COURT OF APPEAL FOR YUKON

Citation: *Kareway Homes Ltd. v. 37889 Yukon Inc.*, 2013 YKCA 4

Date: 20130312
Docket: 11-YU694

Between:

Kareway Homes Ltd.

Appellant
Respondent on cross appeal
(Plaintiff)

And

37889 Yukon Inc.

Respondent
Appellant on cross appeal
(Defendant)

Before: The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Hinkson
The Honourable Mr. Justice Harris

On appeal from: Supreme Court of Yukon, February 17, 2012
(*Kareway Homes Ltd. v. 37889 Yukon Inc.*, 2012 YKSC 10, Whitehorse Docket No. 09-A0095)

Counsel for the Appellant:	J.R. Tucker, S.W. Lesiuk, C.S.S. Immega
Counsel for the Respondent:	M.D. Tatchell
Place and Date of Hearing:	Whitehorse, Yukon November 8–9, 2012
Place and Date of Judgment:	Vancouver, British Columbia March 12, 2013

Written Reasons by:
The Honourable Mr. Justice Hinkson

Concurred in by:
The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Harris

Reasons for Judgment of the Honourable Mr. Justice Hinkson:

[1] On February 17, 2012, a Justice of the Supreme Court of Yukon granted an order dismissing the appellant's claim for the cost of work performed on a condominium project in Whitehorse, Yukon, in excess of what the judge found to be a fixed price for the contract. The judge also allowed the respondent's counterclaim for the repayment of monies paid to the appellant in excess of the fixed price for the contract and for overpayments relating to interest charges, together with interest pursuant to the *Judicature Act*, R.S.Y. 2002, c. 128. The judge also allowed the respondent's counterclaim for an order vacating the claim of lien registered against the title to the project. His reasons for judgment are indexed at 2012 YKSC 10.

[2] The appellant filed an appeal from that order, and the respondent filed a cross appeal.

Background

[3] The trial arose from a dispute involving the development of a two-building condominium complex in Whitehorse over the period from 2006 to 2009 (the "Project"). The trial judge referred to Wayne Cunningham, the principal of the appellant Kareway Homes Ltd., as the Builder, and to Alex Shaman, the principal of the respondent 37889 Yukon Inc., as the Owner, and I will do so as well.

[4] At trial, the appellant maintained that the parties had agreed to a contract which was partly in writing and partly oral and was in the nature of a 'cost plus' contract, and that all of the extras charged to the Project were agreed to by the Owner. The appellant sought some $600,000.00 over what it had been paid by the respondent.

[5] The respondent maintained that the contract was a 'fixed price' contract, and that the appellant significantly exceeded the ultimate fixed price agreed upon, resulting in a significant overpayment of some $750,000.00 by it to the appellant.

[6] At paras. 2 – 4 of his reasons, the trial judge described the genesis of the project:

> [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.
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> [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.
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> [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.

[7] The trial judge found that when the construction did not commence as expected, the parties agreed to amend their agreement, as set out in a fax dated March 7, 2007 from the Builder's lawyer to the Owner's lawyer:

> 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 start up date of approx. April 1, 2007 at project completion date of approx. December 31, 2007. As well, our client advised 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 $100K was not to be held back pending the completion of the "Scope of Work" schedule. He will be contacting Alex directly to discuss this matter.

Decision of the Trial Judge

[8] Before setting out his findings of fact, the trial judge explained at paras. 69 – 70 of his reasons that his findings were largely dependent upon his assessment of the credibility of the witnesses:

> [69] ... 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.
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> [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.

[9] The trial judge then listed his findings of fact at para. 71 of his reasons. While they are lengthy, I have reproduced these findings for ease of reference:

> 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.
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> 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.
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> 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.
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> 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.
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> 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:
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> (a) two buildings housing 10 condo units apiece;
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> (b) the dimensions of each building would be 35 feet in height, 60 feet wide, 130 feet long;
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> (c) each condo unit would have two bedrooms and a den, with an attached two-car garage;
>
> (d) the target markets were seniors, professional single people or young couples with no children; and
>
> (e) the buildings would be oriented towards the east side of the property.
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> 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. 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 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."

