

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Revelry Lodgings Inc. v. Twin Anchors
Manufacturing (2004) Ltd.*,
2026 BCSC 967

Date: 20260528
Docket: S18264
Registry: Salmon Arm

Between:

The Revelry Lodgings Inc.

Plaintiff

And

Twin Anchors Manufacturing (2004) Ltd.

Defendant

Before: The Honourable Justice B. Smith

Reasons for Judgment

Counsel for the Plaintiff:

R.A. Chorneyko

Counsel for the Defendant:

C.T. Hart

Place and Date of Hearing:

Kamloops, B.C.
December 5, 2025

Place and Date of Judgment:

Salmon Arm, B.C.
May 28, 2026

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Overview

[1] This is a summary trial application in an action involving a contract dispute. The plaintiff, The Revelry Lodgings Inc. (“Revelry”), seeks judgment on its claim for the return of all or a portion of a money deposit of \$90,550 (the “Deposit”) that it paid to the defendant, Twin Anchors Manufacturing (2004) Ltd. (“TAM”), for the construction of a prefabricated structure pursuant to a contract between Revelry and TAM (the “Contract”). Revelry also seeks dismissal of TAM’s counterclaim by which TAM claims entitlement to keep all or a portion of the Deposit.

[2] TAM says Revelry repudiated the Contract, and TAM is entitled to damages for loss of profits, which TAM submits should be assessed at \$60,000. In the alternative, TAM contends that Revelry is bound by a settlement contract.

[3] Revelry concedes it cancelled the Contract but denies it repudiated the Contract. Rather, Revelry contends that its cancellation of the Contract was merely a “change to zero” in the scope of the work. Revelry says it is entitled to a return of the Deposit less a reasonable amount for TAM’s expenses, which it submits should be assessed at \$10,000.

[4] Revelry disputes TAM’s quantification of its loss of profits. Revelry also disputes TAM’s claim that Revelry entered a settlement contract. Revelry asserts

TAM's insistence that Revelry sign a release which included a non-disclosure clause, which Revelry refused to agree to, disentitles TAM from relying on the settlement contract.

[5] Revelry does not allege TAM repudiated the Contract.

[6] For the reasons that follow, I find Revelry and TAM entered a binding settlement contract. However, in the event I am incorrect about that, I find Revelry repudiated the Contract; TAM accepted Revelry's repudiation sometime in the fall of 2022; and TAM is entitled to damages, which I assess at \$60,000.

Factual Background

[7] Most of the factual background is undisputed.

The parties and their representatives

[8] Revelry operates a campground property. TAM constructs and sells modular and moveable buildings. At all material times, Revelry's authorized representative was its owner, Mr. James Cherry; and TAM's was its manufacturing manager, Mr. Nigel Watson. It is undisputed that at all material times Mr. Cherry was acting on behalf of Revelry and Mr. Watson was acting on behalf of TAM.

Chronology of events

[9] In 2021, Mr. Cherry devised a plan to build a campground on property Revelry owned near Revelstoke, B.C. Part of the plan involved prefabrication of a laundry facility and caretaker accommodation joint-use building (collectively, the "Laundry Facility"). The original plan was simple: a foundation would be constructed for the Laundry Facility, which would be constructed off-site; and the Laundry Facility would then be moved to the site and affixed to the foundation. Mr. Cherry was aware the construction would have to go through a permitting process. His plan was for the foundation and the Laundry Facility to be in place by early summer of 2022.

[10] On October 15, 2021, Mr. Cherry emailed Mr. Watson, requesting a quote from TAM for the construction of the Laundry Facility.

[11] From early November 2021 and into December 2021, Mr. Cherry and Mr. Watson emailed and texted each other about the proposed construction of the Laundry Facility; Mr. Cherry visited TAM's manufacturing facility in Sicamous, B.C.; and Mr. Watson sent Mr. Cherry a preliminary set of construction drawings for the Laundry Facility and preliminary pricing.

[12] In late January 2022, Mr. Cherry requested changes to the drawings for the Laundry Facility. TAM made the requested changes.

[13] In February 2022, Revelry paid TAM \$11,500.00 as a deposit for the construction drawings (the "Drawing Deposit").

[14] Also in February 2022, Mr. Watson learned from Mr. Cherry that Revelry had retained Valley Pilings Inc. ("Valley Pilings") to provide and install pilings for the Laundry Facility. Providing and installing pilings was never within TAM's potential scope of work. Pilings are structural components of a building which are driven into the ground to provide support to the structure. Information about pilings is relevant to design of a structure and is often required for construction drawings.

[15] On March 10, 2022, Revelry and TAM entered the Contract. Pursuant to the Contract, Revelry agreed to pay \$197,625.00, plus GST, to TAM for construction of the Laundry Facility.

[16] Also in March 2022, Revelry paid TAM \$79,050.00 as a construction deposit (the "Construction Deposit").

[17] The Drawing Deposit and the Construction Deposit collectively comprised the Deposit.

[18] On April 6, 2022, Mr. Watson emailed Mr. Cherry preliminary construction drawings, informed him the project was due to start on April 18, 2022, and requested confirmation that TAM was to proceed without a permit. Mr. Watson deposes he understood Mr. Cherry would submit the drawings to the authorities for a permit, which Mr. Cherry deposes he did.

[19] On April 8, 2022, Mr. Cherry emailed Mr. Watson saying that he hoped to submit the drawings that day and get some preliminary feedback within a week. He said it seemed prudent to wait until then at least before proceeding with construction, although he did not anticipate any problems from the authorities. He also said the April 18, 2022 project start date was sooner than he expected and asked whether the completed Laundry Facility could be stored at TAM's facility, or the project start date pushed back. Mr. Watson emailed Mr. Cherry back, said the project start date could be pushed back a few weeks, and asked Mr. Cherry to let him know the response from the authorities.

