NOVA SCOTIA COURT OF APPEAL

Citation: *Grafton Developments Inc. v. Allterrain Contracting Inc.*, 2022 NSCA 47

Date: 20220609
Docket: CA 500727
Registry: Halifax

Between:

Grafton Developments Inc.

Appellant

v.

Allterrain Contracting Inc.

Respondent

Judge:	The Honourable Justice Peter M. S. Bryson
Appeal Heard:	February 3, 2022, in Halifax, Nova Scotia
Legislation:	*Builders' Lien Act*, R.S.N.S. 1989, c. 277; *Judicature Act*, R.S.N.S. 1989, c. 240, s. 41;
Cases Considered:	*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53; *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4; *Nova Scotia Public Service Long Term Disability Trust Fund v. Baxendale*, 2022 NSCA 6; *Alberta Union of Provincial Employees v. Alberta Health Services*, 2020 ABCA 4; *1079268 Ontario Inc. v. GoodLife Fitness Centres Inc.*, 2017 ONCA 12; *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912; *Magasins Hart Inc. v. 3409 Rue Principale Inc.*, 2020 NBCA 49; *Sloot Construction-Design Ltd. v. North Maple Mall Ltd.* (1999), 50 C.L.R. (2d) 145 (Ont. Sup. Ct.); *James Dick Construction Limited v. Durham Board of Education* (2000), 50 O.R. (3d) 308 (Div Ct); *Guarantee Company of North America v. 1964907 Nova Scotia Ltd.*, 1995 NSCA 33; *Gulf Operators Ltd. v. Acciona Agua Canada Inc.*, 2021 NBCA 26; *Wilson v. K.W. Robb & Associates Ltd*., 1998 NSCA 117;

Subject:	Construction Law – Contract Interpretation – Contractual Interest – Liens – Payment into Court
Summary:	Allterrain performed site preparation, excavation and service installation for Grafton's construction of The Pearl, a luxury apartment building in Halifax. Allterrain was required to repave four small areas where city services entered the property. Grafton later decided to slope the site, which required excavation of the adjacent road, including the areas Allterrain was responsible to repave. Allterrain was retained to do the sloping, but the second agreement provided for paving by others. Later, Grafton insisted that Allterrain repave the road and sidewalk. Allterrain demobilized and sued for the balance owing to it. Allterrain also filed a lien. Grafton counter-claimed for paving and remediation costs. Grafton paid money into court to discharge the lien. The trial judge found that under the second agreement Allterrain had no obligation to repave, allowed its claim to be paid from money paid into court, and awarded interest of 10% compounded.
Issues:	(1) Did the judge err when interpreting the second contract regarding repaving? (2) Did the judge err in allowing satisfaction of the judgment from money paid into court? (3) Did the judge err in the interest awarded?
Result:	Appeal dismissed respecting issues 1 and 3. The judge found the paving obligation was "unambiguous". Although she referred to post-contractual conduct, that did not influence her decision. The judge could have awarded the contractual rate of interest of 2.5% per month compounded, which would have exceeded the 10% annual rate. Any calculation error favoured Grafton. The judge erred in ordering payment of Allterrain's judgment from money paid into court because the lien was filed out of time and so was invalid. Allterrain could not collect from money in court representing discharge of the lien because the lien was unenforceable.

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Respondent

Judges:	Bryson, Bourgeois and Derrick JJ.A.
Appeal Heard:	February 3, 2022, in Halifax, Nova Scotia
Held:	Appeal allowed in part, per reasons for judgment of Bryson J.A.; Bourgeois and Derrick JJ.A. concurring
Counsel:	William L. Ryan, Q.C., for the appellant James D. MacNeil, for the respondent

Reasons for judgment:

Introduction

[1] Grafton Developments Inc. appeals the trial and supplemental decisions of the late Honourable Justice Heather Robertson in which she allowed a contractual claim by Allterrain Contracting Inc. against Grafton, dismissed a counter-claim by Grafton and ordered payment of Allterrain's claim from funds paid into court in satisfaction of Allterrain's lien against Grafton's property (2020 NSSC 66 and 2020 NSSC 226).

[2] On April 22, 2014, by written agreement, Grafton retained Allterrain to provide site preparation, excavation and service installation for construction of The Pearl, a luxury apartment being developed by Grafton on Rainnie Drive, now 1903 Gottingen Street, adjacent to Citadel Hill in the city of Halifax.

