

SUPREME COURT OF NOVA SCOTIA

Citation: *Allterrain Contracting Inc. v. Grafton Developments Inc.*, 2020 NSSC 66

Date: 20200220

Docket: Hfx No. 461012

Registry: Halifax

Between:

Allterrain Contracting Inc.

Plaintiff/

Defendant by Counterclaim

v.

Grafton Developments Inc.

Defendant/

Plaintiff by Counterclaim

<p>D E C I S I O N</p>

Judge: The Honourable Justice M. Heather Robertson

Heard: December 9, 10, 11 and 12, 2019 in Halifax, Nova Scotia

Final Written December 23, 2019

Submissions:

Decision: February 20, 2020

Counsel: James D. MacNeil and Meaghan Kells, for the
plaintiff/defendant by counterclaim
Jeff Aucoin, for the defendant/plaintiff by counterclaim

Robertson, J.:

[1] Allterrain Contracting Inc. (“Allterrain”) is a Nova Scotia company who specializes in civil excavation, installation of services and road construction.

[2] Grafton Developments Inc. (“Grafton”) is a Nova Scotia company, whose primary business is that of development of multi-story buildings. Grafton is the owner of an apartment building known as “The Pearl” located at 1903 Gottingen Street, then named Rainnie Drive, overlooking Citadel Hill. Construction was started in July 2014.

[3] Allterrain claims the invoiced and outstanding amount for its work completed on The Pearl as well as reimbursement for a permit fee, in the total of \$30,569.97. Grafton denies this claim and counterclaims for the amount of \$136,181.75, to complete roadway, sidewalk, curb and gutter remediation, as well as other specified costs which it says Allterrain was obligated to complete.

[4] On all of the evidence before me I have found that Allterrain has proved its claim and that Grafton is liable for the amount claimed. I have also found Grafton’s counterclaim to be without merit. My reasons follow.

Issues

1. Is Allterrain entitled to payment as claimed for the balance outstanding for work performed under the contract with Grafton?
2. Does Grafton have a valid counterclaim against Allterrain?
3. If Allterrain is successful in proving its claim against Grafton, is Allterrain able to realize on the security of \$38,212.21 paid into court by Grafton to vacate the lien, challenged by Grafton as being filed “out of time”?

[5] Allterrain entered into two signed contracts with Grafton for site preparation (mass excavation), installation of water, storm and sanitary services and excavation for electrical services, as well as road reinstatement. The first contract was dated April 22, 2014, Exhibit 1, Tab 4 (“Contract No. 1”). The contract with Grafton was for the sum of \$775,000. Before its completion, incidental to the necessity of shoring or sloping on the Rainnie Drive side of the excavation, a second contract was signed between Allterrain and Grafton dated December 15, 2014. This document is found at Exhibit 1, Tab 9 (“Contract No. 2”).

Evidence and Analysis

[6] Under Contract No. 1, Allterrain's obligation was "reinstate in roadway as specified" in civil plans by SDMM dated April 16, 2013 rev. November 8, 2013 (Exhibit 2).

[7] Pursuant to this contract, services were installed for the building that joined up to the City's water mains, storm and sanitary, on Brunswick Street and up Rainnie Drive. Paving was completed, following Halifax Regional Municipality ("HRM") approval of the servicing, up to the point of the building construction about 200' up Rainnie Drive, from the corner of Brunswick Street and Rainnie Drive.

[8] As The Pearl building was flush with the street, its front door entering directly off the sidewalk on Rainnie Drive, an elevation of 141' excavation was required, to as low as 113' – 115' to competent bedrock. This is shown on the Campbell Comeau Engineering Plan C-2 (Exhibit 1, Tab 8), (hereinafter referred to as CC-2 plans). This meant a vertical excavation of about 30' to the bottom of the garage and required a safe shoring or sloping plan for soil removed in the mass excavation. This occasioned Contract No. 2, dated December 15, 2014, that provided for over excavations on adjacent properties and encroaching on rights of way by sloping, work not included in the scope of the work of Contract No. 1 dated April 22, 2014. This contract was for the sum of \$140,000, once negotiations were completed.

[9] The issue in this litigation is one of the interpretation of the contracts and the obligation created for Allterrain to reinstate the roadway on Rainnie Drive in front of The Pearl.