[20] On May 4, 2022, the authorities emailed Mr. Cherry a twelve-point list, described in the email as "feedback", and identified various deficiencies in his application package. Mr. Cherry forwarded the email to Mr. Watson, who replied: "I will review with design tomorrow morning and call thereafter. On first glance it all looks like we can accommodate."

[21] On May 6, 2022, Mr. Cherry emailed Mr. Watson and said that Valley Pilings was "having difficulty finding an engineer to sign off. My understanding was that your engineer was sufficient, that Shawn [of Valley Pilings] would spec the piles and your person would sign off. Is this correct?" Mr. Watson emailed back saying: "Yes, we can do that, have Shawn send me the piling information and spans."

[22] On May 11, 2022, Valley Pilings emailed Mr. Watson the requested piling information.

[23] TAM subsequently amended the drawings to respond to the permit authorities' official and worked on responding to various issues associated with the layout and structure of the Laundry Facility.

[24] On May 17, 2022, Mr. Watson emailed an engineering firm to hire them to have an engineer review and certify the amended drawings.

[25] On May 18, 2022, Mr. Watson emailed Mr. Cherry a copy of the amended drawings.

[26] While Mr. Watson was attempting to retain an engineering firm, TAM ordered trusses for the Laundry Facility. Trusses are one of the first components of construction for a modular structure.

[27] On May 26, 2022, TAM paid its supplier \$5,472.60 for the trusses.

[28] On June 1, 2022, TAM received delivery of the trusses. That same day, Mr. Watson followed up with the engineering firm, as he had not received a response to his email of May 17, 2022.

[29] On June 8, 2022, Mr. Watson sub-contracted the engineering firm for various services in connection with the amended drawings.

[30] On or around June 23, 2022, the sub-contracted engineering firm informed Mr. Watson that they would need a geotechnical survey from a geotechnical engineer before certifying the amended drawings. That same day, Mr. Watson emailed Mr. Cherry to inform him of this requirement. Mr. Cherry then hired a geotechnical engineer.

[31] On July 7, 2022, Mr. Cherry emailed Mr. Watson informing him that the geotechnical engineer wished to speak with the sub-contracted engineer. Mr. Watson sent Mr. Cherry the sub-contracted engineer's contact information.

[32] Mr. Cherry deposes that: "In July 2022, I decided that it would be best to cancel or at least delay the Structure [the Laundry Facility] until the next spring."

[33] From July 8 to July 17, 2022, Revelry and TAM had limited communications. Then, on or around July 18 or 19, 2022, Mr. Cherry and Mr. Watson had a telephone conversation in which Mr. Cherry told him that Revelry did not want to proceed with the Contract and wanted to know how much money it would get back.

[34] Between July 20, 2022 and September 13, 2022, Mr. Cherry and Mr. Watson exchanged text messages and the occasional phone call.

[35] On September 14, 2022, Mr. Watson emailed Mr. Cherry:

Hi James,

I hope all is well.

My apologies for the delay having this information presented to you.

Having spoken to our owner and received recommendations on our contractual agreement we understand the following payback from the original contract can be met.

1. Amount Paid - \$90,541.50 (\$11,500 Drawing & Build Deposit + \$79,041.50 Construction Deposit)
2. TA Structures to Hold Back Drawing and Build Deposit - \$11,500.00
3. TA Structures to Hold Back 75% of Construction Deposit for next year build - \$59,280.00
4. Payback to James Cherry - \$19,761.50

The following conditions apply:

1. The retained amount of \$70,780 will be non-refundable with the assurance of commencing the build of your required building by 27th March 2023.
2. TA Structures require 30 days' notice for commencement of the building and if commencement does not start prior to 27th March 2023 the retained amount will be withheld.
3. The final pricing for the building will be determined 30 days prior to start date.

I understand you may want some changes to the building, I would suggest we do this in advance in order to expedite the manufacture when the time arrives.

If this is agreed upon I will draft an addendum to our original contract for acceptance.

Thank you in advance

Kind Regards

Nigel

[36] On September 19, 2022, Mr. Cherry attended TAM's manufacturing facility and met with TAM owner, Mr. Greg Kylo.

[37] On October 6, 2022, Mr. Watson spoke with Mr. Cherry and told him TAM could still construct the Laundry Facility or proceed as indicated in his email of September 14, 2022. Mr. Cherry made clear to Mr. Watson that he did not want TAM to construct the Laundry Facility. Mr. Watson deposes that he seems to recall that Mr. Cherry instead wanted to discuss having TAM construct a smaller structure.

[38] On October 17, 2022, Mr. Cherry and Mr. Watson met at TAM's manufacturing facility. Mr. Cherry wanted to know whether TAM would construct a two-bathroom shower unit ("Shower Unit"). They discussed the proposed Shower Unit, and potential options for moving forward.

[39] On October 21, 2022, Mr. Watson emailed Mr. Cherry and attached some floor plans based on their conversations and gave Mr. Cherry "options for termination of the Contract" as follows:

The options for termination of the contract are as follows.

1. As previously detailed, TA will return the amount of \$19,761.50 and the contract will be terminated. TA will provide an amendment to the original contract for termination.
2. TA will hold the monies paid to date and manufacture and deliver the 10' x 8' dual washroom as shown in the attachment and general specification above.
3. The contract will remain and the original building will be manufactured and delivered. Due to the delay in manufacture, the unit will be re-priced and contract will be amended.

Please let me know how you wish to proceed.

Thank you

Kind Regards

Nigel

[40] There were a few other conversations between Mr. Cherry and Mr. Watson in October 2022 and November 2022, in which Mr. Cherry indicated that instead of one Shower Unit, he now wanted two Shower Units. They did not reach any agreement concerning the Laundry Facility.

[41] It appears there was no further contact between November 2022 and April 2023.

