

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kinsol Timber Systems Ltd. v. Oliphant Properties Inc.*,
2026 BCSC 1115

Date: 20260703
Docket: S195232
Registry: Victoria

Between:

Kinsol Timber Systems Ltd.

Plaintiff

And

Oliphant Properties Inc.

Defendant

Before: The Honourable Justice Armstrong

Reasons for Judgment

Counsel for the Plaintiff:

J.A. Hall
J.A. Bloomenthal

Counsel for the Defendant:

M.N. Peirce
Julia Goldman
A. Song, Articled Student

Place and Dates of Trial:

Victoria, B.C.
February 4-7; 10-14, 2025
February 18-21; 24-28, 2025
March 3-7, 2025
April 23-25, 2025
May 5-8, 2025
August 25-29, 2025
September 9, 10, 2025

Place and Date of Judgment:

Victoria, B.C.
July 3, 2026

Introduction

[1] This litigation centres on a contract for the construction of a resort lodge (the “Project”) to be built by the plaintiff for the defendant under a CCDC 5B contract made March 28, 2018 (the “contract”). Construction began in mid-2018 and on August 8, 2019, counsel for the defendant wrote to the plaintiff setting out multiple bases on which it had breached and repudiated the contract. The defendant accepted the plaintiff’s repudiation and stated it would take steps to mitigate its damages, reserving the right to pursue claims for those damages.

[2] Under the contract, the plaintiff had agreed to construct a lodge (the “Lodge”) on a float for a guaranteed maximum price of \$1.5 million (the “GMP”, set out in the “GMP Clause”) with any costs above that amount to be paid for by the plaintiff. The Lodge was to be constructed atop a concrete float and after completion towed to the defendant’s resort on the central coast of British Columbia.

[3] The contract did not specify any standards to be observed in the construction of the Lodge, but the parties had a general understanding that the finishing should be “high-end” and reflect a “rustic and refined” appearance.

[4] The plaintiff claims the defendant ended the contract unlawfully and that it is entitled to reimbursement for the unpaid cost of the work it had completed up to August 8, 2019 (approximately \$230,000 including contractual interest). The plaintiff contends the defendant had no right to end the contract because it had not breached any of the terms, nor did any of its actions amount to a refusal to perform its obligations under the contract. Thus, the plaintiff says the defendant was in breach of the contract as of August 8, 2019.

[5] The defendant counterclaims for its loss and damages resulting from the plaintiff’s repudiation of the contract, which was accepted by the defendant. The defendant claims damages equal to the difference between the GMP and the total cost to complete construction of the Lodge totaling \$2,331,807. This \$756,337 figure represents the defendant’s direct and foreseeable damages resulting from the plaintiff’s refusal to honour the GMP.

The Facts

[6] The parties were introduced to each other in mid-2017 when the plaintiff received an email inquiry from the principals of the defendant (Oliphant Properties Inc.) seeking a builder with timber frame construction experience to build cabins at a resort facility on the central coast of BC known as the Nimmo Bay Resort (the “Resort”). The Resort had been located on a float at Nimmo Bay from the 1940s.

[7] The principals of the defendant are Rebecca Eert and Fraser Murray (in these reasons referred to as “Ms. Murray” and “Mr. Murray” or, collectively, “the Murrays”). The Murrays eventually abandoned plans for cabins and embarked on a new plan to construct a high-end floating resort lodge – i.e., the Lodge – catering to wealthy guests at the Resort.

[8] In 2017 the Murrays engaged a designer, Sarah Davies-Long, to design the Lodge and resort facility on a floating base at Nimmo Bay. Ms. Davies-Long was a close personal friend of the Murrays.

[9] The plaintiff’s principals, Steven Stevenson and Michael Marshal, were experienced builders in mass timber and timber frame construction and had acquired the assets of a previous timber frame construction company in 2017.

Chronology

[10] The events giving rise to the instant proceedings occurred over approximately two years, with many important dates and occurrences within that period. Given the relative factual complexity of this matter, I will provide a high-level overview of the chronology before proceeding to set out the material facts in much greater detail.

Mid-2017

Oliphant initiates contact with Kinsol.

September 27, 2017

Ms. Davies-Long’s initial concept drawings forwarded to Kinsol.