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". 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 it 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.
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> 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.
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> 41. The within action was commenced by the builder on November 25, 2009.
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> 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:
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> > "Extra balcony in Building B at $10,000
> >
> > Additional sink in the master en suites, in Building B at $4,000
> >
> > Furnishings for two show suites at $20,428.57
> >
> > Retaining wall at $25,000
> >
> > Granite countertops at $62,277.51
> >
> > Flooring at $19,130.47."
>
> [Emphasis by the trial judge.]

[10] The trial judge reasoned that in order for him to conclude that the Development Agreement had been amended to become a cost plus contract, he would need to be presented with clear and convincing evidence to that effect (*Domco Construction Inc. v. Aliva Holdings Inc.*, 2003 SKQB 506). He held that not only had the appellant failed to adduce such evidence, but that a host of extrinsic evidence also supported his conclusion that the parties intended to create a fixed price contract. At para. 99 he listed the following evidence in support of this finding:

> 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 the 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.

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 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 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."
>
> 11. [sic] 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.
>
> [Emphasis by the trial judge.]

[11] The trial judge found that the parties agreed to a fixed price contract, through the combined effect of the Development Agreement and the '06 and '07 estimates and based his disposition of the competing claims on that finding. He dismissed the appellant's claim for the unpaid cost of work and granted the respondent's counterclaims for an order vacating the claim of lien registered against the title to the Project; damages for the overpayment by the respondent to the appellant in excess of the final fixed price; damages for overpayments relating to improper interest and payroll charges by the appellant; and prejudgment interest calculated pursuant to the *Judicature Act*.

Issues on Appeal

[12] On its appeal from the order of February 17, 2012, the appellant contends that the trial judge erred in law, or in mixed fact and law:

a) in deciding that the parties agreed on a fixed price for the project;

b) in his interpretation and application of the profit provisions of the contract between the parties;

c) in allowing some agreed upon extras on a cost-only basis;

d) in interpreting the contract between the parties to exclude interest charges in favour of the appellant;

e) in increasing the cost of the project by the amount paid for insurance by the respondent; and

f) in his calculation of the additional costs under the contract between the parties.

[13] On its cross appeal the respondent contends that in assessing its overpayment to the appellant, the trial judge made a palpable and overriding error by failing to include substantial cost items which had already been included in the fixed price contract.

Standard of Review

[14] Findings of fact by a trial judge will not be overturned absent palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at 245.

[15] The determination of questions of mixed fact and law by a trial judge involve applying a legal standard to a set of facts. A finding of mixed fact and law, once the facts have been established without overriding and palpable error, is to be reviewed on a standard of correctness. As Iacobucci and Major JJ., for the majority of the Court set out in *Housen* at p. 262:

> To summarize, a finding of negligence by a trial judge involves applying a legal standard to a set of facts, and thus is a question of mixed fact and law. Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule, as stated in *Jaegli Enterprises*, supra, is that, where the issue on appeal involves the trial

> judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

[16] The standard of review for alleged errors of law is that of correctness: *Housen* at p. 247. The interpretation of a contract is a question of law, and is thus to be reviewed on the standard of correctness: see *269893 Alberta Ltd. v. Otter Bay Developments Ltd.*, 2009 BCCA 37.

Discussion

The Nature of the Contract

[17] The appellant contends that the parties agreed to a cost plus contract, and that the trial judge erred in finding otherwise. Its submission on this point invites this Court to make findings of fact other than those made by the trial judge.

[18] The appellant contends that the Development Agreement does not have the characteristics of a fixed price contract. It says that the respondent was responsible for all the construction costs, which is consistent with a cost plus contract. It also points to the fact that the respondent had the contractual right to review invoices and that it went to great lengths to do so.

[19] As set out above, the trial judge found that the Development Agreement in this case was unique to the Builder's experience. The appellant concedes that the Development Agreement is "not a typical costplus [sic] contract", but contends that its entitlement to some of the profits from the Project is inconsistent with a fixed price contract. The trial judge was not persuaded that there was such an inconsistency and I am of the view that he was correct in that finding.