[42] On April 6, 2023, Mr. Watson emailed Mr. Cherry: "We are looking to start to manufacture the two 8' X 12' buildings you are requesting during the week commencing the 24th April." In subsequent exchanges of emails, they agreed to meet at TAM's manufacturing facility on April 18, 2023.

[43] Mr. Watson deposes that, as far as he can recall, at the meeting on April 18, 2023, Mr. Cherry said that instead of two Shower Units, he now wanted TAM to construct one Shower Unit and a pumphouse (collectively, the “Shower Unit and Pumphouse”). Mr. Watson had concerns about the proposed Shower Unit and Pumphouse because it would not meet Canadian Standards Association standards.

[44] On May 4, 2023, Mr. Watson emailed Mr. Cherry and said that TAM would construct one Shower Unit “as a committed change to the original contract” and that “[f]ollowing the manufacture of this unit we will evaluate to see if we are able to assist with the construction of the 12.5’ X 8’ Pump House.” Mr. Watson deposes that near the end of this period, Mr. Cherry said he instead now wanted TAM to construct four units: two Shower Units; and two Pumphouses.

[45] On May 31, 2023, Mr. Cherry texted Mr. Watson:

Okay Nigel, that makes four weeks now that you’ve ignored my texts and emails. Let Greg know that my next call is to CBC Go Public. We’ll see if some public pressure won’t put an end to this naked opportunism.

[46] Mr. Watson deposes that on or around June 1, 2023, he had a conversation with Mr. Cherry in which Mr. Cherry threatened to report TAM to the media. Mr. Watson reiterated to Mr. Cherry that TAM would be willing to construct one Shower Unit.

[47] On July 5, 2023, Mr. Cherry emailed Mr. Watson and said that instead of two Shower Units and two Pumphouses, Revelry now again wanted TAM to construct the Shower Unit and Pumphouse:

Gentlemen,

Let’s get these buildings done.

My situation has changed recently. I’m looking to take on a minority partner and he’s not excited about pending litigation; he doesn’t want to go to court and he doesn’t want a battle in the media either so let’s settle this now.

I’m prepared to accept the offer discussed in the fall for the bathroom and the shed in lieu of the deposit refund. I’d like them exactly as specified in my meeting with Nigel on April 18th, with the rigid insulation and strapping but without the soffit and siding please.

Deliver and offload the buildings in the parking area at my site by September 30th, keep the balance of the deposits, keep the interest earned/saved on my money over the last 16 months but bring the trusses that were purchased for the original building.

Is this acceptable?

James Cherry

[48] That same day, Mr. Watson replied:

Thanks James,

I will discuss with Greg and get back to you.

Kind regards

Nigel

[49] On July 19, 2023, Mr. Cherry emailed Mr. Kylo and Mr. Watson to follow up:

Greg and Nigel,

So which way are we going with this? I'm looking for a written commitment to build and deliver these buildings by September 30th.

Thanks,

James Cherry

[50] On July 25, 2023, Mr. Watson emailed Mr. Cherry and informed him that TAM declined to construct shower units or pumphouses and offered to either construct the Laundry Facility (with updated contract pricing) or pay \$30,000 to Revelry:

Good morning James.

I hope all is well.

Greg and I met yesterday to discuss the way forward with the buildings you have requested and have decided on the following.

As per the contract we are still very willing to review the current pricing and provide the building as initially contracted. If this is something your new business model will provide for, we would welcome revisiting the unit pricing and would be happy to find the time to manufacture in our schedule.

Unfortunately, we are unwilling to provide the smaller buildings as requested due to the non-compliance with current code requirements outside of our business model. All units that we manufacture are built to a specific building code or CSA standard in this particular building would be outside of this scope.

If the initial contracted building is not what you now require and you would like a release from the original contract, TA Structures will retain an amount

associated with the initial contract cost implications and will refund the sum of \$30,000.

Please let me know how you wish to proceed.

Kind regards,

Nigel.

[51] On July 31, 2023, Mr. Cherry responded and informed Mr. Watson that he wanted the \$30,000:

Okay Nigel,

Fine, send me the 30,000 refund please and I'll build the bathroom and pumphouse myself.

James Cherry

[52] On August 28, 2023, Mr. Watson emailed Mr. Cherry a copy of a settlement agreement, which included a confidentiality clause.

[53] On October 20, 2023, Mr. Cherry emailed Mr. Watson an attachment, namely the signature page of the settlement agreement, but did not include any other pages.

[54] On October 27, 2023, Mr. Watson emailed Mr. Cherry informing him that the single signature page would not be sufficient and that TAM required him to return the entire settlement agreement.

[55] On November 2, 2023, Mr. Cherry emailed Mr. Watson a copy of the executed settlement agreement, with the confidentiality clause struck out.

[56] Revelry has refused to provide TAM with an unaltered version of the signed settlement agreement.

The Settlement Agreement

[57] Relevant terms of the settlement agreement include:

- clause 4, that TAM is entitled to keep \$60,542.50 of the total deposit of \$90,542.50 and will return \$30,000.00 to Revelry;

- clause 5, that Revelry releases and discharges TAM from any and all claims;
- clause 7, that Revelry and TAM will not bring legal proceedings against each other;
- clause 9, that the settlement agreement is not an admission of liability;
- clause 12, that the settlement agreement supersedes any prior agreements;
- clause 13, that the terms of the settlement agreement are contractual and not a recital; and
- clause 14, that the agreement is confidential.

The Contract

[58] Relevant terms of the Contract include:

- the preamble, which recites a purchase price of \$197,625.00;
- clause 2, which provides for certain deposits including a “drawing deposit” of \$11,500 and a “build deposit” of \$79,050;
- clause 3, which provides for immediate payment of \$90,050 and full payment (an additional \$107,075) upon completion of the structure prior to shipping;
- clause 8, by which Revelry could request changes to the structure;
- clause 9, by which the purchase price would increase or decrease based upon the requested changes;

- clause 21, by which TAM was entitled to retain all monies received from Revelry if Revelry did not pay the entire purchase price within 45 days of completion.