[10] The defendant and plaintiff by counterclaim, Grafton, says the contracts are two separate agreements relating to two different sets of plans, having separate scopes of work. Grafton argues that by August 2016 most of the work on both contracts had been completed. However, they argue that Allterrain then refused to return to the site to reinstate the road, sidewalks, curb and gutter, in front of The Pearl on Rainnie Drive, as per their obligation from Contract No. 1.

[11] The plaintiff, Allterrain, argues that the distinction being made by Grafton, that the two contracts are separate and refer to separate scopes of work, is erroneous and a red herring, raised to avoid payment of the outstanding balance owed on the first contract that was all but complete with 1.6% remaining.

[12] The plaintiff argues that the second contract was a contract/change order, that modified its obligations for road reinstatement. Its obligations pursuant to this document (Exhibit 1, Tab 9) stated:

Re: Estimate for proposed over excavation based on shoring plan and specifications provided by your consultant Campbell Comeau Engineering Limited, preliminary issue dated September 2014.

We are pleased to offer our estimate on work scheduled for the above noted site based on the following:

- Excavation to the limits identified in the above noted plan.
- Removal of material from the south, south west side nearest the police station from site. (contamination extra)
- Excavation of materials from the Rainnie drive side of the property and placement on the south southwest side once formworker have three levels of walls and slabs poured to facilitate infill.
- Replacement of fill material including trucking and compaction when building is out of the ground on Rainnie drive
- All flat works, concrete sidewalks, curb and gutter etc by other. (underline added)
- All erosion control, tarps, etc to the owners account. Quote is for excavation only.
- Crane rental to backfill building if required to the owners account.

Total estimate for proposed identified scope
\$140,000.00

(quote subject to our standard terms and condition. Please find on reverse or attached hereto)

[13] The witnesses all agreed that “flat works” in the fifth bullet means pavement. The meaning of “All flat works, concrete sidewalks, curb and gutter etc by other” is the real issue between the parties in this trial.

[14] In any event, even under Contract No. 1, Allterrain only had an obligation to reinstate sidewalks and curbs in four small and distinct areas where the laterals for street services entered the building, shown in yellow on Exhibit 2.

[15] Allterrain seeks the amounts invoiced and remaining due to Allterrain for work completed, \$17,382.72. The remaining portion of the plaintiff’s claim is for the HRM permit fee of \$11,467.00 plus HST, \$1,720.05, taken out by Allterrain

before it commenced road reinstatement. Allterrain claims reimbursement of this permit fee pursuant to its terms and conditions, attached to the contract dated April 22, 2014. Their total claim is therefore for the sum of \$30,569.97.

[16] Grafton counterclaimed against Allterrain seeking \$136,181.75 comprised as follows:

- \$93,468.83 for paving to road, sidewalk, curbs and gutters, which Grafton claims is the cost of the work required after Allterrain abandoned the contract.
- \$15,000.00 for rough site grading allegedly abandoned by Allterrain.
- \$27,712.92 for various costs related to alleged property damage or deficient work by Allterrain.

The witnesses and their respective roles for the corporate parties to this litigation

[17] Andrew Rodgers is the President of Allterrain, and a half owner together with his younger brother, Jason Rodgers. They play distinct roles in their company. They both testified on behalf of Allterrain.

[18] Andrew Rodgers is the controlling force in Allterrain. He does all the estimating, makes all the business management decisions, performs the engineering functions in reading proposals, drawings and preparing contract documents. He also oversees the general office administration and authorizes payment of all bills. In 2014-2015 he spent 70% of his time in the office and only 30% in the field. After 2015 he spends even less time in the field, estimating it to be now only 15%, with the balance in the office.

[19] When in the field, he reviews the sites, reviews the survey data, job progress and resolves any issues that arise. He does not operate any equipment.

[20] After a few years at St. Mary's University where he had not completed a degree, Mr. Rodgers then went to the Nova Scotia Community College in Lawrencetown, Nova Scotia. He completed a survey technicians' course, which he equated with the role of a quantity surveyor. From plans, he can determine the volume of material to be removed to complete any excavation required, a skill he testified he uses daily in his business. He explained his early review of a SDMM

plan (Exhibit 1), which showed the earlier foundation remnants on the site and bore holes 1, 2, 3, 4, and 5. These bore holes determine the depth of rock and surface material. He explained how he studied the SDMM and the Campbell Comeau plan and estimated his company's required work in quotes presented to Grafton on April 22, 2014, and again on November 13, 2014 for site sloping. He testified that he prepared the quotes for Allterrain, negotiated the contracts and instructed his brother, Jason, who manages the site and oversees the actual on-site contract work.