[3] It soon became apparent that shoring or sloping would be required to complete excavation of the site. Grafton elected to slope the area, rather than shore it. Sloping the site was much less expensive. The parties concluded a second agreement on December 15, 2014 for the additional work which would encroach on Rainnie Drive.

[4] A dispute later arose between the parties concerning Allterrain's obligation to pave what had been excavated owing to the sloping. Allterrain left the project and invoiced $17,382.72 to Grafton for work completed to that time. Allterrain also charged Grafton for an HRM permit fee of $11,467.00 plus HST of $1,720.05 for a grand total of $30,569.77. Allterrain sued for this amount and filed a builders' lien against the property.

[5] Grafton refused to pay Allterrain and counter-claimed $136,181.75 for the alleged costs of reinstatement paving, site grading and repairs which it said Allterrain should have performed. Grafton admitted owing Allterrain the $30,569.77, but insisted that Allterrain had failed to complete its contractual obligations. Grafton paid money into court to discharge the lien.

[6] The fundamental dispute at trial was whether Allterrain had to reinstate the road, sidewalk, curbs and gutter which had to be torn up to accommodate the site sloping on Rainnie Drive in front of The Pearl. Under the first contract, Allterrain was required to reinstate the roadway "as specified" in four small, discrete sections on Rainnie Drive where services entered Grafton's property from the street.

[7] Under the second agreement, which followed Grafton's decision to slope the site, Allterrain was required to perform site sloping which substantially encroached on Rainnie Drive. The second agreement said "all flat works, concrete sidewalks, curb and gutter etc by other". It was agreed by the parties that "flat works" referred to reinstatement of curbs and pavement.

[8] Allterrain argued the second agreement superseded any obligation it had to reinstate the small portions of pavement which the first agreement required it to restore. Because essentially all of the roadway adjacent to the site was torn up due to the sloping, Allterrain claimed the foregoing quoted language relieved Allterrain of any repaving obligations.

[9] The judge agreed with Allterrain, allowed its claim, dismissed Grafton's counter-claim, and ordered that funds paid into court in lieu of the lien be used to satisfy Allterrain's judgment. She also awarded interest of $12,748.01 and costs of $18,250.00, inclusive of disbursements.

[10] Grafton says the judge erred by:

1. Misinterpreting Allterrain's remediation obligations under the second agreement;
2. Ordering satisfaction of Allterrain's judgment from the security paid into court to discharge Allterrain's lien;
3. Awarding contractual interest in the manner and amount ordered.

[11] The first ground of appeal should be dismissed because any alleged legal error made by the judge did not affect her ultimate interpretation of the contract.

[12] The second ground of appeal should be allowed because Allterrain filed its lien out of time and, therefore, cannot take advantage of the security posted in lieu of the lien.

[13] The third ground of appeal respecting interest should be dismissed because there was evidence upon which the judge could award at least the amount of interest claimed by Allterrain.

1. Did the judge misinterpret the second agreement?

[14] Once Grafton decided to slope the site, Allterrain submitted a quotation of $160,500 for the sloping. Grafton negotiated this amount down to $140,000.

Negotiations were conducted by Nassim Ghosn and Andrew Rodgers—on behalf of Grafton and Allterrain respectively. Although Grafton's Jason Ghosn and Allterrain's Jason Rodgers did some negotiating, the judge found that neither made "decisions" for their companies.

[15] The real issue between the parties was the meaning of "all flat works, concrete sidewalks, curb and gutter etc by other". The judge found this language was unambiguous, rejecting Grafton's evidence that its obligation to restore paved surfaces was "additional" to Allterrain's obligation to do so in the first contract:

> [62] Having heard all of the evidence of these four gentlemen and having examined all of the documentary evidence, I have concluded that the plain and unambiguous language contained on Contract No. 2, a change order, did modify the obligations contained in Contract No. 1 with respect to remediation of the sidewalk and roadway on Rainnie Drive in front of The Pearl.
>
> All flat works, concrete sidewalks, curb and gutter etc by other
>
> [63] This is straightforward language. It does not say "additional" flat works, concrete sidewalks, etc. I accept Andrew Rodgers' testimony that in negotiations with Nassim Ghosn, ***Allterrain was released from the obligation to remediate pavement and sidewalks, curb and gutter in front of The Pearl*** on Rainnie Drive.
>
> [64] They completed the roadway to the underside of the flat works and sidewalk and were not required to do more, as plainly written in the language of the December 15, 2014 signed contract. ***This work would be done by others, not Allterrain***.
>
> [Emphasis added]

[16] Grafton says the judge erred in two respects. First, she misinterpreted the second agreement by finding it "plain and unambiguous". Alternatively, having made that finding, she was wrong to consider the parties' post-contractual conduct in 2016 in order to interpret the second agreement from 2014.

