Citation: Transcona Roofing Ltd v Marrbeck Construction Ltd, 2024 MBCA 83
Date: 20241025

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Christopher J. Mainella
Madam Justice Lori T. Spivak
Mr. Justice James G. Edmond

Docket: AI23-30-09971	)	
B E T W E E N :	)	
	)	
TRANSCONA ROOFING LTD.	)	
	)	
(Plaintiff)	)	
	)	
- and -	)	***D. G. Hill*** *and*
	)	***B. A. Steidl***
WINNIPEG CONDOMINIUM CORPORATION NO. 40	)	*for the Appellant Winnipeg Condominium Corporation No. 40*
(Defendant) Appellant	)	
	)	
- and -	)	***T. J. Fry*** *and*
	)	***T. D. Reimer***
MARRBECK CONSTRUCTION LTD.	)	*for the Respondent Marrbeck Construction Ltd.*
(Defendant) Respondent	)	
	)	
- and -	)	
	)	
BOB FOTHERINGHAM	)	
	)	
(Defendant)	)	

	)	***J. A. Kagan*** *and*
	)	***S. M. Hamm***
	)	*for the Appellant*
Docket: AI23-30-09974	)	*Transcona Roofing Ltd.*
B E T W E E N :	)	
	)	***T. J. Fry*** *and*
TRANSCONA ROOFING LTD.	)	***T. D. Reimer***
	)	*for the Respondent*
(*Plaintiff) Appellant*	)	*Marrbeck Construction Ltd.*
	)	
- and -	)	***D. G. Hill*** *and*
	)	***B. A. Steidl***
MARRBECK CONSTRUCTION LTD., WINNIPEG CONDOMINIUM CORPORATION NO. 40 and BOB FOTHERINGHAM	)	*for the Respondents Winnipeg Condominium Corporation No. 40 and B. Fotheringham*
	)	
(Defendants) Respondents	)	*Appeals heard:*
	)	***February 12, 2024***
	)	
	)	*Judgment delivered:*
	)	***October 25, 2024***

On appeal from *Transcona Roofing Ltd v Marrbeck Construction Ltd*, 2023 MBKB 104 [*motion decision*]

EDMOND JA

Introduction

[1] Two appeals were heard together relating to a building envelope remediation project (the project) of a condominium complex located at 1726-1742 St. Mary's Road in Winnipeg, Manitoba, commonly known as Water's Edge Townhomes (the property). The motion judge exercised his discretion to grant summary judgment: in favour of the general contractor, the defendant Marrbeck Construction Ltd. (Marrbeck), against the owner of the property, the defendant Winnipeg Condominium Corporation No. 40

(WCC 40); and in favour of the plaintiff Transcona Roofing Ltd. (Transcona), Marrbeck's subcontractor against Marrbeck for Transcona's claim.

[2] The motion judge found that the amount due and owing by WCC 40 to Marrbeck was $1,240,755.73, and allowed the entirety of Marrbeck's claim in the amount of $1,497,929.01, plus prejudgment interest (which was calculated and included in the judgment as $368,799.72). The motion judge found that WCC 40 should have mitigated its damages and failed to do so. Therefore, he disallowed the set-off claimed by WCC 40 respecting the deficiencies.

[3] The motion judge granted judgment in favour of Transcona against Marrbeck for payment based on breach of contract and unjust enrichment in the amount of $1,184,388.01, plus interest at the contract rate. The motion judge dismissed Transcona's claim against WCC 40 and its principal, the defendant Bob Fotheringham (Fotheringham), for breach of trust and unjust enrichment.

[4] WCC 40's appeal advances numerous grounds and challenges the discretionary decision of the motion judge to grant summary judgment pursuant to the MB, *King's Bench Rules*, Man Reg 553/88, r 20. WCC 40 raises issues regarding the change order process; the authority of the consultant or an owner's representative to bind WCC 40; the deficiencies in the work at the time Marrbeck and Transcona ceased working on the project; the value of the alleged deficiencies; mitigation of damages; and the damages awarded.

[5] Transcona's appeal raises issues concerning a "pay when paid" clause in its subcontract with Marrbeck and whether the motion judge erred

in finding that neither WCC 40 nor Fotheringham were liable to Transcona for amounts alleged to be owing. Transcona acknowledged that if WCC 40's appeal is dismissed, its appeal is moot.

[6] For the reasons that follow, I would dismiss WCC 40's appeal regarding liability and allow it, in part, on damages. As acknowledged by Transcona, I agree that given the result on WCC 40's appeal, it is unnecessary to decide Transcona's appeal.

Background Facts

[7] On July 18, 2017, WCC 40 and Marrbeck entered into a construction contract entitled Canadian Construction Documents Committee: Stipulated Price Contract 2008 (the contract) to perform the work and services required and supply materials necessary for the project (the work). The project originally contemplated remediating all nine buildings on the property, which contain 132 individual condominium units operated and maintained by WCC 40.

[8] Crosier Kilgour & Partners Ltd. (CKP) (as it then was) was retained by WCC 40 and served as the project engineer and consultant. John Andrew Wells (Mr. Wells) is a partner of CKP, a professional engineer who specializes in building envelope issues. CKP was responsible for the design, inspecting the work completed on-site, reviewing and certifying progress billings submitted by Marrbeck and identifying any deficiencies in the work. CKP was also responsible for issuing change orders (COs) and change directives during construction.

[9] Marrbeck and Transcona entered into a subcontract (the subcontract) such that Transcona was responsible to complete an extensive amount of the work and to supply materials on the project as outlined in a scope of work letter dated August 22, 2017, and a fixed price subcontract dated September 15, 2017 (originally respecting buildings 1 and 2). Transcona was responsible for the demolition work and the supply and installation of grade beam insulation, canopy posts, asphalt shingles, rainware, fibre cement sidings and the installation of windows and doors.

[10] The work on the project commenced in the summer of 2017. As work progressed on the project, changes were required and nine COs issued by CKP (CO Nos. 1, 2, 3, 4, 5, 6, 7, 9 and 10) were approved and signed by WCC 40 and Marrbeck. CO No. 8 was issued and approved by CKP, but WCC 40 submits that it neither approved nor signed that CO.

[11] Marrbeck issued a CO to Transcona dated August 28, 2018, amending the subcontract to add additional work on the remaining seven buildings on the property (buildings 2 and 8 were not included as part of the amended subcontract).

[12] Between October 2019 and December 2019, several proposed change notices (PCNs) were issued covering additional work required on seven of the nine buildings. The PCNs were approved by Marrbeck and CKP, and they instructed Transcona to proceed with the additional work indicating that COs would be issued in due course. Further, Transcona was instructed by Marrbeck not to issue an invoice respecting the additional work until the COs were issued, at which time, payment would be made.

[13] In accordance with the contract, Marrbeck issued monthly progress billings to WCC 40. CKP, as the payment certifier, reviewed each of the progress billings and, if satisfactory, CKP would issue a certificate of payment (CP) to WCC 40, certifying certain amounts as owing based on CKP's opinion of the value of the work completed each month. Commencing in late 2019, WCC 40 failed to pay Marrbeck for amounts that were certified by CKP for payment. Starting with CP No. 25, WCC 40 did not make further payments to Marrbeck. Marrbeck did not make further payments to Transcona on the basis that it had not been paid by WCC 40.

[14] Marrbeck and Transcona remained on the property and continued to work, believing there would be a resolution and that WCC 40 would resume progress payments. In February 2020, WCC 40 froze further payments to Marrbeck, alleging issues and deficiencies identified in the work.

[15] A meeting was held on March 12, 2020, at which time, CKP issued a memorandum indicating that considerable costs had been incurred by Transcona and Marrbeck, but not yet reimbursed and that WCC 40's review and approval had been repeatedly requested with confirmation pending.

[16] Work continued until March 2020, when Marrbeck and Transcona gave notice to WCC 40 that they were ceasing work due to non-payment of progress billings.

[17] On March 24, 2020, Marrbeck registered a claim for lien (the lien) pursuant to *The Builders' Liens Act*, CCSM c B91 [the *Act*], claiming a lien of $1,287,000 against title to the property.

[18] On April 8, 2020, CKP issued a memorandum to WCC 40 stating, "in general, the vast majority of the work we have observed completed on-site is in general conformance with the drawings and specifications."

