

SUPREME COURT OF NOVA SCOTIA

Citation: *Atlantic Canada Log Homes Inc. v. Buergi*, 2023 NSSC 91

Date: 20230314

Docket: Bwt No. 472942

Registry: Bridgewater

Between:

Atlantic Canada Log Homes Inc.

Plaintiff/Defendant by Counterclaim

v.

Maja Buergi

Defendant/Plaintiff by Counterclaim

Decision

Judge: The Honourable Justice Denise Boudreau

Heard: October 24, 25, 26, 27, 28, 2022, in Bridgewater, Nova Scotia

**Final Written
Submissions:** January 31, 2023

Counsel: Mark A. Taylor, for the Plaintiff
Kathryn M. Dumke, K.C., for the Defendant

By the Court:

[1] The parties are in dispute over a home (partially) built by the plaintiff for the defendant, located at Tupper Lake, Nova Scotia.

Facts

[2] I have considered all the evidence I heard during this trial, although I will not mention all of it. The following are the facts of this matter as I find them, unless stated to be otherwise.

[3] The defendant is from Switzerland. She is now retired but was previously employed as a university professor (in the field of engineering). The plaintiff is a limited company owned by Peter Juergensen and his wife Brigitte. The Juergensens have been residents of Canada since 1998. The plaintiff company has existed since 2001.

[4] In 2012, while still employed in Switzerland, the defendant spent time in Nova Scotia on a sabbatical and decided that she was interested in building a retirement home in this province. Retirement was still a few years away for her at that time.

[5] The defendant was specifically interested in a log home. She found an ad for the plaintiff's company and contacted and spoke to Mr. Juergensen in May 2012. He invited her to his home for further discussion.

[6] The parties met in May 2012. During that meeting they discussed the defendant's ideas. The defendant indicated to Mr. Juergensen that her time frame for retirement was approximately 2016 to 2018 and that her budget would be \$400,000 to \$500,000, as a result of the sale of her home in Switzerland upon her retirement.

[7] Following this meeting the defendant sent Mr. Juergensen some possible plans by email (on May 29). One of the options was the expansion of an existing structure to which the defendant had access; the other she described as follows:

V1 is my "dream home" in the event I can find a vacant property and will be able to build everything from the ground up. In this regard, I would like to find out if this would even be possible with a budget of 500 Canadian dollars.

[8] The parties had a second meeting in June 2012. There was agreement that the defendant's best option was to move forward with the purchase of a vacant lot and a home construction "from the ground up". Notes made by Mr. Juergensen confirm (as he did in his evidence) that the defendant wanted to know what she

could build for \$500,000. He provided her with some information as to what was possible at that price point:

17 June 2012 Cust. Buergi

Ms. Buergi visited us in our home

Investment of C\$500,000 – free estimate

160 qm (2) = 1721 SQ. feet

X \$150 per sq. feet

+ 15% tax

Not Included

Basement

Septic

Complete Groundwork

Well + Waterline + pump

“Kachelofen” (NOTE: I am advised this means “tile stove”)

Free estimate given based on 2012 prices

[9] It should be noted that the defendant and Mr. Juergensen speak German.

Many of their notes and emails, contained in the evidence, were in German (with translation provided for the Court).

[10] The defendant continued along with her plans. By the end of 2012 she had purchased a lot of land at Tupper Lake, Nova Scotia. The Juergensens were made aware of, and kept apprised of, the progress of this purchase; they supported the defendant in this purchase as a suitable lot for construction. It would also appear

that the Juergensens assisted the defendant with certain practicalities involved, including paperwork issues with the municipality.

[11] The defendant then started drafting new building plans, which she acknowledged in her evidence were “completely different” than the draft(s) previously provided to Mr. Juergensen. She started emailing these new draft plans to Mr. Juergensen in 2013, and there were numerous email exchanges between them to discuss her ideas.

[12] I should note that over the course of these parties’ interactions, the defendant drafted various possible construction plans for her home. All of these plans are reasonably sophisticated and detailed. Although they were clearly created by computer program, one presumes that the defendant’s engineering background must have been helpful to her in the creation and discussion of these drafts. Having said that, however, in her emails to Mr. Juergensen, the defendant did note that she was relying upon Mr. Juergensen’s expertise to tell her if her ideas were a) possible within the building code for a log home and b) within her budget.

[13] In my view it is helpful to quote the correspondence. The defendant emailed Mr. Juergensen on April 2, 2013:

April 2 2013 from Ms. Buergi to Mr. Juergensen

...

During the Easter holidays, I finally had some time to work on my dreams 😊

Attached you will find my latest log home version. I tried to implement your suggestions from last time. What do you think about this? Are we slowly moving closer to a practical solution? Could you please provide another non-binding estimate?

...

April 2 2013 Mr. Juergensen to Ms. Buergi

Dear Ms. Buergi,

I received your email and drawings; thank you very much! Some of the details on the drawings are printed so small that they are very hard to read. Nevertheless, I was able to read the dimensions of the home. I will be happy to provide you with a nonbinding estimate in the near future; however, I'd like to ask for your patience. Additionally, please provide the following details:

Main floor:

what type of flooring in which rooms?

What type of wall finishes in which rooms?

Bathroom fixtures, kitchen design should be coordinated at a later time.

Basement:

It is supposed to be completely finished at the same time? If so, please include details as above.

The dimensions of the exterior deck are clearly legible. For now, we need to postpone the determination of the costs for the whirlpool tub, tile stove, well drilling with the pump and water line. I will discuss with Richard all necessary earthworks, including septic and road construction, as far as possible. In addition, we will not be able to determine the cost of installing powerlines until the location of the home has been determined.

I should be able to prepare an initial estimate once you send me these details; otherwise, I will get back with you. The floor plan is laid out very well; I particularly like, among other things, the somewhat larger entrance area. In the kitchen, I see the stove standing diagonally across the corner and also the double sink not below the window. As I can see, you drew the covered deck on the western side of the home; perhaps one should think about how much time one

spends there. It might be worth considering a covered deck above the front of the home facing the lake. However, the disadvantage would be that you would lose a lot of natural light in these rooms, the kitchen, living room, and office.

I believe you were thinking the same thing.

Regarding the basement: everything looks very good; the utilization of the large area has been optimally designed. On the *main floor*, based on the stated dimensions of the home, you would have approximately 1,943 square ft. (or 190 m²) + the same in the basement. [What] a huge area!

In closing, one (for the time being) last question: do you have a rough idea of when the project is to begin? It would be very helpful for our long-term planning if you could give us a rough estimate [of your time frame]. Thank you very much!

...

April 5 2013 Ms. Buergi to Mr. Juergensen:

Good morning Mr. Juergensen,

The sketches with flooring and walls are attached to this email and the following email. Yes, the basement is to be finished, too.

Kitchen: Yes, the stove is to be positioned in the corner. I think it looks better than along a straight wall. I positioned the double sink the way I did so that I can look at the lake or, if I have guest, simultaneously chat with them while I am working. I'll be happy to discuss what makes sense and what doesn't make sense ☺. By the way, this applies to the entire design. I appreciate critical feedback, because I have no experience in this field.