[17] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, the Court described the correct approach to contractual interpretation:

> [47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. ***The overriding concern is to determine "the intent of the parties and the scope of their understanding***" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia*

> *(Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, *per* Cromwell J.). To do so, ***a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract***. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> (*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)
>
> [Emphasis added]

[18] Surrounding circumstances comprise "facts and circumstances that were or "reasonably ought to have been within the knowledge of both parties at or before the date of contracting"" (*S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4, at ¶30).

[19] This Court applied the foregoing principles in *Nova Scotia Public Service Long Term Disability Trust Fund v. Baxendale*, 2022 NSCA 6.

[20] Surrounding circumstances are relevant to contractual interpretation, irrespective of whether the contract is ambiguous:

> [13] Prior to the Supreme Court's decision in *Sattva*, it was not clear that the surrounding circumstances or the "factual matrix" of the contract had to be taken into account when interpreting a contract. The Supreme Court had earlier suggested in *Eli Lilly & Co. v Novopharm Ltd.*, 1998 CanLII 791 (SCC), [1998] 2 SCR 129 at para 55–56 that the surrounding circumstances only had to be considered when the contract was ambiguous. Sattva has made it clear that the ***surrounding circumstances are relevant, whether or not there is an ambiguity in the contract***.
>
> (*Directcash Management Inc. v. Seven Oaks Inn Partnership*, 2014 SKCA 106; see also: *Alberta Union of Provincial Employees v. Alberta Health Services*, 2020 ABCA 4, at ¶23-24; *British Columbia (Minister of Technology Innovation and Citizens' Services) v. Columbus Real Estate Inc.*, 2016 BCCA 283, at ¶42-43)
>
> [Emphasis added]

[21] Surrounding circumstances may include pre-contractual conduct where there is ambiguity or inconsistency in a contract. However, evidence of the parties'

subjective intentions is inadmissible (*Alberta Union of Provincial Employees v. Alberta Health Services*, 2020 ABCA 4, at ¶27, 32 and 49; *1079268 Ontario Inc. v. GoodLife Fitness Centres Inc.*, 2017 ONCA 12, at ¶28).

[22] The law treats post-contractual conduct with greater circumspection. In *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912, Chief Justice Strathy reviewed the dangers associated with reliance on evidence of subsequent conduct, cautioning against admitting such evidence at the outset of any interpretive exercise:

> [46] These dangers, together with the circumscription of a contract's factual matrix to facts known at the time of its execution, militate against admitting evidence of subsequent conduct at the outset of the interpretive exercise. ***Evidence of subsequent conduct should be admitted only if the contract remains ambiguous after considering its text and its factual matrix***.
>
> [Emphasis added]

[23] Accordingly, post-contractual conduct should only be considered if, following interpretation of the provision that is in dispute, in light of the contract as a whole and the circumstances that existed at the time of contractual formation, there remains an ambiguity that supports different reasonable alternative interpretations (*Shewchuk*, at ¶46; *Magasins Hart Inc. v. 3409 Rue Principale Inc.*, 2020 NBCA 49, at ¶50-52). Even if admitted, the weight of such evidence varies in accordance with the degree to which its inherent dangers are mitigated in the circumstances, which may include deliberate conduct by one party to lend support to its preferred interpretation of the contract (*Shewchuk*, ¶45).

[24] Grafton submits the disputed language in the second contract was not "plain and unambiguous", advancing three reasons. First, Grafton says the second contract related to "an entirely different area" than the first contract and was based on "different engineering plans". Grafton claims the second contract related to the excavation required for sloping onto Rainnie Drive and did not overlap with the area which Allterrain was required to pave under the first agreement. This submission is not factually correct. The additional area of Rainnie Drive which had to be excavated to accommodate the sloping did include the four discrete points where services joined the property from Rainnie Drive and which were originally to be paved by Allterrain under the first contract.

[25] Second, Grafton says the judge erred by not considering "any other provision" of the second agreement when interpreting the meaning of "all flat

works, concrete sidewalks, curb and gutter etc by other". Grafton adds there is nothing in the second contract indicating it was intended to amend or modify Allterrain's obligations under the first contract. Grafton dismisses as superfluous the judge's observation that the word "additional" is not included in "all flat works, concrete sidewalks, etc by other".