[20] In my view, the fact that the respondent monitored and reviewed invoices does not warrant the conclusion that the contract was for other than a fixed price. As indicated at para. 71.22(a) above, the trial judge accepted that the Builder mismatched some of the expense categories on the invoices with those in the '06 estimate, as a partial explanation for some of the confusion over the invoices

submitted by the Builder, and the trial judge accepted that only some of the extra costs claimed by the Builder were in fact accepted by the Owner.

[21] By September of 2007, the Owner had exhausted his planned personal investment of approximately $1,900,000.00 and had begun to turn to bank financing to fund the Project. By this time the Owner turned an even sharper eye to the Builder's invoices, as obliged to do by his bank.

[22] The appellant also contends that the respondent's ongoing responsibility to pay the Project costs suggests that the Development Agreement is not a fixed price contract. The fact that the Development Agreement provides for payment of the appellant's regular accounts, as opposed to providing for a progress draw, could support the argument that the Development Agreement is a cost plus contract. However, the trial judge did not see it that way, and I conclude that he was correct in this regard. Although he gave other reasons for finding that the respondent's payments of the appellant's accounts did not sustain the argument that the contract was a cost plus contract, the trial judge set out and accepted several features of the accounting arrangement which supported the finding of a fixed price contract, including:

> [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.

[23] The appellant points out that the Development Agreement did not include a "scope of work" or budget at the time it was entered into. It says that specifications are essential to establishing a fixed price contract, and that the lack thereof also supports the finding that the Development Agreement is a cost plus contract. I agree with the trial judge on this point, who explained at para. 76 of his reasons 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".

[24] In my opinion, these findings were open to the trial judge on the evidence before him. The wording of the Development Agreement was consistent with a fixed price contract, and the trial judge so found. I find that he was correct in his treatment of this wording.

[25] The appellant also contends that the trial judge misapplied the law regarding the characterization of a construction contract as either fixed price or cost plus. At para. 101, the trial judge set out the factors from *Strait Construction Ltd. v. Odar*, 2006 BCSC 690 at para. 18, that a court may use to help determine 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.?

[26] The trial judge considered each factor in light of the case before him, and determined that the majority supported the finding that the Development Agreement was a fixed price contract.

[27] The trial judge also considered the principles discussed in *D.L.C. Electrical Inc. v. Oxford*, 2008 NSSC 157; *J & P Reid Developments v. Branch Tree Nursery and Landscaping*, [2006] N.S.J. No. 313, 2006 NSSC 226; *Chittick v. Taylor*, [1954] A.J. No. 23, 1954 CarswellAlta 43 (Alta. S.C.); *A & A Drywall Ltd. v. Fraserview Development Corp.*, 40 C.L.R. (2d) 105, [1998] B.C.J. No. 2022 (B.C.S.C.); *Dunhill Construction Ltd. v. Ledcor Industries Ltd.*, 9 C.L.R. (2d) 134, [1993] B.C.J. No. 1443 (B.C.S.C.); and I. Goldsmith and T.G. Heintzman's, *Goldsmith on Canadian Building Contracts*, 4th ed. (Toronto: Carswell Company Ltd. 1988).

[28] In this Court, the appellant contends that the trial judge erred in his application of the principles set out in *Strait Construction* because there was no written agreement at all in that case. The use made of the decision in *Strait Construction* by the trial judge was to make findings of fact to assist him in determining whether the contract was for a fixed price with profit sharing or for cost plus with profit sharing. I am unable to see that he erred in this use of the decision in *Strait Construction*.

[29] The appellant further contends that a number of the findings of fact by the trial judge are contrary to a fixed price contract, and are consistent with the respondent's obligation to pay for all of the construction costs. I see no purpose in listing each of

the findings relied upon by the appellant in support of this contention. The examples relied upon by the appellant pertain primarily to the respondent's ongoing monitoring of the construction costs, and protests over some fee items and costs that it resisted.

[30] The appellant contends that the trial judge erred in finding that the appellant had improperly overcharged the respondent by $221,337.09. It says that this ruling is inconsistent with his finding that the Development Agreement is a fixed price contract because the only consideration for such a contract is the price, not the validity of charges. I am unable to agree that there is any such inconsistency. The trial judge correctly found that the parties agreed to a fixed price contract, and the calculation of that price varied by the agreement of the parties to accommodate what they had not anticipated when the original budget was agreed to.