Discussion

[59] I discuss the settlement contract issue before the breach of contract issue because, in my view, the former is determinative.

Settlement

[60] I find that on or about July 31, 2023, Revelry and TAM entered a binding settlement contract.

[61] In any contract, including a settlement contract, there must be a *consensus ad idem* or meeting of the minds on the essential terms of the contract: *Anderson v. Anderson*, 2023 SCC 13, [2023] 1 SCR 473, at para. 58.

[62] TAM has the burden of proving consensus on a balance of probabilities. In discussing the issue in *Salminen v. Garvie*, 2011 BCSC 339 [*Salminen*], at paras. 26–27, Justice Williams said:

[26] The burden of proving consensus is on the party seeking to prove the existence of the agreement; the standard to be met is proof on a balance of probabilities: *Reid v. Reid*, 2011 BCSC 231 at para. 27, [2011] B.C.J. No. 298 (QL), citing *Bell v. Bell* (1998), 1998 CanLII 3194 (BC SC), 24 E.T.R. (2d) 169, [1998] B.C.J. No. 1457 (QL) at para. 14 (S.C.).

[27] The test for determining *consensus ad idem* at the time of contract formation is objective: it is “whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract”; it is “whether a reasonable... [person] in the situation of that party would have believed and understood that the other party was consenting to the identical term”: *Fridman, supra*, p. 15; see also *Smith v. Hughes* (1871), L.R. 6 Q.B. 597 at 607 adopted in *St. John Tugboat Co. Ltd. v. Irving Refining Ltd.*, 1964 CanLII 88 (SCC), [1964] S.C.R. 614, 1964 CarswellNB 4 at para. 19, and *Remington Energy Ltd. v. B.C. Hydro & Power Authority*, 2005 BCCA 191 at para. 31, 42 B.C.L.R. (4th) 31. The actual state of mind and personal knowledge or understanding of the promisor are not relevant in this inquiry: *Hammerton v. MGM Ford-Lincoln Sales Ltd.*, 2007 BCCA 188 at para. 23, 30 B.L.R. (4th) 183, citing S.M. Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book Inc., 2005) at 103. In short, if a reasonable person would find that the parties were in agreement as to a contract and its terms, then a contract would exist at

common law: *Witzke (Guardian ad litem of) v. Dalglish*, 1995 CanLII 625 (BC SC), [1995] B.C.J. No. 403 (QL), 1995 CarswellBC 1822 at para. 59 (S.C. Chambers). The test's focus on objectivity animates the principal purpose of the law of contracts, which is to protect reasonable expectations engendered by promises.

[63] TAM has met this burden. I find that the parties agreed on the essential terms of a settlement, being that: the parties would release each other from their obligations under the Contract; TAM would pay Revelry \$30,000 of the Deposit; and TAM would keep the balance of the Deposit.

[64] On July 25, 2023, Mr. Watson made the settlement offer. On July 31, 2023, Mr. Cherry accepted the settlement offer. In addition to indicating his acceptance in writing, Mr. Cherry subsequently signed and sent back the incomplete counterpart of the settlement agreement on two separate times.

[65] I find that a reasonable observer would find that the parties agreed on the essential terms of the settlement agreement.

[66] At Mr. Cherry's examination for discovery the following exchange took place:

- Q Did you tell – when you sent back the signature page which was signed, did you tell Mr. Watson or anybody at Twin Anchors that you were not agreeing to the confidentiality clause?
- A I had not read or understood the confidentiality clause at that point.
- Q Right. You thought, though, when you sent back the signature page for the settlement agreement on October 20th, 2023, at 12:15 p.m., hey, we're moving forward. This is done. I'm getting my \$30,000 back. We're calling it a day; is that right?
- A Yeah.

[67] Mr. Cherry deposed that he accepted this offer somewhat under protest, stating that it was done because he felt powerless in response to what he perceived to be TAM's "disreputable business practices." This has no bearing on my decision as Revelry did not plead that the settlement agreement was unconscionable. Additionally, as stated above in *Salminen*, Mr. Cherry's subjective feelings do not inform the analysis.

[68] Revelry submits that, because Mr. Cherry did not agree to the confidentiality clause in the settlement agreement, there was no settlement contract. I accept that confidentiality issues were germane to the relationship between the parties particularly considering that Mr. Cherry threatened to contact CBC Go Public, however, there were no discussions that would indicate a confidentiality clause would be an essential term of the settlement agreement.

[69] In *Jenneson v. Olson*, 2019 BCSC 2367 [*Jenneson*], at para 15, Justice Francis canvassed a similar situation:

[15] For example, in *Huma v. Mississauga Hospital and Queensway Health Centre (Trillium Health Partners)*, 2019 ONSC 5115, a settlement agreement was made between the parties via an email exchange. The plaintiffs offered to have the claim dismissed in exchange for a waiver of costs, and the defendants agreed. The parties then disagreed about the form of release. The court found that the essential terms of the settlement, which were set out in the email exchange between the parties, had been agreed to. The terms of the releases, including confidentiality provisions, were not essential terms of the settlement agreement and therefore a disagreement about those terms would not call into question whether an agreement had been made.

[Emphasis added.]

[70] It is settled law that the formation of a contract and its completion involve separate stages. In *Fieguth v. Acklands Ltd.*, [1989] CarswellBC 88 (B.C.C.A.), at para 35, Chief Justice McEachern said:

[35] In these matters it is necessary to separate the question of formation of contract from its completion. The first question is whether the parties have reached an agreement on all essential terms. There is not usually any difficulty in connection with the settlement of a claim or action for cash. That is what happened here and as a settlement implies a promise to furnish a release and, if there is an action, a consent dismissal unless there is a contractual agreement to the contrary, there was agreement on all essential terms.