[21] Jason Rodgers also testified for Allterrain. He received a B.A. from St. Mary's University in 2002. He has no formal certification in the construction trades and learned on the job, when he joined his brother in business in light landscaping excavation work, which grew into a large company performing civil construction, excavation, services installation and road construction.

[22] He runs the operation aspects for Allterrain and manages all of the skilled equipment operators and site staff, including the job foremen. He travels from job site to job site for Allterrain overseeing operations, spending only 5-10% of his time in the office. He testified he spent a lot of time at The Pearl job site however, as their company was a little smaller then and the job was quite technical in its execution. He testified how he left all estimating and contract negotiations to Andrew. He was not present when the contract dated April 22, 2014, was signed by his brother Andrew Rodgers and Nassim Ghosn. He was present when the second contract dated December 15, 2014, was signed by Nassim Ghosn but testified he had not prepared it or negotiated its terms.

[23] Nassim Ghosn and his son, Jason Ghosn, testified on behalf of Grafton. Nassim Ghosn is a developer and the controlling force behind Grafton. He oversees all of the operations of Grafton and negotiated all of the contracts Grafton entered into for the construction of The Pearl. He is an experienced developer having begun his first project 34 years ago, followed by projects ever increasing in size, from the early 15-unit projects to his most recent 17 story project of 170 apartment units, on Barrington Street, in Halifax.

[24] He began The Pearl in 2013 and broke ground in July 2014. Like Andrew Rodgers, Nassim Ghosn makes all the final decisions for Grafton. His son, Jason, now 27 years of age, completed an MBA degree at St. Mary's University in 2014 and has joined his father in the development business. Twenty-four years of age at

the time, he became the project manager on site at The Pearl, overseeing on-site operations, reporting daily to his father.

[25] Although Jason Ghosn described his father's role as in charge of the big picture and all contract negotiations, he testified that his father was very hands-on and visited the site first thing every morning, overseeing it personally.

Issue No. 1 – Is Allterrain entitled to payment as claimed for the balance outstanding for work performed under the contract with Grafton?

[26] For Allterrain to succeed in its claim, the court must accept that the second contract dated December 15, 2014 modified the reinstatement obligations of the contract dated April 22, 2014. There are three aspects to this analysis: (1) the meaning of the words, "All flat works, concrete sidewalks, curb and gutter etc by other." (2) the degree to which the project was complete, as Allterrain's work neared completion, and it sought the balance owing to it for work performed on the contract, chronologically traced through the progress billings of Allterrain and payments made by Grafton and (3) the reasonable interpretation of the text exchange between Jason Ghosn and Jason Rodgers found at Exhibit 1 – Tab 50.

[27] As to the language of the second contract, it is helpful to review the testimony of the parties as to the meaning of these words at Bullet No. 5 in the December 15, 2014 signed document.

[28] Andrew Rodgers testified how his negotiations with Nassim Ghosn proceeded through the late summer and fall 2014. From the outset of the first contract, he testified that a decision had to be made about whether to shore or slope. By September 24, 2014, the Campbell Comeau Plan C-1 at Exhibit 1 – Tab 8 was prepared. Plan C-3 showed the option of sloping and the required encroachment onto the roadway (Rainnie Drive) of some 22'-27'.

[29] Jason Ghosn confirmed this in his testimony and stated that he was tasked by his father to negotiate with HRM to procure the necessary encroachment into the roadway to allow sloping. This required the street to be reduced by one lane (possible as it was a one-way street) a solution that was a far cheaper alternative to shoring.