[31] Finally, the appellant points out that the Development Agreement provides that it will be paid by the respondent for the cost of work "without limitation". It contends that the trial judge misapprehended the effect of the relevant and admissible evidence to the issue of the meaning of cost of work and imposed a limitation that was never agreed upon by the parties.

[32] The respondent contends that the term "cost of work", which is defined in the Development Agreement, includes work already performed and points as well to the definition of "Additional Costs" in the Development Agreement. It also points out that s. 2.4 of the Development Agreement provides:

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

[33] The trial judge referred to ss. 2.4, 8.0, and 9.0 of the Development Agreement. He summarized s. 8.0 as providing that any changes to the project must be consented to in writing, and s. 9.0 as providing 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. He concluded that "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".

[34] Clause 12.2 of the Development Agreement provides that in the event of default by the respondent, the appellant is entitled to be paid for all work performed together with a percentage fee, or a proportionate part of the profit to be calculated in accordance with the Development Agreement, taking into account the percentage completion of the Project as at the date of the termination. The appellant contends that this clause is inconsistent with a fixed price contract. The clause was inoperative in this case, as the appellant stopped work, and the trial judge found that the respondent did not default. However, even if the clause had become operative, it is simply the means by which the parties agreed to compensate the appellant, which may not be the same basis as they agreed that the appellant would be compensated if the Project was completed or the appellant stopped work.

[35] The trial judge found that the numbers in the preliminary budget were those of the 2006 estimate and came from the Builder, and that the Builder understood that the Owner expected "strict control on costs" in the project. He also found that the Builder knew that the Owner would rely upon the proposed construction schedule in the Development Agreement, and that the Owner expected the Builder to be reliable in terms of that time estimate.

[36] The appellant contends that because the trial judge found no ambiguity in the contract to warrant the introduction of parole evidence, he could not rely upon the later 2006 and 2007 estimates to find a fixed price contract. The appellant's position is that the Development Agreement contains an "entire agreement clause" and that the trial judge therefore erred in using extrinsic evidence, such as the Owner's reliance on the budget and third party perspectives, to interpret the contract.

[37] The appellant refers to *Davidson v. Allelix Inc.,* [1991] O.J. No. 2230, 7 O.R. (3d) 581 at 587, and *Eli Lilly & Co. v. Novapharm*, [1998] 2 S.C.R. 129, for the proposition that it is a fundamental rule of contractual interpretation that the intention of the parties is to be determined as of the time when the contract was made.

Accepting, without deciding that the rule is as stated by the appellant, I am unable to see how the trial judge could be said to have transgressed such a rule. He considered the intention of the parties in February 2007 when the Development Agreement was signed. He concluded that the parties intended to create a fixed price contract, as reflected by the terms of the Development Agreement, and that the actual price was to be based upon the 2006 and 2007 estimates, respectively, as the original and final budgets (also referred to by the trial judge as the pre-budget and working budget) for the Project.

[38] I am unable to see how it could be said that the trial judge failed to determine contractual intent by reference to the words the parties used in drafting the document as required by *Eli Lilly & Co. v. Novapharm*. The judge adverted to the words of the Development Agreement as the basis for his findings. He committed no error in so doing. The fact that the appellant is able to point to other words in other parts of the Development Agreement that on one view might be seen as contrary to a more conventional fixed price agreement does not detract from the trial judge's analysis. The Development Agreement was the result of the best drafting efforts of the parties at the time it was signed, and its wording is not entirely consistent with a cost plus contract. The trial judge had to choose between the contending positions of the parties, and did so.

[39] While I accept the appellant's submission that, absent ambiguity, the parties' pre and post-contractual negotiations and conduct should not be considered in interpreting their contract, I do not consider the trial judge's references in para. 99 of his reasons to be an effort to resolve the terms of the contract between the parties. It must be remembered that it was the plaintiff who asserted at trial that the contract had been modified by the parties' conduct. While the trial judge referred to this and other evidence at para. 99 of his reasons, it was in response to the appellant's submission at trial that the Development Agreement was subsequently amended to a cost plus contract by the conduct and/or communications of the parties.