[36] The next stage is the completion of the agreement. If there are no specific terms in this connection either party is entitled to submit whatever releases or other documentation he thinks appropriate. Ordinary business and professional practice cannot be equated to a game of checkers where a player is conclusively presumed to have made his move the moment he removes his hand from the piece. One can tender whatever documents he thinks appropriate without rescinding the settlement agreement. If such documents are accepted and executed and returned then the contract, which

has been executory, becomes executed. If the documents are not accepted then there must be further discussion but neither party is released or discharged unless the other party has demonstrated an unwillingness to be bound by the agreement by insisting upon terms or conditions which have not been agreed upon or are not reasonably implied in these circumstances.

[...]

[44] It should not be thought that every disagreement over documentation consequent upon a settlement, even if insisted upon, amounts to a repudiation of a settlement. Many such settlements are very complicated, such as structured settlements, and the deal is usually struck before the documentation can be completed. In such cases the settlement will be binding if there is agreement on the essential terms. When disputes arise in this connection the question will seldom be one of repudiation as the test cited above is a strict one, but rather whether a final agreement has been reached which the parties intend to record in formal documentation, or whether the parties have only reached a tentative agreement which will not be binding upon them until the documentation is complete. Generally speaking, litigation is settled on the former rather than on the latter basis and parties who reach a settlement should usually be held to their bargains. Subsequent disputes should be resolved by application to the court or by common sense within the framework of the settlement to which the parties have agreed and in accordance with the common practices which prevail amongst members of the bar. It will be rare for conduct subsequent to a settlement agreement to amount to repudiation.

[Emphasis added.]

[71] I find that the parties understood that they were discussing an agreement to end their business relationship and release each other from any liability arising from the Contract. I find they entered a settlement contract reflecting that understanding.

[72] There was then a dispute about a non-essential term of the settlement agreement. That dispute cannot defeat the parties' consensus. As stated in *Fieguth*, parties that have agreed on the substance of an agreement, to be formalized later, should generally be held to their bargains. The parties initially decided to end their relationship and avoid litigation. Their subsequent disagreement about a confidentiality clause should not now allow Revelry to avoid the bargain it made.

[73] I find that Revelry and TAM entered a binding settlement contract, by which TAM must pay Revelry \$30,000 and can retain the balance of the Deposit. Per *Fieguth* at para. 35, I find that it was an implied term of the settlement agreement

that the parties would furnish each other with releases. Since the confidentiality clause was not agreed upon, it does not form part of the settlement agreement.

[74] Accordingly:

- TAM is entitled to keep \$60,542.50 out of the Deposit;
- TAM is ordered to pay Revelry \$30,000, to be set off against the costs award below;
- Revelry's action is otherwise dismissed; and
- TAM's counterclaim is dismissed.

[75] Although I have found that Revelry and TAM entered a binding settlement contract, in the event I am incorrect about that, I will now consider the issues pertaining to breach of the Contract.

Breach of the Contract

[76] I find Revelry repudiated the Contract; TAM accepted Revelry's repudiation sometime in the fall of 2022; and TAM is entitled to damages, which I assess at \$60,000.

[77] To begin with, it must be noted that the parties disagree about the content of what turned out to be an important telephone conversation between Mr. Cherry and Mr. Watson in late July 2022. It will be recalled from the foregoing chronology of events that it was around this time that Mr. Cherry decided to "cancel" the Contract, which he asserts was simply a "change to zero" in the scope of the work.

[78] In Mr. Cherry's affidavit he deposes:

11. I scrambled to retain a geotechnical engineer (which took a few weeks) but I soon came to realize that these unexpected additional costs and delays made the Structure less appealing. In July, 2022 I decided that it would be best to cancel or at least delay the Structure until the next spring.
12. With this in mind I spoke with Mr. Watson by telephone in mid July, 2022. He told me that if I cancel the Contract Twin Anchors would

return the Deposit after deducting a fair amount to compensate Twin Anchors for the work that it had done. I decided that [t]his would probably be the best course and I began to consider alternate ideas for the campground. Mr. Watson followed up with me by text message on July 26, 2022 where he advised me that Revelry's rebate amount would reflect "the amount for the labour and materials purchased" and that "Penny our CFO will run the numbers for you and finalize the rebate figure". A true copy of his text messages attached hereto as Exhibit "B".

[79] In Mr. Watson's affidavit he deposes:

29. From July 8 to July 17, 2022, I had limited communications with Mr. Cherry, but on or around July 18 or July 19, 2022, I had a telephone conversation where Mr. Cherry told me that Revelry did not want to proceed with the construction of the laundry unit. My recollection is that, in our initial conversations in late July 2022, Mr. Cherry did not want to proceed with the purchase agreement, and he wanted to know how much money Revelry would get back.

[80] I reproduce below texts between Mr. Watson and Mr. Cherry between July 18, 2022 and September 15, 2022:

Watson	Received	Jul 18, 2022 10:08:20 a.m.	Sorry, I can't talk right now.
Cherry	Sent	Jul 18, 2022 10:47:09 a.m.	Call me when you can please.
Cherry	Sent	Jul 21, 2022 4:04:30 p.m.	Hey Nigel, can you try to get me an answer tomorrow please? A lot hinges on this for me.
Cherry	Sent	Jul 26, 2022 3:11:42 p.m.	Any word? Shall I maybe set a meeting with Greg this week?
Cherry	Sent	Jul 26, 2022 3:28:47 p.m.	Treat me right on this please and I'll come back to you next year for the building and then cabins in the future. Right now I need to build a power house and a pumphouse to get open this winter. I'm allowed up to 9 square metres without a permit. I can make that work.