The covered deck is [located] in the North and in the south (see drawing). I wanted a connection from the deck in the front to the entrance, and additionally, the possibility to hang laundry when the weather is bad. Moreover, I did not want to make this connection in front of the bedroom. And I like it. I do not want an additional covering [roof] facing south since I have the sunroom which provides shade toward the east. Is there any specific advantage of positioning the deck toward the west? Does bad weather usually move in from the west? If so, we can mirror everything: that wouldn't be a problem.

Yes, it once again ended up consisting of many square metres . Well, I just love large rooms. If it exceeds my budget, I will just have to cut down on something; however, in that case, I will have some concrete reference points.

There is no rush regarding the estimate; feel free to take your time. I just wanted to take advantage of the Easter holidays.

At the moment, I am almost certain that I will be retiring at the end of February 2017. This means forest clearing and access road in the summer of 2016, house construction in the summer of 2017. However, I am in the process of specifically clarifying whether I could retire one (1) year sooner. In that case, everything

would shift by one (1) year. In order for me to determine if this would be feasible, I need your estimate, among other things.

April 7 2013 Mr. Juergensen to Ms. Buergi

Dear Ms. Buergi,

I received your email dated 04/05/1013 [sic] and the attached drawings. Thank you very much!

We can find the best possible solutions for the kitchen, stove, sink and their locations when the time is right. However, your draft makes sense, although it looks a little different than the "norm".

The *covered deck* and the way you plan to use it makes sense, too. However, bad weather, rain, and lots of wind usually moves in from the south or southeast; rarely from the west or north.

Regarding your basement drawings of 04/02/2013, I noticed that you marked some interior basement walls as *concrete walls*. This is how it is done in Europe; however, here in Canada, dividing walls are usually framed walls with 2' by 4' [sic] or 2' by 6' [sic] wood studs with drywall or wood panelling. This is much cheaper than solid concrete walls. If desired, they can be insulated on the inside. Unless you have particular reasons for wanting solid concrete dividing [interior] walls??

Thank you for the information in the targeted schedule. Overall, it is consistent with what you told us last year. There are no fees for the nonbinding estimate. Thank you for asking though.

The drawings/specifications you sent me are very informative. A big complement [to you] !!!

...

April 8 2013 Ms. Buergi to Mr. Juergensen

Good morning Mr. Juergensen,

Regarding concrete basement walls, I came up with the following considerations:

- wherever there are *log walls* on the *main floor*, I supported them in the basement with cement walls. Feel free to change this, if it isn't necessary.
- In addition, I added a cement wall below the tile stove because of its weight. It could be replaced with double T beams, if this is easier.
- The same applies to the *whirlpool* [tub] since it holds several hundreds of litres of water. Therefore, I also supported it by cement walls. Could also be replaced with double T beams.

- Regarding the unfinished basement I am unsure whether the humidity requires concrete walls or not.

Thus, some concrete walls were considered for static reasons or due to humidity levels. Since I am no expert in this field, I cannot determine whether they are actually necessary or not. Please make that decision; you are the expert!

I am enjoying the planning process, and I am grateful for your feedback.

May 6 2013 Mr. Juergensen to Ms. Buergi

Dear Ms. Buergi:

Regarding your planned log home at Tupper Lake and the drawings provided by you via email on April 2 + 5 2013, we prepared the following no obligation and non-binding cost estimate based on current prices and building regulations (Nova Scotia Building Code Regulations).

We have made the following changes in accordance with your drawings concerning the interior basement walls made of concrete:

Interior basement walls will be built at a later time as per engineering planning with a wood frame structure. All other specifications you provided have been considered and calculated without modification in this cost estimate.

The following work and building materials are included:

Architectural drawings and applicable engineers' fees.

Earthworks, felling trees, building a road, building a complete *septic* [drain] field, excavation work for the basement, trench for the water line.

Concrete basement in accordance with your drawing (*walk-out basement*).

Concrete posts [footings] for the outer deck.

An exterior deck in accordance with your drawing, using PT - *pressure-treated* - wood.

Log home package, log walls as marked, made from 8 inch *round* logs, EASTERN WHITE CEDAR. Roof according to your drawing, including roof above the exterior deck, according to your drawing.

Sunroom: Stud walls, exterior panelling 8 inch cedar log siding, cedar corners.

Main floor: all specifications according to your drawing and descriptions. (See note below)

Basement: all specifications according to your drawing and descriptions. (See note below)

Electrical work in accordance with applicable building regulations and your drawing.

Plumbing work in accordance with applicable building regulations and your drawing.

Assembly of the house package including the exterior terraces (or deck) with banisters and stairs.

Installation of the *air exchange system*.

Transport of all building materials.

Provision of a crane.

Building permit, development permit. All inspections during the construction phase, one (1) final inspection.

Construction insurance during construction - *builders risk insurance*.

Proportional gasoline allowance for travel to and from; carpenters - Liverpool - Tupper Lake.

Portable toilet for workers.

Installation [of a] complete rain gutter system, colour of your choosing.

Provision of dumpsters and disposal of construction waste.

One [1] final cleaning of the construction site.

OPEN [ISSUES] AND NOT INCLUDED IN THE ESTIMATE:

Well and pump with water line. Well drilling currently costs \$18.00 Per foot.

Power lines and burying of lines, if applicable.

Kitchen design and appliances

Whirlpool [tub] [2x]

Tile stove

The nonbinding estimate for the above work on your LOT at Tupper Lake is:

CANADIAN DOLLARS: \$452,148.00 PLUS 15% HST

I can calculate a new fixed price for you at a later time, approximately three (3) months before the effective start of construction, which we will then guarantee in writing until the completion of construction and hand over of the house.

All tasks to be completed, permits, and inspections will take approximately six (6) to seven (7) months.

I hope this estimate will be helpful for your planning. As usual, you may contact us at any time if you have any questions or need additional information. There is no fee for this estimate!

...

- [14] There is handwriting at the end of this email which indicates:

Nonbinding estimate for log home only!

Sunroom stud framing with cedar log siding.

Not 8" round massive logs in this location.

Carport and/or garage is not included in free estimate.

- [15] The emails continue:

May 13 2013 Ms. Buergi to Mr. Juergensen:

Good day, Mr. Juergensen,

Thank you for the estimate. Unfortunately, it is much higher than I had expected. I looked at comparable log homes on the Internet during the winter and based on what I found, I had estimated it to be less [a lower price].

I would be interested to know how high the individual items were calculated [a cost breakdown]. Would it be possible for you to add the costs under the items listed below? Thank you.

...

May 24 2013 Mr. Juergensen to Ms. Buergi:

Dear Ms. Buergi,

Please forgive me for taking so long to get back with you.

[I am writing] Regarding your email in which you stated that the price of the total in the "estimate" surprised you. For better understanding, I will provide the following data for clarification.

[Let's] start with the "square footage" of your house. The main floor measures approximately 2,090 sq. ft.; we can consider the planned and finished part of the basement to measure approximately 1,231 sq. ft. Thus, we have a total area [square footage] of approximately 3,321 sq. ft.

Therefore, the total constructed/enclosed area [square footage] is 3, 321 sq. ft. The non-binding estimate is \$452,148.00 plus tax.