[40] At para. 107 of his reasons, the trial judge found that the appellant had not met its onus of establishing on a balance of probabilities that the Development Agreement had been so amended:

> 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.

[41] The appellant has demonstrated no palpable or overriding error or any failure to consider a required element of a legal test of contractual interpretation, or similar error in principle, on the part of the trial judge. The trial judge was correct in concluding that the parties agreed upon a fixed price and scope of work contract with profit sharing if a profit was realized, through the combined effect of the Development Agreement and the 2006 and 2007 estimates. I would not accede to this ground of appeal.

Quantum Issues

[42] The remaining issues on this appeal and cross appeal pertain to the assessments by the trial judge of the contract price and the extra costs, which in turn determined the amount of the respondent's overpayment to the appellant and the calculation of the Project's profit.

a) The Cost of Insurance

[43] Clause 2.1(n) of the Development Agreement provides that the costs of insurance shall be included in the cost of work.

[44] The 2007 budget, that the trial judge determined formed a part of the fixed price, included the amount of $10,000.00 for insurance. Insurance was never secured by the Builder, as the quote he obtained did not meet with the Owner's approval.

[45] Clause 10.0 of the Development Agreement anticipates two insurance policies: 1) a comprehensive general liability insurance to be provided by the Builder; and 2) other insurance on the lands to be provided by the Owner to the benefit of the Builder. That clause states:

> Insurance: The Builder will provide and maintain a Comprehensive General Liability Insurance Policy for not less than $2,000,000. The Owner shall add the Builder as a loss payee to the policy in effect on the lands, as the interests of the Owner may appear.

[46] The appellant asserts that the respondent obtained only a "Course of Construction" insurance policy, rather than the commercial general liability policy required by the Development Agreement, but this alleged failure was neither pleaded nor argued at trial and I will not deal with it here.

[47] The appellant is correct that comprehensive general liability insurance was never obtained. The Owner did obtain other insurance at a cost of $47,814.36 and the trial judge found that the Builder took no issue with this amount. It is apparent that the trial judge considered that the Owner's conduct was to fulfill the Builder's obligation under clause 10.0 of the Development Agreement. As both the Builder and the Owner agreed with the cost, I am unable to accept that the entire cost of the insurance should not properly be charged as an agreed upon extra of the Project.

[48] In my view, the full $47,814.36 must be taken to be an agreed cost. As only $10,000.00 was contemplated in the final budget for insurance costs, the remaining $37,814.36 should be added to the fixed price and I would allow the appeal to reflect that increase. However, as the Owner paid for the insurance directly, the full amount of $47,814.36 must also be credited to him so that the Builder is not repaid for an expense he did not undertake. I will address this latter point below while determining the Owner's overpayment to the Builder.

b) The Treatment of Extras

[49] At paras. 122 – 123 of his reasons, the trial judge found:

> [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	$272,836.44

> [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 [*sic*]. 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.

[50] Although the trial judge found that the parties had agreed to budget an extra $110,000.00 for granite countertops and $40,000.00 for the retaining wall(s), he only allowed $62,277.51 and $25,000 respectively for those items. The appellant contends that the trial judge should not have credited it with only the costs of the agreed upon extras of $272,836.44, but rather with the greater amount of $335,558.93, which includes the full amount that was budgeted for the retaining wall(s) and granite countertops. The respondent contends that the trial judge erred in treating as extras items those that were already in the budgets.

[51] The fixed price determined by the trial judge left room for the Builder to enjoy any savings realized from budgeting for greater than what was spent for expected costs. Absent a finding of recklessness or fraud on the part of the Builder, and none was found by the trial judge, I am unable to discern why the agreed upon prices for extras should be treated any differently than the cost items in the 2006 or 2007 budgets. Each were estimates but were accepted by the parties. The Builder bore the risk of the estimates being too low, and the Owner of them being too high.

