized that if Mr. Shaman had told him that he would not pay what the builder had charged, then he would have stopped work and walked off the job. For example, Mr. Cunningham testified[7]:

> "A I'm not sure whether he said he wouldn't pay it. Because if he said he wouldn't pay something at that time, I would have stopped work any time.
> Q You would have stopped work?
> A I would have stopped work.
> Q Did you tell him that?
> A What's that? No, I didn't tell him that. Anytime he would have said, hey, [indiscernible] I'm -- I'm not going to pay me, then my reaction would have been to completely stop work. There would be no use for me to continue on.
> Q Okay. But we're talking about him saying to you, "I'm not going to pay the interest," and you've agreed he said that?
> A I don't think he totally used those words, but he had concerns of the interest and why he should pay it, and I explained to him that I did that over three invoices, through January, February, and March."

[17] However, just prior to that answer, Mr. Cunningham was asked about Ms. Johnson's notes of his meeting with Mr. Shaman on June 25, 2008, where Mr. Cunningham acknowledged that Mr. Shaman said he was not going to pay the builder's interest charges, which were becoming a significant component of its weekly invoices (see para. 10 above).

[18] Again, the inconsistency is obvious.

4. No limit on costs?

[19] In cross-examination, Mr. Cunningham agreed that the goal of the parties was to find the most lucrative project that would yield the greatest return. However, he then

[7] Transcript, October 4, 2011, p. 47.

went on to say that "saleability" of the condos was the only factor in terms of determining what would be the most lucrative project. In other words, he posited that, as the costs rose, the sale price for the condo units could be increased proportionately. While Mr. Cunningham conceded that the sale prices were still dependent on a "reasonable cost" to build the condos, he nevertheless maintained that "there was no limit" on what he could charge for the cost of work. I found Mr. Cunningham's testimony in this regard to be remarkably inconsistent, illogical and, at times, in defiance of common sense[8]:

"Q But the other point, and perhaps the primary focus, was to find a development, it could be townhomes, it could be apartments, it could be effectively a condominium complex, but what was really at the fore was to find the most lucrative project, that would yield the most return on that land?
A Yes.
Q And you knew that that was the object of the exercise from the very beginning, yes, sir?
A Yes.
Q All right. And you'll agree with me, sir, that Mr. Shaman relied on you to come up with that project which would achieve that goal?
A Yes.
Q And for you to achieve that goal there had to be good controls on budget; yes or no?
A No, not particularly.
Q Well, how do you come up with a lucrative return without no control or inadequate control on a budget, sir?
A It was developing something for the market that looked like there was a need in the market.
Q A which?
A We were developing something. it looked like there was a need –
Q Need, yes.
A -- in the market for this type of building. Older residents were thought looking for something that was secure for them and close to downtown.
Q Okay. But that's something a little bit different, with respect. What I'm asking you about is not what the needs were for members of the community; it was

[8] Transcript, October 4, 2011, pp. 8-10.

what was the most financially achievable way of getting the greatest yield on that property; isn't that the goal?

A Yes.

Q All right. So where does budget, in your view, your theory as the builder, come into play in that regard?

A The first part we were looking for was saleability.

Q Is saleability?

A And this is what I put forward towards Alex and the real estate, that this was going to be the most saleability at the time.

Q Okay. Is that the only factor, sir?

A Yes.

Q The only factor in terms of determining what is the most lucrative?

A Yes.

Q So if the saleability is substantial, but the cost for achieving that construction is disproportionately higher than the other ones, you don't pay attention to that?

A At the time, when I was building through there, we were picking homes, I was starting to build some larger homes for that need, and we'd build them, make them nice, and they sold lucratively.

Q Okay. Let's go back to this project, though, sir.

A Yes.

Q I'm asking you a question about what was in your mind in terms of the factors that you had to take into account to achieve the common goal?

A I believed that this building was going to be the most lucrative for us.

Q The more what?

A The most lucrative for us.

Q For us, yes. But you've pointed to saleability. I'm asking you about costs, what impact, what -- what role does that factor play in the calculation?

A They would be a higher cost unit, they would be -- definitely be more money than the others, and if we added 20 percent onto that, that 20 percent would be more lucrative than 20 percent of a lower number.

Q But is the yield on a condominium or a house simply a function of cost bumped up by 20 percent?

A Yes, on -- on the more expensive stuff, it seemed like you can get a higher return on.

Q Yes.

A I'd learnt before that. The lower projects, smaller condominiums, smaller things, smaller -- very smaller contractors, sometimes home owners jump into that market and get the price down more.

Q But you have to keep an eye on the market in terms

of saleability; that much is certain, correct, sir?
A Yes.
Q And at a certain point the saleability of those units is going to depend on the price, obviously, yes?
A Yes.
Q And price is a function of cost, is it not, sir?
A Yes.
Q And the higher the cost, obviously, the lower the level of the saleability; isn't that fair to say?
A Yes.
Q All right. So my question to you, sir, from the inception of this project, is what control did you envision with respect to cost?
A At the time of?
Q At any time when you were putting this project together with Mr. Shaman, and you knew the goal, what did you understand, what did you contemplate to be, the role that cost would play in this?
A Well, I knew it's a good time, that there wasn't much on the market for what we were doing at all, and anything we were offering.
THE COURT: Sorry, again?
A So we were offering --
THE COURT:
Sorry, I just didn't catch the last thing you said.
A We were marketing a product that was more unique to downtown than what other people were doing, so we'd be in a unique market.
MR. TATCHELL:
Q Okay. I'll ask the –
A That –
Q -- question. Go ahead, sir, if you're still -- carry on.
A That we would be able to put our price on it.
Q Any price?
A Not any price, but we still have to build reasonably too.
Q Build reasonably means, sir, build at a reasonable cost?
A Reasonable cost.
Q And you understood that at all times, did you not?
A Yes.
Q And I suggest to you that you knew very well, sir, that that was quite important to Mr. Shaman?
A Yes.
Q And he relied on you to get it right when it came down to cost estimates; yes or no?
A Not with cost estimates, no.
Q Well, on the cost, who does the cost estimating for this project?
A We didn't do a cost estimate on the project.
Q Why not?

A We never had time. We had complete drawings to do the cost everything -- everything, was into June of 2007.
Q So you wish this Court to believe, sir, that notwithstanding the Development Agreement, which we'll turn to in a minute, that notwithstanding that agreement, this -- there was no cap, no limit on what you could charge for the cost of this work?
A There's -- yes, there was no limit, but –" (my emphasis)

5. No cost estimate?

[20] In direct examination, Mr. Cunningham acknowledged drafting a document entitled "Takhini Condominium Project", which projected certain start-up costs for the period of September and October 2006 and included (at least) five pages of "estimate sheets", as well as a "Total Project…Estimate" of $4,268,000 (not including GST). This is the document I refer to as the "'06 estimate". Mr. Shaman and Ms. Johnson referred to it as the "original budget". It is therefore a document of central importance in this case. In his direct examination, Mr. Cunningham said that one of the reasons he drafted this document was to enable the parties to begin the construction of the project, and that he reviewed the document with Mr. Shaman. However, in the quote above, at para. 19, Mr. Cunningham quite inconsistently said, "We didn't do a cost estimate on the project."

6. "Scope of Work"?

[21] The last page of the Development Agreement is entitled "Schedule A – Scope of Project". The rest of the page is blank. Both Mr. Cunningham and Mr. Shaman were asked a number of questions about the term "scope of work", which was used interchangeably with "scope of project". Whether there was in fact a scope of work document prepared for the project and, if so, what it contained, was another central

issue in this trial. In cross-examination, Mr. Cunningham was asked questions about his examination for discovery evidence on the point, as follows[9]:

> "Q All right. Now, before the break, we were also talking about this term that you've just referred to as "Scope of Work"; do you remember that?
> A Yes.
> Q And it's a term that's used in the industry, and it's a term that you use?
> A Yes.
> Q Okay. Now, do you remember being examined for discovery by me on July 20th and 21st of 2010?
> A Yes.
> Q Okay. I'm going to refer to the questions I asked you in discovery on July 20th.
>
> …
>
> Q And you were examined under oath in this examination for discovery?
> A Yes.
> Q And I'm going to turn to page 56, and I'll let you read with me, Mr. Cunningham. Starting at line 11, and this is me questioning you:
>
> Q Before we broke, Mr. Cunningham, we were talking about something called a Scope of Work, or Scope of Project. are you able to say whether you ever actually did prepare a Scope of Work or Scope of Project?
> A "Scope" meaning?
> Q It's a term that's in the contract, and I wondered if that means anything to you, given that you're in the industry. Is this a term of art that you do not use, or is it something that you do use?
> A It's a term I don't use.
>
> Were you asked those questions?
> A Yes.
> Q Did you give those answers?
> A Yes.
> Q Were those answers true?
> A Yes.
> Q Why are you telling us today it's now a term that you do use, "Scope of work"?

[9] Transcript, October 4-5, 2011, pp. 12-13.

A [Indiscernible] -- on my housing before that, I didn't use it.
Q When did you start using "Scope of work"?
A Only on this project." (my emphasis)

[22] The examination for discovery took place on July 20 and 21, 2010, which was long after the builder stopped working on the project. Therefore, Mr. Cunningham's explanation that he was unfamiliar with the term "scope of work" at his discovery, but was familiar with the term by the time of trial because he used the term while working on the project, makes no sense.

[23] Further, Mr. Cunningham's professed ignorance about the term "scope of work" at his discovery is belied by the apparent instructions he gave to his lawyer much earlier on. A fax from his lawyer to the owner's lawyer dated March 7, 2007, reads[10]:

> "Further to your telephone message of this morning, we have spoken to our client. He and Alex have spoken to each other and have agreed that the Development Agreement is to be amended to reflect the project startup date of approx. April 1, 2007 at project completion date of approx. December 31, 2007. As well, our client advises that he is in the process of preparing the "Scope of Work" schedule but that it will take some time before it is completed. However, our client claims that the $100 K was not to be held back pending the completion of the "Scope of Work" schedule. He will be contacted Alex directly to discuss this matter." (my emphasis)

[24] Mr. Cunningham gave other evidence at trial, also inconsistent with his discovery evidence, about his understanding of what was intended to go in Schedule A[11]:

"Q …I'm going to move to another series of answers you gave to His Honour the other day, yesterday, about that. And you told His Honour what you felt was supposed to be in the Scope of Work document; do you remember telling him that?
A I believe so.

[10] Vol. 2, Tab 42, p. 42.
[11] Transcript, October 4, 2011, pp. 18–20.

Q And you said yesterday in the afternoon, in answer to my friend's question, "What should have been there?" And you answered, "Specs, colours, types of products, finished landscaping"; do you remember giving that answer?
A Yes, I do.
Q And that's the answer you gave to my friend's question of what was the scope of work supposed to look like; yes or no?
A Yes.
Q Okay. And for our reference, we'll look at Tab 38 of the same -- of Volume 2, and you should see the Development Agreement in there.

THE COURT: Tab?

MR. TATCHELL:

It's in Volume 2 at Tab 38, Your Honour.

Q And this is the Development Agreement, and you'll see my friend referred you to page 14, Schedule "A" Scope of Project?
A Pardon me? You said which page?
Q Page 14, it's the last page in your document. I -- I called it page 14. There's two numbers there, but it's the last page in that document, and all you've got is a title, Scope of Project, yes?
A Yes.
Q Schedule "A"?
A Yes.
Q Now, and it's in response to that that you were able to identify what you thought should be there. That's what you said in testimony yesterday afternoon.
A Yes.
Q Okay. Let's look at the examination for discovery of the second day, and this will be –

MR. TATCHELL:

I'll give him, Your Honour, the outline first.

Q Page 179, and I'm going to take you through line 24 through to the next page. And again, you were asked these -- I'm going to ask you some series of questions. I'll read this to you and then you can answer my questions.
A Yes.
Q Question at line 24:

> Q All right. On this document, Mr. Cunningham, there is a reference, under s. 1.0, and I'm going to ask you to read that into the record.
> A There's two 1.0's.
> Now, over to page 180:
> Q Oh, sorry. Let's do the second section 1.0.
> A Finalize and approved description and scope of project list, Schedule A, prior to execution of

agreement.
Q So, there's a discussion, now, about Schedule A, in this very early juncture; November of 2006. And the question then is, what is Schedule A, if your solicitor is referring to a Schedule A and you, in turn, are providing comments back to the opposing solicitor? What is Schedule A?
A I still don't know. It was probably supposed to be the estimate sheet.

Now, were you asked those questions?
A Yes.
Q Were you -- did you give those answers?
A Yes.
Q And will you agree with me, sir, that that's a much different answer than you gave yesterday?
A I probably got flustered and got spreadsheets and scope mixed up that time.
Q I beg your pardon?
A I probably got flustered a little bit and gave the answer out of an estimate instead of a -- the Scope of Work.
Q Well, you expressed not only that it should be an estimate sheet, you said you didn't really -- you really were not sure.
A Yes.
Q Were you flustered yesterday too, sir?
A What's that?
Q Were you flustered yesterday as well?
A A couple of times.
Q Uh-huh. It's the same process, is it not, Mr. Cunningham?
A Yes.
Q Being examined, yes?
A Yes.
Q All right. So I suggest to you that you knew very well what the Scope of Work was supposed to be and what was supposed to be attached to that document.
A Yes." (my emphasis)

7. No budget?

[25] The cost estimate dated September 7, 2007, prepared by the owner using information supplied by the builder (the "'07 estimate"), is relied upon by the owner as the "final budget" for the project, subject to the cost of a number of extras which were subsequently agreed upon by the parties. It is therefore another document of central

importance in this trial. Yet, strangely, the builder paid very little attention to this key piece of evidence in the presentation of its case.

[26] Mr. Cunningham was cross-examined about discussions between the parties leading up to the creation of ’07 estimate, including a reference to the total estimated project cost in the ‘06 estimate of $4.268 million (not including GST)[12]:

> “Q Okay. Now, do you recall that there were discussions, again, moving ahead a bit, in September or through the summer of 2007, about add-ons to that budget figure of 4.268 million, and by that I mean discussions about certain items, which probably should be introduced to the project to make it more “saleable”?
> A Yes.
> Q Yes. And that, I suggest to you, resulted in an increase in this budget amount by September of 2007?
> A Yes.
> Q Okay. And that also resulted in a number which was presented to the bank, which is the one that’s contained in your letter?
> A Yes.” (my emphasis)

[27] I will return to the topic of Mr. Cunningham’s letter shortly, but for now it is sufficient to note that he did not quibble with counsel when he used the words “that budget figure” and “this budget amount”. That is inconsistent with Mr. Cunningham's testimony elsewhere, where he repeated several times that “there was no budget” for this project.