When you divide the estimated cost of \$452,148.00 by the above-mentioned enclosed area on both floors, i.e. main floor and basement, approximately 3,321 sq. ft., you will get a cost per square foot of \$136.00 (and this calculation cannot include applicable taxes!) This price already includes all costs for the construction

of the full basement, the complete earthworks, septic, etc., as described. In addition, the entire exterior deck, including roofing, is included in the price. I believe this is an excellent price, and you were able to get a first impression of our services last year when you were on-site.

A good (reasonable) price per square foot for a log home of this size with high-end finishes is approximately \$160.00. However, this price does not include the described earthworks, a full basement and optional exterior decks!

I fully empathize with customers who browse the Internet trying to compare prices. The problem is that one would truly have to compare "apples to apples", not including the level of service provided. If you ask five (5) different contractors for estimates, you will receive five (5) different prices and material lists. This may be the case anywhere. What is more important is the completeness of the package and ultimately, which quality standards they meet. It is absolutely imperative to only use high-quality [construction] materials when building a timber/log home. Price differences between A + B or C wood qualities are significant!

As you told me, you love large rooms, etc. you did an excellent job in the construction design and the plans you provided to me, which means that you made my job of calculating much easier which allowed me to prepare a very good, although non-binding, cost estimate.

I can expressly confirm that we will pass on and offer you our best house price / package price at a later time when the project is about to start.

I hope you will find the above information helpful.

We are here for you. Please do not hesitate to contact us at any time!

[16] Following these exchanges of emails, the defendant continued to give the project thought.

[17] In 2015 the defendant contacted Mr. Juergensen and advised that she had changes she wished to make to her plans. For example, she wished to take out the Whirlpool tub from the home interior; she also wished to switched out the (main floor) bedroom and kitchen areas for each other. Although the defendant testified that she considered these suggestions as a "sizing down" of her plans, she also

indicated that these suggestions did not cause any reduction in the total area of her plan's outside walls.

[18] The defendant was also interested in alternate energy sources, and being “off the public electrical grid” as much as possible. She told Mr. Juergensen that she was interested in having both solar panels (to heat water) and a “photovoltaic” system (to produce power) installed on the roof of the home. She testified that she provided a draft plan to Mr. Juergensen which included these elements, in particular, the shape of the roof that she proposed in order to accommodate these elements (and their weight).

[19] Having said that, I should note that this Court has been provided with multiple versions of the defendant's draft home construction plans. I was advised that one (or more) of those plans were the ones prepared by the defendant in 2015 and sent to Mr. Juergensen. To be frank, I remain unsure as to when each of these plans was prepared and when they were exchanged (if at all).

[20] This seems like an opportune time to pause and note that the presentation of evidence in this trial left much to be desired, and left much of the details unclear.

[21] During the trial the Court was provided with a “Joint Exhibit Book” (Exhibit 1). The first 60 pages or so of that document contain various draft construction

plans. They are mostly undated; they have no divisions between them, which makes it difficult to know where each starts and ends. There was, however, an Index to Exhibit 1, which provided some detail and had been agreed upon.

[22] Unfortunately, once the witnesses started testifying, it became clear that the Index to Exhibit 1 was inaccurate. Both Ms. Buergi and Mr. Juergensen, in their evidence, contradicted or were unsure of dates purportedly “agreed-upon” in the Index. In particular, Ms. Buergi did not recognize the plans marked as “2015” in the Index, to have been prepared or sent in 2015.

[23] Having been alerted to these issues, counsel then provided me with a (jointly agreed-upon) “Amended Index” to Exhibit 1 (marked as Exhibit 7). I have reviewed it and compared it to the first Index and the evidence of the witnesses. Frankly, it is no better than the first version. Some details remain contradicted/unclear.

[24] To note a related problem, and for some unexplained reason, the emails in Exhibit 1 are separated from their attachments. It was often impossible to determine which of the documents were being discussed in any given email. This was a problem for the Court and proved a problem for the witnesses as well.

[25] In their testimony, both Mr. Juergensen and Ms. Buergi were often unsure as to many dates and details of the events 2013 to 2017. There were many questions answered with “I think so” or “maybe”. Even when directed to the documents in Exhibit 1, often neither could say when certain documents were produced, when they were exchanged, what house plan went with what email, and so on. Neither witness was able to resolve many of the questions and inconsistencies that were apparent from the evidence or lack of evidence before the Court.

[26] Exhibit 1 is a large volume and because of its organization (or lack of organization) it is a very difficult document to work with. It does not have clear demarcations between its documents and is, inexplicably, not in chronological order (or, quite frankly, any logical order that I could determine).

[27] I return to 2015. Exhibit 1 contains handwritten notes from the defendant which she referenced in her evidence (pages 351 to 354), relating to meetings that occurred between she and the Juergensens in August 2015:

11 August [20]15

Meeting with the Juergensens in Cottage (illegible word) at Lake Patrick.

Roof: - We agreed on the ordinary saddle roof.

- It must have a pitch angle of 40 – 45 degrees toward the south (optimal for photovoltaic)

- There must be enough space to lay three rows [of panels]

- 4 vertical solar panels

- Exterior walls [of the] house 8“ long (suggested by P.J.)
- Interior walls framed (suggested by P.J.)
- Sunroom walls framed (suggested by P.J.)
- Light well – no problem
- approximately 160 CAD per ft(2) finished living space
- Heater (illegible word) => P.J. to find out if electrical heater is still necessary

19 August [20]15

Electricity / telephone: approximately 10,000 CAD (circa 200m)

Whirlpool:mcburneypools.com

Main fl. 300,000 – CAD

Total: 468,00.- [sic] + TAX CAD

Well: 19. – CAD/foot – max 10,000.-

Exterior decks: approximately 10,000.-

Doors 91

20% when contract is signed

60% 60 days before the start of construction : middle of April

20% after hand over of keys

- In Sept 16 determine where [location of] house and carport.
- Build basement in the fall
- Build road and court in front of the house [front yard/driveway]
- Build well.

[28] The document includes a typewritten note at the end of the handwritten

notes:

The planned home was a little larger at that time; approximately 3, 000 sq. ft. I ended up reducing its size a little, because I wanted to be able to pay for everything with the proceeds from [the sale of] my house in Switzerland and without taking out a mortgage.

[29] Exhibit 1 also contains a document which appears to be a new estimate from the plaintiff, created in August 2015:

| | |
|--------------------------------------|-----------|
| 27 August 2015 | |
| Customer Buergi – Swiss | |
| Estimate Budget – pricing only | |
| Kenomee Log Package | \$56,700 |
| Trucking cost log package | \$1,300 |
| Kitchen allowance, no appliances | \$10,000 |
| Basement + all concrete posts | \$53,500 |
| Electric Log home, carport | \$32,000 |
| Labour W Smith Log home Carport | \$109,200 |
| Gas only - travel to T.L. | \$2,000 |
| Eng. Roof Trusses Log Home | |
| Carport, eng, subfloor log home | \$23,000 |
| Peller Windows and Doors | \$25,600 |
| Transport Windows Montreal T.L. | \$1,280 |
| Reutac Toilet & cleaning | \$750 |
| Raingutter Log Home + Carport | \$1,600 |
| Tiles allowance \$5 – sq. ft | \$1,500 |
| Building Development Permit | \$600 |
| Eng Costs floor plan | \$1,300 |
| Div. Building materials for log home | |
| + carport Mary Lake HH | \$76,000 |
| Kent, div. building materials | \$22,000 |
| Flooring allowance \$3.25 sq ft | |
| Plumbing + Air Exchanger | \$16,600 |
| Groundwork, excavation + backfill, | |

crusher dust for carport, compacting \$15,500

| | |
|------------|-----------|
| Ca – Total | \$449,430 |
| | + tax 15% |

[30] Page 2 of that document notes:

Estimate M Buergi

Estimate plus:

Well + pump

Outside deck / steps Log Home

Carport + Log Siding

Painting Log Home Carport

Photovoltaic System

Pool/spa

Allowance for Flooring, kitchen + tiles is included

Appliances for kitchen not included!