[26] Third, Grafton says the "surrounding circumstances" of the execution of the second agreement supported ambiguity. Grafton insists the judge gave too much weight to the "subjective evidence" of Allterrain's Andrew Rodgers respecting negotiations with Grafton's Nassim Ghosn and misinterpreted his evidence. Grafton says the judge was wrong to find:

> [30] […] Once the decision was made to slope the site onto Rainnie Drive, Andrew Rodgers testified that Nassim Ghosn negotiated Allterrain's $160,500 quote for sloping down to $140,000, agreeing that the scope of Allterrain's work would be reduced by agreeing that Grafton would do the flat work remediation at a later date, at its own expense. […]

[27] The interpretive key is the parties' intention. The second contract involved excavation and paving work which overlapped at least the four entry points to Grafton's property, originally to be remediated and paved by Allterrain.

[28] Allterrain never agreed to do all of the reinstatement work between the property and Rainnie Drive. Grafton's submission admits as much but insists Allterrain would remain responsible to do four small remediation and paving projects where services entered the property and someone else would do the rest of the new excavation and paving required by the sloping which Grafton decided to undertake subsequent to the first agreement. It does not make commercial sense to interpret the second contract in this manner. Two contractors doing contiguous paving on the same site in the same area to remediate torn up paving caused by the new sloping requirement, is unrealistic. The judge accepted the explanation of Allterrain's Andrew Rodgers that the reduced quotation of $140,000.00 reflected removal of Allterrains's paving obligations.

[29] Grafton counters that later texts from Jason Rodgers support Grafton's interpretation of the second agreement as requiring Allterrain to do remedial paving.

[30] Justice Robertson was satisfied that neither Jason Ghosn nor Jason Rodgers were responsible for negotiating the agreements nor did they represent the

intention of the contracting parties. Accordingly, Grafton's reliance on post-contractual texts from Jason Rodgers to support its interpretation was misplaced. Jason Rodgers did not negotiate the agreements on behalf of Allterrain and his exchanges with Jason Ghosn could not bind Allterrain. The judge found "[t]hese text messages do not reflect the intention of the parties who negotiated the contracts".

[31] Justice Robertson also found the outstanding 20% for reinstatement was not billed and Grafton's own reconciliation of progress billings showed Allterrain was 1.6% away from completion of the project when it demobilized. Allterrain valued this unfinished work at $18,000 which was never completed or invoiced. The judge inferred Grafton's principal, Nassim Ghosn, knew progress was 1.6% away from completion. This finding is inconsistent with Grafton's position that additional remediation, valued by Grafton at $93,468.83, remained owing under the first contract.

[32] Grafton responds that Allterrain completed and billed some additional reinstatement work after the execution of the second agreement. Grafton claims this suggests "all flat works" etc. were not to be done only by third parties but also by Allterrain. However, Jason Rodgers characterized this additional work as "a little bit of gravel work and tidy up" worth "forty-five hundred bucks" which was "insignificant" in the grand scheme of project restoration.

[33] In this case, the post-contractual conduct the judge considered included progress billing and text messages exchanged between Allterrain's Jason Rodgers and Grafton's Jason Ghosn in 2016. The judge ultimately did not rely on these messages because she found they did not reflect the intention of the parties.

[34] Having found the provision unambiguous, Justice Robertson need not have considered the evidence of the parties' subsequent conduct, but her consideration of post-contractual conduct was responsive to Grafton's submissions. Grafton relied on the parties' post-contractual conduct to support its interpretation. The ultimate reply to Grafton's criticism of the judge's reference to post-contractual conduct is that the judge did not rely on that conduct because she found it did not reflect the parties' intentions. Even so, the evidential risks of admitting post-contractual conduct are mitigated in the present circumstances. The parties' potential to influence contractual interpretation by their behaviour in performing a contract does not arise here because reinstatement work was 80% complete. Additionally, Allterrain's progress billing was not ambiguous. Nothing suggested

Allterrain refused to bill Grafton for the remediation as a deliberate effort to support its preferred interpretation of the second agreement.

[35] Had the judge decided the disputed language was ambiguous, she would have been entitled to give post-contractual conduct considerable weight since it was consistent with Allterrain's interpretation of the second contract. In any event, because of her clear finding the provision was unambiguous, the judge's consideration of this evidence did not affect the outcome.