[30] Andrew Rodgers testified that he was aware from discussions with Nassim Ghosn that there had been a one-million-dollar estimate provided for the vertical shoring on this site. This was far too great an expense for a building project of this

size. Andrew Rodgers testified that he was asked by Nassim Ghosn to explore a cheaper shoring alternative and went to SPPL who quoted \$500,000, still much too high in Nassim Ghosn's view. 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. Andrew Rodgers testified when asked what Bullet No. 5 means:

That would be giving the over excavation, the curb, gutter, sidewalks, the newly installed gravels, a portion of the roadway and all the asphalt reinstatement required to be put back in, due to this other excavation, would be completed by others at the owner's direction at a later date.

[31] Nassim Ghosn testified in cross examination that "all flat works, concrete sidewalks, curb and gutter etc by other" meant anything "additional that I destroyed by sloping that, that I would be responsible to reinstate, that is what I understood." He agreed that the word "additional" did not appear in Bullet No. 5 of the contract.

[32] Jason Ghosn's testimony as to the meaning of Bullet No. 5, is similar to his father's. He testified that Bullet No. 5 somehow referenced any "additional" flatworks, concrete sidewalks, curb, and gutter, etc. that would be to the expense of others. Through his discovery evidence Jason Ghosn did appear to acknowledge that Contract No. 2 was a change order and did modify Contract No. 1, but he then concluded "we can agree to disagree" on interpretation, when pressed by Mr. MacNeil.

[33] With respect to the degree of project completion, it is important to note that from November 30, 2014, Progress Bill No. 5 of Exhibit 5 the item Reinstatement, showed as 75% complete on Progress Bill No. 13, April 29, 2015, reinstatement showed as 80% complete. It remained at 80% on Progress Bill No.14, May 30, 2016 and Progress Bill No. 15, June 30, 2016 and remained so although all other items of Contract No. 1 and the change order (Contract No. 2) reached full completion.

[34] The outstanding 20%, \$18,000 for the item of reinstatement, was never billed and, according to Andrew Rodgers' testimony, never was intended to be billed as Allterrain was released of obligation to do so by the clear language of the contract dated December 15, 2014 in Bullet No. 5.

[35] As noted on Exhibit 5 - p. 1, the progress billing summary sheet, \$17,382.56 remained owing from Grafton after September 2, 2016, when Grafton made its last payment on the contracts of \$15,000.

[36] It is also interesting to note that at Exhibit 1 – Tab 58 in Grafton’s own reconciliation of the progress billing to date and remainder of the contract outstanding shows Allterrain’s Contract No. 2 as 100% complete – with \$140,000 paid out and Contract No. 1 as having 1.6% to complete as of September 2, 2016.

[37] Both Jason Ghosn and Nassim Ghosn gave evidence as to the scrutiny they gave Allterrain’s progress billing. Nassim Ghosn made a point of teaching his son, Jason Ghosn, to never let the payments get ahead of the work. It was important to keep your eye on the percentage of work remaining to be done so Allterrain could “never get ahead of themselves,” advising Jason Ghosn not to pay too fast if there is still work to be done.

[38] Text messages between Jason Rodgers and Jason Ghosn also come into play. Indeed, Nassim Ghosn also taught his son, Jason Ghosn, to keep track of any expenses that might be to the account of Allterrain for any damages done or extra charges resulting from their carrying out the contract. Jason Ghosn kept such a list in evidence as Exhibit 8 “Allterrain Balance owed to Grafton” dated April 13, 2016:

50% of cost to remove Excavator from site	\$2,875.00
Two Trailers of our pre sold waste blocks taken (Jason made aware) \$50*36	\$1,800.00
Reference Ace Plumbing [invoice] #3109	\$339.79
Reference All Star Change order #9	\$534.00
Reference All Star Change order #11 item 0338	\$750.00
March 4 th , 2015 excavator broke points Reference SDMM Invoice (30826)-5	\$1,071.80
Barry purchased Filter cloth from us on April 15, 2015	\$800.00
June 7 th , 2015 excavator cut power to site reference AJ Electric Invoice #844	\$291.50
Excavator Broke Indirect Fire Heater heater from CAT	\$818.98
Total	\$9281.07

[39] Jason Ghosn testified that he kept track of these items, “I keep as leverage.” He testified that if all went well, the costs would never arise. Indeed, in a text sent to Jason Rodgers on August 17th he makes reference to reviewing a list of charges

with his father and texts Jason Rodgers; “he said if everything goes smooth from this point out he will eat these costs.”