<u>October 16, 2017</u>	Email exchange between Ms. Murray and Mr. Stevenson re contract terms.
<u>November 21, 2017</u>	Email exchange re Ms. Davies-Long's provision of drawings.
<u>November 30, 2017</u>	Date of draft contract to the Murrays.
<u>December 4, 2017</u>	Email exchange re lawyer's comments on contract
<u>December 12, 2017</u>	Ms. Davies-Long provides drawings to Kinsol. Kinsol requests better drawings with more details.
<u>January 22, 2018</u>	Proposed budget of \$1.495 million issued to Oliphant by Kinsol.
<u>March 28, 2018</u>	Contract executed.
<u>April 12, 2018</u>	Ms. Davies-Long advises she is not able to provide detailed drawings. Kinsol undertakes to prepare shop drawings of timber frame and walls.
<u>Summer 2018</u>	Plan to have Pacific Industrial Marine construct new float. Due to design changes, window for Pacific to construct the float is lost.
<u>September 23, 2018</u>	Meeting of principals of Oliphant and Kinsol at Campbell River.

September 25, 2018

Oliphant contracts with IMF to have float constructed.

October 11, 2018

Oliphant confirms that Ms. Davies-Long has a number of design deliverables outstanding. As a result, Oliphant decides that it will take delivery in October 2020, immediately corrected to October 2019.

Late fall 2018

Kinsol begins prefabrication of timber frame and wall sections for the Lodge.

November 28, 2018

New float delivered to Kinsol site.

March 12, 2019

Kinsol issues budget estimate showing total Project budget of \$1,713,427.49, including Kinsol costs to complete of \$739,101.37 and the defendant's costs of \$ 66,233.

July 10, 2019

Kinsol issues budget estimate showing total Project costs of \$1.9 million.

August 8, 2019

Oliphant's solicitor issues termination letter.

September 5, 2019

Float and Lodge released to Oliphant on terms.

November 26, 2019

These proceedings are commenced.

September 2017 – March 2018

[11] In September 2017, Ms. Davies-Long prepared a preliminary conceptual design package for the Project for the Murrays and a copy was given to the plaintiff informing it about the concept of the Murrays' plans.

[12] Mr. Stevenson and Mr. Marshall visited the proposed location of the Project in September 2017 and participated in discussions with the Murrays concerning the plans and expectations. By October 2017 the Murrays requested a cost estimate from the plaintiff.

[13] The plaintiff reviewed the conceptual drawings and eventually engaged in communications and negotiations toward entering into a contract for the work contemplated by Ms. Davies-Long's plans. On October 4, 2017, Mr. Stevenson provided the plaintiff with an initial proposal for the construction of the Lodge with a budget estimate of \$720,317 and a draft of a contract for the Project.

[14] Throughout the fall of 2017 and into 2018 the plaintiff provided information and advice to the Murrays concerning the proposed construction project including its recommendation of a suitable form of contract. The October 2017 draft contract set out Mr. Stevenson's recommended terms and outlined the parties' prospective roles in the Project. Mr. Stevenson advised the Murrays on many aspects of the Project and recommended using a CCDC 5B contract, which was subsequently negotiated and signed on March 28, 2018 (i.e., the contract).

[15] The Murrays originally contemplated purchasing a used float for the base of the new Lodge; however, by early November 2017 they had rejected the prospect of a used float and were discussing an option of purchasing a new float.

[16] There was a proliferation of email exchanges and discussions between the Murrays, Mr. Stevenson, and Ms. Davies-Long concerning the Project over the months from September 2017 to March 28, 2018, and after concerning the design of the proposed Lodge, a budget for the Project, and terms of the proposed contract for construction.

[17] Throughout these months up to March 28, 2018, there was no physical work performed by the plaintiff. The plaintiff did make inquiries and efforts to engage third parties for tasks that were anticipated in the building process including communications with an engineer and a tentative float builder.

[18] In the initial stages of these discussions, Ms. Davies-Long was responsible to the defendant for drawing the conceptual plans and specifications and architectural drawings necessary for the construction of the Lodge.

[19] During November 2017, Ms. Murray was in communication with a lawyer who was reviewing the proposed contract for her. On November 21, 2017, Ms. Murray advised Mr. Stevenson that her lawyer had recommended the parties enter into an initial contract for the design phase of the Lodge followed by a more comprehensive contract once the design phase was completed. On November 22, 2017, Ms. Murray informed Mr. Stevenson that although she would have preferred a design contract followed by a construction contract, she and her lawyers were comfortable with the form of contract that had been proposed by the plaintiff.