[36] The second contract plainly says that flat works and sidewalks would be installed by "other" meaning someone other than Allterrain. The surrounding circumstances do not detract from this interpretation.

2. Could the money paid into court in response to Allterrain's lien claim be used to satisfy Allterrain's judgment?

[37] Grafton relies on two cases to argue by analogy that the security posted in this case is unavailable to satisfy Allterrain's judgment.

[38] In *Sloot Construction-Design Ltd. v. North Maple Mall Ltd.* (1999), 50 C.L.R. (2d) 145 (Ont. Sup. Ct.), the court had to decide whether security posted to vacate a lien "is available to satisfy the claims of all lien claimants without regard to the liability of the party posting the security". The court rejected a claim that the security would be available to satisfy the lien of the plaintiff, even if the court found that the party posting the security was not liable to the plaintiff. The court noted, "Posting security does not enlarge the rights of the lienholders and give them a right of recovery that they never had against the land itself" (*Sloot*, at ¶42). If the lien claimant "does not have a lien against the interest of [a party] in the lands against which the claims for lien were registered … [it] does not have a charge against the security which was posted to stand in the place of [that party's] interest in that land". In *Sloot*, the court held that the plaintiff had a lien against the "owner", but not against a lessee who was not an "owner" under the *Act*.

[39] Grafton also cites *James Dick Construction Limited v. Durham Board of Education* (2000), 50 O.R. (3d) 308 (Div Ct), in which a subcontractor had liened property for services rendered to another subcontractor of the main contractor. The main contractor posted security to vacate the lien. However, the main contractor owed no duty to the lien claimants other than to retain the statutory holdback. Since the sole claim of the lien claimants was a claim to a share in the holdback, the court permitted the lien claimants recovery of that amount.

[40] In *Guarantee Company of North America v. 1964907 Nova Scotia Ltd.*, 1995 NSCA 33, at ¶17, the Court explained the effect of an order vacating a lien claim:

> [17] The effect of an order vacating the registration of a claim of lien was discussed by this Court in *Langevin Developments Ltd. v. Tri-Corp General Contracting and Sales Ltd.* (1988), 87 N.S.R. (2d) 332. The Court stated at p. 336:
>
> > [16] The effect of an order granted under s. 28(4) [now 29(4)], is to provide security for the amount of the lien by payment into court, or otherwise, and thereupon the registration of the lien is vacated. Such an order unburdens the title and permits the owner to get on with his business but at the same time protects the lien claimant so that he knows that the funds necessary to satisfy his claim are secure. If necessary, the lien claimant may still be put to the proof of his claim and any defences available to the owner will have to be met.
> >
> > [17] A significant feature of an order granted under s. 28(4) [now s. 29(4)] is that the judge may order that the registration of the lien be vacated. That is exactly what Judge Anderson did in the order he granted on November 21, 1986: the registration of the certificate of Tri-*Corp's lis pendens* was vacated upon the payment of money into court by the owner Langevin. At that point and thereafter, on the facts of this case, no valid certificate of *lis pendens* was registered "in the registry office in which the claim for lien might have been registered" (s. 24).
> >
> > [18] ***The effect of a vacating order under s. 28(4) [now s. 29(4)] is to transfer the claim for the lien from the land to the fund of money the owner has placed with the court***. In *Jenkins v. Wilin Construction Limited* (1978), 25 N.S.R. (2d) 19; 36 A.P.R. 19, Judge O Hearn said at page 24:
> >
> > > "... the case law shows that the lien is preserved so that the action on the lien is preserved as well as the jurisdiction of the court to deal with the action, but the lien is transferred to the fund in court and the land is released from it." [Emphasis added]

[41] A claimant must still prove entitlement to a lien which includes compliance with the *Builders' Lien Act*, R.S.N.S. 1989, c. 277. This was not directly addressed in *1964907 Nova Scotia Ltd.* but a recent New Brunswick Court of Appeal decision, *Gulf Operators Ltd. v. Acciona Agua Canada Inc.*, 2021 NBCA 26, provides:

> [31] The owner establishes the s. 16 trust fund in order to have the funds available to satisfy a valid claim of lien and avoid having his land sold in the event the lienholder is successful in its claim. If the filing of the lien is vacated by operation of s. 51, it is because the fund established by s. 16, to guard against enforcement of the lien by having the land sold, has been replaced with the fund

> established by the security posted under s. 51. That security takes the place of the land, and the registration of the lien filed against that land is vacated. There can, therefore, be no continuing charge against the s. 16 holdback fund. The ***claimant is then left to prove the validity of the lien*** and, to the extent he does, he recovers from the s. 51 fund. He can no longer recover from the s. 16 fund. [Emphasis added]

[42] In this case, Allterrain filed its lien outside the sixty-day limit provided for in s. 24(1) of the *Builders' Lien Act*. This does not affect the validity of Allterrain's contractual claim as a debt. But it does mean that Allterrain cannot enjoy the security of the lien, now represented by the funds paid into court.