[19] In a further memorandum dated April 21, 2020, CKP confirmed that opinion and stated it was "committed to assisting in reaching a resolution to address the outstanding monies currently owed to the contractor."

[20] WCC 40 paid Marrbeck the following amounts in accordance with the contract, which included amounts owing pursuant to nine approved COs, calculated as follows:

CP Nos. 1 to 24:	$3,894,854.97
Less Total Holdback:	$208,440.83
Total Net Amount:	$3,686,414.14
Total GST:	$184,320.89
CP No. 9-HB (with GST):	$87,856.95
Grand Total Paid:	**$3,958,591.98**

[21] Although CKP issued CP Nos. 25, 26, 28, 29 and 30, none of the amounts certified by CKP were paid by WCC 40.

[22] CKP issued PCN No. 13 that related to certain conditions discovered during construction, which required extra work. After Marrbeck submitted a response to PCN No. 13, CKP prepared CO No. 8, authorizing certain work

required under PCN No. 13 to proceed and, as I already noted, WCC 40 submits it did not approve or sign CO No. 8.

[23] WCC 40 retained Phil Dorn (Mr. Dorn) (professional engineer and president of Samson Engineering Inc.) to conduct a review of the work competed by Marrbeck and Transcona. Mr. Dorn provided opinion evidence relating to the deficiencies in the work, the scope of the required remediation and the cost to remedy the deficient or defective work. He prepared two reports, the latter of which valued the deficiencies on the project in the amount of $4,740,584.40 (collectively, the Samson reports).

[24] The alleged issues and deficiencies outlined in one of the Samson reports included the following:

> a) combustible polystyrene insulation was substituted for non-combustible mineral wool insulation;
>
> b) blown-in fibreglass insulation was substituted for blown-in cellulose insulation which failed to achieve an R50 rating;
>
> c) perforated aluminum soffits were substituted for James Hardie Soffits;
>
> d) the James Hardie siding products, Dura Flow roof vents, and Primex HVAC vents were not installed in accordance with manufacturer's instructions; and
>
> e) non-compliance with the National Building Code of Canada 2015 ("the Code") for the following:
>
> i. Roof Space – para.9.19.1.2 Vent Venting Requirements and para.9.19.1.3 Clearances of Section 9.19 of the Code;

ii. Fire Separations – para.3.1.9.1 Fire Stops and para.3.1.11.2 Fire Blocks in Wall Assemblies of Section 3.1.9 Fire Separations of the Code;

iii. Air Barrier Systems – para.5.4.1.1 Required Resistance to Air Leakage of Section 5.4 Air Leakage of the Code;

iv. Airtight Tight Mechanical Ventilation – para.9.32.3.11 Ducts of Section 9.32.3 Mechanical Ventilation of the Code; and

v. Surface Drainage – para.9.14.6.1 Surface Drainage of Section 9.14.2 Foundation Drainage of the Code.

[25] WCC 40 retained Peter Parkman (president of Arrow Exteriors Inc.), an exterior finishings contractor, to provide an opinion on the market value to repair the exterior wall assembly of seven of the buildings on the property. His opinion estimated the cost at $2,812,590 (the Arrow report). This report was relied upon by Mr. Dorn, who included it to arrive at the total value of the deficiencies.

[26] On July 8, 2020, Marrbeck commenced an action against WCC 40, seeking damages in the amount of $1,497,929.01, for breach of contract, unjust enrichment and *quantum meruit*. The claim also seeks to enforce its lien (the Marrbeck action).

[27] On July 9, 2020, Transcona issued a statement of claim naming Marrbeck, WCC 40 and Fotheringham as defendants (the Transcona action). Transcona sued Marrbeck for breach of contract based on the non-payment of its invoices, and WCC 40 and Fotheringham for unjust enrichment and breach of the trust provisions of the *Act*.

[28] The two actions (the actions) were consolidated by way of a consent order and proceeded under the Transcona action.

[29] In the Marrbeck action, WCC 40, relying upon the Samson reports and the Arrow report, filed a statement of defence and counterclaim against Marrbeck claiming damages by way of counterclaim for the deficiencies of $4,740,584.40.

[30] Transcona relied upon the expert opinion evidence of Ben Postma (Mr. Postma) (cost consultant and estimator for Postma Consulting Ltd.) and Patrick Gloux (Mr. Gloux) (assistant structural engineering department head at KGS Group). Mr. Gloux reviewed the Samson reports and provided an opinion regarding the deficiencies, having regard to the scope of work identified in the contract documents (the KGS report).

[31] Mr. Postma prepared an assessment of the cost to complete the outstanding deficiencies based on the KGS report (the Postma report). The Postma report assessed the value of the deficiencies at $128,333.

[32] CKP prepared a report dated June 13, 2022, and an undertaking letter dated July 8, 2022 (the undertaking letter), which reviewed the nature and scope of the deficiencies in the work completed by Marrbeck and Transcona, as well as the Samson reports. CKP also made site visits to verify issues on-site. CKP reiterated the opinion it previously had in the spring of 2020, that Marrbeck and Transcona had been completing the work in general conformity with the contract documents. CKP revised its prior estimate of the value of the deficient work. CKP expressed the view that many of the deficient items would have been resolved as part of the "deficiency walk-through process" (*motion decision* at para 33) had the work stoppage not

occurred. CKP valued the deficiencies at $243,500. That number included $42,000 for items that had already been deducted by CKP when it issued CP No. 30.

[33] Transcona filed a motion seeking summary judgment in the amount of $1,184,388.01, plus interest. That amount included unpaid invoices, holdback amounts, plus amounts alleged to be owing pursuant to CO No. 8/PCN No. 13.

[34] Marrbeck also sought summary judgment against WCC 40 and, at a pre-trial conference, the motion judge granted leave to both Transcona and Marrbeck to proceed with their motions for summary judgment. Marrbeck claimed the amount alleged to be owing of $1,272,917.20, inclusive of GST plus interest from October 31, 2022, to the date of payment at the rate permitted by the contract.

[35] WCC 40 opposed the summary judgment motions primarily on the basis that the deficiencies in the work were greater in value than the work for which Marrbeck and Transcona were seeking payment and, considering the competing expert opinion evidence, the actions were not appropriate cases to be determined by summary judgment.

[36] The primary defence advanced by Marrbeck to the Transcona action was based on a "pay when paid" clause in the subcontract which provides: "Payment shall be due 45 days after [Marrbeck] has received payment from [WCC 40] and all other conditions for payment have been met" ("pay when paid" clause).

[37] As outlined earlier, the motion judge granted summary judgment to Marrbeck against WCC 40 and to Transcona against Marrbeck. WCC 40 appeals the *motion decision* and requests this Court set it aside.

[38] Transcona appeals two aspects of the motion judge's decision, submitting he erred in his interpretation of the "pay when paid" clause and in finding that neither WCC 40 nor Fotheringham were directly liable to Transcona for the amounts owing.

[39] Marrbeck did not appeal the motion judge's finding of its liability for the amount due and owing to Transcona.

Standard of Review

[40] The standard of review respecting summary judgment was summarized by this Court in *Business Development Bank of Canada v Cohen*, 2021 MBCA 41 at paras 31-33 [*Business Development Bank*]:

> The applicable standards of review are set out in *Dakota* at paras 36-37.
>
> The decision to grant or deny a motion for summary judgment is a discretionary decision, reviewed on a deferential standard, and will only be set aside if there is a material error as to the law or the facts, or if the decision is so clearly wrong as to be unjust.
>
> The determination as to whether there is a genuine issue requiring a trial is a question of mixed fact and law and will not be overturned absent palpable and overriding error.

[41] The parties agree, as do I, that the applicable standard of review is that set out in *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*]. Questions of fact and mixed fact and law are reviewed on the standard of palpable and

overriding error, and questions of law are reviewed on the standard of correctness (see *ibid* at paras 8, 10, 37).