[40] Jason Rodgers for his part asked for an accounting of these alleged costs three times in the summer of 2016. On August 17, 2016, they were finally sent to Allterrain by email. They also arise as part of Grafton’s counterclaim. Jason Ghosn testified on cross examination that once these extra costs were sent to Jason Rodgers the purpose was “at the very end I wanted to negotiate with them.”

[41] Grafton has relied on the series of texts between Jason Ghosn and Jason Rodgers (Exhibit 1 - Tab 50) that begin on May 25, 2016, through to November 2, 2016. They ask the court to make the inference that Allterrain was aware of its obligation to remediate the flatworks, concrete sidewalks, curbs and gutter. It appears that Jason Rodgers at one point agrees that the remainder of the work includes pavement of the roadway and remediation of sidewalk, curb and gutter in the four areas where laterals enter the building.

[42] The texts should be read at the same time to capture the focus of each of the Jasons as the project neared completion.

[43] Jason Rodgers was focused on collecting funds for the work billed and not yet paid. He chased Jason Ghosn from May to September for payment, seeking the final \$30,000 – \$35,000 owing until Jason Ghosn finally relented and made \$15,000 available on September 6th, and this was the last payment Grafton made.

[44] Jason Ghosn on the other hand wanted Allterrain back on the site to complete remaining tasks.

[45] Jason Ghosn addresses in texts: backfill around the building – August 10, 2016; a junction box installation – August 11-16, 2016 ; his estimation of 1.7% remaining to complete relates to road reinstatement – August 29, 2016; and, light standard relocation and discussions with HRM and Black and MacDonald – October 26 – November 2, 2016.

[46] Jason Ghosn writes on November 2, 2016, re the light standard:

Got the go ahead from HRM

Putting the same bases in the same spot and they will put a night pole on

Lets get this done ASAP

[47] Jason Rodgers replies:

Did you get a quote from black and Macdonald for this work?

None of it is included in our scope for the building or the slope excavation extra

[48] He sends a screen shot in this text of Contract No. 2 dated December 15, 2014. Jason Rodgers then texts:

As a matter of fact neither is all the curb or sidewalk included in our price. Only the asphalt road way and the curb only in areas where our services enter the building. I will have to get you a price on this.

[49] He sends a screen shot in this text of Contract No. 1 dated April 22, 2014.

[50] Jason Rodgers then writes:

I'd have to look at the plan and see what "as identified" means for the sidewalk and curb restoration is. Definitely all the electrical, sand encasement, excavation compaction and backfill for the lighting restoration is extra

[51] Jason Ghosn replies:

I'm sure all the paving, curb and sidewalk is your responsibility. It is also clearly identified in our contract and we had been discussed when determining the amount of work remaining in your contract. We will take care of both light standards and work associated with them

[52] Jason Rodgers texts:

Ok I'll clarify with Andrew. Let me know when all electrical is complete and I'll put in curb and sidewalk and pave

[53] What is obvious about the texts between Jason Ghosn and Jason Rodgers is that each has to seek direction – Jason Ghosn from his father, Nassim Ghosn, and Jason Rodgers from his brother, Andrew Rodgers.

[54] Neither Jason negotiated the terms of these contracts. Neither Jason makes decisions for their companies.

[55] Jason Rodgers seeks payment for the balance outstanding for work completed. He relies on Allterrain's accountant, Mr. Cameron to address those numbers: \$17,382.66 – for site work, billed and unpaid and \$11,467.00 for

recovery of the HRM street permit fee. This is an accounting exercise as Jason Rodgers calls back to his office to see “what is outstanding.”

[56] Jason Ghosn focuses on the outstanding value of work he believes remains to be completed – a valuation exercise of the on-site work.

[57] Jason Rodgers is being told by Andrew to wrap up the job, collect what is owing and move on to supervise one of their other projects.

[58] Jason Ghosn is being told by his father to get Allterrain back to the site and negotiate its completion. Nassim Ghosn acknowledged in his cross examination that Allterrain was not responsible for all concrete sidewalks in front of The Pearl, nor all curbs and gutter, apart from sidewalk, curb, and gutter at the four places where lateral service lines entered the building. He acknowledged Grafton would have had to negotiate a price from Allterrain to do this extra work but that they had not made such a request of Allterrain.