[43] Allterrain protests that it had no notice prior to trial that the validity of its lien was under challenge. But Allterrain does not claim it was prejudiced or explain what legal difference that would make to a lien filed out of time.

[44] Grafton had paid $38,212.21 into court as security to vacate the lien. Allterrain has no secured claim to those funds, because it had no valid lien in the first place. Allterrain filed its lien out of time.

[45] Although the judge was aware that Allterrain's lien claim was filed outside the sixty-day period in the *Builders' Lien Act*, she found, citing no authority, that it would be "unequitable to remove the funds rightfully found owing to Allterrain, only to possibly delay their right to recover payment for a matter that arose in 2016".

[46] The judge distinguished *Sloot Construction* and *James Dick Construction* because those cases involved parties posting security that were not directly liable to the lien claimant. Respectfully, that is a distinction without a difference. The question is not who contracted with whom, but whether the funds in court which stand in the place of a lien give a claimant a higher right than it had prior to payment into court. Similarly, an invalid lien does not become effectual owing to concerns about delayed recovery. The judge erred in law by finding that funds paid into court can be accessed by Allterrain under the *Builders' Lien Act* to satisfy its judgment in part or in whole against Grafton.

3. Did the trial judge miscalculate the interest award?

[47] Allterrain's post-trial submissions refer to both monthly interest of 2.5% and a 10% "fee" on the outstanding amount. There is no provenance given for the latter. Allterrain's claimed total of $12,748.01 was accepted by the judge. It

appears to correspond to an annual rate of 10% on $30,569.77 compounded for 3.5 years.

[48] Grafton says the judge erred by awarding 10% of $30,569.77. The judge should have awarded 2.5%, but calculated annually for a total of $2,792.33.

[49] Grafton adds that interest should have been addressed as a matter of contractual interpretation in the main decision and not relegated to the costs judgment. Grafton cites no law to suggest the judge was *functus*. This argument is without merit.

[50] The relevant passage from clause 28 of the first contract provides for interest as follows:

> Any outstanding amounts will incur interest at the rate of 2.5% per month compounded.

[51] There is no reference in the evidence to a 10% fee claimed by Allterrain and counsel could not direct the Court to this figure in oral submissions. Clause 28 of the first contract says interest is due on outstanding amounts at 2.5% per month, compounded. Interest at that monthly rate approximates 34.5% annually.

[52] The court has a discretion to award pre-judgment interest under the *Judicature Act*, R.S.N.S. 1989, c. 240, s. 41. That discretion normally yields to a contractually agreed rate of interest (*Wilson v. K.W. Robb & Associates Ltd*., 1998 NSCA 117). Two-and-a-half percent calculated monthly and compounded on outstanding contractual amounts would exceed the $12,748.01 ultimately awarded.

[53] It is for Grafton to show an error of law or a material error of fact in the judge's interest calculation. It has not done so. Any calculation error which deviated from the contract favoured Grafton. This ground of appeal should be dismissed.

Conclusion

[54] The judge did not err in fact or law in her interpretation of the contractual arrangements between the parties. There was no obligation on Allterrain to remediate and pave the newly excavated areas resulting from Grafton's decision to slope the worksite.

[55] The judge did err in finding that money paid into court to satisfy the lien claim was available to pay Allterrain's judgment, since Allterrain could not succeed on its claim of lien as it was out of time.

[56] Grafton's complaint that the judge failed to award the contractual rate of interest actually favoured Grafton. Allterrain has not cross-appealed. This ground of appeal is without merit.

[57] Allterrain seeks costs of 40% of the trial costs awarded which had totaled $25,892.49 and included $2,000 for disbursements.

[58] Recognizing that Grafton has had some success on appeal, I would not award 40% of the trial costs. I would grant costs of $8,000, inclusive of disbursements to Allterrain, on the appeal.

Bryson J.A.

Concurred in:

Bourgeois J.A.

Derrick J.A.