[42] The appeals raise issues of contractual interpretation pertaining to the contract and the subcontract. Contractual interpretation involves a question of mixed fact and law which cannot be interfered with absent palpable and overriding error unless there is an error in respect of an extricable question of law or where the interpretation of a standard-form contract is at issue (see *Bonnefield Canadian Farmland Evergreen LP v Fat Cat Farms Ltd*, 2022 MBCA 77 at para 11; *6486976 Manitoba Ltd v 7344989 Manitoba Ltd*, 2021 MBCA 61 at para 6, citing *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at paras 50-55 [*Sattva*]).

[43] The motion judge's findings on mitigation of damages are to be shown deference absent a palpable and overriding error. First, the motion judge found that WCC 40 should have mitigated its damages. As stated by Karakatsanis J, for the majority, in *Southcott Estates Inc v Toronto Catholic District School Board*, 2012 SCC 51 at para 47 [*Southcott*], whether a party should have mitigated damages is a question of mixed fact and law, reviewable on a standard of palpable and overriding error (see Harvin D Pitch & Ronald M Snyder, *Damages for Breach of Contract*, 2nd ed (Toronto: Thomson Reuters, 2020) at s 10:1, online: (WL Can); *Housen* at para 36).

[44] Second, the motion judge found that WCC 40 did not take steps to mitigate its damages (see *motion decision* at para 83). This is a finding of fact, also reviewable for palpable and overriding error (see *Housen* at para 10).

[45] Third, because the motion judge found that WCC 40 should have mitigated its damages, but did not, he did not permit WCC 40 to deduct the

cost of remedying deficiencies from the amount owed to Marrbeck. This finding is a question of mixed fact and law because it requires interpretation of the terms of the contract. The motion judge considered the relevant terms of the contract (see *motion decision* at para 80) and that finding is reviewable on a standard of palpable and overriding error (see *Sattva* at paras 50-55).

[46] The standard of palpable and overriding error is one that "is 'plainly seen', 'plainly identified', or 'obvious'" (*R v Kruk*, 2024 SCC 7 at para 97, citing *Housen* at paras 5-6) and "it must be overriding, in that it must go to the core of the outcome of the case, such that it affected the result" (*R v Perswain*, 2023 MBCA 33 at para 12; see also *Benhaim v St-Germain*, 2016 SCC 48 at para 38, citing *Canada v South Yukon Forest Corporation*, 2012 FCA 165 at para 46; *R v Clark*, 2005 SCC 2 at para 9).

Issues

[47] The WCC 40 appeal raises twelve grounds. Nine of the grounds raise contractual interpretation issues alleging that the motion judge failed to apply and/or failed to refer to provisions in the contract.

[48] The issues raised in the WCC 40 appeal can be succinctly stated as follows:

1) Did the motion judge err in deciding that the actions were appropriately determined pursuant to the summary judgment process?

2) Did the motion judge err in finding that the requirement in the contract for a CO and a change directive to be signed by

WCC 40 was waived by WCC 40's conduct or acquiescence?

3) Did the motion judge err in failing to apply and/or refer to material provisions of the contract, which was raised for the first time on appeal?

4) Did the motion judge err in his findings that WCC 40 should have mitigated its damages and failed to do so, thereby disentitling it to a set-off?

5) Did the motion judge err in his assessment of damages?

Issue 1: Did the Motion Judge Err in Deciding That the Actions Were Appropriately Determined Pursuant to the Summary Judgment Process?

[49] WCC 40 submits that there was a genuine issue or issues that required the summary judgment motion to be dismissed and required the dispute to go to trial. WCC 40 acknowledges that the decision to grant or deny a motion for summary judgment is a discretionary decision and is given significant deference on appeal. It also submits that the motion judge committed palpable and overriding errors in his application of the provisions of the contract and in his review of the conflicting expert opinion evidence specifically respecting alleged breaches of the contract requirements, as well as failing to comply with the *National Building Code of Canada: 2015* [the *Code*][1]. Further, WCC 40 submits that the motion judge's decision was so clearly wrong as to amount to an injustice.

[1] See Canadian Commission on Building and Fire Codes, *National Building Code of Canada: 2015*, vol 1 (Ottawa: National Research Council of Canada, 2015), online (pdf): <nrc publications.canada.ca/eng/view/ft/?id=c8876272-9028-4358-9b42-6974ba258d99&dp=2&dsl=en>.

[50] Marrbeck submits that the motion judge applied the summary judgment framework correctly and made specific findings based on the evidence and relevant legal principles, which allowed him to fairly resolve the matters in dispute. Marrbeck also submits that at no time during the summary judgment process did WCC 40 prove that a trial was necessary, nor did it demonstrate that anything would be different at a trial than the evidence that had already been filed and submitted in the written and oral arguments reviewed during the hearing. Accordingly, it further submits that proceeding with a summary judgment hearing was neither unfair nor an unjust application of the rule, as the matters in dispute could be fully determined and it was appropriate for the motion judge to do so.

Analysis and Decision on Issue 1

[51] A decision to grant or deny a motion for summary judgment will only be set aside if there is a material error of fact or law, or if the decision is so clearly wrong as to be unjust. Further, determining whether there is a genuine issue requiring a trial is a question of mixed fact and law and will not be overturned absent palpable and overriding error.

[52] As this Court explained in *Dakota Ojibway Child and Family Services v MBH*, 2019 MBCA 91 at paras 108-11 [*Dakota Ojibway*], the moving party always bears the persuasive burden of proving that "a fair and just adjudication is possible on a summary judgment basis and that there is no genuine issue requiring a trial" (at para 111). The moving party "must first satisfy the motion judge that there can be a fair and just determination on the merits" (*ibid* at para 108) and must meet "the evidential burden of establishing that there is no genuine issue requiring a trial" (*ibid*). If the moving party

meets those requirements, the responding party must "meet its evidential burden of establishing 'that the record, the facts, or the law preclude a fair disposition' . . . or that there is a genuine issue requiring a trial" (*ibid* at para 109).

[53] Applying this process to the facts of this case, I see no basis to interfere with the motion judge's decision that Marrbeck and Transcona met the persuasive burden of establishing that there could be a fair and just determination of the dispute and there was no genuine issue requiring a trial. Further, I am satisfied that WCC 40 did not meet its evidential burden of establishing that the record, the facts or the law precluded a fair disposition of the matters in dispute.

[54] The primary dispute between the parties regarding the availability of summary judgment is the conflicting expert opinion evidence about the extent of the deficiencies in the work completed by Marrbeck and Transcona.

[55] In *Business Development Bank*, this Court determined that the motion judge erred when he decided the dispute on the record before him and without explanation. There were conflicting expert opinions filed by the parties regarding the value of property. This Court held that the summary judgment process did not allow the motion judge to make the necessary findings of fact, and the responding party did meet the evidential burden that there was a genuine issue requiring a trial (see *ibid* at para 44).

[56] In this case, the motion judge was faced with conflicting evidence and, specifically, conflicting expert opinion evidence regarding the deficiencies in the work and the cost to remedy the alleged deficiencies. He

reviewed the conflicting evidence carefully and provided explanations as to why he preferred the evidence of CKP over the evidence of the other experts.

[57] The motion judge had the benefit of affidavits, expert reports, cross-examination transcripts, examination for discovery transcript of Mr. Wells, as well as answers to undertakings given during the cross-examinations and examination for discovery. His findings and reasons for preferring the evidence of Mr. Wells and the opinion of CKP are amply supported by the record.

[58] CKP was the consultant on the project, intimately familiar with the changes to the work as the work progressed, was involved in the approval process, inspected the work during construction, as well as after Marrbeck and Transcona left the job site and Mr. Wells was responsive to questions raised by counsel during the examination for discovery. The motion judge appropriately found that CKP's unique position allowed it to determine more accurately what was properly done at the site and what remained outstanding under the scope of work, as well as what was properly considered a deficiency (see *motion decision* at para 59).

[59] The motion judge also gave reasons for not accepting the opinions expressed by WCC 40's experts, which are supported by a review of the record. He found the conclusions in the Samson reports and the Arrow report were premised on incorrect assumptions, and he rejected their conclusions. Their reports were based on the work under the original specifications being completed and various manufacturer guidelines, not based on the actual or required scope of work, which changed significantly throughout the course of the project as directed by CKP on behalf of WCC 40. He concluded that the

flaws in the Samson reports and the Arrow report were not minor, but "foundational ones" (*ibid* at para 56).