[59] I believe Nassim Ghosn was teaching his son the art of negotiation, at the point of near completion of Allterrain’s work. Trade off some expenses owing, i.e. the list at Exhibit 8, against extras Grafton would have to pay for, such as additional sidewalk, curbs and gutter. Press for road remediation.

[60] In any event, Jason Rodgers did consult with his brother Andrew Rodgers. Allterrain sought the balance owing on their contract for several months and as it was not forthcoming, Allterrain left the site and liened the project.

[61] Grafton responded to the lien action with payment into court to vacate the lien, defended the action and sued for its alleged damages to complete the 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.

[65] With respect to my acceptance of Andrew Rodgers' testimony as credible on the meaning of this language in Bullet No. 5, I also considered the testimony of Nassim Ghosn who stated that this language did not affect the obligations to remediate under Contract No. 1.

[66] Nassim Ghosn is a very sophisticated, experienced developer whom I believe pays careful attention to details. One presumes if he had had questions about the plain language of the contract, he would have raised the matter. Counsel for Allterrain suggested that if he was unaware of the implications of this wording, he was being reckless in ignoring its plain meaning. Nassim Ghosn had testified that he sometimes signed contracts without reading them fully, relying on the other party to review the highlights. He testified that was the case when he signed Contract No. 1 and initialed the terms and conditions attached "although they were illegible."

[67] With respect to the terms and conditions attached to Contract No. 1, Andrew Rodgers' evidence was that although the printed document came out in two colours, black and red, it was legible and on April 2nd he had reviewed every line of the terms and conditions with Nassim Ghosn. Every second line was red as seen on Exhibit 4, a photocopy of the original initialed terms and conditions that did reproduce the red colour.

[68] It is interesting to note that the negotiation of Term No. 28, of the terms of payment, reflected the requirement of 15 days to pay outstanding contract amounts after billing. Nassim Ghosn negotiated this term to 30 days before payment due. These numbers were printed in red on Term No. 28. Nassim's initials are found across the first two lines of Term No. 28, where the numbers are found and changed to 30 days, not 15, and also initialed by Andrew Rodgers.

[69] As well, Nassim Ghosn made a site sketch on the page of terms and conditions. Also noted was the volume of materials required to be excavated: 500 m³ written by Term No. 10. That term identified shoring or slope stabilization to be an extra. This was Andrew Rodgers' volume of materials estimate that was being reviewed and discussed with Nassim Ghosn, also initialed by him at Term No. 10 on the document, acknowledging it was an extra cost over the contract

price. Term No. 4 also in red, specified “permits, testing, design or engineering by others.”

[70] I accept the evidence of Andrew Rodgers on the legibility of the terms and conditions at p. 2 of Contract No. 1. I also accept his evidence that he reviewed these legible terms, line by line, with Nassim Ghosn, and that two documents, Contract No. 1 signed at the meeting, were fully legible.

[71] Nassim Ghosn is in my view a careful man who kept his eyes on all the details. He would not have “recklessly” or inadvertently signed a document on behalf of Grafton, without reading it, considering it, and reviewing it before applying his signature and initials.

[72] Nassim Ghosn’s attention to detail also extends to his personal review of progress billing, keeping his eye on the money paid for work performed so “Allterrain didn’t get ahead of itself.”

[73] I believe Nassim Ghosn knew the state of the progress of the work done by Allterrain to be 1.6% from completion, confirmed in Exhibit 1 – Tab 58. Grafton’s own document showed that \$17,382.65 remained outstanding after the last payment by Grafton of \$15,000 on September 2, 2016. That amount and the cost of the HRM street opening permit constitute the claim of Allterrain.

[74] My view of the texts (Exhibit 1 – Tab 50) is that they were exchanged between the two younger men, neither of whom had negotiated the terms of the contracts or were calling the shots. Although Jason Rodgers becomes confused about remediation of the roadway, he defers to this brother, Andrew Rodgers, and tells Jason Ghosn, “I’ll clarify with Andrew.” These text messages do not reflect the intention of the parties who negotiated the contracts. That intention can only be expressed by the two people, Nassim Ghosn and Andrew Rodgers, who entered into the contracts on August 22, 2014, and December 15, 2014, at the time they made the commitment to contract.

Issue No. 2: Does Grafton have a valid counterclaim against Allterrain?