[52] In my view, the judge erred in reducing the agreed upon extras, and they ought to have been allowed in the agreed amount of $335,558.93. This results in a $62,722.49 increase to the trial judge's fixed price figure.

[53] The trial judge's fixed price figure also does not include the entire agreed cost of insurance discussed above. As such, a further $37,814.36 should be added to the amount of $335,558.93, equalling $373,373.29 to be added as agreed extras.

[54] The total Project costs in the 2007 budget were $4,541,392.20. The agreed extras increase that amount to a total fixed price of $4,914,765.49. This results in an increase to the fixed price found by the trial judge of $100,536.74 and I would allow the appeal to reflect that increase.

c) The Appellant's Interest Charges

[55] The appellant contended that its claim for $89,312.71 for interest charges was contemplated by clause 2.3 of the Development Agreement as "any and all contingencies". The trial judge found that there was no provision in the Development Agreement for such charges. In my view he was correct in so finding and I would not accede to this ground of appeal.

d) The Calculation of the Additional Costs

[56] Clause 2.2 of the Development Agreement defines additional costs as costs in addition to the cost of work that "the Owner shall be responsible for, shall be reimbursed for from the proceeds of sale, and shall include in the Cost of Work for the purposes of calculating the share of the profit to which each party is entitled". This includes costs such as legal fees relating to the creation of the condominium corporation and sales of the units of the Project, and costs relating to real estate commissions, properties, and utilities.

[57] The trial judge summarized the parties' positions with respect to additional costs at paras. 139 – 140 of his reasons:

> [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.
>
> [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, and I accept the revised total $406,548.41 as the proper one.

[58] The appellant contends that the additional costs should have been limited to the soft costs, in the amount of $168,396.00 as the budgeted amounts for these items in the 2007 budget. The judge evidently preferred the respondent's calculations and the basis for them. He had an evidentiary foundation for his preference, part of which was that some of the additional costs were the result of delays in the Project. The appellant has demonstrated no error on the part of the trial judge in calculating the additional costs, and I would not accede to this ground of appeal.

e) The Profit Provisions of the Contract

[59] The appellant contends that the trial judge erred in his interpretation and application of the profit provisions of the contract. It contends that the trial judge erred by:

i. attributing no value to the single unsold unit in the Project;

ii. including the cost of the land in the profit calculation;

iii. including the Owner's overpayment to the Builder in the profit calculation; and

iv. including the improper charges by the Builder in the profit calculation.

i) The Unsold Unit

[60] The trial judge dealt with the unsold unit at para. 144 of his reasons:

> 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.

[61] The appellant seeks leave to adduce further evidence with respect to the value of the unsold unit "in order to correct the Learned Trial Judge's error and rectify the calculation of project revenue and the profit calculation". Rule 31 of the *Yukon Court of Appeal Rules, 2005* permits a party to apply for leave to adduce evidence that was not before the court appealed from. The test to be applied on such an application is that set out in *R. v. Palmer*, [1980] 1 S.C.R. 759 at 775:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen* [[1964] S.C.R. 484].
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[62] Although they differed in their views of the contractual terms, both parties sought a determination of the profits of the Project at trial. The appellant contends that it could not have been expected to anticipate that it would be necessary to adduce evidence at trial with respect to the value of the unit. I am unable to accept this submission. As it was integral to the calculation of the profits from the Project, the value of the unsold unit was a matter of relevance to both sides. The appellant's application thus fails on the first of the *Palmer* grounds.

[63] Having said that, it is my opinion that the judge erred in reaching a conclusion as to the profits of the Project by attributing no value to the unsold unit. The other nineteen units in the Project sold for an average of $363,754.88. The real estate agent who sold the other units gave evidence that the twentieth was "unsaleable" due to cracks in the building, but not that it was without any value. In his later reasons on costs, the trial judge stated that he was "*functus* on the issue of the unsold condominium and [that he had] no jurisdiction to entertain any submissions or make any decisions on the point." As the trial judge left the matter of the New Home Owner's Rebates open for further evidence and submissions, I would allow the appeal of this issue. I would order that this item too should be the subject of any further evidence that either or both of the parties choose to properly adduce, and any further submissions before the trial judge.

ii) The Value of the Land

[64] The trial judge found that the parties had agreed upon the value of the land upon which the Project was built at $250,000.00. He found that amount should be repaid to the Owner prior to the calculation of profit for the Project. In reaching that finding, the trial judge explained at para. 143 of his reasons:

> ... Mr. Cunningham's own document, the '06 estimate, ... 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.