[31] These two “estimates”, one recorded by the defendant and one recorded by Mr. Juergensen, are both dated August 2015. Interestingly, however, they are not in the same amount. It is impossible to know if one of those estimates includes an element or elements that the other does not.

[32] The estimate noted by the defendant is almost entirely without detail. The estimate noted by Mr. Juergensen, while more detailed, is also somewhat unclear. For example, there is a bare reference to the “basement + concrete posts”, without further explanation as to what that is referring. The estimate seems to both include, and exclude, the carport. It also seems to exclude the outside deck and

steps (although the deck had specifically been included in Mr. Juergensen's 2013 estimate).

[33] All of this lack of clarity and detail resulted in entirely predictable problems. For example, at some point, a carport (attached to the home) begins to appear in some versions of the plans drafted by the defendant. Later, the plans change to make this carport into a stand-alone garage, separate from the house. It appears from the evidence that this was done at Mr. Juergenson's suggestion, which the defendant accepted. However, no one recalls when this happened, or much detail of those discussions. The estimates provided variously mention a carport and/or a garage. Perhaps most notably in the context of the present dispute, it is unclear how (or if) that change provoked any change in the ultimate price.

[34] The basement provides a further example. Mr. Juergensen testified that, in his mind, this deal always included an "unfinished" basement. The defendant, for her part, testified that it was always her intention to have a "finished" basement.

[35] The documents are precious little help in resolving this dispute. Mr. Juergensen's 2012 notes indicate that the "basement" is not included. The 2013 estimates speak of the basement, but only in general terms and in the context of the basement walls (i.e., concrete or not). One of the defendant's draft plans (from

2013) seems to note a requirement for “flooring and tiles” in the basement; there also appears to be reference to a “bathroom with shower”. Another plan (contained in Exhibit 1 at page 25 and repeated at page 150) is marked “unfinished basement”. I cannot be entirely sure of the year of that particular plan, nor if it was even exchanged. It is also unclear to me if the later plans contained in Exhibit 1 are different again.

[36] In 2016, the defendant, once again, sent new draft construction plans to the plaintiff. Unfortunately, and once again, I am not entirely sure exactly what plans were sent at that time. As was the case throughout much of Exhibit 1, the plans were not attached to the correspondence they were originally attached to. Further, while the Amended Index (Exhibit 7) says the plans at pages 41 to 53 are from 2016, the defendant in her evidence said all plans from pages 31 to 56 were from 2015.

[37] In any event, the 2016 correspondence from the defendant to Mr. Juergensen noted:

Please find enclosed, the latest sketch plans of my house.

Primarily, the right side has changed when you look at it from the direction of the lake, i.e. the bedroom, walk in closet, and bathroom. I now removed the washing machine from the bathroom; its location bothered me. Things will get a lot easier now with the walls and the doors.

I am still undecided regarding the flooring, I hope we can discuss and settle this subject in September. If I can mount the photovoltaic panels on the roof, the new plans are valid. However, if I need to mount the panels on a separate frame, I would rather have the old roof shape.

What are your plans for the next steps? Will you be building the foundation in September/October?

...

[38] A word about those photovoltaic panels. When this suggestion was first made by the defendant to Mr. Juergensen, he indicated to her that he was entirely unfamiliar with such a system. He put the defendant in contact with a company in Cape Breton, who, he thought, might be able to help her. The defendant contacted that company directly and discussed it with them. For various reasons, that idea was eventually abandoned. However, as can be seen from the just-noted correspondence, it was still being discussed as late as 2016. It was significant because such a system would require a certain roof shape.

[39] In 2016 the parties visited Kenomee Log Homes (“Kenomee”) to discuss the defendant’s plans and wishes. This was the company that would design the log home package and supply the materials. In December 2016, the plaintiff obtained a quote from Kenomee for the required package, including the logs and the building blueprints.

[40] The quote from Kenomee was for a 54’ x 47’ home, with a separate 22’ x 27’ garage. Their estimate was approximately \$68,000 (although this quote was for

“full logs”; log siding (made from half logs), would be considerably cheaper). The quote included the materials for the separate garage (with log siding).

[41] The plaintiff sent this quote to the defendant. She responded that from her perspective everything looked okay. She authorized the payment of a deposit to Kenomee.

[42] It should be noted that this amount, already, is in excess of the August 2015 estimate provided by the plaintiff. Mr. Juergensen had estimated \$56,700 for the Kenomee package. The estimate from Kenomee is now over \$68,000. Despite that, the Kenomee estimate was deemed acceptable by the defendant.

[43] In March 2017 the defendant again made changes to the plans. She communicated a list of those changes to Mr. Juergensen and requested that he send along those changes to the designer of the Kenomee plan. While it does not appear that there were any major structural or “outside” building changes requested at that time, there were multiple changes requested to elements such as windows, decks, and doors.

[44] I cannot take judicial notice of what any changes in building plans might entail from a practical perspective. I have no way of knowing whether these 2017

changes were major or minor changes, from either a building perspective or a cost perspective.

[45] However, I do find it significant that, even as late as March 2017, many aspects of this construction are still being discussed and debated; even aspects which, in my view, would seem to be reasonably important. For example, there continues to be discussion relating to the solar panels; to the hot tub to be installed on the deck (which, according to Mr. Juergensen, required special building and engineering considerations due to its weight, depending on manufacturer specifications); and the tile stove.

[46] It also appears that as late as March of 2017, the defendant is still interested in the photovoltaic system, and is still seeking whether the proposed design will accommodate same. Again, I note that both the solar panels and the photovoltaic system were significant factors in determining the roof shape and weight requirements.

[47] The final Kenomee plans were completed and dated on March 26, 2017. As I understand it, this is the plan closest to the house that was actually built on the property, at least from the perspective of the exterior.

[48] Construction actually commenced on the building in 2017. It would appear that the defendant and Mr. Juergensen continued to have discussions onsite as construction progressed. According to the defendant, these discussions were often unpleasant due to Mr. Juergensen's demeanor, which she found aggressive and rude. The defendant noted that when she would raise concerns, he would blame her for the difficulty, and would become loud and aggressive.

[49] In April 2017 the defendant paid \$287,500 to the plaintiff. In 2016/7 she also paid Kenomee directly (approximately \$70,000).