Watson	Received	Jul 26, 2022 4:21:32 p.m.	Hi James, I spoke briefly with Greg and we will do all we can at our end. We can hold back the amount for the labor and materials purchased and set this as a deposit for next year. Penny our CFO will run the numbers for you and finalize the rebate figure.
Cherry	Sent	Jul 27, 2022 3:47:57 p.m.	When do you suppose I can expect that offer? I'm sort of in limbo here waiting to see which direction we're going on this building.
Cherry	Sent	Jul 29, 2022 2:33:21 p.m.	Please Nigel, I need to know the cost of cancelling and I need to know how long you can hold the quote.
Watson	Received	July 29, 2022 2:40:59 p.m.	I understand, I have requested this information from the owner I'll follow up with him.
Cherry	Sent	Jul 29, 2022 2:41:21 p.m.	Thank you
Cherry	Sent	Jul 29, 2022 2:49:42 p.m.	Do you know approximately what the trusses cost? Was there any other material purchased?
Watson	Received	Jul 29, 2022 2:56:33 p.m.	TA have almost \$15,000 in Costs, labour and Materials and we are awaiting an invoice from Allester Engineering for their services. With the \$10,000 build spot deposit, I would think would be close to \$25,000 to hold the unit until next spring. I need verification on this but it will be close.
Cherry	Sent	Aug 5, 2022 1:27:18 p.m.	When you get a chance I'd like to see a list of the materials please.
Watson	Received	Aug 5, 2022 9:16:54 p.m.	You bet, I'll forward as an email
Cherry	Sent	Aug 15, 2022 11:25:32 a.m.	Can we settle this up this week please?

Watson	Received	Aug 15, 2022 11:57:23 a.m.	Yes, I have just spoken to Greg, we are still waiting on our engineer costs. Greg has promised an answer by the end of the week.
Cherry	Sent	Sep 15, 2022 1:31:48 p.m.	Hey Nigel, I'd like to sit down with Greg for a discussion. Can we book it for Monday afternoon?

[81] These communications show no agreement for the return of a portion of the Deposit was reached between July 18, 2022 and September 15, 2022. On the contrary, they show that as of July 27, 2022, Mr. Cherry was still inquiring as to “which direction we’re going on this building” and that as of July 29, 2022, it was clear that Mr. Cherry still did not know the “cost of cancelling”.

[82] The text on July 26, 2022, referred to in the above excerpt from Mr. Cherry’s affidavit was not, contrary to Mr. Cherry’s assertion, Mr. Watson following up with him. Rather, it was Mr. Watson responding to two texts that Mr. Cherry had sent him a short while earlier that day.

[83] At Mr. Cherry’s examination for discovery, a portion of which was read into the record at trial, he essentially repeatedly claimed that he thought when he was having these communications with Mr. Watson, they already had an agreement and all that needed to be finalized was the amount TAM would hold back for its labour and materials.

[84] I find myself unable to accept Mr. Cherry’s explanation, because it is inconsistent with the content of the communications. Common sense dictates that from Mr. Cherry’s perspective, in the circumstances, TAM’s agreement to return such a significant amount of the Deposit would obviously have been an extremely important point, and one he would have been anxious to confirm in writing. Yet, not once in any of Mr. Cherry’s communications does he reference his claimed telephone call with Mr. Watson in mid-July 2022, or what they discussed. Similarly, it is also revealing, in my view, that following Mr. Watson’s July 29, 2022, email referencing “close to \$25,000 to hold the unit until next spring”, Mr. Cherry does not

respond until August 5, 2022, and then says simply: “When you get a chance I’d like to see a list of the materials please”.

[85] Revelry’s contention that its cancellation of the Contract was merely a “change to zero” in the scope of the work is not persuasive. Although Mr. Cherry verbally, and in writing, proposed various changes to the Contract, a “change to zero” was not one of them. The Contract makes provision for changes by way of Change Order form, but not for any “change to zero”. Clause 8 of the Contract states:

8. Any requests for changes to the Structure(s) shall be effective only if made in writing and signed by duly authorized personnel of the Vendor and Purchaser on a Change Order Form which shall set forth such specification change or amendment, and adjustment to the Purchase Price and the Completion Date. The Purchaser acknowledges that changes to the Specifications or Plans may result in considerable and costly delays in the manufacture of the Structure(s), and that the accommodation of requests for design, specification or material changes shall be at the sole discretion of the Vendor.

[86] I find that until Revelry directed TAM to cancel the Contract, TAM was fulfilling its obligations under the Contract. TAM provided preliminary construction drawings. It scheduled a start date for construction. It responded positively when Revelry wanted the start date pushed back. It amended the construction drawings to respond to the approval authorities’ official and worked on responding to various issues associated with the layout and structure. It sub-contracted an engineer to review and certify the amended drawings. It ordered, paid for, and took delivery of trusses. It facilitated contact between Revelry’s geotechnical engineer and its sub-contracted engineer.

[87] When Revelry cancelled the Contract, TAM was awaiting geotechnical data from Revelry to provide to its sub-contracted engineer. Even after Revelry cancelled the Contract, TAM remained willing to work with Revelry.

[88] Revelry argues TAM breached the Contract by failing to return to Revelry the portion of the Deposit exceeding a reasonable price for the work TAM completed

with respect to the Laundry Facility. In response to this argument, TAM says that there is nothing in the Contract which would support Revelry's position, as there is nothing within the Contract describing the consequences of Revelry directing a cancellation of the Contract.

[89] As explained in *Kuo v. Kuo*, 2016 BCSC 767 (approved at 2017 BCCA 245), at paras. 25, and 32–35:

[25] Repudiation occurs when a party to the contract, either by words or conduct, displays an intention not to be bound by the contract: *Guarantee Co. of North America v. Gordon Capital Corp.*, 1999 CanLII 664 (SCC), [1999] 3 S.C.R. 423 (S.C.C.) at para 40. Furthermore, the courts have held that generally once the parties have reached an agreement one party can tender whatever documents they deem appropriate to complete the agreement without rescinding the settlement: *Fieguth v. Acklands Limited* (1989), 1989 CanLII 2744 (BC CA), 37 B.C.L.R. (2d) 62 (C.A.).