[60] A careful review of the record establishes that the evidence allowed the motion judge to make the necessary findings of fact, apply the law to the facts, and to conclude that proceeding with summary judgment was a proportionate, more expeditious and less expensive means to achieve a just result.

[61] His findings are owed deference and, as I will explain below, I am not satisfied that he made any material error of fact or law that would justify setting aside his decision on liability. Further, I am not satisfied that the decision to grant the motions for summary judgment were so clearly wrong as to be unjust.

[62] As a result, I would dismiss this ground of appeal.

Issue 2: Did the Motion Judge Err in Finding That the Requirement in the Contract for a CO and a Change Directive to Be Signed by WCC 40 Was Waived by WCC 40's Conduct or Acquiescence?

[63] The motion judge acknowledged that certain COs and PCNs were not signed off by WCC 40 and found that WCC 40 acquiesced in the provision of extras and consented to the changes. Further, he found that WCC 40 delegated to CKP, pursuant to the contract, the right to give instructions on the project. Because WCC 40 was aware that Marrbeck was doing extra work or supplying extra materials for work that was required for the project and WCC 40 stood by, approved and took the benefit of what was being done, WCC 40 was liable for giving such implied instructions to complete the work

and therefore, required to pay for that work. The motion judge also found that if WCC 40 was disputing the work and any determinations made by CKP, they had recourse under the dispute resolution mechanism in the contract, but it did not exercise the right to do so (see *motion decision* at paras 69-71, 73).

[64] WCC 40 submits that the motion judge committed an error in law in failing to refer to and apply material terms of the general conditions (GCs) of the contract relating to COs and change directives. It submits that thirty or more COs were never approved and never signed by WCC 40. The contract requires COs and change directives to be approved and signed by WCC 40.

[65] Marrbeck submits that the requirement for WCC 40 to sign COs and change directives was waived and the motion judge's finding that WCC 40 acquiesced in the completion of the extra work is entitled to deference. The fact that the motion judge did not specifically refer to the definition of CO or change directive is not fatal and is not proof the argument was not considered.

Analysis and Decision on Issue 2

Contractual Interpretation, Acquiescence/Waiver and Changes in the Work

[66] The starting point for analysis is to consider and apply the correct test for contractual interpretation. In *Sattva*, the Supreme Court of Canada emphasized that the overriding concern is to determine the intent of the parties and the scope of their understanding. To do that, a court must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract (see *ibid* at para 47). Further, the Supreme Court

noted that contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix (see *ibid* at para 50).

[67] The submissions advanced by WCC 40 turn in large part on the authority of CKP to make decisions as the consultant pursuant to the contract. An examination of the relevant provisions of the contract is important to determine the intent of the parties regarding the authority of CKP respecting changes in the work.

[68] CKP is named as the consultant in the contract, but is not a party to it. The contract explicitly states that it does not create any contractual relationship between CKP and the contractor, in this case, Marrbeck. CKP is named as the person or entity engaged by WCC 40 in the contract.

[69] The contract sets out the authority of the consultant (i.e., CKP) and states that it has the "authority to act on behalf of [WCC 40] only to the extent provided in the [contract]" (GC 2.1.1). It also sets out its role as WCC 40's agent (GC 2.2).

[70] The role of CKP includes:

- Administer the contract (GC 2.2.1);
- Visit the site to become familiar with the progress and quality of the work and to determine if the work is proceeding in general conformity with the contract (GC 2.2.2);

- Promptly inform WCC 40 when Marrbeck's application for payment was received (GC 2.2.4);

- Determine all amounts owing to Marrbeck by evaluating its applications for payment (GC 2.2.5);

- Interpret the requirements of the contract. This must be consistent with the intent of the contract and impartial to both WCC 40 and Marrbeck. The interpretations must be given in writing to the parties within a reasonable time (GC 2.2.7);

- Make findings regarding claims for a change in contract price (GC 2.2.11);

- Reject work that does not conform to the requirements of the contract. CKP has the authority to require inspection or testing of work when necessary (GC 2.2.12);

- Promptly provide supplemental instructions to Marrbeck during the progress of the work (GC 2.2.13);

- Review and take appropriate action upon shop drawings, samples, and other submittals of Marrbeck, in accordance with the contract (GC 2.2.14);

- Prepare COs and change directives (GC 2.2.15);

- Conduct reviews of the work to determine the date of substantial performance of the work (GC 2.2.16);

- Receive and review written warranties and related documents required by the contract and provided by Marrbeck and forward such warranties and documents to WCC 40 for its acceptance (GC 2.2.18);

- Have access to the work at all times and examine any portion of the work to confirm that it is in accordance with the contract requirements (GC 2.3.1 and GC 2.3.5);

- Exercise authority to make various findings regarding the project and the contract. When the contract is unclear, CKP makes decisions on how to proceed. Further, if Marrbeck's shop drawings deviate from the contract requirements, it determines if the deviation can be accepted (GC 3.8.2 and GC 3.10.9).

[71] The contract defines a change directive as a written instruction prepared by CKP and signed by WCC 40 directing Marrbeck to proceed with the change in the work prior to WCC 40 and Marrbeck agreeing upon adjustments in the contract price and contract time. It also defines a CO as:

> a written amendment to the *Contract* prepared by [CKP] and signed by [WCC 40] and [Marrbeck] stating their agreement upon:
>
> - a change in the *Work*;
>
> - the method of adjustment or the amount of the adjustment in the *Contract Price*, if any; and
>
> - the extent of the adjustment in the *Contract Time*, if any.
>
> [emphasis in original]

COs Approved by CKP and Towers Realty Group

[72] In this case, the evidence filed establishes that CKP issued COs, site instructions and change directives. It is not disputed that nine COs were issued, signed off on and approved by WCC 40. Further COs were issued and authorized by CKP but were not signed by WCC 40. The contract describes the owner as WCC 40 c/o Towers Realty Group (Towers), which was the property manager for WCC 40. Minutes of the first site meeting describe representatives of CKP and Towers as having "signing authorities on [COs]."

[73] CKP issued certain COs that were approved by CKP and Towers. For example, a CO relating to the aluminum soffits approved by Towers in an email dated January 2, 2018, and the James Hardie panel siding that could not meet installation requirements such that an engineered solution was designed by CKP and approved by Towers.

[74] In addition to approving changes in the work, CKP was responsible for certifying payments for the project. The contract, as amended by the supplementary conditions, deals with the payment process and once CKP has certified the work, WCC 40 shall promptly make payment to Marrbeck. It also requires WCC 40 to make progress payments to Marrbeck, when due, in the amount certified by CKP.

[75] In this case, the motion judge found that the process outlined in the contract was followed by CKP. Marrbeck prepared and submitted applications for payment, which included work required pursuant to authorized and approved COs. The applications were promptly reviewed by CKP and thereafter, CPs were issued. CKP had the obligation to review the value of the work completed and certify whether to approve an application for

payment or revise the amount claimed and issue a CP not later than ten calendar days after receiving an application (GC 5.3.1).

[76] The contract also contains a dispute resolution process. The process required the parties to turn to CKP to resolve disputes. When WCC 40 and Marrbeck did not agree on the difference in value between the work performed and the work called for by the contract when the work is defective, the dispute is referred to CKP for determination (GC 2.4.3). If the dispute is not resolved promptly, CKP "will give such instructions as in [its] opinion are necessary for the proper performance of the *Work* and to prevent delays pending settlement of the dispute" (GC 8.1.3) (emphasis in original).

[77] The contract also deals with claims for a change in the contract price (GC 6.6). Marrbeck is required to give notice and, if there is no agreement, CKP decides on the claim within thirty working days (GC 6.6.5). If a party does not accept the decision of CKP, the dispute is settled in accordance with the dispute resolution provisions. The dispute resolution provisions state that CKP decides all disputes at the first instance. If the dispute is not resolved, CKP provides instructions that, in its opinion, are necessary for the proper performance of the work and to prevent delays pending settlement of the dispute (GC 8.1.3).

[78] And finally, GC 8.2.2 is important, as a party is conclusively deemed to have accepted the finding of CKP under GC 2.2 and to have expressly waived and released the other party from any claims in respect of the particular matter dealt with in that finding, unless within five working days after receipt of that finding, the party sends a notice of dispute to the other party and CKP that contains particulars of the matter in dispute.