[50] Mr. Juergensen testified that there were additional requests made by the defendant of the plaintiff as the construction progressed. I have been provided with (undated) notes from Mr. Juergensen stating the following (Exhibit 1, pages 245 to 246):

Page I

Extra request by M. Buergi in May/June 2017

PT deck on special sonotubes at Lakefront, Dims: 30' x 20'

Costs

Excavator 10 hrs, excavation for sonotubes, backfilling, class A stones with special foil under complete deck.

Delivery and pick up of Excavator

Concrete supply for sonotubes

Groundwork, total costs \$3,840

Concrete for sonotubes \$770

 Total \$4,610 + tax

Above Groundwork total costs includes also the following work:

10 hours labour for Excavator operator cutting trees for well location, built ramp for well truck, fill materials for ramp.

Digging of 2 holes at the Driveway Entrance, for installation of a Gate (By RSH – Caledonia)

Gate is an extra request by M. Buergi All arranged by Peter Juergensen

Page II

Lake Deck

Complete materials to build PT deck, 20' x 30' feet, except concrete supply.

Included in my letter 12 Sep 2017

Total \$3469 + Tax

Total labour for Wayne and Jake = 40 hours

40 hours x \$38 = \$1520 + 15% tax

Working hours and labour is included in the total labour costs (\$48,340-) See page 3 my letter 12 September 2017!

| | |
|-------------------------------|--------|
| <u>Breakdown:</u> Total costs | \$4610 |
| | \$3469 |
| | \$1520 |

 \$9599 + tax

[51] This estimate relates to an entirely new lakefront deck, and a gate, requested by the defendant. The defendant testified that originally she wanted this done later; however, Mr. Juergensen advised it would be cheaper to do it then (presumably because of the equipment being on site) so she agreed, so long as its construction did not delay the house build. Obviously, however, it was an extra cost not provided for in any earlier estimates or quotes.

[52] I was also provided with the following notes from Mr. Juergensen, again undated (Exhibit 1, pages 247 to 248):

Change + Add on:

Garage instead of Carport:

| | |
|-------------------------------|-----------|
| Foundation | \$9280 |
| Concrete Floor | \$3891 |
| Roof Trusses | \$2260 |
| Shingles, 40 bundles | \$1059 |
| Nova Seal Roof Paper | \$105 |
| 2 Garage doors + installation | \$2238 |
| 7 site entrance door & lock | \$408 |
| Venting | \$65 |
| Studs 2" x 6" x 8' | \$450 |
| Plywood | \$1075 |
| Nails. Tapes | \$125 |
| Housewrap, Typar | \$110 |
| Drip Edge | \$96 |
| Studs 2" x 10" x 10' 4x | \$56 |
| 7 pcs 1/2" plywood | \$45 |
| PT plywood – soffit | \$435 |
| Lathe, strapping shelts | \$79 |
| Paint, 8 cans | \$273 |
| Excavation for foundation | \$660 |
| Fill Material “ “ | \$2400 |
| Compacting Fill | \$125 |
| <hr/> | |
| Total | \$25,185 |
| 15% HST | \$3777.75 |
| <hr/> | |

Grand total \$28,962.75

Original plan was to use “crusher dust” as floor, instead of a concrete floor!

The following labour hours are included in our total labour costs, our letter dated 12 Sep 2017, page 3.

Working hours on Garage only:

Quinn total – 51 hrs

Shawn total – 26 hrs

Jake total – 46.5 hrs

Wayne total – 21.5 hrs

Total: 150.0 hours

150 hours x \$38 = \$ 5700

15% Tax = \$855

Grandtotal = \$6555

Garage exterior logsiding in the amount of \$14, 482 plus 15% tax is already included in Kenomee Sales Agreement (see documents att.)

Only this garage material was paid direct to Kenomee by M. Buergi (log siding)!

[53] This document obviously relates to the stand-alone garage. As I previously noted, the parties had agreed to change the attached carport to a stand-alone garage at some unknown date (but prior to the Kenomee quote/plans).

[54] It is not clear to me how to incorporate this “garage” quote into the evidence as a whole. Mr. Juergensen’s August 2015 quote seemed to both include the cost of some (or all) materials for the carport, but then to exclude the carport. This last quote is for a garage, which one presumes would be more expensive, as it is a separate and enclosed building. But I cannot determine the difference in the two

with the evidence I have. Surely some of the materials budgeted for the carport in the August 2015 quote were used in the building of the garage.

[55] For her part, the defendant did not dispute that she requested, or agreed to, certain extras during the construction process. For example, the garage and the lakefront deck, as I have already mentioned. As another example, she and Mr. Juergensen at some point had a discussion about installing Cape Cod siding. Mr. Juergensen said he could get a good price, and the defendant agreed that it was a good maintenance free product, so she agreed to it. The defendant did not always ask, or know, if these extras would increase her ultimate price.

[56] At some point there arose a debate between the parties about the Whirlpool spa that the defendant wanted installed on the outside deck. Mr. Juergensen noted to the defendant that this required specific engineering plans due to the weight. The defendant did not agree. This issue appears to have remained unresolved between them.

[57] In late September 2017, when the construction was well in progress, the defendant and Mr. Juergensen had a telephone conversation. Mr. Juergensen advised that he was now estimating a much higher cost for completion of the home, in the range of \$600,000 plus tax (non-inclusive of the log package). The

defendant was shocked, as she recalled the original estimates of approximately \$450,000. In her view, there had been very few changes made, or at least nothing that would cause such a dramatic increase in the price. Mr. Juergensen, for his part, was of the view that there had been a number of changes made since the original estimate which caused the greater cost (for example, the stand-alone garage).

[58] In October 2017 the plaintiff issued another invoice to the defendant for about \$135,000. The defendant gave the plaintiff a cheque for \$110,000 in response, saying that she would have the balance in a few weeks. However, by this point the defendant had had enough of Mr. Juergensen and his company and had decided that she wanted to fire him.

[59] In October 2017 a final incident occurred between the defendant and Mr. Juergensen onsite. They were arguing and Mr. Juergensen became aggressive with the defendant, raising his voice. The defendant became faint and required assistance from one of the workers on site.

[60] Following this incident, the defendant formally terminated the plaintiff company, on October 25. The defendant spoke to Wayne Smith, who was the lead carpenter on the job site, to see if he and his crew would continue and finish the home if the plaintiff company was terminated. Mr. Smith agreed. The defendant

and Mr. Smith also, themselves, came up with a plan for the design of the deck/Whirlpool spa and did not seek further engineered plans.

[61] It was confirmed by the workers on site (Wayne Smith and Quinn Smith) that at the time the plaintiff was terminated, the outside of the home was completed, the log walls were up, and the building was roof tight. However, a significant amount of inside finish work was remaining to be completed. This was not disputed by Mr. Juergensen in his evidence.

[62] Wayne Smith testified that, in his opinion, at that time only 50 percent of the home was then completed. He included in this assessment the finishing of the basement, as it was his understanding (although he did not seem sure) that the original plans called for a finished basement. He noted that he and his crew did finish the basement for the defendant.

[63] Interestingly, given everything I have described, it does not appear that the defendant sought any formal advance estimate from Mr. Smith as to what he would charge to complete the home. Wayne Smith testified that he was unsure whether he gave any estimate, that he “might have given her a ballpark”. The defendant and Mr. Smith had no written contract.