[28] As I said, the ’07 estimate is a central document in this trial. However, in an extraordinarily disingenuous fashion, Mr. Cunningham attempted to distance himself from this document by pretending that he never received a copy of it. The document is attached to a letter from Niels Jacobsen to the owner’s bank, also dated September 7, 2007. Mr. Jacobsen is a professional engineer who was retained by the builder to

[12] Transcript, October 4, 2011, p. 24.

effectively act in the role of a quantity surveyor, monitoring the progress of the project and periodically reporting to the owner's bank. The parties referred to these reports as "engineer's progress reports", and I will discuss them again later. In cross-examination, Mr. Cunningham was asked about the engineer's progress report of September 7, 2007 and whether he received a copy[13]:

> "A I -- I wouldn't know for sure. I don't think -- I think it probably went straight to Chris [Johnson].
> Q Which is not to say you didn't get a copy?
> A Yes, most of the stuff that he dealt with, Chris [Johnson], I never got a copy of anything.
> Q I'm not interested in what most of the stuff is; I'm interested in this document, sir. Did you get a copy or not?
> A No.
> Q Do you know that for sure?
> A Not a hundred percent for sure, but." (my emphasis)

[29] However, Mr. Cunningham later admitted that he recognized the '07 estimate attached to Mr. Jacobsen's letter and indeed had discussed it with him[14]:

> "A -- we only had one meeting about this letter.
> ...
> Q And I suggest, sir, that you recognize this document?
> A Yes."

[30] Furthermore, in the '07 estimate, the total hard costs are shown to be $3,834,000. That Mr. Cunningham not only saw a copy of the '07 estimate, but was also quite familiar with it, is evident from the fact that this figure of $3.834 million found its way into a letter Mr. Cunningham drafted to the owner's bank dated September 17, 2007. Mr. Cunningham was asked about this in cross-examination[15]:

> "Q And you see your letter of September 17, 2007?
> A Yes.
> Q And you'll agree with me, sir, that the -- that there's

[13] Transcript, October 5, 2011, p. 74.
[14] Transcript, October 5, 2011, p. 76.
[15] Transcript, October 5, 2011, p. 77.

two things about this document that are notable, at least two things. The first is you send a letter or at least prepare a letter and sign it, saying:

> Please be advised Kareway Homes Ltd., the General Building Contractor has reviewed the attached September 07th Progress Report….

A Yes.
Q And you said that in your letter, sir?
A Yes.
Q And you had that progress report that we just referred to attached to this letter?
A I don't believe I had that attached to the letter.
Q You attached the -- you don't believe you attached it?
A I didn't attach any progress report to the letter.
Q Going on:

> After reconfirming costs --

This is the second sentence.

> After reconfirming costs with all our suppliers and subcontractors we confirm that the total hard cost estimates are accurate at $3,834,000.00 for the completion of this project.

You made that statement, sir?
A Yes.
Q And that $3.834 million correlates exactly with that September 7, 2007 attachment for hard costs?
A It wasn't attached to this letter. It was stuff that Niels and I reviewed at that time.
Q So the $3.834 million of hard costs that we just saw in the progress report, which was at least attached to Mr. Jacobsen's letter, is the number you're referring to in this letter?
A Yes.
Q And you and Mr. Jacobsen had reviewed that number?
A On those cost reports we did." (my emphasis)

8. Marking up labour costs?

[31] At a meeting between Mr. Cunningham, Mr. Shaman, and Ms. Johnson on August 21, 2007, Ms. Johnson raised concerns about the extent to which the builder

was marking up its labour costs to cover premium contributions for workers' compensation and unemployment insurance ("UIC"), holiday pay and statutory holidays, among other things (referred to below as "administration fees"). Mr. Cunningham's answers in cross-examination on this issue reflect poorly on his credibility and, once again, occasionally defy common sense. To provide the full flavour of his testimony in this regard, the quotation below is quite lengthy[16]:

> "Q You will agree with me, Mr. Cunningham, I suggest, that, in any event, Mr. Shaman was not pleased with your answer about these administration fees?
> A He raised the issue, yes, and I raised the issue and said that's -- it's part of Kareway's costs of keeping the business going.
> Q And then [Ms. Johnson's note] goes on to say:
>
> In the end Wayne just said "Well don't pay them then."
>
> And I suggest that that's what you said at the end of the discussion with Mr. Shaman?
> A I don't believe I would say that, but.
> Q Okay, let me -- let me insert this question, then. I suggest that you absolutely knew at the end of this meeting that you were not going to have consensus on the part of the owner to pay those fees?
> A And also three different times, when I asked Alex, "Are we going to have any trouble with our bills? Am I still going to get paid for all my stuff?" and he would say yes.
> Q I'm going to go back to the question. When you left this meeting, you understood that the owner was not going to pay for the administration fees?
> A No, I did not understand that, because I said it was -- I kept referring to them back that this is part of my cost, and that's what I'm putting in.
> Q <u>The note goes on</u>:
>
> <u>My complaints were - WCB & UIC over charged</u>
>
> And that's the note we're just looking at, almost 18

[16] Transcript, October 5, 2011, pp. 62-65.

months later.

A Yes.

Q They are back to - it's almost two years later - they are referring back to the very items that they raised with you at the beginning of the project.

A So nothing was -- they brought this up in August, and then they had virtually nothing said until almost two years later.

Q Well, I suggest they didn't have to say anything, Mr. Cunningham, because they made it very clear to you in this meeting that they weren't going to pay those fees?

A And at the same time I got it cleared and it was part of the cost of my project.

Q The -- the note goes on:

STAT holidays is not based on 4%

You remember that discussion?

A Yes.

Q And Chris Johnson effectively said, "That's simply an error"?

A That's not an error; four percent does work out.

Q Well, how does it work out? Tell me what you mean by that.

A Four percent of a person's pay on a regular 40-hour week, four percent comes out to actually less than what a person gets paid for a whole day, which he would get paid for a full day on a stat holiday.

Q Moving on to the next line:

3.1% for paperwork is ridiculous

Now, you recall there, again, Chris Johnson and Alex Shaman's consternation, I'll use that term, over this charge?

A She said that, yes.

Q Okay. And they made it pretty clear to you, sir, that they were not going to endorse or agree to that charge?

A Carol still put the time in for this to do the payroll.

Q That's not the question, sir.

A Yes.

Q Did you understand the question?

A Yes, I understand the question.

Q Okay, answer the question, then, sir.

A And I was -- repeat it again, please.
Q You understood that they were not going to pay 3.1 percent for paperwork, that they made clear in August of 2007?
A They didn't make it clear that they said they're not paying for it. They never, ever made anything directly quite clear to me and said that they were not paying for anything.
Q I heard you -- except that she conveyed a sentiment to you as follows:

3.1% for paperwork is ridiculous

A She says ridiculous.
Q She said ridiculous.
A And she probably, at that time, she says ridiculous and I said that's still what it costs us to have the payroll done.
Q And did you take it, you'll agree, that there was very little question in your mind that they were going to balk if you charged 3.1 percent in the future?
A Nothing was said for almost two years, until this May 30th.
Q Moving onto the next line:

Wayne should not get STAT & Vacation Pay

We're back to that, and that sounds quite familiar, based on the very comment in the note on May 30, 2009, will you agree with me?
A Yes.
Q Okay. So at the very outset they made it clear, I suggest, that they were not going to pay you that?
A And I said I'm entitled to a stat holiday; I'm an employee of Kareway also.
Q It goes on to say:

Wayne & Carol should not get Clothing & Tool allowance.

And you recall, sir, that this, in particular, was something that really bothered Chris Johnson and Alex Shaman?
A They suggested it. I can't say that -- they suggested these things all the time to me at this meeting. The meeting was a polite meeting. It was not, like I was

saying, a heated argument or anything. It's [indiscernible] we were still -- Carol and I are both employees of Kareway Homes. We have the same things that the other employees need, clothing and everything else, for the projects.

Q The point is, is that, is it your position or your evidence that if that's the cost of running a business for a year you're going to pass that onto a consumer, even if the project is only supposed to last seven months?

A It's not -- it was prorated through my other projects too. It was not the total cost of this.

Q And what clothing and tool allowance are we talking about?

A Clothing for work.

Q But what is Carol -- what does Carol do for work in terms of a clothing allowance?

A She still goes out onto the sites.

Q And the tool allowance, what tool allowance does she get?

A Hers would be more into maybe some of the office stuff but that's an average I take for what I spend on all my tools for the year. So I do average things out for the percentages I put on there.

THE COURT: Average what out?

A What I spend on tools for the year.

THE COURT: I think the question was directed towards Carol's tool allowance.

A The tool allowance, there wouldn't be too much for Carol, but the average I averaged out with my percent worked out to that percentage for -- across the board for all the tools.

MR. TATCHELL:

Q So you just charge a percentage?

A Yes.

…

Q Well, this is a percentage at a certain rate, and that was simply, and I'll say arbitrarily, set by you and passed onto 37889?

A Yes, I set that rate." (my emphasis)

[32] Ms. Johnson's notes about the August 21, 2007 meeting also include the following reference "Wayne doesn't pay UIC", referring to Mr. Cunningham.

Mr. Cunningham was asked about that meeting and did not dispute that this issue was raised. However, quite remarkably, and in a way which reflects poorly on his credibility, Mr. Cunningham acknowledged in cross-examination that he became aware that his own personal labour claim could not justifiably include a mark-up for unemployment insurance, but did not tell Mr. Shaman this[17]:

> "Q You found out that you did not have to pay UIC, but you chose not to tell the customer?
>
> A Yes."

(b) Alex Shaman

[33] The builder's counsel submits that, where Mr. Shaman's evidence conflicts with that of Mr. Cunningham, Mr. Cunningham's evidence should be believed. He makes this submission for four principal reasons:

1. Mr. Shaman "lied" when he swore eight statutory declarations in which he stated that "all accounts payable in respect of the project" had been paid;
2. Mr. Shaman gave inconsistent evidence about when he received the '06 estimate from Mr. Cunningham;
3. Mr. Shaman gave inconsistent evidence about when Mr. Cunningham was out of Whitehorse in July 2007; and
4. Mr. Shaman gave inconsistent evidence about agreeing to change the schedule of the project.

I will deal each of these points in turn, followed by one of my own.

1. The statutory declarations

[34] These were required by Mr. Shaman's bank in order to obtain financing. The dates of the statutory declarations sworn by him were:

[17] Transcript, October 5, 2011, p. 66.

- January 9, 2008,
- March 18, 2008,
- May 5, 2008,
- June 10, 2008,
- July 14, 2008,
- July 31, 2008,
- September 15, 2008,
- October 20, 2008, and
- December 17, 2008.

[35] At about the same time, the owner began to require the builder to supply its own statutory declarations, as required by the Development Agreement. Mr. Cunningham swore six such declarations:

- May 6, 2008,
- July 22, 2008,
- July 30, 2008,
- September 17, 2008,
- October 21, 2008, and
- December 18, 2008.

[36] The builder's counsel argues that Mr. Shaman's statutory declarations were false because the owner had not paid all the accounts rendered by the builder with respect to the project when they were sworn. At paragraph 3 of each statutory declaration, the owner swore that "All accounts payable in respect of the project for the period 30 days prior to the date of this claim have been paid except for holdbacks."

[37] Mr. Shaman testified in cross-examination that by “accounts payable” he meant the builder’s invoices which were not in dispute. In other words, Mr. Shaman maintained that paragraph 3 in each statutory declaration was true because all of the builder’s accounts payable were paid, except for the ones in dispute.

[38] In re-examination, Mr. Shaman further explained that he also relied on the statutory declarations from Mr. Cunningham that all of the bills owing by the builder were similarly paid. The builder’s counsel counters this by arguing that Mr. Shaman swore the first two statutory declarations without having received any statutory declarations from the builder, and on the other occasions, with the exception of the statutory declaration of July 31, 2008, Mr. Shaman received the builder’s statutory declarations after he swore his own.

[39] Mr. Cunningham’s statutory declarations included the following paragraphs:

> “2. All claims for wages and materials due and payable in respect of the said construction project to date have been fully paid and satisfied and therefore there are no persons entitled at this time to claim of [as written] file a lien under the Builder’s Lien Act in respect of the said construction project.
>
> 3. This declaration is made for the purpose of inducing the Bank to make payment of a portion (the balance) of the funds secured by the above-mentioned mortgage and I am aware that in making such payment the Bank will be relying on the statements herein contained.”

[40] The owner’s counsel made five points in support of the veracity of Mr. Shaman’s testimony in this regard.

[41] First, paragraph 2.0 (a) of the Development Agreement stipulates at least two conditions before payment even becomes due (i.e. becomes transformed into an account payable):

1. That the builder's invoice has been approved by the owner; and
2. That the builder must provide "a statutory declaration certifying payment of all [its] accounts payable."

The latter precondition was waived by the owner during the initial period of the project, as the owner was relying on its own funds and had not yet begun drawing on financing from its bank. However, I accept that it may well have been the first pre-condition which Mr. Shaman had in mind when he testified about only paying the accounts which were not in dispute.

[42] Second, the owner's counsel reminds me that this contract was funded not on the basis of "payment of invoices or accounts payable" *per se*, but rather on the basis of advances made by the owner to the builder, which were applied by the builder against the outstanding balance owing.

[43] Third, counsel argued that significant disputes about the builder's invoices arose when Mr. Cunningham decided unilaterally to resume the construction of Building B in February 2008 (discussed further below), thereby skewing and inflating the invoice numbers at a point when financing had only been obtained by the owner for Building A.[18] This, argued counsel, made it next to impossible for the owner to make sense of, let alone "approve", the invoices being presented by the builder.

[44] Fourth, the owner's counsel submits that the builder's own statutory declarations establish the connection made by Mr. Shaman between his statutory declarations to the bank and the information which he relied upon from the builder. The fact that many of the builder's statutory declarations were sworn after those of the owner "misses the

[18] The two buildings comprising the condominium project were referred to by the parties as "Buildings A and B".

point” says counsel. Rather, it is the language of the builder’s statutory declarations, combined with that in the Development Agreement, which makes it reasonable for Mr. Shaman to have testified in re-examination that he also had in mind, at the time of swearing his own statutory declarations, the accounts payable status of the builder with its sub-trades.