[75] The counterclaim advanced by Grafton seeks the cost of the completion of the contract, the details of which are found in Exhibits 8, 9 and 10 in evidence and para. 20 of their statement of counterclaim, for a total claim of \$136,181.75 to complete Allterrain’s deficiencies and complete its unfinished work.

[76] As it is my findings that Contract No. 2 modified Contract No. 1 and released Allterrain from any obligation for further road, sidewalk, curb and gutter remediation in front of The Pearl, the claims for remediation costs must fail. The cost of reinstatement was to Grafton's account after December 15, 2014. In any event, I find that these claims were not proved. Para. 20(k) of the statement of counterclaim, claims \$93,468.83 for the remediation. Exhibit 10, the invoices that support the claim are for a slightly higher total of \$94,429.68. None of these contractors who provided service testified. There is no evidence as to the scope of work performed. There is only the evidence of Jason and Nassim Ghosn that seasonal work is more costly, with reinstatement work done in winter months. Even this is at odds with Grafton employee, David Mio, who indicated that reinstatement work could begin in mid-September.

[77] For instance, with respect to any obligation to reinstate sidewalk curb and gutter, it is agreed by the parties that, as indicated in Contract No. 1, Allterrain only had to reinstate the four discrete areas where service trenches and services ran from the street to the building. Jason Ghosn agreed on cross examination that the invoices in Exhibit 10 pp. 8, 9, and 10 did not differentiate or break-out these costs and reflected all the sidewalk, curb and gutter reinstatement costs to the account of Grafton.

[78] Similarly, some costs invoiced by East Coast Limited are actually for dates of mobilization, November 7 and 8, 2016, before Allterrain left the site on November 21, 2016. Again, no scope of work is set out in these invoices. Nor are there notes or other documents to verify the scope of work that these invoices cover. This is very clear from Jason Ghosn's evidence on cross examination.

[79] Jason Ghosn's own estimates of the value of the work to complete the project never rose above \$40,000, as shown in his text message calculations.

[80] In para. 20 a)-j) of the statement of counterclaim, Grafton outlines extra costs it incurred due to Allterrain's errors and damage on the work site.

[81] I will deal with these items because this was also the reserve list of potential costs as shown on Exhibit 8, dated April 13, 2016, that Jason Ghosn kept track of to use as a negotiating tool at the end of the contract. These are the costs he testified he kept as leverage and if all went well his father "was willing to eat these costs." Asked three times for the list of "alleged costs" by Allterrain, Jason Ghosn finally emailed them on August 17, 2016. Allterrain had never been given any notice of deficiencies or damages at the time any of these costs were incurred. No

notes or other documents were kept by Jason Ghosn, just a list he could use for leverage.

[82] Problematic in the failure to keep clearer records is the claim in para. 20a for \$12,806.94 for mud slabs resulting from Allterrain's over excavation. On cross examination it was apparent that many of the dates of these Quality Concrete invoices did not coincide with the construction excavation schedule, relating to pouring the foundation. Further, many of the invoices for mud slabs were identified as concrete for sidewalks.

[83] Jason Ghosn admitted in cross examination that the invoices were out of sync and problematic. They are therefore unproved. Para. 20b of the statement of counterclaim claims \$5,000 for the removal of an excavator from the site. First this claim was earlier described as a cost for which 50% should be to the account of Allterrain (Exhibit 8 – Item No. 1). This claim is not supported by any document, receipt, invoice or confirmation of payment.

[84] Regarding para. 20d, \$339.79 to reinstate underground piping (Exhibit 1 – Tab 25, p. 4), there was no notice to Allterrain, no notes or documents to support this claim or even a photo to show “damaged piping.”

[85] The claim for additional rebar at para. 20e of the counterclaims, invoice at Exhibit 1 – Tab 15 for \$534.00, is similarly undocumented and was never mentioned to Allterrain.

[86] The same lack of confirmatory evidence applies for the paras. 20f, g, h, i and j claims for items that require reimbursement. In particular, SDMM invoice for layout grid links, Exhibit 1 – Tab 25, p. 2, on March 2015, does not coincide with work done by Allterrain as evidenced by the timelines of construction work shown in their progress billing.