[64] I have been provided with a document which appears to itemize the total labour done by Mr. Smith's crew to complete the defendant's home after the plaintiff was terminated (Exhibit 1, pages 295 to 296). Wayne Smith testified that he and the defendant prepared this document together. Although he called it an "estimate", the document is dated December 3, 2017, when he and his crew would have already been doing the job for several weeks. None of the listed items are given a value, in terms of hours spent on each particular job. The total "estimate" is for \$122,956.78.

[65] There are a few notable aspects to this document, which I review in combination with the evidence of both Mr. Smith and the defendant:

a) much of the list appears to be "finishing" type work; it includes no electrical or plumbing work (which was done by others contracted by the plaintiff);

b) a number of the items listed appear to (again) be extras/changes, effected on the (on-site) instructions of the defendant, not found on the official Kenomee plans;

- c) there were further changes made that are not listed on this document, including the change to the deck/Whirlpool spa design, a re-design of the entrance steps, and at least one sonar tube/post being moved;
- d) the document notes that it represents costs for labour only. However, it provides for the installation of a number of items, with no accompanying bill for the items themselves. In fact, I see no bill from Mr. Smith in relation to any materials at all. It is unclear to me whether this means that all materials were all already on site (and paid for by the plaintiff) at the time of the plaintiff's termination, or whether the defendant paid suppliers directly after the plaintiff's termination;
- e) Mr. Smith believed that this estimate was inclusive of HST, although he seemed unsure. If it was, such would mean the cost of completion, after the plaintiff was fired, was a little over \$100,000;
- f) Mr. Smith could not confirm what his actual final bill to the defendant was.

[66] As I have already noted, the defendant made two payments to the plaintiff: one for \$287,500 in April 2017, and a second one of \$110,000 on October 2, 2017. She had also paid Kenomee directly. Her total payments on the home (at the time the plaintiff was fired) were \$467,625.23.

[67] The second payment to the plaintiff was partial payment for an invoice, going to September 8, 2017, in the total amount of \$136,588.95. The plaintiff notes that \$26,588.95 is still owing on that invoice. The defendant testified that she did not pay the remainder as she felt she had paid enough, given the circumstances.

[68] The plaintiff claims that it incurred further expenses between that last invoice (September 8) and the official date they were terminated (October 25, 2017), including labour / materials / engineering costs / fuel expenses in the amount of \$73,730.78. They note a credit to the defendant, for builder's risk insurance, in the amount of \$595.

[69] It should lastly be noted that the defendant called (as an expert witness) Mr. Josh Morash, a licensed real estate appraiser. In his evidence Mr. Morash appraised the home, as of June 1, 2018, as being worth \$515,000 (although it should be noted that he attended the home in July 2019). Mr. Morash further estimated the "replacement cost" of the home, again as of that date, to be \$512,608. He does this by taking the square footage of each level of the home, the garage, and the deck and giving that number a value per square foot (as determined by a computer program).

Claims

[70] The plaintiff claims damages in the amount of \$99,724.73, which it submits is the remainder of the amount owing on this contract, for the work they did and the materials they provided, until the time they were dismissed by the defendant. In the alternative, the plaintiff claims from the defendant for unjust enrichment or on a quantum meruit basis.

[71] The defendant disputes the plaintiff's claims. She submits that the plaintiff's 2015 estimate should be considered a formal offer, and binding, towards the establishment of a "fixed price" contract. This estimate was in the amount of \$468,000 plus tax (or, by my calculations, \$538,200).

[72] The defendant further argues that the plaintiff repudiated this fixed price contract. In addition, she argues that in its estimate(s), the plaintiff (through its representative Mr. Juergensen) misrepresented the cost of this construction in order to induce her to enter the contract.

[73] The defendant further argues that since at the time the plaintiff was terminated the house was only 50 percent complete, she should only have paid 50 percent of the contract price by that time (\$269,100). By this logic, submits the defendant, she has in fact overpaid the plaintiff by over \$200,000. She seeks repayment of that difference.

[74] The defendant further counter claims for the additional cost to her in hiring a new contractor to finish the construction, as well as general damages.

[75] The plaintiff defends the counter claim and says that all estimates provided to the defendant were “non binding”. Furthermore, that many extras were requested by the defendant during the build which increased its cost.

Analysis

[76] The various claims made by the parties are quite intertwined. The defendant’s response to the plaintiff’s claim is entirely dependant on the Court’s assessment of her substantive arguments relating to contract law. Therefore, I will assess the parties’ claims in a global fashion.

[77] One of the first and most fundamental questions that is raised by the litigation is: Was there an enforceable contract between the parties?

[78] An enforceable contract requires four things: an offer, an acceptance of that offer, consideration, and the parties’ intention to contract with each other.

[79] The defendant claims that there was a binding contract in existence here, at least in terms of price, that the plaintiff should be held to. As I have noted, the plaintiff provided more than one “non-binding” estimate to the defendant, during

the years 2012 to 2017. The defendant suggests that the plaintiff's August 2015 estimate (contained in her notes from that meeting, in the amount of \$468,000 plus tax) should be considered a formal offer. The defendant says she accepted this offer. Consideration was exchanged. According to the defendant, all the elements of a contract have been met and the quoted price should be enforced.

[80] I note *Dunn v. Vicars*, 2007 BCSC 1598:

Law concerning Estimates

85 The law touching on the possible contractual effect of an estimate was aptly summarized by Masuhara J. in *Golder Associates v. Mill Creek Developments Ltd.* 2004 BCSC 665, at para. 20-24:

[20] While an estimate for the cost of services to be provided is not a guarantee or warranty at law, it may have contractual effect, in essence setting a limit beyond which fees may not go: see *Price v. Roberts & Muir* (1987) BCLR (2d) 375 (BCCA). In that case, involving a lawyer's estimate to the client, Madam Justice McLachlin, as she then was, for the Court, limited the circumstances in which such a finding may be made, at 378:

Depending on the circumstances, a lawyer may not be bound by an estimate, if for example, he or she does work outside the estimate at the request of the client, or if the client by his or her conduct unduly increases the amount of the work, or if unforeseen circumstances add a new and unexpected dimension to the work.

[21] In similar vein, the defendants cited *Kidd v. Mississauga Hydro-Electric Commission et al.* (1979) 97 DLR (3d) 535 (HCJ), where the court stated at 540:

... I do not, of course, mean to say that all estimates are necessarily binding. Clearly they are not, and the plaintiff here might well have been allowed, because of the vagueness of his estimate, a substantial margin of error. But where the eventual figure is almost 3 times the original estimate, it is my view that the estimator should be held to that original figure.

[22] Mitigating in favour of an estimate having binding effect is the principle that although estimates are necessarily somewhat imprecise, persons in the business of providing work preceded by estimates should be able to do so with some accuracy: see *Kidd, supra* at 540.

[23] The plaintiff cited the recent Alberta case of *Husky Oil Operations Ltd. v Ledcor industries Ltd.* 2003 ABQB 751. In that case, the Court examined the principles underlying the question of whether an estimate is binding, and stated at para. 36: "It is clear the court has to look at the circumstances in which an estimate is provided, the positions of the two parties, the knowledge of the party providing the estimate and whether it was relied upon by the party requesting it."