[...]

[32] The remedy for repudiation depends on the response of the non-repudiating party. The non-repudiating party has two options: (1) treat the contract as still in force and sue for damages or performance or both, or (2) accept the repudiation, terminate the contract, and discharge the parties from future obligations.

[33] The challenging aspect is determining what actions and conduct are tantamount to repudiation. Courts have continually emphasized that this is a fact-driven task by looking at the parties' words and conduct.

[34] In *Guarantee Trust Co.* the court, after discussing the difference between rescission and repudiation, went on to state when a "misrepresentation" can lead to the rescission of a contract. The court said that one needs to look at whether the breach is "substantial" or "goes to the root of" the agreement -- or what is often also described as a material breach (at para. 44). The decision is not directly on point with the facts of this case as it deals with rescission, repudiation, and misrepresentation; however, the discussion is useful in the analysis here.

[35] The plaintiff submits that the breach has to be something that frustrates the whole contract. If it does, then the injured party can treat the contract as ended; but if the contract is not totally frustrated, then the innocent party can only receive damages. For this proposition, the plaintiff relies on *Poole v. Tomenson Saunders Whitehead Ltd.*, 1987 CanLII 2647 (BC CA), [1987] 6 W.W.R. 273 (B.C.C.A.):

The common theme, emphasized by every court, when determining whether a breach of contract justifies the innocent party terminating the contract rather than confining his remedy to the damages caused by the breach, is that the breach must be tantamount to the frustration of the contract either as a result of the unequivocal refusal of one party to perform his contractual obligation or as a result of conduct

which has destroyed the commercial purpose of the contract --
thereby entitling the innocent party to be relieved from future
performance. [emphasis added]

This statement has been accepted numerous times by the courts of this province and was approved recently by our Court of Appeal in cases dealing with fundamental breach: *Quinlan v. University of British Columbia*, 2009 BCCA 248; *Gulstan v. Aldred*, 2011 BCCA 147.

[90] TAM says similar direct statements to cancel contracts have been understood to terminate contracts and provide the innocent party with a right to recover lost profits: *Rumpel Construction Ltd. v. Western Canadian Construction Company Ltd.*, 2022 BCSC 980 [*Rumpe*] at para. 35; *FPS Food Process Solutions Corporation v. XTL Inc.*, 2025 BCCA 305 [*FPS*] at paras. 6–12.

[91] Applying these principles to the facts of the instant case, I find that Mr. Cherry, by his words and conduct on behalf of Revelry, specifically by directing TAM to cancel the Contract, displayed Revelry's intention that it would not be bound by the Contract. I find that Revelry thereby repudiated the Contract. Further, I find that TAM did not agree to return the Deposit to Revelry, less certain amounts, if Revelry cancelled the Contract.

[92] The evidence establishes that by October 2022, TAM was no longer pursuing construction of the Laundry Facility and was instead pursuing construction of Shower Units.

[93] TAM accepted Revelry's repudiation of the Contract sometime in the fall of 2022.

[94] Having determined that Revelry repudiated the Contract, and that TAM accepted the repudiation, I turn now to the question of the measure of damages.

Measure of damages – “reliance” or “expectancy”?

[95] Revelry says TAM's damages must be limited to the reliance measure of damages, namely the costs which TAM incurred in furtherance of the Contract.

[96] TAM says Revelry's position is contrary to the law in British Columbia, and that Revelry has failed to cite any authority in support of its position.

[97] I find TAM's position is correct.

[98] As was recently explained by the Court in *FPS*, at paras. 47–64, when one party elects to cancel or terminate a contract, the innocent party is entitled to an award of damages that would place it in the same position as if the contract had been performed, where the measure of damages includes both lost profits and unmitigated costs of manufacture.

[99] Further, as illustrated by cases such as *Rumpel*, where the innocent party has done limited work on a project and the repudiating party has simply cancelled the contract, the innocent party has been awarded lost profits.

[100] In *FPS*, FPS entered into a contract with XTL Inc. ("XTL"), pursuant to which FPS agreed to manufacture and deliver an industrial freezer. XTL was ultimately unable to secure financing for the project and repudiated the contract. XTL then brought an action to recover the partial payments it had made to FPS pursuant to the contract. FPS defended and filed a counterclaim seeking damages for its anticipated lost profits.

[101] The trial judge dismissed FPS' counterclaim, finding that: (1) FPS had to elect between a claim for reliance damages (the set-off amounts) and expectation damages (lost profits); and (2) FPS had failed to establish with accuracy the profits it would have earned. On appeal, the Court ordered a new trial because the judge erred in law in their findings on FPS's claim for a set-off and its counterclaim for lost profits. With respect to the issue of lost profits, after reviewing the law in relation to recovery for *both* incurred expenses and lost profits, the Court concluded at paragraphs 62–64:

[62] I do not interpret *Sunshine Vacation Villas* as establishing an invariable rule that a plaintiff can never recover both lost profits and incurred expenses as compensation for a breach of contract, even though those types of damages are usually considered under the distinct heads of expectation and reliance damages, respectively. As the Court noted in *Sunshine Vacation Villas*, the rationale for not awarding damages for expenses and lost profits is to avoid double recovery: at 40. Where there is no overlap in the claimed

damages, and thus no risk of double recovery, a plaintiff is entitled to an award that puts them in the position they would have been in if the contract had been performed. This may include both incurred expenses and lost profits, if the latter are calculated after taking expenses into account. As observed in *Callow*, while expectation and reliance damages are conceptually distinct, as a practical matter these two heads of damages “will be the same in many if not most cases”: at para. 108.