Supplementary conditions amended the time frame to five working days from fifteen days.

[79] In my view, the findings made by the motion judge were made without palpable and overriding error. On the evidence filed, there was no error in finding that CKP had authority to approve COs, that WCC 40 approved or acquiesced in the work confirmed by way of COs and that WCC 40 was liable to pay Marrbeck for the extra work required as authorized by CKP and/or Towers.

[80] The motion judge found that WCC 40 was aware of the changes required and either approved some of the COs through its designation of Towers as having authority on COs or acquiesced in the provision of the extra work required and did not give notice of its objection.

[81] The contract required CKP to review all claims and make determinations. I see no palpable and overriding error in the motion judge's finding that WCC 40 stood by, approved and took the benefit of the work that was being completed and, therefore, is liable to pay for such work. Further, if WCC 40 was disputing the COs and any determinations made by CKP, it had recourse under the dispute resolution mechanism in the contract, but it did not exercise the right to do so.

[82] All of this to say that the contract had a mechanism to deal with claims, COs, change directives and to resolve disputes. It was CKP's duty and responsibility to make decisions and once those decisions were made, they were final unless a notice of dispute was sent. No evidence was led that notices were sent pursuant to GC 8.2.2 giving notice of dispute respecting a decision made by CKP.

Motion Judge's Reference to Contract Provisions

[83] The evidence of Fotheringham was that he did not sign off on the COs and that GC 6.1 and GC 6.2 were not followed as a CO or a change directive required WCC 40's approval. Even though the motion judge made no specific reference to the relevant provisions of the contract regarding changes to the work, he was aware of the requirement for WCC 40 and Marrbeck to sign COs. That point was argued by the parties; hence, the motion judge considered the evidence regarding approvals by Towers and whether WCC 40 had waived the formal requirement of signing COs or impliedly accepted the COs. It was open to the motion judge to interpret the contract as a whole and find that, while the strict requirement to sign a CO was not met, WCC 40, by its conduct, waived the requirement and acquiesced to the changes in the work. Further, it was open to the motion judge to find that if WCC 40 disputed the issuance of certain COs, then it was required to follow the dispute resolution process in the contract.

[84] It was unnecessary for the motion judge to reference all arguments and specific contract provisions in his analysis. The omission is not fatal and not proof that the argument was not considered (see *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62; *R v Burns*, [1994] 1 SCR 656, 1994 CanLII 127 (SCC) [*Burns*]).

[85] The motion judge's analysis and interpretation of the contract is consistent with the contract as a whole and construction law authorities. An owner's conduct may amount to a waiver such that a written requirement becomes a mere formality when the obligation to pay for changes is reviewed

and approved by the consultant (see *2016637 Ontario Inc o/a Balkan Construction v Catan Canada Inc*, 2013 ONSC 4727 [*Balkan*]; Thomas G Heintzman, Bryan G West & Immanuel Goldsmith, *Heintzman, West and Goldsmith on Canadian Building Contracts*, 5th ed (Toronto: Thomson Reuters, 2020) (loose-leaf updated 2024, release 4) at section 6.37, online: (WL Can)).

GC 1.3.2 Waiver

[86] WCC 40 relies on GC 1.3.2, submitting that no action or failure to act by it shall constitute a waiver of any right or duty under the contract, nor shall any such action or failure to act constitute an approval of or acquiescence in any breach, except as specifically agreed in writing.

[87] This waiver has been interpreted as not applying to procedural steps (see *Balkan*; Heintzman). These authorities support the motion judge's finding that changes in the work can bind WCC 40 even where strict compliance with the written CO procedure is not followed. A contractor's claim is not barred if the evidence supports a finding that the owner has waived its rights.

[88] The motion judge made no error when he concluded that the requirement for WCC 40 to sign each CO was waived or the requirement of approval was complied with based on a review of all of the evidence.

[89] Rich Marchetti, president of Transcona, stated in his affidavit sworn September 16, 2021, that throughout the course of Transcona's work, Marrbeck and CKP issued various COs and site directives to Transcona and certified amounts to be due and owing by WCC 40, which included CO work.

[90] Terry Hanstead (Mr. Hanstead), president of Marrbeck, confirmed in his affidavit affirmed October 19, 2021, that certain extra work was required by WCC 40 as the work progressed, stating that "the scope and price of which was approved by WCC 40 and CKP."

[91] The motion judge's findings are owed deference, and I am not satisfied he made a palpable and overriding error in his interpretation of the contract and in applying the law to the facts of this case. Accordingly, I would dismiss this ground of appeal.

Issue 3: Did the Motion Judge Err in Failing to Apply And/or Refer to Material Provisions of the Contract, Which Was Raised for the First Time on Appeal?

[92] In his decision, the motion judge did not reference several provisions of the contract (which I will outline below) as he addressed the submissions advanced on the summary judgment motions. WCC 40 submits that the motion judge's failure to refer to and apply these provisions amounts to an error in law or, alternatively, an error of mixed fact and law.

[93] Marrbeck submits that WCC 40's reference to provisions of the contract was raised for the first time on appeal and was not argued at the summary judgment hearing. Hence, it submits that it is entirely unreasonable to suggest that there is fault in the motion judge failing to reference those specific provisions. The motion judge considered the contract as a whole and addressed the real issues in dispute, namely, liability for payment of work completed by Marrbeck and Transcona, the extent of the deficiencies in the work, WCC 40's right of set-off and mitigation. He made no error in failing to reference specific provisions of the contract.

Analysis and Decision on Issue 3

[94] As mentioned earlier, it is important to emphasize that the primary submissions advanced by WCC 40 at the summary judgment hearing were that the matters in dispute were not suitable for summary judgment; it had not approved COs issued and was not therefore liable to pay for the changes in the work; and it was entitled to a set-off based on the deficiencies identified in the Samson reports and the Arrow report.

[95] WCC 40 did not advance submissions regarding alleged breaches of the contract, including (a) the amounts claimed on Marrbeck's applications for payment differed from the quoted amounts on their submitted bid form, (b) Marrbeck's failure to give notice of concealed and/or unknown defects, (c) WCC 40 not agreeing to accept substantial performance, (d) Marrbeck not using the best quality products, (e) the work failing to conform with the *Code*, and (f) Marrbeck failing to comply with the provisions of the common product requirement section of the supplementary conditions of the contract to comply with the manufacturer's instructions.

[96] Given the submissions made before the motion judge, I agree that it is unreasonable to suggest that the motion judge should be faulted for failing to reference each specific contract provision in the *motion decision*.

[97] Perhaps more importantly, raising new issues on appeal is subject to a high onus on the party seeking to do so. This Court in *R v Chapman*, 2012 MBCA 112, stated that "[a]ppellate courts will generally not entertain new issues on appeal unless leave is first obtained" (at para 3), absent exceptional circumstances (see John Sopinka, Mark A Gelowitz & W David Rankin,

Sopinka, Gelowitz and Rankin on the Conduct of an Appeal, 5th ed (Toronto: LexisNexis, 2022) at 158-61).

[98] This is the rule of procedural fairness. Other evidence or argument may have been filed or made at the hearing of the motions if the various provisions of the contract had been raised as issues in dispute. The parties that were cross-examined were not cross-examined on these issues. I agree with the submission advanced by Marrbeck that raising these alleged breaches on appeal and not before the motion judge amounts to procedural unfairness. I am not satisfied WCC 40 has met the onus of establishing exceptional circumstances for granting leave to raise these new issues on appeal.

[99] Even if leave was granted, the evidence and the findings made by the motion judge do not support the alleged breaches advanced by WCC 40. The motion judge gave reasons for preferring the opinion expressed by CKP over the Samson reports and the Arrow report. The determinations made by CKP provide an answer to these allegations. In its report dated June 13, 2022, CKP addressed each of the alleged deficiencies, provided an explanation for the changes required, determined the products authorized to be used and responded to the alleged failures to comply with the contract documents and the *Code*. The motion judge accepted CKP's opinion and determinations.

[100] As stated earlier, the motion judge's findings and acceptance of the opinion evidence of CKP are entitled to deference and I see no palpable or overriding error in his decision. I would therefore dismiss this ground of appeal.