[24] In sum, the Court must determine if the estimates were made in circumstances which imbue them with contractual effect and, if so, what margin of error may limit the extent to which the estimates are binding.

86 Dorgan J. In *Strait Construction Ltd v. Odar*, 2006 BCSC 690, mentioned a number of factors that the Court could usefully consider in determining whether an estimate was intended to have contractual effect.

[18] I have reviewed the cases on this issue and have extracted the following factors which have been considered by the courts in determining the nature of the building contract:

1. Did the agreement provide for a percentage of the project cost is 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.?

[81] In looking at those factors in the context of the present case, some of them are helpful to the analysis. For example, it is acknowledged that in 2012/2013 the defendant did note to the plaintiff that she had a budget of \$500,000. On the other

hand, in this case the plaintiff was not asked to design the home in keeping with that budget; in fact, it was the defendant who designed her own home. Her discussions with Mr. Juergensen revolved, in part, around whether her wishes were in keeping with her budget.

[82] It is also notable that the plaintiff's estimates were always presented as "non-binding". While I agree that such is not a determining factor, it does inform as to the plaintiff's intentions in providing these quotes.

[83] In the final analysis, I remain unconvinced that the 2015 estimate contained in the defendant's notes was binding on the plaintiff as an offer.

[84] Firstly, the defendant's notes contain practically no detail whatsoever. Surely a contractually binding offer to build a home (or, in fact, any structure) must contain more than a price; it must also contain what is being offered to be built at that price. A simple price quote, in the context of this case (where many building options were being discussed, suggested, rejected, accepted) could not form the basis for a binding agreement.

[85] Further, even that price quote is subject to conflicting evidence. Mr. Juergensen has another estimate dated August 2015. It is more detailed but still is

not entirely clear about some very major aspects of the build. Most notably, it is in a different amount from the defendant's notes.

[86] Following August of 2015, the defendant in particular does not appear to have clearly resolved what it was she wanted built. The evidence shows that the defendant continued to revise the design plans after 2015, and/or continued to reference possible changes, and/or referenced the appropriateness of prior plans, and so on.

[87] The defendant may feel that the changes she suggested and/or made after 2015 were not significant. Frankly, I have no way to determine that. I cannot make any findings, in many cases, as to whether the suggested changes or new plans (repeatedly) submitted by the defendant represented major or minor changes.

[88] Having said that, at least some of the issues to be decided appear to be significant. In 2016, as I previously noted, the defendant wrote to the plaintiff and provided new draft construction plans. She noted:

If I can mount the photovoltaic panels on the roof, the new plans are valid. However, if I need to mount the panels on a separate frame, I would rather have the old roof shape.

[89] I feel reasonably safe in saying that the roof shape of a home is a major detail. It is entirely unclear to me whether the 2015 "offer" contained in the

defendant's notes (or, for that matter, in Mr. Juergensen's notes) represents the "old" roof shape or the "new".

[90] I accept that in a contract for the construction of a home, there may very well be changes that occur as matters progress, for various reasons. I can envisage many circumstances where such changes, while possibly affecting the final price, would not change the fact that there existed a binding agreement between the parties.

[91] Here, however, in my view the "estimate" provided in 2015 could not possibly be considered the foundation for a binding agreement between the parties. It was entirely too vague and occurred at a stage where the defendant had not yet reached a final conclusion as to the project she wished to build.

Negligent misrepresentation

[92] The defendant argues that the plaintiff negligently misrepresented his 2015 estimate of the costs of building this home, with a view towards inducing her to choose him as the builder for her home. She submits that having done so, he should now be held to his estimate.

[93] I note the law as set out by the SCC in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87:

The required elements for a successful Hedley Byrne claim have been stated in many authorities, sometimes in varying forms. The decisions of the Court cited above suggest five general requirements: (1) there must be a duty of care based on a “special relationship” between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making the misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

[94] In my view, none of these elements exist here.

[95] There was no “special relationship” between these parties; the plaintiff was simply asked to provide an estimate to a potential customer. Such, one presumes, is something that is done routinely by businesspeople. It is not enough to establish a relationship as required by the caselaw.

[96] As to the second element, I am unconvinced that the 2015 estimate(s) was “untrue, inaccurate, or misleading”. According to the defendant’s 2015 notes, she was quoted \$468,000 plus tax; by my calculations, this equals nearly \$540,000. I am very unclear as to what this price included. Further, many changes were effected after the year 2015, both large and small. There is no way for me to “value” those changes, made after this 2015 estimate. Therefore, it is at least

possible that the 2015 estimate was reasonably accurate, for whatever was being proposed at that time.

[97] I cannot find that the plaintiff acted negligently in making this estimate. I also cannot conclude that the defendant relied upon this estimate, although she says she did. While she presumably accepted the price, it is clear that she had not yet decided on many aspects of the construction. After 2015 and for (approximately) two more years, the defendant continued to make and suggest various changes, some of which can only be described as significant changes (e.g., new draft construction plans, new roof designs) well after this estimate had been provided. The defendant knew or should have known that any estimate would be compromised by significant or numerous changes.

[98] I cannot conclude that there was a binding contract crystallised between the parties as of 2015. I cannot conclude that what was put to the defendant was a negligent misrepresentation. The counter claims must fail.

[99] Having said all of that, I acknowledge that I have some sympathy for the defendant in how all of this unfolded. I am sure this is not how she envisaged the start of her new life in Nova Scotia.

[100] Frankly, the way that this entire matter proceeded could only be described as haphazard. It is unfortunate that the construction of this expensive home proceeded with so much uncertainty, vagueness, and without any formal documentation to set down the terms of the agreement.

[101] In my view, the majority of the blame for that lies at the feet of the plaintiff. As the customer, and a lay person, the defendant could not possibly have been expected to know how a contract for construction should be effected. That was the responsibility of the plaintiff. In fact, the defendant testified, and I accept, that she sought a written contract from the plaintiff, but none was forthcoming. This construction was within the usual and ordinary business of the plaintiff, and it was their responsibility to ensure clarity in the project, both in its scope and its cost.

[102] Having said that, I do not absolve the defendant from all responsibility. She did agree to engage the plaintiff to build this house, despite the lack of detail/clarification that was, or should have been, obvious. The defendant also made and/or agreed to numerous changes and suggestions that, I have no doubt, cost the plaintiff extra time and money. At least some of those changes (i.e., the photovoltaic panels, the Whirlpool) were significant, and caused much discussion and time for the plaintiff, even those that were eventually abandoned or changed by the defendant.

Quantum Meruit / unpaid work and materials supplied by the plaintiff

[103] As previously noted, the plaintiff submits that at the time it was terminated, the defendant still owed money for services and materials provided to that date (October 26, 2017). The plaintiff seeks payment of that money, either on the basis of the defendant's continuing agreement to receive services and materials from the plaintiff until termination or on a quantum meruit basis.

[104] The defendant disputes that this money should be owing to the plaintiff. She first points to the evidence of Mr. Morash, who found a "replacement cost" for the building of approximately \$513,000, as evidence that the plaintiff's quantum meruit claim should fail. As I understand her argument, she says that the amount she has paid to the plaintiff thus far is reasonable for the building she got.