[45] Fifth, the owner’s counsel points to the nature of the owner’s statutory declarations, attached as they were to individual “progress claims”, seeking draws on the owner’s financing. The standard form statutory declaration includes paragraph 6, which reads as follows:

> “The proceeds of the progress claim set out above will be used by the Borrower to funds [as written] payments under contracts relating to the project. In respect of such payments, the amount required under the Act be paid into the holdback account(s) is as set out above. If there is more than one such holdback account required under the Act, the respective amounts to be paid into each holdback account are set out in the Schedule attached to this solemn declaration.”

This, suggests counsel, is evidence that the standard form of statutory declaration is intended to deal with the situation where the owner and the developer are one and the same person or entity. For example, this was Mr. Cunningham’s usual business practice as a builder, prior to becoming involved with the project. He said he would purchase land for the purpose of building a residential home on that land, and then later sell the home with a mark-up for his profit. While in the case at bar, the owner is distinct from the developer, counsel nevertheless argued that the ‘payables’ which are referred to in the owner’s statutory declarations (“all accounts payable in respect of the project”), are more likely the payables going to the builder’s sub-trades than any payables owing from

the owner to the builder. At the very least, said counsel, this likely contributed to Mr. Shaman's confusion in answering the questions about the statutory declarations.

[46] I generally accept these arguments by the owner's counsel and reject the suggestion by the builder's counsel that Mr. Shaman "lied" when he swore his statutory declarations.

2. Shaman was inconsistent about the date when he received the '06 estimate from Cunningham

[47] It is correct that in cross-examination Mr. Shaman said that he was "sure" that it was early in 2007 when he received the '06 estimate. However, it must also be remembered that, just a few questions before, when Mr. Shaman was asked about when he provided the '06 estimate to his bank, he testified that it was in early 2007, but that it could have been in 2006 and that he could not remember the exact date. In re-examination, Mr. Shaman was asked about when he first told Mr. Cunningham that he was going to use the '06 estimate as a budget with the bank. Mr. Shaman answered that it was in late 2006 or in the early part of 2007. Obviously, Mr. Shaman would have had to have previously received the '06 estimate in order to have such a conversation. Thus, I conclude that the point which the builder's counsel raises here is more of a quibble than a substantial and probative inconsistency.

3. Shaman was inconsistent about when Cunningham was out of Whitehorse in 2007

[48] Once again, while that is technically correct, Mr. Shaman readily conceded in re-examination that it was probably in 2008 when Mr. Cunningham was out of Whitehorse, and that he gets his years mixed up. Thus, I am unable to conclude that this relatively minor mistake should significantly detract from Mr. Shaman's credibility.

4. Shaman was inconsistent about the change to the construction schedule

[49] In his first affidavit, at para. 8, Mr. Shaman referred to the completion date in the Development Agreement of September 30, 2007, and stated: “At no time have I provided my consent in writing or otherwise, to a date other than September 30, 2007.” However, in his second affidavit, at para. 8, Mr. Shaman deposed as follows:

> “At paragraph 8 of my Affidavit # 1, I depose that the completion date of September 30, 2007 was never varied with my written consent or otherwise and indeed I believed that be the case when I swore that Affidavit on December 16, 2009. However, in July of 2010, I had the opportunity to review correspondence produced in these proceedings by the Plaintiff which were from the Plaintiff’s then solicitor, Serge Lamarche, dated March 7 and 13, 2007 neither of which I have previously seen or received. These letters ... have refreshed my memory and I can depose now that I had forgotten that the Plaintiff's representative, Wayne Cunningham, and I did agree to an extension of the startup date from March 1, 2007 to April 1, 2007 and the completion date from September 30, 2007 to December 31, 2007 – not only extending the start date by a month but also extending the completion date by three months and thereby allowing more time to complete the Project.”

This seems a reasonable explanation for Mr. Shaman’s mistake in his first affidavit. Thus, I do not conclude that it should significantly detract from his credibility.

5. Other problems with Shaman’s testimony

[50] All this is not to say that I did not have certain difficulties with Mr. Shaman’s evidence in other respects. In fairness, however, and notwithstanding his substantial success as a businessman, some of these difficulties may have related to Mr. Shaman’s professed challenges in absorbing and processing written material. Nevertheless, even with that accommodation in mind, I found Mr. Shaman to have very poor communication skills. His evidence was often vague, occasionally contradictory, and difficult to follow. A

couple of examples will suffice for now, while others will become evident later in these reasons.

[51] First, in cross-examination, Mr. Shaman testified that he asked Mr. Cunningham to “sign off” on the ‘06 estimate as the budget for the project. Then, Mr. Shaman said he *did not recall* asking Mr. Cunningham to sign off on it. In re-examination Mr. Shaman said that he did *not* ask Cunningham to sign off on it.

[52] The second example relates to two letters Mr. Cunningham wrote to the owner’s bank on September 8 and 17, 2007. I have already referred to the September 17 letter as containing the total hard cost estimate from the ’07 estimate. Mr. Cunningham testified that Mr. Shaman asked him to write these letters in order to assist him in obtaining financing from his bank. Mr. Shaman denied asking Mr. Cunningham to draft the letters. When asked whether it was “simply coincidence” that Mr. Cunningham did so, Mr. Shaman answered affirmatively.

[53] While I do not conclude Mr. Cunningham only wrote the letters because Mr. Shaman asked him to, the inference that Mr. Shaman did ask seems almost inescapable. Indeed, in his first affidavit, at para. 11, it is interesting to note how Mr. Shaman juxtaposed the issue of his financing and Mr. Cunningham’s letter of September 17, 2007:

> “In September 2007, I needed to provide information to my banker, the Bank of Montreal in Kelowna, British Columbia, as to the projected future costs of the project. The plaintiff provided a letter to the bank dated September 17, 2007 where he stated that after confirming his costs with his suppliers and subcontractors, the total hard cost estimates were accurate at 3,834,004 completion of the project…”

(c) Chris Johnson

[54] Ms. Johnson drafted seven progress reports which were provided to the owner's bank together with covering letters from the builder's engineer, Mr. Jacobsen. These were the "engineer's progress reports", which I refer to above, and which were submitted to the bank in order to obtain draws on the owner's financing.

[55] The builder's counsel submits that Ms. Johnson admitted that five of these engineer's progress reports "were false" in that they did not accurately reflect the builder's billings to the dates indicated in the reports. Further, counsel submits that the reports did not accurately reflect the projected costs of the project to its conclusion, which Ms. Johnson knew because she had prepared accurate projections in another series of reports referred to by the parties as the "actual progress reports".

[56] A complete answer to the challenge to Ms. Johnson's credibility will be made following my findings of fact below. For now, I begin with my observation that Ms. Johnson seemed to be a careful, diligent and thoughtful witness, who did not appear to exhibit any bias against Mr. Cunningham, notwithstanding the fact that she was retained by the owner. She also brought to her bookkeeping duties a significant amount of related experience. She is a high school graduate who went on to take accounting courses and was employed with Revenue Canada 1981 to 1987. She was employed as a bookkeeper from 1987 to 1991. Over the period from 1991 to 2005 she owned the Yamaha business in Whitehorse. She has been self-employed as a bookkeeper and property manager from 2005 to the present, carrying on business as "Cornerstone Business Services."

[57] Ms. Johnson was hired by the owner in the spring of 2007 to keep track of expenses on the project. In particular, because Mr. Shaman was often away from Whitehorse during construction, he expected her to be his “eyes and ears” in terms of monitoring the progress and costs of the project.

[58] The diligence with which Ms. Johnson approached her duties is exemplified by the series of notes which she made following various meetings she attended between Mr. Shaman and Mr. Cunningham. I will return to some of these notes later in my findings of fact. For now, it is sufficient to note that, by and large, Mr. Cunningham did not take significant issue with the content of the notes as an accurate depiction of matters discussed at those meetings.

[59] Near the beginning of her retainer, Ms. Johnson began to experience problems allocating items from the builder’s weekly invoices to the expense categories set up under the ‘06 estimate, and she later encountered the same issue working with the’07 estimate. This problem was exacerbated by the fact that, while the builder claimed to have a purchase order system in place, it often required a subjective interpretation of the invoices in order to determine how the purchased items should be categorized. This led to frequent discussions between Ms. Johnson and Mr. Cunningham about the proper allocation of those items.

[60] Further, when the owner’s bank financing became necessary, the bank required that the engineer’s progress reports be in a certain format, which differed from what was being used by the builder in its expense tracking. Ultimately, Ms. Johnson agreed to take over the tracking of the builder’s expenses herself, using the builder’s format. These became known as “actual progress reports”. It is the divergence between the

actual progress reports and the engineer's progress reports, which gives rise to the challenge by the builder's counsel to Ms. Johnson's credibility.

[61] According to Ms. Johnson, as time went on, she became increasingly concerned that the information being provided to her by Mr. Cunningham was not accurate. The problems in this regard included :

(a) regular reallocating of expenses from one category to another;

(b) the extent to which Mr. Cunningham referred to certain categories of expenses as being completed (i.e. a particular expense item was 100% finished), only to receive further invoices under those same categories; and

(c) whether the expenses should be allocated to Building A or Building B.

[62] The owner also began to dispute the correctness of the builder's invoices. In Ms. Johnson's testimony about the engineer's progress report of June 26, 2008, she explained that she was not including all of the builder's billings in the progress reports, because the owner no longer agreed that they were all legitimate.

[63] Further, there were representations by Mr. Cunningham that, notwithstanding the owner's concerns about increasing costs, Building B would "come in cheaper" than Building A. Those representations were initially accepted by the owner and Ms. Johnson, but eventually they began to seriously question the accuracy of the builder's numbers. It is in this context that Ms. Johnson testified that the engineer's progress reports may have been under-representing the true cost of the project.

[64] According to Ms. Johnson, the problem for her and Mr. Shaman was that they did not really know where the project was at financially because of the inaccurate

information they were getting from Mr. Cunningham. For example, they could not always rely on the actual progress reports because the numbers therein were derived from information from Mr. Cunningham. Ms. Johnson spoke in terms of “fearing” that they were more over budget then the engineer’s progress reports indicated, but she denied the suggestion by counsel that these reports were “false”. Rather, she maintained they were accurate to the best of her knowledge and ability, because she and Mr. Shaman were disputing a number of the builder’s charges and a lot of what Mr. Cunningham was telling them.

[65] Further, Ms. Johnson was aware of the owner’s need to continue to obtain financing draws and knew that the engineer’s progress reports were required by the bank for those draws. I infer from this that she likely felt pressure to act professionally as the owner’s bookkeeper, while doing her best to keep the project going.

[66] Ultimately, however, Ms. Johnson testified that she found it “very frustrating” to try and do a good job in the circumstances. For example, with reference to a meeting between the parties on March 28, 2008, she said that she and Mr. Shaman had “extreme discomfort” because they did not feel Mr. Cunningham “actually had a handle on the project” and they doubted the truth of what he was saying. Towards the end of the period of the bank financing there was a point where she said she did not know what to believe.

[67] Nevertheless, and importantly, when re-examined about the differences between the engineer’s progress reports and actual progress reports and whether the numbers in the respective reports were true or not, she made a distinction between what she knew at that time and her later knowledge, clarifying that her answers to the builder’s counsel

in that regard were based on what she learned later, rather than what she absolutely knew to be true at the time.

[68] Taking all of these circumstances into consideration, together with my very favourable view of her demeanour, I conclude that the challenge to Ms. Johnson's credibility by the builder's counsel in this regard does not adversely impact on her credibility to any significant extent. At the end of the day, my initial assessment of Ms. Johnson as a thoughtful, diligent, careful and unbiased witness remains.

3. FINDINGS OF FACT

[69] My findings of fact in this case are largely dependent upon my assessment of the credibility of the various witnesses, principally Mr. Cunningham, Mr. Shaman and Ms. Johnson. As I concluded above, I have significant problems with Mr. Cunningham's credibility in several key respects, most centrally on the question of whether the '06 and '07 estimates were respectively intended as the original and final budgets on the project.

[70] Mr. Shaman's testimony was not without its problems, however it was corroborated in many important respects by Ms. Johnson, whom I find to be an entirely believable witness. Therefore, contrary to the submission of the builder's counsel, where the evidence of Mr. Cunningham conflicts with that of Mr. Shaman and Ms. Johnson, I generally prefer the evidence of the latter two witnesses.

[71] On this basis, I make the following findings of fact:

1. In about 2005, Mr. Cunningham built a residential home for Mr. Shaman on a fixed price basis and employed a "scope of work" document as part of that job.

2. In the spring of 2006, Mr. Cunningham and Mr. Shaman met again to discuss the development of a piece of property Mr. Shaman had purchased in the Takhini area of Whitehorse, which he wished to develop for commercial purposes.

3. Mr. Shaman had previously encountered some difficulties with the local residents resisting his attempts at rezoning the property for the purposes of the development.

4. Mr. Shaman solicited the assistance of Mr. Cunningham to prepare conceptual drawings for the development and to assist Mr. Shaman in his attempts at resolving the rezoning issues.

5. By March of 2006, the parties settled on a 20 unit condominium complex spread out over two identical buildings. The following elements had been agreed upon:

(a) two buildings housing 10 condo units apiece;

(b) the dimensions of each building would be 35 feet in height, 60 feet wide, 130 feet long;

(c) each condo unit would have two bedrooms and a den, with an attached two-car garage;

(c) the target markets were seniors, professional single people or young couples with no children; and

(d) the buildings would be oriented towards the east side of the property.

6. Mr. Cunningham prepared some conceptual drawings, attended meetings with area residents and city officials, and ultimately was successful with the rezoning in the early summer of 2006.

7. Mr. Shaman and Mr. Cunningham discussed concepts for the further development of the project and Mr. Cunningham arranged for some architectural drawings to be done.

8. Mr. Shaman asked Mr. Cunningham to be involved with the demolition of the existing structures on the property and the installation of the necessary services for the future development of the project.