[20] Although the first draft of the CCDC 5B contract named the Murrays as owners and the plaintiff as construction manager, the Murrays later incorporated the defendant company in March 2018, and it became the owner of the Resort and Lodge. The parties signed the contract on March 28, 2018, with the defendant substituted as the owner in place of the Murrays.

[21] The form and terms of the contract were discussed and negotiated. Ms. Murray reported to the plaintiff comments and suggestions from her lawyer concerning the optimum contractual relationship and arrangement that should be employed for the Project.

[22] Many of the exchanges between the parties throughout 2017 up to March 28, 2018, focused on the costs of the project, budget items, architectural plans, drawings and specifications, and the plaintiff's ability to agree on a budget that would fall within the defendant's resources.

[23] In December 2017, the Murrays were able to obtain \$1.5 million in financing to build the Lodge. This sum represented the maximum amount of financing the defendant could commit to the Project.

[24] In early December 2017 Ms. Murray and Mr. Stevenson discussed including a term in the contract to allow the defendant to terminate the contract if the cost of the project was to become prohibitive. On December 7, 2017, Ms. Davies-Long produced a revised set of conceptual designs reducing the area of the main floor of the Lodge. Mr. Stevenson requested information from Ms. Davies-Long concerning specification and pricing for features of the new building; he wanted more detailed set of plans “that would be close to an architectural set with dimensions for all openings”.

[25] In December 2017, Mr. Stevenson expressed to the defendant concerns regarding Ms. Davies-Long’s abilities to provide drawings. He nevertheless deferred to the Murrays’ decision to rely on her.

[26] At times before signing the contract, Ms. Murray expressed concerns about budget overruns that could impair the Resort operation. The parties discussed a maximum price for building the project, but Mr. Stevenson would not accept this type of restriction until he was satisfied with the level of design specifications to be provided by Ms. Davies-Long.

[27] In December 2017 and January 2018 there were also concerns discussed about a budget and opportunities to reduce expenses from the capital cost of building the Project.

[28] In the course of discussions, the possibility of appointing a consultant was raised by the defendant. The plaintiff recommended against using a third-party consultant and suggested that both parties could be named consultants in the contract, with a provision that the defendant could engage a third-party evaluator to assess the cost of work in conjunction with the plaintiff should the need arise.

[29] The standard CCDC 5B contract incorporated approximately 16 references to consultants. In discussions, Mr. Stevenson advised the defendant that a consultant would serve only as a “payment certifier”. He eventually recommended that the parties themselves be defined as the consultants without any regard to the implications for those other terms referring to consultants. In the end, Ms. Murray deferred to Mr. Stevenson’s advice and declined to obtain independent advice.

[30] Both parties agreed to serve in the role of consultant. The term consultant was defined in the contract as “the architect, the engineer or entity licensed to practice in the province or territory of the Place of the Work”. The decision to appoint the parties as consultant became an issue in the dispute between them.

[31] Inexplicably, Mr. Stevenson ignored the definition of “consultant” in the contract referring to architects and engineers. It does not appear that Mr. Stevenson informed the Murrays about this definition or the role set out in the contract for a “consultant”. In November 2017 Ms. Murray reported that her lawyers had suggested the parties use a remuneration plan that would govern the project through the design phase. She suggested that once the design phase was complete, the parties would have a solid idea on budget and could sign a more comprehensive contract. There was considerable uncertainty concerning the design phase and what might be budgeting constraints.

[32] Eventually, Ms. Murray suggested using a contract with an adjusted guaranteed maximum price budget because the defendant needed to be certain the Lodge would be built for no more than \$1.5 million.

[33] On November 20, 2017, the plaintiff provided a budget total estimate of cost to complete of \$1,419,271. In December 2017 the defendant secured \$1.5 million in financing for the construction of the Project. This funding limit of \$1.5 million was known to the plaintiff and formed a continuing concern up until the contract was signed and afterwards.

[34] On January 8, 2018, the plaintiff issued a similarly structured budget estimate of cost at \$1,996,005. On January 8, 2018, Mr. Stevenson warned the defendant that the costs based on the current design were hundreds of thousands of dollars over budget.

[35] On January 12, 2018, Mr. Stevenson sent an email review of issues related to the size of the float, the cost of the float, and details concerning steps to be followed including starting the production of the float by March 1, 2018. He sounded a note of caution, indicating that he did not think Ms. Davies-Long would be capable of producing the necessary drawings within the timeframe he had set out.