[105] I cannot accept the evidence of Mr. Morash for the purpose that the defendant submits. I do not accept that a real estate professional's "replacement cost" estimate is meant to represent the actual cost of building that exact home on its site. That is not the purpose of such estimates; they are prepared for real estate purposes, to evaluate what such a building represents to a potential buyer, particularly in comparison with other evaluation techniques (such as the comparison approach).

[106] The number is arrived at by use of a computer program, which uses a general dollar amount per square foot. The program does not take into account any unique features that might significantly increase or decrease the cost of an actual build. In this case, for example, although the basement features and fixtures were noted to be “comparable” to the main floor features, the basement area cost per square foot was estimated as less than a third of the main floor cost per square foot. In fact, the basement cost (per square foot) was almost the same as the garage cost (per square foot), even though (I presume) the garage would not have “living area” flooring or fixtures.

[107] I do not say this to impugn Mr. Morash or his report; I have no doubt that this is exactly how he always does such reports and that his methods are valid in the real estate world. I am merely pointing out that these reports are created for real estate purposes, and not to determine actual construction costs. I do not think it controversial to say that the actual cost of building any particular house can vary greatly, depending on a myriad of factors and timing considerations. It could fairly be described as a continually moving target. For that matter, even the appraised value of any home can vary greatly depending on timing factors. Anyone keeping an eye on real estate markets in the recent past could certainly attest to that.

[108] The defendant is entirely correct to say that the claims made by the plaintiff do not rest upon the “value of the build” to the defendant, but, rather, on any actual and provable costs incurred by the plaintiff.

[109] I have no difficulty with the concept that if the plaintiff did supply labour and materials to the defendant, to her benefit, and was not paid for those labour and materials, it should be compensated. As has been the case throughout, the difficulty lies in the evidence put before me.

[110] I have been provided with the invoice from the plaintiff to the defendant dated September 12, 2017, for labour and materials to that date. The document indicates that the defendant then owed \$136,588.94.

[111] In terms of materials, the document provides a list of items purchased, although it is not completely detailed (some amounts are claimed for “misc. materials”). Of course, I would not expect such a list to include every nail or tube of caulking used. However, even with that said, the list remains unsatisfactory.

[112] In particular, the amounts listed are all rounded off, that is to say, every amount claimed is in round dollar figures. This has to mean that some or all of this information has been estimated by the plaintiff. If the plaintiff had actually added up exactly what he had paid for all materials, the figures would not look like they

do. I also note that the plaintiff has added 15 percent tax to the entire amount for materials; it is unclear to me why. Were his payments to building supplies stores or wholesalers not inclusive of HST already? I have no invoices from any suppliers for any of these materials. Therefore, I cannot know the exact figures, or whether they already included sales tax. The difference may be large or small, I have no way of knowing.

[113] On that same document the plaintiff has listed “labour to date” as “\$48,341 + tax”. I further have been provided a document dated September 25, 2017, entitled “Working hours from 16th June until 08 September 2017”; this document shows the working hours for the five employees, their rates, and the accompanying cost to the plaintiff. There is, once again, the addition of 15 percent HST to this “labour” amount.

[114] The defendant paid \$110,000 upon receipt of this invoice. The plaintiff says that there remains \$26,588.95 owing. I do not have any faith in the numbers provided by the plaintiff, in particular as to materials. I feel unsafe in determining any quantum as to that balance.

[115] I was provided a document entitled “labour costs from September 09 to October 13, 2017”. This is again a document showing working hours for the five

employees and the accompanying cost to the plaintiff. The total costs are shown as \$25,133. There is, again, the addition of 15 percent HST to this amount (\$3,769.95).

[116] I was further provided with an invoice dated October 26th, showing “labour costs from 13 October until 25 October 2017”. Again, there is another description of working hours for the five employees and the accompanying cost to the plaintiff. However, in this case the plaintiff has now also included labour hours for Mr. Juergensen himself, 53 hours at \$25 per hour (total \$1,325), with the note “supervision and labour”. The total labour costs for that period of time (including Mr. Juergensen) are shown as \$10,521. There is, again, the addition of 15 percent HST to this amount.

[117] Given that some of these September/October labour costs were sufficiently and reasonably detailed, I am prepared to grant to the plaintiff the repayment of some of these costs. I accept that some of these costs were incurred in the building of the defendant’s home, paid for by the plaintiff, for which the defendant received benefit with her knowledge and agreement. Therefore, she should repay those.

[118] Having said that, I will not grant to the plaintiff any cost for “labour” or “supervision” done by Mr. Juergensen in the invoice of October 2017. This type of

charge never appeared until the time of the plaintiff's termination. I accept that the five other listed workers had to be paid, and were paid by the plaintiff, with the express or implicit agreement of the defendant. I frankly cannot make the same findings in relation to any amount claimed in relation to Mr. Jurgensen. Removing that amount leaves me with \$9,196.

[119] Furthermore, it is unclear to me why the plaintiff has included an HST amount on labour costs. While I am aware that there are typically HST charges on new home construction, I do not know how, or if, that is applicable to payroll costs.

[120] Removing the amount for Mr. Juergensen on the October invoice, the total HST claimed by the plaintiff on the September/October labour costs would equal \$5,149.35 (\$3,769.95 in September plus \$1,379.40 in October).

[121] Again, if the plaintiff has actually paid this HST to the government of Canada, for those specific payroll costs, to the benefit of the defendant, I would have no difficulty in concluding that the plaintiff should be reimbursed.

[122] I would therefore ask that the plaintiff provide me with proof of that HST payment to the government, within 30 days of this decision. If I receive such evidence and I am satisfied that the plaintiff paid this HST amount, to the benefit

of the defendant, I will add that HST amount to the plaintiff's award. If I do not receive it, or if I am not satisfied by what is produced, the amount will not be added.

[123] In conclusion, as a result of the labour costs paid from September 9 to October 26 by the plaintiff, to the benefit of the defendant, I find the defendant must pay to the plaintiff the amount of **\$34,329** (\$25,133 plus \$9,196).

[124] If the plaintiff provides me with satisfactory proof of payment of the HST amount on these labour costs to the government of Canada, I will allow an additional **\$5,149.35** to this award.

[125] I award no interest on this amount. The plaintiff has made no request for same.

[126] I also find it appropriate to deal with the issue of costs now.

[127] I acknowledge that I have not sought, nor received, any submissions as to court costs. I further acknowledge that party and party court costs are normally awarded to a successful party.

[128] However, in this case, I need no submissions. I conclude that no costs should be payable by either party. I do acknowledge that the plaintiff was awarded a

portion of his claim. However, as I said earlier, the plaintiff (as the contractor) had the greater role to play in ensuring a smooth construction process. It failed in that role. I place much of the blame for the confusion and difficulties that occurred here at its feet. Rule 77 of our Civil Procedure Rules provides that costs are meant to do justice to the parties, in all the circumstances of the case. In my view, no costs should be awarded to either party in this case.

[129] I ask counsel to provide me with a draft Order consented to as to form.

Boudreau, J.