9. In August 2006, Mr. Cunningham prepared the ‘06 estimate and provided a copy to Mr. Shaman shortly thereafter.

10. Both Mr. Shaman and Mr. Cunningham are notoriously poor communicators. I found at trial that Mr. Cunningham has a tendency to speak in very rapid-fire bursts of phrases, and frequently slurs his words together so that they are difficult to understand. Further, both he and Mr. Shaman have a tendency to speak in broken sentences, moving from one thought to another without a clear conjunction. Mr. Shaman is also very soft-spoken and difficult to hear at times. Both persons were frequently indiscernible during their testimony and I regularly had to ask each of them to repeat what they had said at various times. I find that this mumbling led to a degree of miscommunication between them.

11. An early example of miscommunication between the parties involved the concrete foundation work for the project:

(a) The ‘06 estimate included a “proposed construction schedule” for the project over the period from September 2006 to October 2007. In

particular, during the period of September and October 2006, the following items of work had been identified:

> “Permits
>
> Site demolition
>
> Water and sewer installation
>
> Slab preparation for both buildings
>
> Concrete place and finishing for both structural slabs
>
> Site grading”

In addition, the ‘06 estimate included a number of cost estimates for various categories of labour and materials. Those relevant to the initial development of the project included:

> “Excavation & Service
>
> ...
>
> Water and Sewer service
>
> ...
>
> Cement Finishing
>
> ...
>
> Concrete.”

(b) In the fall of 2006, during a period when Mr. Shaman was away from Whitehorse, Mr. Cunningham proceeded with the foundation work for the project, which included the pouring of concrete slabs for each of the two condominium buildings. This work was finished by the end of October 2006. Mr. Cunningham billed the owner just over $375,000 for all of the

builder's services to that point, the vast majority of which would have involved the foundation work.

(c) Mr. Cunningham assumed he had the owner's authority to proceed with the foundation work, whereas Mr. Shaman maintained that he had not in fact authorized that work, and it came as a total surprise to him. I find that the miscommunication arose from the combination of Mr. Shaman's instructions to Mr. Cunningham to proceed with "demolition" and "putting in the services", and the fact that the '06 estimate had included a schedule for the foundation work and various estimates for labour and materials associated with that work.

12. Upon Mr. Shaman's return to Whitehorse in the fall of 2006, he met with Mr. Cunningham to discuss the foundation work which had been done. Mr. Cunningham explained that he wanted the slabs to be completed before winter. Mr. Shaman said that Mr. Cunningham should not do any further work on the project without a contract and a budget being in place. Mr. Shaman immediately retained counsel for the purpose of drafting of an agreement.

13. Drafts of the proposed written agreement were exchanged between the parties and their respective counsel over the ensuing months in late 2006 and early 2007. Mr. Cunningham's counsel provided a four-page memo regarding suggestions about certain wording in the agreement.[19] Included in that list was a reference to the profit-sharing provision in the draft agreement, where Mr. Cunningham's counsel made the following notation: "50/50 split but the Builder's portion must be no less than 13% of the "Cost of Work". I find that this

[19] Exhibit 1, Volume 2, Tab. 42, pp. 1-4.

was an attempt by Mr. Cunningham to introduce a ‘cost plus’ component into the contract. However, the Development Agreement which was ultimately signed by the parties on February 27, 2007, and specifically the profit-sharing provision, contains no such wording. Rather, it simply says that the profit “shall be divided equally”.

14. By December 8, 2006, the owner had provided to the builder a total of $375,000 in advances, the first $25,000 of which had been credited to the builder’s initial invoice of $375,357.70. Mr. Shaman specifically held back $100,000, to be held in trust by his lawyer, because he was concerned about possible liens on the property and the fact that he and the builder had not yet entered into a written agreement.

15. Following the signing of the Development Agreement, the parties agreed that the construction schedule would be amended to run from April 1 to December 31, 2007. They further agreed that Mr. Cunningham would prepare the “Scope of Work” schedule relating to the Development Agreement (referred to in the agreement as “Schedule A - Scope of Project”, but otherwise left blank), but Mr. Cunningham indicated it would take some time before that could be completed. In the meantime, he asked that the remaining $100,000 being held back by Mr. Shaman be paid to the builder, pending the completion of the “Scope of Work”. These agreements were confirmed in the fax from the builder’s counsel dated March 7, 2007 (see para. 23 above). Mr. Shaman agreed to proceed on that basis.

16. This was the first construction project of this magnitude in the builder's experience. Typically, the builder would purchase properties and build single dwelling residential homes on them, selling them for a mark-up. As the owner and developer in such undertakings, Mr. Cunningham did not have to work under an agreement and did not have to answer to a customer. The Development Agreement in this case was unique to his experience. He understood that it was "vital" to the owner to have such an agreement before proceeding with the work.

17. Construction did not begin on April 1, 2007, because the builder had not yet obtained the structural and electrical drawings from its engineer. Originally, Mr. Cunningham expected that those drawings would be prepared over the winter months of 2006 - 2007, but Mr. Shaman had specifically instructed him not to undertake any further work on the project until the Development Agreement was in place. Framing began on the site in June 2007.

18. In approximately May 2007, the owner retained Ms. Chris Johnson as its bookkeeper in relation to the project.

19. Although the Development Agreement referred to monthly invoices from the builder, Mr. Shaman wanted to receive them on a weekly basis in order to keep a closer eye on costs. The builder agreed to this.

20. On June 15, 2007, Mr. Shaman and Ms. Johnson met with Carol Cunningham. Ms. Johnson's note of that meeting records that there was reference made to a problem because the categories of expenses in the first invoice from the builder (for the work to and including the foundations) did not

match “the budget categories”. I find this to be a reference to the categories of the various anticipated expenses in the ‘06 estimate.

21. On July 4, 2007, Mr. Shaman and Ms. Johnson met with Mr. Cunningham. Ms. Johnson’s notes indicate that they “reviewed [the] budget” and that Mr. Shaman was concerned because the excavating costs were “double budget”. Ms. Johnson also asked Mr. Cunningham about using a purchase order system. Mr. Cunningham and Mr. Shaman also discussed installing fireplaces in each of the condos and having a show suite ready for August, although Mr. Cunningham did not think it would be ready until the Fall. I find that the reference to a “budget” by Ms. Johnson in her notes of this meeting relates to the ‘06 estimate.

22. On August 21, 2007, Mr. Shaman and Ms. Johnson again met with Mr. Cunningham:

(a) Mr. Shaman was concerned about the delay in construction, but Mr. Cunningham assured him that he would be able to continue working into the winter. Ms. Johnson commented on “the budget” information she received and said that it did not balance with the builder’s invoicing. I find this to be another reference to the mismatching of the expense categories on the invoices with those in the ‘06 estimate. Mr. Cunningham indicated this was probably because his own bookkeeper was behind on entering information and that the owner had not yet been billed for some items. He suggested it would all balance out in the end. Ms. Johnson asked whether the builder could code the individual invoices before sending them to the

owner. I find this to be a further request from the owner to the builder to use a purchase order system;

(b) Mr. Cunningham indicated he thought he might have five pre-sales; and

(c) Ms. Johnson raised the issue of the builder charging “administration fees” and how that was not fair and not part of the true cost of the project. She referred to the builder’s mark-up on labour costs for such things as workers’ compensation and unemployment insurance premiums, statutory holidays, holiday pay, and office administration. Ms. Johnson further indicated that Mr. Cunningham and his wife should not be entitled to clothing and tool allowances. Finally, she indicated that Mr. Cunningham does not pay unemployment insurance premiums, therefore his labour claim should not be marked up for that reason.

23. By September 2007, the owner had exhausted its own funds and was turning to its bank for financing. The bank had previously indicated to Mr. Shaman that it would require regular reports from a quantity surveyor on the status of the construction as that related to the cost of the project. As there are no quantity surveyors in the Yukon, it was agreed by the parties that Mr. Cunningham would retain Niels Jacobsen as a professional engineer to perform those services.

24. In anticipation of the first financing draw from the bank, Ms. Johnson prepared a memorandum to Mr. Shaman dated September 4, 2007, regarding the “Requirements from Project Engineer”:

(a) This memo indicated that the bank would require from the project engineer a number of items including confirmation that he has reviewed the plans and specifications for the phase being financed, and finds those to be acceptable. In addition, the project engineer would have to review the “detailed construction budget for the project” being financed and conclude that the budget is sufficient to allow for completion in accordance with plans and specifications; and

(b) A copy of this memo was faxed to Mr. Cunningham by Ms. Johnson and included some handwritten notes made by Ms. Johnson, requesting additional information from him, for the bank. I find as a fact that Mr. Cunningham in turn provided a copy of this memo to Mr. Jacobsen. On his copy of the memo, Mr. Jacobsen made notes regarding address information for the owner’s bank and the name of the bank officer on the file.

25. On September 5, 2007, the owner entered into an “Agency Agreement for Sale of Property” (“Listing Agreement”) with Marilyn Mah. About that time, the project was named “Lansing Point.” The owner retained Ms. Mah as a realtor to sell at least 16 of the 20 condo units on the project. It was then anticipated that the owner and the builder would be able to sell four of the units on their own. Ms. Mah prepared an information package for prospective purchasers which included a number of details regarding the specifications of the individual condo units, as well as their sale prices and planned drawings of the units and the buildings. Most of the information regarding the specifications of the units was supplied to

Ms. Mah by Mr. Cunningham prior to her signing the Listing Agreement. A subsequent updated version of the information package was prepared by Ms. Mah in December 2007.

26. Using information provided by Mr. Cunningham, Ms. Johnson prepared an updated progress report on the costs of the project to date, as well as the estimated costs to complete. This was dated September 7, 2007, and was provided by her to Mr. Jacobsen. Mr. Jacobsen and Mr. Cunningham met at the project site to go over this progress report, which included the '07 estimate, and confirm its accuracy. Following that meeting, Mr. Jacobsen wrote a letter to the owner's bank, also dated September 7, 2007, attaching the '07 estimate and confirming that he had done a general review of the plans and specifications for the project. The '07 estimate indicated that the total project costs were to be $4.541 million, with a sub-total for 'hard costs' at $3.834 million (not including GST).

27. On September 8, 2007, Mr. Cunningham, on behalf of the builder, wrote to the owner's bank confirming that the builder was the general contractor for the project and that Mr. Cunningham was "fully responsible for the overall project management, construction, and marketing" of the project. This letter included the following paragraph:

> "Kareway Homes Ltd. is solely responsible for establishing and maintaining the project budget. The cost and budget are continuously reviewed and scrutinized on a regular basis and have been adjusted accordingly throughout the construction of this project. Wayne Cunningham is confident and satisfied that the current detailed budget is realistic and sufficient which will allow [as written] for completion of this

> project in accordance with the plans and specifications." (my emphasis)

28. On September 17, 2007, Mr. Cunningham again wrote to the owner's bank confirming that he had reviewed the September 7th progress report and stating that "the total hard cost estimates are accurate at $3,834,000 for the completion of this project." I find this to be a direct reference to the subtotal for "total hard costs" in the '07 estimate prepared by Ms. Johnson.

29. In a letter from Mr. Jacobsen to the owner's bank dated January 3, 2008, enclosing one of the several subsequent engineer's progress reports, Mr. Jacobsen referred to "the budget figure of $4,441,392.20 in the September 7, 2007 progress report" (my emphasis). As previously noted, Mr. Jacobsen was retained by the builder and was acting as the builder's agent, and, at least in part, on the builder's instructions. The total project costs in the September 7, 2007 progress report were in fact $4,541,392.20, so it appears as if Mr. Jacobsen made a typographical error in this letter.

30. On October 28, 2007, Mr. Shaman and Ms. Johnson met with Mr. Cunningham. Mr. Shaman indicated that he could not make a draw on his financing because the anticipated six pre-sales previously mentioned by Mr. Cunningham had not materialized. Consequently, the parties decided to change the owner's financing to Building A only, and to close up Building B for the winter. The plan was to complete Building A in order to sell some condo units, and later proceed with the financing on Building B. Contrary to that arrangement, the builder restarted construction on Building B in approximately February 2008, before Building A was completed.

31. On April 8, 2008, Mr. Shaman and Ms. Johnson met with Mr. Cunningham:

(a) Mr. Shaman was concerned about the “overrun”, which I find to be with reference to the ’07 estimate. Mr. Cunningham suggested that some of the labour expenses may have been distributed incorrectly, however Ms. Johnson disagreed with this explanation. Mr. Cunningham then suggested that expenses may have been billed to Building A instead of Building B. Ms. Johnson again asked Mr. Cunningham to code the individual invoices before copying them for her, so that she could more easily enter them in the various expense categories. Mr. Cunningham agreed that construction costs would not be over $2.2 million for Building A and that Building B should cost a bit less. He again indicated that there were six pre-sales, two for Building A and four for Building B, and estimated that the project should be complete by the end of August 2008; and

(b) Mr. Shaman expressed unhappiness about the overruns and the delay. He also complained about the fact that Mr. Cunningham had indicated that certain expense categories, such as electrical and siding, were 100% complete, and yet the owner was continuing to receive further invoices from the builder for expenses in those categories.

32. On June 5, 2008, Ms. Johnson complained to Carol Cunningham about being charged “2%”, which I find to be a reference to the builder’s attempt to charge the owner interest on its outstanding invoices from suppliers. Ms.

Johnson asked Ms. Cunningham to supply statements supporting these charges, but she refused to do so.

33. On June 25, 2008, Mr. Shaman and Ms. Johnson again met with Mr. Cunningham. Mr. Shaman told Mr. Cunningham that he was not accepting the “budget overrun”. They were then reviewing an estimate which put the cost to complete at $5.58 million. Mr. Shaman was unhappy because Building B was now costing more than Building A, when Mr. Cunningham previously assured the owner that Building B would cost less. Mr. Shaman said he was not going to pay for the interest being charged by the builder. He also wanted to know why the labour costs were so high. Mr. Shaman again complained about the lack of a proper purchase order system. Mr. Shaman was upset that they were still working on Building A and that Mr. Cunningham would not commit to a completion date.

34. On December 18, 2008, Mr. Shaman and Ms. Johnson met with Mr. Cunningham. Mr. Shaman again complained about the project being “over budget” and about Building B costing more than Building A. He wanted to know what Mr. Cunningham was going to do about it. Mr. Shaman stated that there was “no profit left” in the project, but Mr. Cunningham thought there was. Mr. Cunningham suggested that they could simply charge more for the condo units.