Issue 4: Did the Motion Judge Err in His Findings That WCC 40 Should Have Mitigated Its Damages and Failed to Do So, Thereby Disentitling WCC 40 to a Set-off?

Analysis and Decision on Issue 4

[101] The motion judge found that WCC 40 should have mitigated its damages and failed to do so. He rejected WCC 40's set-off based on the deficiencies calculated in the Samson reports and the Arrow report. He accepted the opinion expressed by CKP that the deficiencies would have been resolved during the walk-through process but for the failure of WCC 40 to make payments pursuant to the contract. He found that Marrbeck and Transcona could have addressed the deficiencies if WCC 40 would have allowed them to do so (see *motion decision* at para 80).

[102] The motion judge rejected the set-off claimed by WCC 40 except for an overbilling in the amount of $35,654.41, referenced in the undertaking letter. This amount was identified by CKP as the amount overbilled on CKP's "Work-To-Be-Completed tracking spreadsheet". The motion judge characterized this amount as Marrbeck invoicing for work beyond the value of what was completed on site (see *ibid* at para 75).

[103] The motion judge acknowledged that if he was in error on the set-off issue, the appropriate amount for the deficiencies in the circumstances was the most recent quantification completed by CKP in the undertaking letter. He accepted CKP's calculation of $243,500 as a proper value of the deficiencies subject to a deduction of $42,000, in relation to a duplication of the deficiency holdback made in CP No. 30 (deficiency holdback). He found that the amount of the reduction for deficiencies should be $201,500.

[104] WCC 40 submits that the motion judge made palpable and overriding errors in his assessment of the deficiencies, in failing to make a deduction for the defective work and in finding that WCC 40 failed to mitigate its damages.

[105] Marrbeck submits CKP's findings on the deficiencies were accepted by the motion judge and CKP expressed the opinion that the deficiencies would have been corrected during the walk-through process had the work stoppage not occurred due to WCC 40's non-payment. WCC 40 was required to permit Marrbeck and Transcona to correct the defective work identified by CKP and WCC 40 failed to do so.

[106] The question to address is whether the motion judge made a palpable and overriding error in his findings on mitigation. The motion judge cited *Wilson v Hodson and Gates*, 2011 MBQB 187 [*Wilson*], respecting general principles on mitigation of damages. In *Wilson*, the plaintiff roofing company did not complete the job and was not given the opportunity to complete it. The defendant owner hired a third-party company to complete the job. Justice Menzies allowed the defendant owner's claim for set-off in remedying the defective work, but only for a portion of the expense incurred by hiring the second roofing company; specifically, the third party billed $3,692.20, and the judge allowed the defendant owner to recover $1,000 (see *ibid* at para 76).

[107] In *Wilson* at para 75, Menzies J relied upon, and quoted *Obad (cob Rockwood Drywall) v Ontario Housing Corp*, [1981] OJ No 282 at para 48 (ONSC) (HCJ)) [*Obad*], which reads:

> It is accepted law that an owner is entitled to set off the costs of remedying deficiencies under a construction contract. The

> contractor has the corresponding right to have the occasion to remedy any defects in the work himself. As was stated in ***Obad v. Ontario Housing Corp.***, [1981] O. J. No. 282 (Ont. H. C.) at [paragraph] 48:
>
> > With respect to the claim for damages resting on expenditures to correct the plaintiff's work, it would seem that, although the defendant, [the general contractor], is entitled to have a set-off for defective work, its obligation to mitigate its damages would require that it allow the plaintiff to continue, having in mind the reasonable probability that the plaintiff would correct its own work in order to obtain payment of the price. On that basis the defendant, [the general contractor], is not entitled to have damages based on its own costs of correction.

[108] *Wilson* has been followed in several other decisions on the issue of mitigation of damages such that where an owner denies the contractor the right to remedy any alleged deficiencies, the owner's right of set-off may be "somewhat curtailed" or, in some cases, disallowed entirely (*Wiebe v Braun*, 2011 MBQB 157 at para 32 [*Wiebe*]; see also *Ellcar Ventures Ltd v MacLeod*, 2023 BCSC 2095 [*Ellcar*]; *North Perimeter v 6625844 Manitoba Ltd*, 2021 MBQB 94 at para 11 [*North Perimeter*]; *Jozsa v Charlwood-Sebazco*, 2016 BCSC 78 [*Jozsa*]; *Jorcel v Vinet*, 2012 ONSC 1583 [*Jorcel*]; *Vallie Construction Inc v Minaker*, 2011 ONSC 6565 [*Vallie*]).

[109] Like *Wilson*, *Wiebe* was also decided by Menzies J, and cited *Obad* with approval. Justice Menzies wrote: "In the situation where the owner of property denies the contractor the right to remedy any alleged deficiencies, the owner's right of set off may be *somewhat curtailed*" (at para 32) (emphasis added). In *Wiebe*, the contractor reduced his price to exclude work that he did not complete; the owners were therefore not permitted to recover for the cost of that work, which was completed by someone else (see para 34).

[110] *Jozsa* relied upon *Wiebe* and *Obad* (see para 73). *Jozsa* acknowledged the general principle that "[e]ven where an owner terminates a contract, the owner can still counterclaim for defective work"—but added that "the contractor has the right to remedy any defects in the work himself, and if he is deprived of that right the owner's right of set off may be curtailed" (*ibid*). *Jozsa* examined all the deficiencies alleged by the defendant, and repeatedly concluded that if the deficiency was one which the plaintiff could have repaired had it been permitted to complete the project, the defendant was not entitled to set-off on that item (see paras 94, 96, 102, 105, 145, 172, 219).

[111] The motion judge cited at para 63, *North Perimeter*, which summarized several legal principles applicable to construction law that were noted as "not really contentious" (*ibid* at para 10; see also para 11). Among these, Martin J cited at para 11, the following statement from *D & M Steel Ltd v 51 Construction Ltd*, 2018 ONSC 2171 at para 52 [*D & M Steel*], pertaining to set-off:

> If there are defects in a contractor's workmanship, but not enough to amount to a fundamental breach entitling the owner to terminate the contract, the contractor should be permitted to remedy the defects and *failure by the owner to permit such corrections will disentitle or reduce the amount of damages the owner can claim* to remedy the defects as a result of its failure to mitigate.
>
> [emphasis added; footnote omitted]

[112] *D & M Steel* relied on *Balkan* in support of the statement above. In *Balkan*, the trial judge implied a contractual term, requiring the defendant owner to give the contractor notice of defects and an opportunity to correct them. Because the owner did not give timely notice of alleged defects

regarding painting (see *ibid* at para 49), radiators (see *ibid* at para 54), patched holes (see *ibid* at para 56) and the lock system (see *ibid* at para 58), no set-off was permitted for these issues.

[113] Finally, in *1127074 Alberta Ltd v Olin*, 2019 ABQB 910 [*Olin*], the defendant homeowner hired the plaintiff for concrete work. The homeowner refused to allow the contractor to repair, remove or repour the concrete slab at issue, and he did not do any timely remedial work. The trial judge found that the repairs offered by the contractor were reasonable, and the homeowner should have accepted them. Because he did not, none of the losses incurred as a result could be claimed as damages (see *ibid* at paras 58-59). Recognizing that the homeowner did not mitigate, the trial judge reduced the value of his counterclaim against the contractor from $43,632.58 to $1,000.

[114] The cases therefore present varied approaches to limiting an owner's right of set-off. Most of these cases permitted a partial set-off, despite the owner's conduct (see *Ellcar*; *North Perimeter*; *Olin*; *Jorcel*; *Wilson*; *Vallie*). Set-off was denied in *Wiebe* because the contractor reduced his price to account for work he never undertook. In *Obad*, *Jozsa* and *Balkan*—all of which were home renovations—set-off was entirely denied. These cases all addressed simple contracts—distinct from the present contract applicable on this appeal—and the contractual terms relevant to mitigation were implied by the courts.