[65] The appellant contends that the cost of land should not be included in the profit calculation. It says that the cost of land is not included in the definition of cost of work, additional costs, or any of the other items to be used in the profit share calculation. Rather, it says that the $35,000 "per door" allotment was meant to compensate the respondent for the cost of the land.

[66] Although the Owner was obliged to contribute the land under the Development Agreement, the value of the land was to be recovered by the Owner

before the profit was calculated. The two documents referred to by the trial judge support his interpretation of how the land value was to be treated, and I am unable to find that his interpretation was incorrect.

[67] While the value of the land is to be repaid to the Owner prior to the calculation of profit for the Project, it should not also be included in the calculation of the fixed price for the purpose of calculating the respondent's overpayment. As the cost of the land is included in the 2007 budget, but was paid for by the respondent, its cost of $250,000.00 must be subtracted from the fixed price prior to determining the respondent's overpayment to the appellant. I therefore reject this ground of appeal but will address the matter further below when I deal with the respondent's cross-appeal.

iii) The Owner's Overpayment

[68] The 2007 budget was for $4,541,392.20 for Cost of Work and Additional Costs, broken down to $3,834,000.00 in hard costs, exclusive of GST, and $707,392.20 in soft costs inclusive of the land value and $10,000.00 for insurance. To reach a final budget figure, the trial judge utilized the actual costs for the agreed items of $272,836.44, resulting in a total fixed price of $4,814,228.75, with any excess being the responsibility of the Builder.

[69] The trial judge based his calculation of the respondent's overpayment of $311,771.25 by subtracting the amended final budget figure of $4,814,228.75 from $5,126,000.00. At para. 124 of his reasons he explained:

> 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.

[70] I am unable to agree with the appellant that the judge's calculation was an over estimate of the respondent's payments to it. However, as I have explained above, the appellant should be credited with the full amount of extras budgeted ($373,373.29). I have also concluded that, for the purpose of determining the respondent's overpayment to the appellant, the fixed price should be reduced by

$250,000.00 to account for the cost of land. Subtracting $250,000.00 from and adding $373,373.29 to the 2007 budget of $4,541,392.20 results in a fixed price of $4,664,765.49.

[71] Although the respondent asserted in its reply factum that the correct figure of its payments to the appellant was $6,162,053.62, rather than the figure of $5,126,000.00, it has not satisfied me that the trial judge erred in his conclusion that the latter figure was undisputed.

[72] However, in my opinion, to accurately determine the respondent's overpayment to the appellant, the costs of the insurance and the additional costs – which were paid directly by the Owner but included in the fixed price – must be added to the Owner's payment of $5,126,000.00. This results in a total of $5,580,362.77. To fail to do so would result in the appellant being credited for costs paid for by the Owner, while also reducing the overpayment owed by it to the Owner. The Owner would therefore receive less repayment from the appellant by way of overpayment and would remain out of pocket for the initial expenses.

[73] I would allow the appeal of this issue to the limited extent described above. Subtracting the fixed price of $4,664,765.49 from $5,580,362.77, I conclude that the Owner overpaid the Builder by $915,597.28.

[74] This largely answers the respondent's assertion that the calculation was an underestimate, which I will fully address below.

iv) Improper Charges by the Builder

[75] The trial judge also found that the respondent had overpaid the appellant $221,377.09 by way of improper charges. The respondent contends that this figure is too little. The appellant contends that if the amount is correct, and it is to repay that amount to the respondent, then the amount cannot be included as an expense of the Project.

[76] The trial judge broke this figure down at para. 149 of his reasons:

> 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;
>
> 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;
>
> 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.

[77] The third and fourth of these claims are conceded by the appellant. I will deal with the first claim regarding interest charges below as indicated.