35. On March 3, 2009, Mr. Shaman and Ms. Johnson again met with Mr. Cunningham, this time at the project site, and they viewed the condo units:

(a) Mr. Shaman again complained about the project being delayed and about the “budget…overrun”. He described the situation as “ridiculous”. Mr. Cunningham failed to respond with any specific suggestions; and

(b) Following that meeting, Mr. Cunningham asked for a further advance to credit against the builder’s outstanding balance from its invoices. Mr. Shaman agreed to a further advance of $100,000, but instructed Ms. Johnson to ensure that Mr. Cunningham swore a statutory declaration (as required by the Development Agreement) before releasing the funds. Mr. Cunningham attended at Ms. Johnson's office later that day to pick up the cheque. He said it was too late that day to provide the statutory declaration but said that he would do so later. He never did.

36. In early 2009, Mr. Shaman determined that it was necessary to insulate the attic of one of the buildings. According to Mr. Shaman, the subcontractor had a dispute with the builder over an unpaid bill, so Mr. Shaman took this on himself, and paid the subcontractor for the work. This was in the amount of $13,673.84. I did not understand the builder to have any quarrel with this amount. Accordingly, I find that it is a sum due to the owner, for which it is entitled to be repaid before any determination of profit-sharing.

37. It was also Mr. Shaman's evidence that he paid a total of $47,814.36 in insurance costs for the project. Again, I did not understand the builder to take any issue with this amount. I therefore find that is should be repaid to the owner before any determination of profit.

38. On May 30, 2009, Ms. Johnson prepared a memorandum for the builder formally objecting to a number of items for which the owner claimed it was being overcharged. Unfortunately, there was little or no evidence explaining the "General adjustments" of $17,127.58 included in that memorandum. However the references to overcharges relating to "interest" and to "payroll" were previously discussed with Mr. Cunningham much earlier on in the meetings between the parties on August 21, 2007 and June 25, 2008. For the reasons given by Mr. Shaman and Chris Johnson at those meetings, and as further detailed in their testimony, I find the owner’s objections to being overcharged on interest, in the amount of $89,312.71, and on payroll, in the amount of $100,335.75, to be legitimate.

39. On September 28, 2009, Mr. Shaman and Ms. Johnson again met with Mr. Cunningham. Ms. Johnson provided Mr. Cunningham with more documentation regarding items that were in dispute. Mr. Cunningham suggested that the overruns being complained about had been agreed to by Mr. Shaman and that they were just part of the builder’s costs. Mr. Shaman asked for further information on the actual cost of the extras that they had agreed to. Mr. Shaman's own estimate was that the cost of these extras did not exceed $200,000. Mr. Cunningham again suggested that they should simply charge more for the condos. Mr. Shaman asked what else needed to be done and how much it was going to cost. Mr. Cunningham said there was an outstanding bill for $40,000 for security, but Mr. Shaman responded that “the budget” only called for $24,000. I find this to be a direct reference to the security system category in the

’07 estimate. Mr. Shaman complained that the builder was $16,000 over the “budget” for that category and that he, Mr. Shaman, was previously unaware of the overrun. Mr. Shaman asked Mr. Cunningham to review the information provided. That was the last meeting between the parties and the builder’s last day of work on the project.

40. On November 3, 2009, the builder’s lawyer gave notice to the owner that it considered the owner to be in breach of the Development Agreement and that the builder was terminating the agreement immediately.

41. The within action was commenced by the builder on November 25, 2009.

42. In March 2011, the builder prepared a document detailing what he perceived to be the expense items which were over and above the ‘06 and ’07 estimates. Both Mr. Shaman and Ms. Johnson gave evidence about this list. The cost items which Mr. Shaman agreed to were as follows:

- “Extra balcony in Building B @ $10,000
- Additional sink in the master ensuites, in Building B @ $4,000
- Furnishings for two show suites @ $20,428.57
- Retaining wall @ $25,000
- Granite countertops @ $62,277.51
- Flooring @ $19,130.47.”

4. ANALYSIS

(a) The argument that this was a ‘cost plus’ contract

[72] The builder’s counsel relies on *Domco Construction Inc. v. Aliva Holdings Inc.*, 2003 SKQB 506, in support of the general proposition that a written agreement can be

changed by subsequent verbal agreement or the subsequent conduct of the parties. The court in that case quoted in turn from *Triple R Contracting Ltd. v 34848 Alberta Ltd.*, 2001 ABQB 52 (at para. 23 of *Domco*) as follows:

> "...when, as here, the subsequent conduct of the contracting parties points to the conclusion that they do not consider themselves to be governed by the Contract's terms and instead developed an alternative arrangement established on clear evidence, it is unreasonable to impose the written Contract on the relationship."

[73] The owner's counsel does not dispute this general proposition, but argues that there is an absence of "clear evidence" of an intention by the parties to change the terms of the Development Agreement.

1. The conduct of the parties

[74] The conduct which the builder's counsel relies on to indicate an amendment to the Development Agreement is as follows:

1. The parties agreed to proceed with the construction of the project without a "Scope of Work";
2. Construction proceeded without a project pre-budget and a project working budget;
3. The parties agreed that the builder would submit its invoices on a weekly basis as opposed to the monthly basis contemplated by the Development Agreement;
4. Changes were made to the project without the written approval of the parties;
5. Changes were made to the construction schedule for the project without the written approval of the parties; and

6. Statutory declarations from the builder were not a pre-condition of payment of the builder's invoices.

[75] The builder's first point is that the parties agreed to begin construction without a "Scope of Work". It is curious that the builder now seeks to gain an advantage from the fact that the owner allowed construction to commence without a "scope of work", when it was Mr. Cunningham himself who promised Mr. Shaman that he would prepare such a document, but never did.

[76] Here, I agree with the owner's counsel that the absence of a "scope of work", or more particularly the fact that Schedule A to the Development Agreement was left blank after the parties signed it, is not of itself particularly probative. The '06 estimate initially provided sufficient detail about the nature of the work entailed in the project and the estimated cost of the various items that the builder himself felt confident enough to proceed with pouring the concrete slabs for the foundations for the buildings in the fall of 2006, and thus incurring a bill in excess of $350,000. By December 2006, the architectural design of the buildings was pretty much finished, the parties knew what the footprint of the buildings would be (height, width and breadth), and they had obtained approval from the City to proceed with construction. Further, an engineer had designed the foundation slabs based on the known size of the buildings. By early September 2007, the realtor had sufficient details on the specifications of the project to begin her marketing efforts for the condos. Lastly, following the execution of the Development Agreement, the '07 estimate contained sufficient detail about the features of the project, along with the other plans and specifications that the engineer referred to, to allow the project to proceed to the satisfaction of the owner's bank. In other words, by the time of

the September 7, 2007 engineer's progress report, if not earlier, the parties knew exactly what they were trying to build and how much it should cost; they were not hampered by the absence of a particular document entitled a "scope of work".

[77] The builder's second point is that there was no pre-budget or working budget. However, as urged by the owner, the '06 estimate could be characterized as a pre-budget and the '07 estimate might be regarded as a working budget. In any event, this is essentially the ultimate issue in this case. Obviously, if I find in favour of the owner on the point, then the builder's argument is undone.

[78] The builder's third point about weekly invoicing is not particularly probative of anything in the builder's favour. To the extent that it is probative, it shows that the owner was concerned about keeping a close eye on the costs of the project and therefore wanted to receive more frequent invoices. I find that this was not a substantive change to the terms of the Development Agreement.

[79] The builder's fourth point is that changes to the project were clearly agreed to by the parties and were not always reduced to writing. While that is true, it was invariably because of the builder's default. There were repeated references by both Mr. Shaman and Ms. Johnson to Mr. Cunningham discussing changes with them, but failing to provide subsequent estimates for the cost of those changes.

[80] The builder's fifth point is that there was non-compliance by the parties with the construction schedule set out in the Development Agreement, as it was subsequently amended in writing via the fax cover sheet from the builder's counsel. Once again, this is hardly something that the builder can seek to take advantage of, especially in the face of the repeated complaints by Mr. Shaman about the issue of delay.

[81] The builder's last point is that the owner effectively waived the requirement for statutory declarations from the builder despite it being set out in the Development Agreement. This largely coincided with the initial period when the owner was self-financing the project. However, when the owner had to turn to its bank for financing, the condition was revived and was regularly employed.

2. Owner never refused to pay nor told builder to stop work

[82] The builder's counsel also argued that when the project costs began to exceed the projections in the '06 estimate, and subsequently those in the '07 estimate, Mr. Shaman never said he would not pay the builder's invoices and never told Mr. Cunningham to stop work on the project. Thus, goes the argument, Mr. Shaman implicitly encouraged the builder to continue working on the project, despite the increased overall costs, which is more consistent with a cost plus than a fixed price contract.

[83] The flaws in this argument are as follows. First of all, I reject the suggestion that Mr. Shaman agreed to pay the builder's invoices. On the contrary, my findings of fact show that Mr. Shaman expressly refused to pay the builder's interest charges. Mr. Shaman also refused to pay portions of the builder's administration fees added as a mark-up to the builder's labour costs (initially this refusal was implicit, but by September 28, 2009, it had become explicit).

[84] More importantly, however, even if the owner never expressly told the builder that it was not going to pay the builder's invoices, this is not determinative of the contract being a cost plus arrangement. While it is true that the project was over-

budget and that Mr. Cunningham recovered some of his extra expenses, it is clear on the evidence that Mr. Shaman was not giving him *carte blanche.*

[85] Finally, the suggestion by the builder's counsel that Mr. Shaman "persistently urged" Mr. Cunningham to continue working on the project despite the budget concerns is something of an overstatement. While Mr. Shaman clearly expressed frustration with the delay in the project, and thereby implicitly urged Mr. Cunningham to get on with things, that still does not justify the conclusion argued by the builder's counsel. Not telling the builder to stop work, or conversely encouraging it to continue, is as consistent with the arrangement being a fixed price contract as it is with it being a cost plus contract. If it was the former, then there would be no risk to the owner if the builder exceeded the fixed price.

3. The 'entire agreement' argument

[86] The builder's counsel also argued that the "entire agreement" condition in the Development Agreement makes it "abundantly clear" that the '06 estimate, which was already in Mr. Shaman's possession when he signed the Development Agreement, was neither the budget nor the scope of work for the project. However, the flaw in this argument is that the Development Agreement also makes repeated references to <u>other</u> obligations where the work had presumably already been done and the obligation met, in whole or in part. See for examples paragraphs 1.0(b) and (c); 1.0(iii); 2.1(j), (k), (o), (p), (r) and (s). This supports the owner's position that the '06 estimate can be viewed as the project "pre-budget", as referred to in paragraph 1.0(i).

4. Why wasn't the '06 estimate attached to the Development Agreement?

[87] The builder's counsel finally argued that if the '06 estimate was intended to be an initial budget, then it is logical to assume that it would have been attached to the Development Agreement as Schedule A. However, his argument overlooks the fact that immediately after the Development Agreement was signed, there was a communication in writing by the builder's lawyer that Mr. Cunningham had undertaken to prepare the "Scope of Work" for the project. This is consistent with the fact that the parties agreed in the Development Agreement to do a number of other things in the future, including the development and approval of the pre-budget and working budget, in addition to the other matters referred to in paragraph 1.0 (i) to (vi).

(b) The argument that this was and remained a 'fixed price' contract

[88] The parties, and particularly the builder, were generally prepared to commence the project by the Fall of 2006. At this point, for budget purposes, Mr. Shaman was relying upon the '06 estimate, which I have found was prepared by Mr. Cunningham in August 2006. Soon after receiving the '06 estimate, Mr. Shaman forwarded it to his bank. In a letter from the owner's bank to Mr. Shaman dated November 21, 2006, an attached discussion paper made reference to the "preliminary budget" and referred to categories of expenses similar to those in the '06 estimate[20]. Mr. Shaman testified, and I accept as a fact, that the numbers in the preliminary budget were those of the '06 estimate and came from Mr. Cunningham.

[89] As well, around this time, Mr. Shaman was upset by the fact that Mr. Cunningham had proceeded to pour the concrete slabs for the foundation of the buildings without his

[20] Exhibit 1, Vol. 3, Tab 82.

express authorization and consequently prohibited Mr. Cunningham from doing any further work on the project until the two of them had entered into a written agreement. This need for the owner to be in control of the project is consistent with Mr. Shaman's evidence that he understood it to be governed by a budget.

[90] Mr. Shaman had no previous experience in commercial construction of this nature. Mr. Cunningham understood that the Development Agreement was “vital” to Mr. Shaman “at all times” during the preparation for and construction of the project. He also understood that Mr. Shaman expected “strict control on costs” in the project. Further, he knew that the owner would rely upon the proposed construction schedule in the Development Agreement, and that the owner expected him to be reliable in terms of that time estimate.

[91] At about the time the Development Agreement was signed, Mr. Shaman had a discussion with Mr. Cunningham stating that they needed a scope of work agreement and that it would include a budget.

[92] The Development Agreement refers to the builder’s expertise and the obligations and reliance which flow from that expertise. In the recitals, the Agreement states that “The builder has skills, contacts and expertise in respect of the type and scope of the development proposed for the Lands”. Further, section 1.0 of the Development Agreement states:

> “1.0 Contributions to the Project: The Builder agrees that it will:
>
> (a) supply the labour and materials;
> (b) provide assistance with the rezoning of the Lands;
> (c) provide design conceptualizations;
> (d) provide marketing assistance; and
> (e) provide sales assistance;

> and such other things necessary to do the construction work required for the project described in Schedule "A" attached hereto (the "Project") and assist with the sale and disposition of the resulting condominium units in a proper and workmanlike manner in accordance with the terms of this Agreement. The description of the scope of the Project listed on Schedule "A" attached hereto will include every kind of work, labour, tools, plant, materials, equipment, articles and things necessary for the full execution and completion of the Project…"

[93] As has been touched on above, there are a number of provisions in the Development Agreement which suggest that it was intended to have a retrospective as well as a prospective effect. For example, the obligations of the builder in section 1.0 referred to rezoning and design conceptualization; the former was entirely completed, and the latter was largely completed, before the Agreement was signed in February 2007. Further, paragraph F in the recital states: "The Owner and the Builder have agreed and will further agree hereinafter as to the specific requirements in order to develop the Lands". Section 1.0 of the Agreement includes the following language: "The description of the scope of the Project listed on Schedule "A" attached hereto will include…". Finally, section 1.0 (iii) states: "… both parties will contribute to and reach consensus on the… development and approval of Project description, scope, plans, drawings, blueprints, specifications, designs and material lists…".