[87] From the evidence of Jason Ghosn on these claims, much of which was successfully challenged in cross examination, I cannot find on a balance of probabilities that Grafton has met its burden to establish these claims.

[88] Allterrain is correct in its submission that the lack of opportunity to inspect or correct alleged deficiencies is problematic, as supported by *Rocksolid v. Bertolissi*, 2013 ONSC 7343 at para. 92.

[89] In any event, I find that Grafton's counterclaim has not been proved.

[90] Allterrain is entitled to the payment for the amount outstanding of \$17,382.72 with respect to work completed and the HRM street opening permit fee of \$11,467.00 plus HST of \$1720.05. I have found that Nassim Ghosn understood and could read a legible copy of the terms and conditions attached to Contract No. 1 dated April 22, 2014. Term No. 4 stipulated that Allterrain was not responsible for permits. The fact that Allterrain was required to take out the street opening permit with HRM, as it was the company doing the excavating services and some early remediation on the HRM roadway, does not relieve Grafton of the obligation to pay for this permit. Clearly Grafton understood this requirement as testified by both Jason and Nassim Ghosn and the documents in evidence, at Exhibit 6 and Exhibit 7.

[91] Accordingly, Allterrain has proved its claim against Grafton for \$30,569.77.

[92] An issue arose during trial, that of the validity of Allterrain's lien claim, as Grafton asserted the lien was filed out of time. Grafton relied on Exhibit 1 – Tab 51, a summary of Allterrain's manhours at the site, showing a last entry of August 2016. The statutory requirement is filing of a lien claim within 60 days of last work done on site. This claim that the lien was filed out of time is not found in Grafton's pleadings and was only argued at trial.

[93] Grafton takes the position that if Allterrain is successful in this suit, they can only be awarded a judgment against Grafton for amounts owing and cannot realize on the security of \$38,212.21 paid into court by Grafton to vacate the lien on the property, which they say should be returned to Grafton.

[94] They rely on *Sloot Construction-Design Ltd. v. North Maple Mall Ltd.*, 1999 CarswellOnt 4174, [1990] O.J. No. 4927 at para. 42:

. . . Security posted under s. 44 simply stands in the place of the land, and can be looked to to satisfy liens as defined and limited by the provisions of the Act. 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.

[95] They also rely on *James Dick Construction Ltd. v. Durham Board of Education*, 2000 CarswellOnt 3086 at para. 20:

. . . Before the posting of security, the only claim the lien claimants had was a claim to share in the 10% statutory holdback. If Tasis chose to post security to vacate the claims for liens filed against its subcontractor, so the orderly flow of funds could continue to nourish the project, how can this

be said to increase the contractor's liability to lien claimants to whom the contractor owes no other duty than to retain the 10% statutory holdback, and any notice holdback, subject to proper set off? This interpretation would leave the contractor in an intolerable position — either Tasis takes no action and the project is halted in its tracks, or Tasis posts security and exposes itself to a liability it does not otherwise bear. . . .

[96] The plaintiff Allterrain distinguishes both these cases. In *Sloot Construction, supra*, the plaintiff's submission was that when a lien is vacated by posting security, the security once posted, is available to satisfy the claims of all lien claimants without regard to the liability of the party posting security. In *Sloot, supra*, there were multiple defendants, but Loblaws was the party who posted the security to vacate the lien. The matter at issue was whether that security (i.e. that Loblaws posted) should be available to the plaintiff for any successful lien claims they established against the other defendants who did not post security. Allterrain says this is quite different than their own claim against Grafton.

[97] They also say that *James Dick Construction Ltd. supra.* can be distinguished for the same reason. Regardless of liability, does one party posting security make it available to other lien claimants?

[98] In this case there are no other lien claimants seeking to benefit from the payment of this security. Allterrain has been successful in proving their claim against Grafton. Grafton is liable to Allterrain. Grafton posted security in direct response to Allterrain's claim, a liability which would fall directly on Grafton.

[99] There do not appear to be any other cases to assist in determining this issue.

[100] Accordingly, as Grafton bears liability for Allterrain's claim, I find 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.

[101] Allterrain is granted judgment against Grafton for \$30,569.77 and may realize on the security posted by Grafton to vacate the lien, as per the order of Brothers, J. dated October 4, 2018.

[102] If the parties are unable to agree on costs, I will receive written submissions.