Discussion

[63] In my view, this is not a case in which FPS was required to elect between damages for lost profits and incurred expenses in claiming compensation for XTL’s breach of the Contract. The purchase price under the Contract included manufacturing costs and FPS’s anticipated profit. If XTL had performed the Contract and paid the full purchase price, FPS would have recovered both its manufacturing costs and its profit. FPS’s claim for lost profit consisted of the amount it expected to profit, after accounting for the cost of the manufacture of the Freezer. In other words, its claimed expenses were not included in the measure of potential profits, and therefore there is no risk of double recovery. In my view, the present case falls within the principle set out at para. 168 of *Ticketnet* that plaintiffs do not need to elect between damages for lost profits and incurred expenses in cases where “actual expenses are not included in projected profits”.

[64] Accordingly, I conclude that the judge erred in law in finding that FPS could not concurrently pursue its claim for damages for lost profits and for the actual costs it incurred in partial performance of the Contract. An award of both heads of damages would not necessarily lead to double recovery in this case, and therefore there was no basis to put FPS to an election.

[102] In the instant case, the price under the Contract included manufacturing costs and TAM’s anticipated profit. If Revelry had performed the Contract and paid the full price under the Contract, TAM would have recovered both its manufacturing costs and its anticipated profit.

[103] Similarly, in *Rumpel*, Rumpel, a framing contractor and Western Canada Construction Ltd (“Western”), a general contractor, entered a contract which required Rumpel to frame two towers. Ultimately, *before the framing was set to begin*, Western cancelled the contract, at a time when Western had performed only \$12,731.25 of work with respect to a contract price of \$1,150,000.00. After argument about whether a contract existed, the court said:

[84] Given Western’s breach of its contractual obligation, Rumpel is entitled to damages to put itself in the same position as if the contract had been performed. The onus is on Rumpel to prove its loss on a balance of probabilities standard. In the case of contractual breach, a party is expected to attempt to mitigate its losses to a reasonably possible extent, but the onus is on the party advancing the argument to show a failure of mitigation.

[104] The Court then assessed Rumpel's lost profits at \$220,000.00, after accounting for a project Rumpel would not otherwise have been able to take on.

[105] I turn now to the question of the assessment of damages.

Assessment of Damages

[106] I would assess TAM's damages at \$60,000.00.

[107] I reach this assessment based on:

- Mr. Watson's affidavit about initial estimates; and
- Mr. Watson's affidavit and the affidavit of TAM's financial controller, Ms. Penny Trudel, about profits TAM earned from completing other 2022 contracts.

[108] It is settled law that damages for breach of contract do not have to be assessed with certainty. Rather, where the plaintiff proves some loss, the court is to estimate that loss even if it requires some "guess work".

[109] As explained in *FPS* at paras. 67–69:

[67] The difficulty with the trial judge's reasoning is in his reference to FPS's failure to "establish with accuracy" the profits it would have earned if the parties completed the project. As FPS argues, the law is clear that damages for breach of contract do not have to be assessed with certainty. Rather, where the plaintiff proves some loss, the court will estimate that loss even if it requires some "guess work": Waddams at para. 736.

[68] In the seminal case of *Chaplin v. Hicks*, [1911] 2 K.B. 786, [1911-13] All E.R. 224 (C.A.) at 795, a case involving a loss of opportunity for employment, the Court held that:

...where it is clear there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there be an absolute measure of damages in each case.

[69] This Court recently cited the above quote from *Chaplin* with approval in *Ojanen v. Acumen Law Corporation*, 2021 BCCA 189, noting that "[t]he law has long recognized that the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages for a breach of contract": at para. 62.

[110] Loss of profits are typically calculated based on gross profits and gross profit margins: *Contura Building Corporation v. 0772551 Ltd.*, 2018 BCSC 466 at paras. 137–148; *Hart v. Hansma*, 2014 BCSC 518 at paras. 129–145.

[111] Mr. Watson deposes that the price for the construction of the Laundry Facility was determined based on his experience as a manufacturing manager; knowledge of the costs associated with labour and materials; and desire for TAM to earn profit. Mr. Watson's practice was to prepare a spreadsheet showing the labour and material costs associated with a proposed structure and then determine the contract price based on a gross margin markup of typically either 25% or 30%.

[112] Mr. Watson's and Ms. Trudel's affidavits include spreadsheets showing financial information about the profits TAM earned from completing other 2022 contracts. What they show is that the average gross profit margin for all structures was 42.5%, ranging from 15.25% to 64.66%. In other words, on average, TAM earned \$0.425 dollars in gross profit for every sale dollar. However, this includes bulk units. When bulk units are taken out of the analysis, the average gross profit margin drops to 26.355%. In other words, if the bulk units are removed, TAM earned \$0.26355 dollars in gross profit for every sale dollar.

[113] The price of the Contract was \$197,625.00, so if TAM had achieved its average gross profit margin, it would have earned gross profit of \$83,990.63. If TAM had earned its average margin, and the bulk units were removed, it would have earned gross profit of \$52,084.07. Averaging these two margins, TAM's loss of gross profit would be \$68,037.35.

[114] In addition, I rely on the evidence read in by Revelry, which establishes that TAM has always made profits on its structures.

[115] TAM claims \$60,000.00, which it says is an appropriate amount to compensate it for its lost profits. The \$60,000 amount is equivalent to a gross profit margin of 30.3%. In Mr. Watson's initial estimates for construction of the Laundry Facility, he used a 30% margin. As part of the planning process, Mr. Watson

estimated that the costs for the Laundry Facility would be \$138,314.29. By applying 30% markup to that amount, he arrived at a figure of \$197,591.84, which is a profit of only slightly less than \$60,000.00.

[116] Based on the foregoing, I find that \$60,000 would represent the “best guess” of TAM’s lost profits and is the amount TAM would be entitled to retain from the Deposit.

Costs

[117] TAM has been completely successful and is entitled to costs, which will be assessed at Scale B.

“B. Smith J.”

B. SMITH J.