[94] Section 1.1 of the Development Agreement also tasks the builder, and not the owner, with the responsibility of satisfying itself if there are no 'other matters' which could in any way affect the project:

> "1.1 To the extent reasonably practicable or consistent with trade or industry practice, the Builder shall satisfy itself as to the nature, physical condition and location of the work to be done on the Project, including but

> not limited to the character of equipment and facilities needed prior to enduring the execution or performance of the Project, the general and local conditions and all other matters which can in any way effect [as written] the Project. Notwithstanding the foregoing, all decisions as to the design of the Project, both interior and exterior, shall require the approval of the Owner, acting reasonably."

[95] Sections 2.1 and 2.2 define the "Cost of Work" and the "Additional Costs".

[96] Section 2.4 requires the parties to prepare a pre-budget and working budget for the project, and states that any deviations from those budgets must be approved in writing by the parties:

> "2.4 In respect of the Cost of Work and the Additional Costs, the Builder and Owner shall prepare a Project pre-budget and Project working budget which are acceptable to both parties. Notwithstanding any other provision contained herein Any [as written] deviations from the Project pre-budget or Project working budget shall, in advance, be approved in writing by the parties."

[97] Section 8.0 provides that any changes to the project must be consented to in writing. Section 9.0 provides that any party undertaking a change to the project without first obtaining the written consent of the other shall not be entitled to payment for costs relating to that change.

[98] In my view, it is the combination of these three sections of the Development Agreement (2.4, 8.0 and 9.0) which make it a fixed price contract.

[99] In order for me to conclude that the Development Agreement was subsequently amended to become a cost plus contract by the conduct and/or communications of the parties, clear and convincing evidence is required: see *Domco*, cited above, at para. 23. The builder has failed to provide such evidence. Rather, I remain persuaded that the

parties intended to create a fixed price contract, as reflected by the terms of the Development Agreement, and that this conclusion is supported by a host of other extrinsic circumstances:

1. The builder created the ‘06 estimate in August 2006 before any of the substantial work on the project commenced. It is obvious to me that Mr. Shaman relied upon this document as the preliminary budget for the project, because he forwarded it to the owner’s bank in the fall of 2006. It would also appear that the bank in turn understood (according to its letter of November 21, 2006) that it was a preliminary budget for the project.

2. The fact that there was no “Scope of Project” attached to the Development Agreement is explained by the terms of the Agreement itself, which contemplated that this would be done by the parties in the future. Further, the fact that the owner authorized the builder to commence work on the project without a “Scope of Project” or “Scope of Work” is explained by the fact that Mr. Cunningham undertook to prepare such a document about time the Development Agreement was signed. It is apparent that Mr. Shaman relied on this undertaking, as he authorized the release of a further $100,000 advance to the builder in exchange for the promise. Mr. Shaman also understood, based on his discussion with Mr. Cunningham at that time, that the scope of work would include a budget. Finally on this point, Mr. Cunningham admitted on cross-examination that there was nothing to stop him from working on the “Scope of Work” document, even after commencement of work on the project.[21]

[21] Transcript, October 4, 2011, p. 40.

3. The fact that the builder was unsuccessful in its attempt to negotiate that its remuneration under the Development Agreement would be 50% of the profit, but “no less than 13% of the “Cost of Work””, supports the inference that the idea was expressly rejected by the owner.

4. The fact that Ms. Johnson made repeated references in her notes to the “budget” in her meetings with the parties, beginning as early as June 2007 is probative and consistent with Mr. Shaman’s evidence that both understood the ‘06 and ’07 estimates to be, respectively, the original and final budgets for the project.

5. The fact that the Listing Agreement with the realtor was established by September 5, 2007, is consistent with the fact (largely admitted by Mr. Cunningham) that most of the specifications for the project were in place by that time. As Ms. Mah testified, she would not have been able to properly market the condos otherwise. This conclusion is also reflected in the information package prepared by Ms. Mah for prospective purchasers, the first draft of which was done in September 2007, and which was based on information provided by Mr. Cunningham.

6. Ms. Johnson’s memorandum of September 4, 2007, speaks about the project engineer reviewing “the detailed construction budget for the project”. I find she is referring to Mr. Jacobsen’s later review of the ’07 estimate with Mr. Cunningham at the project site. Mr. Jacobsen then forwarded the ’07 estimate to the owner’s bank under the cover of his letter September 7, 2007. Mr. Jacobsen also testified that he understood the ’07 estimate to be “the estimated cost to

complete the project". Mr. Jacobsen later referred to the "budget" associated with the project in his correspondence to the owner's bank on January 3 and 9, 2008 and also on March 5, 2008.

7. Ms. Johnson herself clearly considered the September 7, 2007 engineer's progress report (the '07 estimate) as a "budget", that projected the total project costs to be $4.541 million. Ms. Johnson said this number was based on the "original budget" (the '06 estimate) plus discussions between Mr. Shaman and Mr. Cunningham over the summer of 2007. Further, when asked in cross-examination why she did not use the alternative total project estimate of $4.985 million provided by Mr. Cunningham in his "estimate", also dated September 7, 2007, she said it was because she did not feel Mr. Cunningham's estimate was accurate. She said that he would never change or update his values based on the discussions between the parties at their various meetings. This is consistent with Ms. Johnson's later discomfort with the accuracy of the numbers provided by Mr. Cunningham, which found their way into the later "actual progress reports" discussed above.

8. Two of the most probative pieces of evidence demonstrating that there was a budget for the project are the builder's letters to the owner's bank dated September 8 and 17, 2007:

(a) Mr. Cunningham acknowledged that at least one of the reasons why he instructed his wife to draft these letters was because he received Ms. Johnson's memo of September 4, 2007, which once again referred to "the detailed construction budget for the project".

(b) Mr. Cunningham also emphasized that the other reason he caused these letters to be drafted was because Mr. Shaman requested him to do so, in connection with the owner's application for bank financing. I confess that I fail to understand the probative value of that assertion. While Mr. Shaman denies this, as I concluded above, it seems more than coincidental that Mr. Cunningham caused the letters to be drafted when he did, unless he was relying exclusively on Ms. Johnson's memo of September 4, 2007. In any event, even if Mr. Shaman did ask him to write the letters, I question what that proves. It would not change the fact that Mr. Cunningham was clearly prepared to make important representations to the owner's bank (whether or not the letters were actually forwarded to the bank[22]) on a multi-million dollar project, a time when he knew that the owner's application for financing was critical to the success of the project and, in doing so, he not only referred to there being a "detailed budget" for the project, but he also provided the exact total for hard costs from the September 7, 2007 engineer's progress report (the '07 estimate).

(c) If the builder's point here is that he only drafted the letters because he was told to do so, it would still reflect poorly on Mr. Cunningham's credibility, because it would be tantamount to an admission that he was prepared to make a representation to the bank which, if in fact this was a cost plus contract, was untrue.

(d) In any event, in direct examination, Mr. Cunningham said that Mr. Shaman had asked him to confirm with the owner's bank that he was

[22] See Exhibit 1, Vol. 4, Tab 162.

the building contractor on the project and that the cost of the project was in line with the ‘06 estimate, which Mr. Shaman had previously given to the bank. However, the total hard cost estimate in the ‘06 estimate was $3,634,000, whereas the total for hard costs referred to by Mr. Cunningham in his letter to the owner’s bank of September 17, 2007, was $3,834,000, precisely the number in the ’07 estimate. That suggests to me that Mr. Cunningham's testimony about the content of his discussion with Mr. Shaman prior to the drafting of these letters cannot be relied upon.

(e) Finally on this point, the earlier letter of September 8, 2007, also speaks loudly for itself:

> “... [the builder] is solely responsible for establishing and maintaining the project’s budget ... [and that the builder] is confident and satisfied that the current detailed budget is realistic and sufficient which will allow for completion of this project in accordance with the plans and specifications.” (my emphasis)

11. Lastly, even on the builder’s evidence and submissions, this could not have been a true cost plus contract, because the builder is not claiming to be entitled to a percentage mark-up or fixed fee after the costs are paid. Rather, the Development Agreement entitles the builder to a 50% share of the profit and, in order to have a profit, it is only logical that the costs would have to be controlled. If, as Mr. Cunningham suggests, there was “no limit” to the costs, then there would have been a significant risk to both parties of there being an extremely reduced profit, or no profit at all. Surely that would not have been in either party's interests, leading to a logical inference that neither would have willingly made such a bargain.

[100] It is revealing to note here that in his closing oral submissions, the builder's counsel asserted for the first time in this litigation that, as a result of the verbal changes to the written agreement between the parties, the contract can be viewed as 'partly oral and partly in writing' and that the Development Agreement can still be relied upon for some of the terms of the contract. However, leaving aside for the moment the fact that this assertion was never pled by the builder, when I asked counsel how I am to determine which of the terms of the Development Agreement I am to enforce and which I should ignore, I did not receive an understandable answer.

(c) The application of the case law

[101] The builder's counsel relies upon the case of *Strait Construction Ltd. v. Odar*, 2006 BCSC 690, as providing the factual indicia that allow a court to distinguish fixed-price versus cost plus contracts. At paras. 17 and 18, Dorgan J. helpfully summarized the case law in this area (I have omitted the citations):

> "17 Much of the case law in this area addresses the situation where the final costs of construction are higher than the builder's estimate and the owner claims that the contract was a fixed price contract, while the contractor claims the contract was a cost plus contract.
>
> 18 I have reviewed the cases on this issue and have extracted the following factors which have been considered by the courts in determining the nature of a building contract:
>
> 1. Did the agreement provide for a percentage of the project cost as a fee to the contractor?
>
> …
>
> 2. Was price of overriding importance for the owner and was that communicated to the contractor?
>
> …

> 3. Was an estimate provided and did the owner rely on the estimate?
>
> …
>
> 4. Did the owner require the contractor to design a project at a specified cost or seek assurances as to what the project would cost?
>
> …
>
> 5 .Did the contractor pay for the materials and labour and then bill the owner on a regular basis for the work done?
>
> …
>
> 6. Did the contractor make it clear that it was not assuming any of the risk that the final price would exceed the estimate?
>
> …
>
> 7. Did the contractor provide the owner with information regarding rates for labour and equipment rental etc.?
>
> … ”

[102] In the case at bar, the majority of these questions can be answered in favour of a fixed price contract:

1. *Did the agreement provide for a percentage of the project cost as a fee to the contractor?* No, it provides for an equal division of the anticipated profits. Indeed, it would appear as if the percentage of profit cost proposal was specifically rejected by the owner in the negotiations leading up to the Development Agreement.

2. *Was the price of overriding importance for the owner and was that communicated to the contractor?* Yes, the evidence of both Mr. Shaman and Ms. Johnson, which I found to be credible, supports this conclusion.

3. *Was an estimate provided and did the owner rely on the estimate?* Yes, the builder provided both the ‘06 estimate and the information which went into the ’07 estimate. For the reasons stated above, I conclude that the owner clearly relied on both.

4. *Did the owner require the contractor to design a project for a specified cost or seek assurances as to what the project would cost?* The answer to the latter part of this question is clearly ‘yes’. While Mr. Shaman did not require Mr. Cunningham to design a project at a cost specified by him, he repeatedly sought assurances from Mr. Cunningham as to what the project would cost.

5. *Did the contractor pay for the materials and labour and then bill the owner on a regular basis for the work done?* Yes, but standing alone and in the context of all the evidence, this does not tip the balance in favour of a cost plus contract.

6. *Did the contractor make it clear that it was not assuming any of the risk that the final price would exceed the estimate?* No, the Development Agreement clearly anticipated a final budget and that any changes would have to be approved in writing by the owner.

7. *Did the contractor provide the owner with information regarding rates for labour and equipment rental, etc.?* There is evidence that the builder provided the owner with information regarding labour rates. However, once again, even combined with the answer to question five, this does not tip the balance in favour of a cost plus contract.

[103] The owner’s counsel referred to the case of *D.L.C. Electrical Inc. v. Oxford*, 2008 NSSC 157. In that case, Warner J. outlined the law regarding the interpretation of

construction contracts and in particular the rules relating to “extras”, such as the changes to the project which are at issue in the case at bar. At paras. 22, 24 and 25, Warner J. stated:

> “[22] Subject to the Statute of Frauds, a contract may be oral or in writing. It may further be a written contract, or an oral agreement evidenced by a written memorandum; in the latter instance the memorandum need not be entered into at the time of agreement. A written memorandum need not be a single document but may consist of a series of connected documents. *Goldsmith on Canadian Building Contracts*, Fourth Edition, by Immanuel Goldsmith and Thomas Heintzman (looseleaf to release 2 in 2007; Carswell) Chapter 12(c).
>
> …
>
> [24] The issue in this case is the interpretation of that contract. Both parties have referred the Court to, and asked the Court to consider, extrinsic or parol evidence in support of their interpretation of the contract.
>
> [25] In a case involving similar circumstances, *J & P Reid Developments v. Branch Tree Nursery and Landscaping*, [2006] N.S.J. No. 313, 2006 NSSC 226, this Court summarized some of the relevant principles for interpreting construction contracts at paras. 58 to 65, some of which read as follows:
>
> > “60 *Goldsmith on Canadian Building Contracts*, Fourth Edition, by Immanuel Goldsmith and Thomas Heintzman, (Carswell: 1995) summarizes the relevant principles at pages 1-38 and 1-39 as follows:
> >
> > “... the function of the court in interpreting a contract is to determine the intention of the parties as expressed in their agreement. It is not the actual intention of the parties, but the intention of the parties as they have expressed it,that is the guiding consideration.
> >
> > If the parties have expressed their intention in clear terms, there is no need to resort to rules of interpretation, and in fact it is not permissible to do so…” (my emphasis)

[104] With respect to the topic of “extras”, Warner J. continued, at para. 27:

> “A significant issue between the parties as to whether there were "extras" and if so, what they were. The seminal decision describing the nature of extras is *Chittick v. Taylor*, [1954] A.J. No. 23, 1954 CarswellAlta 43 (Alta.S.C.). At paras. 5 to 10, the Court described the rules as follows:
>
> > “[5] Generally speaking, in my opinion, the following rules should apply:
> >
> > [6] Rule 1. An item specifically provided for in the contract is not an “extra”.
> >
> > [7] Rule 2. When the plaintiff supplied material of a better quality than the minimum quality necessary for the fulfilment of the contract, without any instructions, express or implied, from the defendant do so, he is not entitled to charge the extra cost as an "extra".
> >
> > [8] Rule 3. When the plaintiff did work or supplied materials not called for by the contract (plans or specifications) without instructions, express or implied, from the defendant, or the consent of the defendant, he is not entitled to charge this additional work or materials as an “extra”.
> >
> > [9] Rule 4. When the plaintiff did work or supplied materials not called for by the contract on the instructions, express or implied, of the defendant, he is entitled to charge for additional work or materials as an "extra."
> >
> > [10] What amounted to instructions from the defendant is dependent on the circumstances relating to each item. If the defendant, without giving definite instructions, knew the plaintiff was doing extra work or supplying extra materials and stood by and approved of what was being done and encouraged the plaintiff to do it, that, in my opinion, amounts to an implied instruction to the plaintiff, and the defendant is liable.”(my emphasis)

[105] I would add to these principles by simply observing that if the builder asserts that an extra was agreed to by the owner, as a change to the written agreement, then

logically the builder should bear the onus of proving that fact on a balance of probabilities.