[78] The second of these claims was found to be inappropriate because it was not contemplated by the Development Agreement or as an agreed extra. There is no basis upon which I could disturb this finding.

[79] As the last three claims were found to have been inappropriately made by the appellant, and have been ordered to be repaid by the trial judge, I agree with the appellant that they cannot be included as project costs for the purpose of the calculation of the Project's profit and I would allow the appeal of this issue.

Disposition of Appeal

[80] I would therefore allow the appeal to the limited extent of:

i. directing that the value of the unsold unit be remitted to the trial judge for determination, and the value, once determined be used for a recalculation of the Project's profit, if any;

ii. directing that the cost of the land be repaid to the respondent prior to the calculation of the Project's profit, if any, and reducing

the fixed price by $250,000.00 to reflect the respondent's payment for the land;

iii. increasing the fixed price of the contract by $62,722.49 to reflect the cost of extras for granite countertops and retaining wall(s) agreed upon by the parties;

iv. increasing the fixed price by $37,814.36 to reflect the amount budgeted for the insurance cost agreed to by the parties and crediting the Owner by $47,814.36 for the purpose of determining his overpayment to the Builder; and

v. increasing the amount of the Owner's payments to the Builder to account for the insurance costs, and the additional costs for a total of $5,580,362.77.

The Cross Appeal

[81] In its reply to the counterclaim, the appellant asserts that it was late in the proceedings before the respondent contended that the Development Agreement was a fixed price contract. This is incorrect, and I see no reason to deal further with that submission. The trial judge accepted variations in the positions of the parties even during the trial and properly dealt with the evidence before him, and the submissions that were based upon the evidence at trial.

[82] At para. 135 of his reasons, the trial judge found that the total value of the sales of Project units was $6,911,342.67, net of GST. He regarded the GST as being of no benefit to the Project, as it was payable to the federal government. At para. 136 he found that the New Home Owner's Rebates, which the appellant valued at $101,778.02 and the respondent at $48,311.32, should be treated as revenue in the Owner's hands. He did not decide what figure should be attributed to the rebates, leaving that determination until the unspecified warranty period had expired.

[83] The respondent contends that the trial judge committed a palpable and overriding error in his calculation of its overpayment to the appellant at only $311,771.25 by not including the following items in that calculation:

a)	Land	$250,000.00
b)	Attic Insulation	$13,673.84
c)	Insurance Costs	$47,814.36
d)	Additional Costs	$406,548.41
e)	Fireplaces	$110,000.00
		$828,036.61

[84] I have already determined that the cost of the land should not have been included as a soft cost in the final budget for the purpose of the calculation of the respondent's overpayment to the appellant. I have also concluded that the cost of the land must be repaid to the respondent before any profit sharing, if any.

[85] The attic insulation was paid directly to a subcontractor by the respondent in the amount of $13,673.84. As the Builder took no issue with this amount, the trial judge found that it must be repaid to the Owner prior to any determination of profit sharing (at para. 36). I find no error in this approach. However, I do not accept that the amount should be counted again when determining the Owner's overpayment to the Builder.

[86] I have already determined that the cost of the insurance is an agreed upon extra paid for by the respondent which must be included in the fixed price and used to determine the Owner's overpayment.

[87] I have also accepted that the additional costs of $406,548.41 should be included in the calculation of the respondent's overpayment to the appellant.

[88] The trial judge properly found the cost of the fireplaces, which was paid for by the Builder, was an agreed upon extra in the amount of $132,000.00 which he added to the fixed price. I see no reason to disrupt this finding.

[89] As the issues that I have addressed in my reasons on the cross appeal are also addressed in my reasons on the appeal, I would therefore dismiss the cross appeal.

Conclusion

[90] The appeal from the order of February 17, 2012 is allowed to the extent set out above, and the cross appeal from that order is dismissed.

[91] I consider that the respondent has been successful on the appeal and for that reason his cross appeal was dismissed as it was largely rendered redundant by the disposition of the appeal. I would therefore order that the appellant pay the costs of both the appeal and the cross appeal.

The Honourable Mr. Justice Hinkson

I agree:

The Honourable Mr. Justice Groberman

I agree:

The Honourable Mr. Justice Harris