[115] The New Brunswick Court of Appeal recently considered mitigation in *Potash Corporation of Saskatchewan Inc v HB Construction Company Ltd*, 2022 NBCA 39 [*PCS*], where there was a more sophisticated contract. The Court examined the contractual provision that required the owner to give

notice to the contractor of a defect in the work. The trial judge concluded that the owner was not entitled to set-off, in part because it gave no notice or opportunity for the contactor to remedy its deficiencies, as required by the applicable contract (see *ibid* at paras 361-65). The Court gave deference to the trial judge's findings, concluding that there was "no palpable and overriding basis for appellate intervention on any of them" (*ibid* at para 140).

[116] In the present case, the motion judge identified GC 2.4 as governing deficiencies (see *motion decision* at para 80). This provision reads as follows:

> **GC 2.4 DEFECTIVE WORK**
>
> 2.4.1 [Marrbeck] shall promptly correct defective work that has been rejected by [CKP] as failing to conform to the *Contract Documents* whether or not the defective work has been incorporated in the *Work* and whether or not the defect is the result of poor workmanship, use of defective products or damage through carelessness or other act or omission of [Marrbeck].
>
> 2.4.2 [Marrbeck] shall make good promptly other contractors' work destroyed or damaged by such corrections at [Marrbeck's] expense.
>
> 2.4.3 If in the opinion of [CKP] it is not expedient to correct defective work or work not performed as provided in the *Contract Documents*, [WCC 40] may deduct from the amount otherwise due to [Marrbeck] the difference in value between the work as performed and that called for by the *Contract Documents*. If [WCC 40] and [Marrbeck] do not agree on the difference in value, they shall refer the matter to [CKP] for determination.
>
> [emphasis in original; underlining added]

[117] Similar to the contractual provision in *PCS*, the contract also permits WCC 40 to deduct for deficiencies if the described procedure was followed. CKP was required to identify defective work (GC 2.4.1). If CKP had determined it was not expedient for Marrbeck to correct the deficiencies or work was not performed as provided in the contract documents, WCC 40 would have been entitled to deduct from the amount otherwise due to Marrbeck the difference in value between the work as performed and that called for by the contract (GC 2.4.3). If the parties did not agree on the difference in value, they were required to refer the matter to CKP for determination. In other words, WCC 40 may have then been entitled to set-off.

[118] The motion judge found that WCC 40 did not abide by these contractual provisions (see *motion decision* at paras 80-83). CKP did not find repair was impractical; in fact, CKP stated that most of the issues could have been addressed during the ordinary course of construction (see *ibid* at para 80). WCC 40 did not allow Marrbeck back onto the site to remediate (see *ibid* at para 83). Further—and unlike most of the cases reviewed above—the motion judge found that WCC 40 did almost nothing to mitigate (see *ibid* at paras 82-83). Based on all of these findings of fact, the motion judge denied WCC 40 recovery for the deficiencies. He made no palpable and overriding error in making these findings and, as explained earlier, in accepting the opinion evidence of CKP.

[119] General principles of mitigation support the motion judge's finding. As stated by the Supreme Court in *Southcott* at para 72:

> The doctrine of mitigation holds that a plaintiff cannot recover damages for loss that could have been reasonably avoided: *Asamera Oil Corp. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633, at p. 660; *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Company of London, Ltd.*, [1912] A.C. 673 (H.L.), at p. 689; *Dunkirk Colliery Co. v. Lever* (1878), 9 Ch. D. 20 (C.A.), at p. 25. . . . [I]f the plaintiff unreasonably fails to mitigate, its damages for breach of contract may be reduced: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, at pp. 166-67; *Darbishire v. Warran*, [1963] 1 W.L.R. 1067 (C.A.), at p. 1075.

[120] In my view, the motion judge's findings on mitigation and specifically, that the owner could have reasonably avoided the damages amounting to deficiencies by giving Marrbeck and Transcona an opportunity to remediate, and that WCC 40 unreasonably failed to mitigate are owed deference. Similar to the finding in *PCS*, I am not satisfied there is any palpable and overriding error providing a basis for appellate intervention on the motion judge's findings and I would dismiss this ground of appeal. Because the deficiency holdback was held back from Marrbeck and WCC 40 failed to mitigate its damages, the $42,000 must be paid by WCC 40 to Marrbeck.

Issue 5: Did the Motion Judge Err in His Assessment of Damages?

[121] The motion judge accepted the evidence of Marrbeck and Transcona relating to the amounts owing. He found that WCC 40 was liable to pay Marrbeck the following amounts:

Amounts certified by CKP:	$597,526.39
Additional work confirmed by CKP respecting work under CO No. 8 and PCN 13:	$193,104.52
Payment of the statutory holdback:	$183,885.92
Interest due pursuant to the rate set in the contract up to October 27, 2022:	$195,047.90
Additional costs incurred by Marrbeck:	$71,191
Total amount owing:	**$1,240,755.73**

[122] Notwithstanding the amount the motion judge found to be owing, he also stated: "I am also allowing the entirety of Marrbeck's claim of $1,497,929.01 set out in their statement of claim because I find that the work was performed and was authorized by WCC 40" (*motion decision* at para 97(f)).

[123] As to Transcona's claim against Marrbeck, the motion judge granted judgment in the amount due and owing to Transcona, $1,184,388.01, calculated as follows:

Unpaid invoices (exclusive of holdback deducted):	$781,662.87
Holdback amount:	$193,589.26
Unpaid CO No. 8/PCN 13 work:	$209,135.88
Total:	**$1,184,388.01**

[124] The motion judge's finding respecting the amount found to be due and owing to Transcona was not appealed.

[125] WCC 40 submits that the motion judge committed palpable and overriding errors in awarding damages to Marrbeck in the amount of $1,497,929.01, plus prejudgment interest when only $1,240,755.73 was found to be owing, including amounts certified by CKP, allowing amounts respecting CO No. 8, releasing the statutory holdback and including amounts claimed without supporting evidence.

[126] Marrbeck submits that the motion judge's findings were based on a review of all the evidence and are entitled to deference. Once an application for payment was made, CKP was to review the application and issue a CP respecting the amount it determined to be properly due at the time. Once the CP had been issued, WCC 40 was mandated to pay Marrbeck.

[127] Although the motion judge found the total amount owing to Marrbeck was $1,240,755.73, he awarded Marrbeck the entirety of its claim as set out in its statement of claim of $1,497,929.01. The amount included sums approved by CKP, but also sums for additional work completed, but not yet reviewed and certified by CKP. It also included additional costs and expenses incurred due to delay and breaches by WCC 40.

[128] Marrbeck further submits that the claim allowed at $1,497,929.01 included sums that were awarded to Transcona and, while the work had not been reviewed by CKP, it had been proven in the evidence. Further, the amount allowed was exclusive of interest. Therefore, there was no error in awarding prejudgment interest on that amount as indicated in the *motion decision*.

Analysis and Decision on Issue 5

[129] The motion judge's findings are entitled to deference and, other than referenced below, he made no palpable or overriding error respecting the amount found to be due and owing by WCC 40 to Marrbeck. The evidence filed supports the motion judge's finding that the amount due and owing by WCC 40 to Marrbeck was $1,240,755.73 (see *motion decision* at para 97).

[130] Despite otherwise thoughtful and comprehensive reasons, the motion judge made an error when he allowed the entirety of Marrbeck's claim in the amount of $1,497,929.01 because he found the work was performed and authorized by WCC 40. That sum was claimed by Marrbeck in its statement of claim and was referenced in the affidavit of Mr. Hanstead. A portion of the amount claimed by Marrbeck, namely, $396,109, is described by Mr. Hanstead as "additional expenses and costs suffered or incurred by Marrbeck due to the delay and breaches by WCC 40". Contrary to the motion judge's finding, that portion of the claim was not for work performed and authorized by WCC 40. It is a damage claim and there was no evidence that that claim was reviewed by CKP or approved by WCC 40. Further, Marrbeck filed no backup documentation to support that amount other than referring to a claim for $71,191.

[131] The motion judge described Marrbeck's claim on the motion totaling $1,240,755.73, which included $71,191 "for additional expenses and costs suffered or incurred by Marrbeck due to the delay and breaches by WCC 40 (including additional rental and fencing costs)" (*motion decision* at para 29(c)). He made no reference to the claim of $396,109 for additional costs and expenses. He concluded that "the additional costs [incurred by

Marrbeck] should be paid by WCC 40 totalling $71,191.00" (*ibid* at para 97(e)). It appears that he was satisfied that a portion of the additional costs should be paid and that finding is entitled to deference.