[106] The owner's counsel also referred to *A & A Drywall Ltd. v. Fraserview Development Corp.*, [1998] B.C.J. No. 2022 (S.C.), where Oppal J., at paras. 32 and 34, provided a synopsis of the law relating to changes to construction contracts. At para. 32, he quoted extensively from the text Goldsmith on Canadian Building Contracts, as follows:

> "[32] The law relating to the issues in this case is not in dispute. In I. Goldsmith and T.G. Heintzman's, *Goldsmith on Canadian Building Contracts*, 4th ed. (Toronto: Carswell Company Ltd. l988), the authors discussed the rights and obligations of parties where extra work which is not provided for in the contract is performed by a contractor. At 4-12, the authors state:
>
> > Contracts which entitle the owner to order extras usually contain a provision to the effect that the contractor will not be entitled to payment for extras without a written order to do such extra work signed by the architect or engineer, or some other authorized person. Compliance with such a provision, however unrealistic it may be in actual practice, is a condition precedent to payment; and a contractor who voluntarily chooses to perform such extra work without a written order, takes the risk that he may not get paid for the work. .... Whether a particular item of work is an extra or not must be determined by reference to the terms of the contract, the nature of the work and the surrounding circumstances. If, on the proper construction of the contract documents, which generally include the drawings and specifications, the item of work is one which the contractor is required to perform, it cannot be an extra, notwithstanding the fact that the contractor may have failed to realize at the time of entering into the contract that he would be required to perform such work.

> In order to be entitled to payment for an extra, the contractor must not only comply with any specific provision in the contract relating to extras, but the work must have been carried out at the express or implied instructions of the owner. A contractor who voluntarily and without instructions does additional work not required by the contract is not entitled to any extra payment therefor, unless the owner, by standing by with the knowledge of what is being done, can be held to have impliedly authorized such extra work, or unless the extra work was necessitated by a misrepresentation made by the owner.
>
> …
>
> [34] In *Dunhill Construction Ltd. v. Ledcor Industries Ltd.*, [1993] B.C.J. No. 1443 (B.C.S.C.), the Court relied on *Acme Masonry Ltd. (supra)*. Tysoe J. at para. 59 stated as follows:
>
> > Clauses in fixed price construction contracts requiring change orders for extras are critical to the integrity of such contracts. The owner or prime contractor has contracted to have the work done for a specified amount of money. If the contractor believes that an item is an extra, the owner or prime contractor should be given an opportunity to consider the situation before the work is done. It may be that if the owner or prime contractor agrees that the item is outside the scope of the work under the contract, they may not wish to spend the additional money to have the extra done. An owner or prime contractor would have no ability to control its costs if the contractor were allowed to do the work without a change order or purchase order and to make a claim for an extra after the work is completed." (my emphasis)

[107] In the case at bar, as I have already concluded, the fixed price and scope of work were agreed to through the combined effect of the Development Agreement and the '06 and '07 estimates. However, to the extent that the builder asserts there were verbal changes to that written agreement, then he must establish on a balance of probabilities that, for each extra for which he wants to be paid, there was a clear agreement between

him and the owner as to both price and the scope or nature of the particular work associated with that extra. As I conclude below, with a few specific exceptions, the builder has seriously failed in this regard.

(d) The Extras

[108] Unfortunately, the evidence regarding the extras agreed to by the parties over and above the total project cost set out in the '07 estimate is not very clear. I previously made a finding of fact that the parties agreed to the following extras (p. 50):

Deck on Building B	$10,000
Additional sink in the master ensuites, in Building B	$4,000
Furnishings for two show suites	$20,428.57
Retaining wall(s)	$25,000
Granite countertops	$62,277.51
Flooring	$19,130.47
Total	**$140,836.55**

[109] However, the owner also agreed in its Amended Statement of Defence that it intended to increase the costs over the '07 estimate by $230,000 for:

(a) 20 countertops at $3,000 each for $60,000;

(b) 20 fireplaces at $5,000 each for $100,000;

(c) retaining walls for $40,000;

(d) furniture rentals of $20,000; and

(e) a deck for Building B at $10,000.

I will attempt to deal with all of the items at issue.

1. Countertops

[110] Countertops were included as a line item in the ‘07 estimate for total of $72,000, or $3,600 per unit. However, Mr. Shaman admitted that he agreed with Mr. Cunningham to install higher-quality granite countertops at a price of $5,500 per unit over and above the ‘07 estimate. Thus, as I understand the evidence, there was to be an increase for countertops from the amount allotted in the ‘07 estimate by $110,000.[23] However, Mr. Cunningham’s evidence, with reference to the document he prepared in March 2011 regarding the project extras[24] (the builder’s “Extras” document), was that the granite countertops only ended up costing $62,277.51 more than what was allocated for this item in the ‘07 estimate. This last number is closer to the total pled by the owner in its Amended Statement of Defence. I take the builder’s evidence as an admission in this regard and that is why I previously found as a fact that the countertops are a legitimate extra costing $62,277.51 over the amount allotted for that item in the ‘07 estimate.

2. Fireplaces

[111] The evidence of the fireplaces remains a mystery. At one point in his direct examination, Mr. Shaman said that the fireplaces were an extra relative to the ‘06 estimate. That would appear to be technically correct because, although there was a line item entitled “Fireplace” in the ‘06 estimate, there was no value attributed to that item. However, in the ‘07 estimate, a total of $110,000 was attributed to this item. This may explain why Mr. Shaman then changed his direct evidence to indicate that the fireplaces were <u>not</u> an extra, because they were already in the ‘07 estimate.

[112] However, when Mr. Shaman was cross-examined, he reverted to saying that the fireplaces <u>were</u> an extra. When he was asked about conversations he had with

[23] $5,500 x 20 units = $110,000.
[24] Exhibit 1, volume 2, tab 22.

Mr. Cunningham regarding the need for separate gas meters for the propane fireplaces, he also acknowledged that Mr. Cunningham verbally indicated at one point that he estimated the price for the gas fireplaces would be $5,000 per unit. However, Mr. Shaman was not clear whether this price included the cost of the individual gas meters. In the end, Mr. Shaman conceded that he knew that the gas meters were required and he agreed to their installation, although he did not think that this would increase the cost per unit.

[113] Mr. Cunningham's evidence, again with reference to the builder's "Extras" document, was that the fireplaces ended up costing $132,000 more than the value allocated for fireplaces in the '07 estimate.

[114] Given that I have found this to be a fixed price contract, the more extras that the builder can establish as having been agreed to, the better off it will be for him, as this will result in an increase in the total fixed price of the project. In other words, it is in the builder's interest to establish on a balance of probabilities the maximum number of extras agreed to between the parties. In that regard, and given the uncertainty of Mr. Shaman's evidence on the point, it seems fair to accept Mr. Cunningham's evidence that the actual amount agreed to by the parties as an extra for the fireplaces was $132,000 over the '07 estimate.

3. Retaining wall(s)

[115] With respect to the retaining wall(s), Mr. Shaman admitted in direct examination that this was an extra which he discussed with Mr. Cunningham and ultimately authorized. However, he also said that he thought it was an item in the '07 estimate at a value of $12,000. My review of the '07 estimate indicates that this not the case. Mr.

Shaman admitted that later in 2008 he learned that the retaining wall ended up costing $25,000, which is the builder's evidence in its "Extras" document. Yet, that number does not correspond with the $40,000 pled by the owner in its Amended Statement of Defence for this item.

[116] In the result, given the uncertainty in the evidence, it would seem fair to treat the amount pled for this item by the owner as a judicial admission, but only to the extent claimed by the builder, i.e. $25,000. Accordingly, at para. 71, item 42 above, I found that the parties agreed to a value of $25,000 for retaining wall(s), over and above the '07 estimate.

4. Furnishings

[117] With respect to the furnishings purchased by the parties for the show suites, Mr. Shaman acknowledged in his direct examination that he was aware of the amount and agreed to it. At that point he was being examined about the builder's "Extras" document, which indicates a value of $20,428.57 over and above the '07 estimate. I did not hear Mr. Shaman disagree with this amount and accordingly I have accepted it as a legitimate extra.

5. Deck on Building B

[118] With respect to the new deck or balcony for Building B, the evidence of Mr. Shaman and Mr. Cunningham fortunately coincides. Mr. Shaman agreed that he was told by Mr. Cunningham that this item would cost an additional $10,000 over and above the '07 estimate. That is also the same number which Mr. Cunningham listed in his "Extras" document. Therefore, I have no difficulty in concluding that this is a legitimate extra in that amount.

6. Additional sinks

[119] An additional item about which Mr. Shaman gave inconsistent evidence is referred to as “an Additional sink in master en suite of all units in building B” in the builder's “Extras” document, with a total value of $4,000 over the ‘07 estimate. When asked about this in direct examination, Mr. Shaman indicated that he agreed with it, but did not recall if he was told of the amount by Mr. Cunningham. However, in cross-examination, Mr. Shaman was asked by the builder’s counsel about “undercounter sinks” and stated that he never had a conversation with Mr. Cunningham about those and did not even know what they were. Given the lack of a clear denial by the owner on this point, I have found that Mr. Shaman’s initial admission supports the conclusion that he agreed on the item of additional sinks for total of $4,000 over the ‘07 estimate.

7. Flooring

[120] Mr. Shaman testified in direct examination that this was an “add on” which he agreed to, but that he was “not really” told the cost of the extra by Mr. Cunningham. Given his uncertainty on the point, I am prepared to accept Mr. Cunningham’s evidence that this was a legitimate extra in the amount of $19,130.47.

8. Total extras

[121] No other extras were acknowledged by Mr. Shaman as having been agreed to with Mr. Cunningham. Thus, given my concerns about Mr. Cunningham's credibility, with the very few exceptions which I have just addressed above, where the evidence of Mr. Shaman conflicts with that of Mr. Cunningham on the topic of extras, I prefer the evidence of Mr. Shaman.

[122] To summarize, I find the following to be legitimate extras over and above the ‘07 estimate:

Countertops	$62,277.51
Fireplaces	$132,000
Retaining wall(s)	$25,000
Furnishings	$20,428.57
Deck on Building B	$10,000
Additional sinks	$4,000
Flooring	$19,130.47
Total	**$272,836.55**.

[123] The total project costs in the ‘07 estimate were $4,541,392.20. The total extras increase that amount to $4,814,228.75. Having found that this project was governed by a fixed price contract, which was only amended to the extent of the legitimate extras agreed to by the parties, any project costs exceeding $4,814,228.75 are the responsibility of the builder.

[124] It appears to be undisputed that the total of the advances paid by the owner to the builder over the course of the project was $5,126,000. Therefore, on its face, it would appear that the owner has overpaid the builder by $311,771.25.

(e) The remaining items in dispute

[125] A number of items remain in dispute regarding the final calculation to determine if there is any profit from the project to be shared equally between the parties. I will attempt to deal with each in turn. However, I regret to say that I did not find the submissions of either counsel on the question of damages to be particularly helpful. It seemed at times as if both parties had put most of their time and energy into arguing the merits of their respective positions on liability and that, when we got to the issue of

damages, some of the arguments appeared to be more in the nature of afterthoughts. Perhaps the best example of this concern is the question of interest owing to the owner under the Development Agreement.

1. Interest owing to the owner

[126] Section 3.0(b) of the Development Agreement, reads as follows:

> "… The Owner shall be reimbursed for the Cost of Work paid to the Builder on the Additional Costs, together with 12% on such sums calculated from the date of disbursement."

[127] The chart put forward by the builder's counsel is in its "Written Argument" filed November 10, 2011, at Tab 13, and it indicates a total of $588,598.28 owing to the owner for interest. However, as I had some questions on this and other particulars regarding damages, I invited the builder's counsel to provide me with further information following the closing submissions by both counsel on the last day of trial. The builder's additional submissions were filed on December 12, 2011 in a document entitled "Judge's Requests of the Plaintiff". Attached to those submissions was a revised interest calculation, with a new total of $655,468.41, an increase of $66,870.13 from the earlier number. The only justification for the increased total was a one line statement that the adjustment was done "to include the proper dates when the holdback amounts were received by 37889." However, as I recall little or no discussion on the final day of trial about the question of when "holdback amounts" were deemed to be received by the owner, the explanation means little to me.

[128] I encountered similar problems with the owner's interest calculations. During the trial, Ms. Johnson testified about a document she prepared to reflect the proper amount of interest owing. This is found in Exhibit 1, Volume 4, Tab 142(b). Ms. Johnson pointed

out that the last five entries from March 5 to June 8, 2010 were not related to the project. Accordingly, if I deduct the interest entries for those last five dates, the total amount of interest claimed by the owner is reduced from $770,989.87 to $737,789.74. However, attached to the “Closing Submissions” of the owner’s counsel, filed November 15, 2011, is a revised interest calculation prepared by the owner. Remarkably, it still includes the entries from March 5 to June 8, 2010 plus an additional entry for June 30, 2010 (but without an amount claimed), now claiming a total of $790,877.06. I was unable to discern any explanation for the substantial difference between the two documents. If I assume that the last six entries in the document attached to the owner’s “Closing Submissions” should be subtracted from the stated total, the amended total would become $756,550.17. However, this still leaves a difference of $18,760.43 between the document discussed by Ms. Johnson and the document tendered in the “Closing Submissions”, again without any explanation.

[129] With this background, I will do my best to try and come to a determination on the question of interest owing to the owner under the Development Agreement. As I understand the owner’s “Further Submissions” filed December 14, 2011, it is inappropriate for the builder to use gross revenues from the sale of the condo units, inclusive of GST, as a credit to the owner for the purposes of calculating interest due under the Development Agreement. While there was some evidence about the question of GST at trial, from my perspective and limited knowledge of the issue, it was left dangling. In any event, it seems logical to me that any GST associated with the sale of the condo units should <u>not</u> be included as revenue, because I understand that those amounts are effectively received from the purchasers and then forwarded to the Canada

Revenue Agency in due course. In other words, it is my understanding that the owner does not benefit from the GST component of the condo sales.

[130] What was referred to alternatively at the trial as the “GST Rebate” or the “New Home Owner’s Rebate”, is a different animal from the simple GST component of the condo sales. As I understand the evidence, this is capable of being considered legitimate revenue in the owner's hands, but not at the date of receipt. That is because section 2.1 of the Development Agreement provides in the penultimate paragraph:

> “The Owner and Builder agree that a reserve in the sum of equal to the goods and services tax rebate for the Project shall be set aside to cover any home warranty costs that may be incurred after the sale of the condominium units of the Project (the “Warranty Reserve”). The Warranty Reserve shall not be dispersed in accordance with section 3.0 hereof until the warranty period has expired.”

[131] I do not recall any evidence as to the length of the warranty. However, it is probably reasonable to speculate that it would have been about a year or two. Further, it would appear from the builder’s interest calculation document dated December 12, 2011, that the condominiums were sold over the period from June 20, 2008 to October 27, 2009, although one sale collapsed and another condo unit remains unmarketable. Thus, it is probably safe to assume that the warranty periods for the condo sales had expired by the time of trial and that the owner should now be credited with having received the total of the New Home Owner’s Rebates as revenue from the project. Having said that, as I indicate below under “Total Condo Sales”, the exact amount of the total for the New Home Owner’s Rebate is not clear.

[132] In an effort to put some closure to this issue, I largely accept the approach of the owner's counsel to the determination of the amount of interest properly owing to the

owner under the Development Agreement. I refer once again to the document attached as Tab 2 to the owner's "Closing Submissions" and rely upon the points of clarification in the owner's subsequently filed "Further Submissions" with one exception - the New Home Owner's Rebate should be considered revenue to the owner, assuming the warranty period has expired. Also, given the evidence of Ms. Johnson about the entries from March 5 to June 8, 2010 being unrelated to the project, those should be deducted from the total indicated on Tab 2. That would leave a balance owing of $756,550.17, subject to any adjustment that may be necessary for the total of the New Home Owner's Rebates.

2. Owner's legal fees

[133] There was a further dispute between parties regarding the proper amount of legal fees which could be claimed by the owner as "Additional Costs" under the Development Agreement. The Agreement provides, at subsections 2.2(a) and (c) that the owner shall be reimbursed certain legal fees prior to the calculation of profit on the project. Those are defined as:

> "(a) legal fees relating to the creation of the condominium corporation and the sales of the condominium units of the Project
>
> …
>
> (c)…legal fees… associated with the sale of each and every condominium unit of the Project."

[134] The builder's counsel complains that the legal fees claimed by the owner are those set out in Exhibit 16, being a document entitled "Lansing Point – Project Reconciliation Oct 2010". He suggests that some of these legal fees are improper because they are not related to the creation of the condominium corporation or sales of

the condominium units. However, it once again appears that counsel have failed to join issue on this question. The actual legal fees claimed by the owner are set out in an attachment to the owner's "Closing Submissions", and were attached again to the owner's subsequently filed "Further Submissions". Those legal fees total $21,814.69 and are referenced specifically to documents in Exhibit 1, which I have reviewed. I am satisfied that all the legal fees claimed relate to either the creation of the condominium corporation or sales of the condominium units and are therefore proper "Additional Costs".

3. Total condo sales

[135] A further dispute between the parties involved the correct calculation of the total value of the sales of the condominium units. This is, of course, relevant to the question of whether there was ultimately any profit to be shared on the project. The document relied upon by the builder was attached as Tab 11 to its "Written Argument" and shows total sales of $7,156,500 (incl. GST) and $6,911,342.67 (w/o GST). However, on the final day of trial, the builder's counsel was unable to explain to me precisely what the source of the information in the document was. In his subsequently filed "Judge's Requests of the Plaintiff", the builder's counsel confirmed that the information used to generate this table was obtained from the various vendors' statements of adjustment and invoices for real estate fees, as well as the lawyers' accounts for the sales, all found in Exhibit 1. The owner's counsel disputes the total gross value of $7,156,500 proffered by the builder's counsel, because it includes GST. For the reasons I stated above, I agree, with the exception of the New Home Owner's Rebate. Thus, the total value of the sales should be reduced to $6,911,342.67.

[136] The total of the New Home Owner's Rebates should be properly treated as revenue in the owner's hands. However, once again, the state of the evidence and the submissions from the builder's counsel leaves me unassisted and confused. In Tab 11 of the builder's "Written Argument", the total of the rebates is shown as $101,778.02. Yet, in the revised interest calculation attached to the builder's "Judge's Requests of the Plaintiff", filed subsequently, the total rebates listed only come to $48,311.32[25], with no explanation for the considerable difference. Given this large disparity, I am unable to make a determination on this issue. My conclusion below assumes either one or the other number is correct.

[137] This issue also relates to the calculation of interest owing to the owner.

[138] Hopefully, counsel can sort this out and, if not, they can return before me for directions. The principle should be clear – the total of the rebates is to be treated as part of the revenue of the owner from the condo sales, assuming the warranty period has expired.

4. Total "Additional Costs"

[139] There was a further dispute between the parties as to the proper amount of total Additional Costs to be reimbursed to the owner prior to the calculation of profit, if any. The document relied upon by the builder's counsel was attached as Tab 12 to his "Written Argument", which shows a total of $227,451.07 (incl. GST). However, on the final day of trial, the builder's counsel was unable to specifically direct me to the source of the information in that table. He subsequently directed me to the document I just referred to above as Exhibit 16.

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[25] The total of those items in the second column entitled "rebate".

[140] The document relied upon by the owner's counsel was attached as Tab 1 to his "Closing Submissions", but was scarcely referred to by him in either his written or oral argument. The total of those expenses at that time were $752,115.91. The owner's counsel subsequently filed a revised table of the Additional Costs in his "Further Submissions", which acknowledged an error in the inclusion of GST totalling $345,567.40. The revised amount is now proffered to be $406,548.41. All of the line items on the revised table are supported by documents in evidence[26], and I accept the revised total $406,548.41 as the proper one.

5. Cost of the land

[141] A further dispute between the parties regarding the calculation of profit, if any, relates to the cost of the land for the project. There is evidence that the owner purchased the land for the project in 2005 for $210,000. As I recall, Mr. Shaman testified in cross-examination that there were some additional survey and other related costs which resulted in the parties agreeing that the value of the land would be set at $250,000. This agreement is reflected in both the '06 and '07 estimates, as well as virtually every other progress report prepared throughout the course of the project.

[142] The builder's counsel points to what was referred to as the "per door cost" provision in the Development Agreement, at section 3.0(c), which provides that, prior to the equal division of profit:

> "…the Owner shall be paid the sum of Thirty Five Thousand Dollars ($35,000.00) per condominium unit of the Project;"

The builder's counsel argues that "this charge is clearly intended to compensate 37889 for providing the Lands, and it is for that reason that the cost of the Lands is not

[26] Exhibit 1.

included as a part of the “Additional Costs” to be paid to 37889."[27] Thus, argues counsel, the cost of the land should not be included in the calculation of the profit for the project.

[143] The flaw with this argument is that it is entirely unsupported by any evidence whatsoever as to the intention of the parties. Indeed, it is contrary to Mr. Cunningham's own document, the ‘06 estimate, which clearly includes the cost of land in the calculation of anticipated profit at that time. A similar approach was also taken in the ‘07 estimate, which Mr. Cunningham reviewed and approved of, as his letters to the owner's bank indicate. Accordingly, I agree with the owner's counsel that the argument amounts “to nothing more than conjecture”, and I accept that the cost of the land should be reimbursed to the owner prior to the calculation of profit for the project.

6. The unsold condo

[144] The builder’s calculation of total revenue for the project includes the value of one of the condominium units which remains unsold. There was evidence that the building in which this unit is contained is shifting on its foundations, which has resulted in cracks in the walls of the unit, rendering it presently unmarketable. Once again, scant attention was paid to this issue either in evidence or by counsel in their closing submissions. However, it seems logical that if the unit is unmarketable, it cannot be considered a present benefit in the hands of the owner. I therefore conclude that its value should not be included in the total revenue for the project.

7. The furniture in the show suites

[145] The builder’s counsel argues that this furniture, which was initially rented and then subsequently purchased by the parties, and which he values at $20,000, should be

[27] Builder’s “Written Argument”, filed November 10, 2011, para. 122.

included as part of the revenue for the project. Precisely where that number came from is not immediately apparent to me. It does not appear in Exhibit 16 or in the ‘07 estimate, although it does appear in paragraph 9(d) of the owner’s Amended Statement of Defence as “furniture rentals”. Yet again, little or no attention was paid to this issue by counsel either in evidence or in their submissions. The owner's counsel simply suggests that the furniture “can only be classified as a depreciating asset whose book value is probably negligible”. I agree. The value of the furniture is not to be added to the total revenue for the project.

8. Owner’s bookkeeping and accounting fees

[146] The builder’s counsel argued that the bookkeeping fees paid by the owner to Chris Johnson totalling $97,785.23 should not be recoverable by the owner as an Additional Cost under the Development Agreement. Again, unless I missed something in their submissions, it once again appears that counsel failed to join issue on this point. I do not understand the owner's counsel to be claiming this expense prior to the calculation of profit. Therefore, it appears to be a non-issue.

[147] The same can be said of the concerns of the builder’s counsel regarding “Professional Fees – Accounting” in the amount of $12,061.51. Although this number appears in Exhibit 16, I do not understand the owner's counsel to be arguing that it should be reimbursed to the owner prior to the calculation of profit. Thus, it is also a non-issue.

9. Builder’s claim for rent

[148] The builder’s counsel included a claim for rental income for condo unit #6 for six months at $1,700 per month over the period from October 2009 to March 2010, during

which time Mr. Shaman was residing in the unit. The builder's counsel submits that a total of $10,200 for this alleged rent should be accounted for as revenue for the project in order to determine whether there is any profit to be split. It is my understanding that this claim only appears in the document at Tab 12 of the "Written Argument" of the builder's counsel, however the argument for this particular claim does not appear in the "Written Argument" itself. I do not recall it being touched upon during the oral submissions either. Thus, the claim appears to have been 'thrown in' at the last minute by counsel without any justification. It is also not contained within the builder's pleadings and for that reason alone it is improper. Accordingly, the claim is disallowed.

10. Improper charges by the builder

[149] If I am wrong in finding that this was, and remained, a fixed price contract throughout, I would nevertheless reduce the amount of the builder's claim for its outstanding invoices totalling $679,093.54 by the following:

a) Interest charges of $89,312.71, which were neither authorized by the Development Agreement or otherwise;[28]

b) Overcharges by the builder on payroll in the amount of $100,335.75, as stipulated in the owner's memorandum dated May 30, 2009;[29]

c) Payroll adjustments of $3,527.11, acknowledged by the builder; and

d) Duplication of invoices from the builder totalling $28,201.52, again acknowledged by the builder.

Total: $221,377.09.

[28] See para. 71, item 38, above.
[29] See para. 71, item 38, above.

[150] Therefore, assuming that this was cost plus contract, the total amount which the builder could possibly claim would be the value of its outstanding invoices in the amount of $679,093.54, less the total of the improper charges of $221,377.09, leaving a remainder of $457,716.45.

5. CONCLUSION

[151] The following conclusions are with reference to the pleadings filed by the parties:

1. The builder's claim for unpaid Cost of Work in the amount of $679,093.54 is dismissed;
2. The builder's claims for an accounting from the owner for the Additional Costs and the builder's share of the profits are set out below;
3. The builder's claim for enforcement, realization and validation of its claim of lien is dismissed, although it is technically moot;
4. The owner's counterclaim for damages for the amount of interest it paid to its banker since September 30, 2007 has not been made out;
5. The owner's counterclaim for damages for the loss of the sale of a number of the condominium units on the project, because of late completion, has not been made out;
6. The owner's counterclaim for an order vacating the claim of lien registered against the title to the project is granted;
7. The owner's counterclaim for damages for monies had and received by the builder in excess of the final fixed price agreed to by the parties, inclusive of extras, is granted, calculated below as "Overpayment by owner";

8. The owner's counterclaim for damages from the builder for overpayments relating to interest charges and payroll charges is granted, calculated below as "Improper charges by builder";

9. The owner's counterclaim for damages for misrepresentation has not been made out; and

10. The owner's counterclaim for prejudgment interest is granted, and shall be calculated pursuant to the *Judicature Act*, R.S.Y., 2002, c. 128.

[152] My calculations of the final damages are as follows:

Total Project Revenues:		
Condo Sales:	$6,911,342.67	$6,911,342.67
Total New Home Owner's Rebates (assuming either):	101,778.02	48,311.32
Total Revenues	**7,013,120.69**	**6,959,653.99**
Less:		
Cost of Work (paid by owner per fixed price contract, plus agreed extras)[30]	4,814,228.75	4,814,228.75
Interest due to Owner (12%)[31]	756,550.17	756,550.17
Per door condo fees due to owner ($35,000 x 19 units)	665,000.00	665,000.00
Cost of Land	250,000.00	250,000.00
Overpayment by owner[32]	311,771.25	311,771.25
Improper charges by builder	221,377.09	221,377.09

[30] See para. 123 above
[31] See para. 128 above
[32] See para. 124 above

Attic insulation[33]	13,673.84	13,673.84
Insurance paid by the owner[34]	47,814.36	47,814.36
Total Costs	**$7,080,415.46**	**$7,080,415.46**
Profit (Loss)	**($67,294.77)**	**($120,761.47)**

[153] Thus, based upon my findings of fact above and these calculations, there is no profit to be shared between the parties.

[154] Costs would ordinarily follow the event in favour of the owner. However, as I did not specifically hear any submissions from counsel on the point, I decline to make an order at this time. If there is disagreement, I will remain seized for the purpose of determining this issue, and any others that may arise from these reasons.

GOWER J.

[33] See para. 71, item 36, above
[34] See para. 71, item 37, above