[132] Even before applying the governing principles on summary judgment motions, a claimant bears the onus to provide an evidentiary foundation for all claims for damages (see SM Waddams & Patrick Healy, *Law of Damages* (Toronto: Thomson Reuters, 2020) (loose-leaf updated 2023, release 1) at section 13:2, online: (WL Can); *Permaform Plastics Ltd v London & Midland General Insurance Co*, 1996 CarswellMan 325, 1996 CanLII 17951 (MBCA)).

[133] The leading case on summary judgment is *Dakota Ojibway*. This Court described the responsibility to file all admissible evidence, which has been described in a number of cases, as a litigant putting their "best foot forward" (*ibid* at para 75). Further, Burnett JA explained that a moving party always bears the persuasive burden of proving its claim and that a fair and just adjudication is possible on a summary judgment motion (see *ibid* at para 111).

[134] Marrbeck had the persuasive burden of proving the additional expenses and costs it suffered or incurred due to the delay and breaches of WCC 40. It is not enough to allege that an amount is due and owing without proof of the additional expenses and costs suffered. A bald statement that an amount is due and owing is clearly not evidence supporting the claim for additional expenses and delay caused by WCC 40. More is required, such as backup documents or an explanation of the claims in an affidavit, to prove each claim advanced. In my view, it is plainly obvious that a party cannot claim amounts that are not proven with supporting evidence.

[135] Marrbeck submitted that, in addition to what had been reviewed by CKP, the value of completed work should be allowed. That additional work was quantified and included in the evidence and was allowed as part of the motion judge's calculation of the total amount due and owing of $1,240,755.73.

[136] In the absence of evidence, it was not open for the motion judge to allow the entirety of Marrbeck's claim of $1,497,929.01, without proof of each of the heads of damages claimed. This constitutes a palpable and overriding error. It contrasts with other claims that were based on work certified as completed by CKP by way of CPs, approvals of COs or proven by evidence.

[137] A further minor correction is required to the judgment. It may have been an oversight when it was prepared and signed, as it made no deduction for the overbilling ($35,654.41) referenced at para 84 of the *motion decision*. That deduction was ordered and should have been taken into account.

Jurisdiction and Available Remedies

[138] The next question to consider is how to address the appropriate remedy. In the leading decision in *Naylor Group Inc v Ellis-Don Construction Ltd*, 2001 SCC 58 at para 80, Binnie J wrote:

> It is common ground that the Court of Appeal was not entitled to substitute its own view of a proper award unless it could be shown that the trial judge had made an error of principle of law, or misapprehended the evidence (*Lang v. Pollard*, [1957] S.C.R. 858, at p. 862), or it could be shown *there was no evidence on which the trial judge could have reached his or her conclusion* (*Woelk v. Halvorson*, [1980] 2 S.C.R. 430, at p. 435), or the trial judge failed to consider relevant factors in the assessment of damages, or

> considered irrelevant factors, or otherwise, in the result, made "a palpably incorrect" or "wholly erroneous" assessment of the damages (*Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, at p. 235; *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705, at p. 810; *Widrig v. Strazer*, [1964] S.C.R. 376, at pp. 388-89; *Woelk*, *supra*, at pp. 435-37; *Waddams*, *supra*, at para. 13.420; and H. D. Pitch and R. M. Snyder, *Damages for Breach of Contract* (2nd ed. 1989), at 15§5. *Where one or more of these conditions are met, however, the appellate court is obliged to interfere.*
>
> [emphasis added]

[139] In *Dansereau v The City of Winnipeg*, 2014 MBCA 18 at para 6, Mainella JA wrote:

> Deference is owed to a judge's award of damages absent the judge *making an error in law or principle, coming to a conclusion without evidence*, or making an award that was wholly erroneous by being either inordinately low or inordinately high in the circumstances (*Woelk et al. v. Halvorson*, [1980] 2 S.C.R. 430 at 435-36). In arriving at a damages award, a judge's assessment of the evidence, or proportioning of damages, *is a question of fact that cannot be set aside on appeal absent demonstration of palpable and overriding error* (*K.L.B. v. British Columbia*, 2003 SCC 51 at para. 62, [2003] 2 S.C.R. 403; and *M.B. v. British Columbia*, 2003 SCC 53 at para. 54, [2003] 2 S.C.R. 477).
>
> [emphasis added]

[140] Applying these principles and as explained above, I find that the motion judge made a palpable and overriding error when he awarded a portion of Marrbeck's claim without evidence. Therefore, this Court is obliged to interfere and deny that portion of the claim. An appellate court may make its own determinations based on the record, where it is feasible on a practical

level and in the interests of justice to do so (see *Beaulieu v Winnipeg (City of)*, 2022 MBCA 81 at para 94).

[141] This Court has the jurisdiction and power to award an appropriate remedy pursuant to sections 26(1)-26(2) of *The Court of Appeal Act*, CCSM c C240. While this Court has the power to order a new trial upon any question (see *ibid*, s 28), I am not satisfied that ordering a new trial or a trial of an issue is consistent with the purpose and intent of the summary judgment provisions, which allow for a proportionate, more expeditious and less expensive means to achieve a just result.

[142] In my view, the motion judge appropriately reviewed each of the claims advanced and allowed the claim as calculated in para 97 of the *motion decision*. That amount includes interest up to October 27, 2022. Accordingly, I would adjust the principal amount due and owing to Marrbeck by WCC 40 to $1,052,053.42, calculated as follows: the amount found to be due and owing $1,240,755.73 minus the interest of $195,047.90, minus the overbilling of $35,654.41 (see *ibid* at para 84), plus the deficiency holdback of $42,000. Since the deficiency holdback was deducted from the amount due to Marrbeck (CP No. 30) and WCC 40 failed to mitigate its damages, the $42,000 is owing to Marrbeck. Marrbeck is entitled to interest on $1,052,053.42 at the contract rate of interest from the date the amount was due and owing to the date of payment.

[143] As to the other submissions advanced by WCC 40, the motion judge made no palpable and overriding error in allowing Marrbeck's claim. One submission deserves a further brief comment. The motion judge made no error in allowing payment of the statutory holdback. Pursuant to section 24

of the *Act*, a statutory holdback is payable forty days after the contract or subcontract was abandoned unless a lien is registered, and an action is commenced. In this case, by reason of the non-payment by WCC 40, Marrbeck and Transcona abandoned the job site and Marrbeck registered a lien. The statutory holdback that had accumulated to that point in time is due and owing and, upon discharge of the lien, the statutory holdback plus accrued interest should be paid by WCC 40 to Marrbeck and similarly, the holdback is payable by Marrbeck to Transcona. Once an action is commenced to enforce a lien, a court order is required to discharge a lien and a pending litigation order. The parties may file a consent order to do so.

Conclusion

[144] I would dismiss WCC 40's appeal on liability. I would allow WCC 40's appeal on damages, in part. On each of the issues, I conclude as follows:

a) The motion judge did not err in deciding that the actions were appropriate cases to be determined pursuant to the summary judgment process;

b) The motion judge did not err in finding that the requirement in the contract for a CO and a change directive to be signed by WCC 40 was waived by WCC 40's conduct or acquiescence;

c) The motion judge did not err in failing to apply and/or refer to material provisions of the contract;

d) The motion judge did not err in his findings made as to mitigation of damages; and

e) The motion judge erred, in part, in his assessment of damages.

[145] Accordingly, I would allow WCC 40's appeal on damages, such that the total amount owing by WCC 40 to Marrbeck should be reduced to the principal amount (excluding interest) of $1,052,053.42 (as calculated at para 142 herein). Interest is payable on that amount at the contract rate from the date the amount was due and owing to the date of payment.

[146] The amount due and owing by Marrbeck to Transcona was found by the motion judge to be $1,184,388.01, plus interest at the contract rate and was not appealed.

[147] It is unnecessary to decide the issues raised in Transcona's appeal. This decision is not to be construed as an endorsement or disagreement with the motion judge's conclusions on the issues raised in Transcona's appeal. Those issues are best left for another day.

Edmond JA

I agree: Mainella JA

I agree: Spivak JA