[36] In his January 12, 2018, email Mr. Stevenson indicated there was a small allowance for contingency built into the project budget of \$1,495,855 and that the current budget was between D and C budgets (as described in a standard CCDC 5B contract). He recognized there was the need for additional contingency room in the budget.

[37] On January 18, 2018, Mr. Stevenson requested Ms. Davies-Long provide conceptual drawings and architectural drawings by the end of January to permit the plaintiff to proceed with estimating costs.

[38] On January 22, 2018, the plaintiff produced a budget estimate for the project of \$1,495,000, based on Ms. Davies-Long's plans. The differences between these three budgets took into account different estimations concerning the cost of the float. Mr. Stevenson said this budget was intended to inform the defendant of "the breakdown across the line items". This budget estimate of \$1,495,000 was based on Ms. Davies-Long's new set of plans.

[39] In their exchanges between late 2017 and early 2018 the parties recognized the budget limits constraining the construction costs of the Lodge. There were discussions about contingency allowances in the budget. From an early stage, the parties discussed ways to ensure the construction could be completed within a budget.

[40] On January 23, 2018, Mr. Stevenson confirmed that the defendant could pay for some costs from the budget. He advised that the plaintiff needed detailed architectural drawings for the engineers to provide input into the structural costs for the float. It would require more details on the architectural drawings before instructing engineers.

[41] By January 31, 2018, Ms. Davies-Long had not produced architectural drawings as requested by Mr. Stevenson. She apologized for her delay in submitting these drawings, due in part to her holidays. Eventually she produced a set of plans on February 17, 2018, comprising conceptual designs with minimal detail and dimensions.

[42] On February 13, 2018, Ms. Murray requested a copy of the proposed contract that included the GMP Clause and a term permitting the defendant to engage a third-party evaluator to assess the cost of the work done if necessary. She confirmed that the defendant would be able to pay for large ticket items separately in order to save the 5% charge otherwise payable to the plaintiff.

[43] On February 17, 2018, Ms. Davies-Long issued a fourth set of conceptual design plans sent to the defendant and eventually to the plaintiff. By March 1, 2018, the plaintiff was attempting to work around Ms. Davies-Long's delayed producing of drawings and design choices.

[44] By March 9, 2018, the plaintiff had retained an engineering firm to prepare the structural plans for the float and informally engaged Pacific Industrial Marine ("PIM") to construct the float for the Project. No quotation could be provided by PIM until the float plans were confirmed.

[45] On the advice of her lawyer, Ms. Murray suggested different types of contracts to address the uncertainties in the early stages and secure an assurance that the price would not exceed \$1.5 million at completion.

[46] The plaintiff proposed that certain savings could be achieved if the defendant paid for things directly to suppliers rather than relying on the plaintiff to pay and

invoice the defendant for costs. The objective of this suggestion was tied to the plaintiff's proposal that charges for a construction manager's fee based on percentages of the services (normally 5%) and the work (12.5%) could be reduced. The defendant accepted this suggestion and was prepared to pay for certain large-ticket items, such as the float, to save this 5% "cost-plus" on the value of services to reduce the plaintiff's fees and to help make the construction happen for a maximum of \$1.5 million.

[47] The final discussions concerning the parties' contractual arrangement occurred during the day of March 28, 2018. They exchanged emails on March 28, 2018, in which Mr. Stevenson agreed to fix the plaintiff's construction management fee for the "Services as defined in the contract" at a flat \$60,000 (rather than 5%) taking into account that the defendant would be paying an estimated \$300,000 for float expenses. He confirmed the \$60,000 savings were included in the maximum price of \$1.5 million. The construction manager's fee also included amounts for the time-based rates of personnel engaged in performing the services and a charge payable to the plaintiff equal to 12.5% of the cost of the work.

[48] On March 28, 2018, the plaintiff and defendant exchanged emails before signing the contract. Ms. Murray was concerned to have the plaintiff's assurance that if the defendant directly paid for third-party costs, they would not be charged the 5% management fee on that amount but that any costs they paid would form part of the \$1.5 million limit on its costs for the Lodge. This was agreed and the contract was executed.

[49] The parties signed the contract late in the day of March 28, 2018. The final copy of the March 28, 2018, contract included the GMP Clause, through which the plaintiff guaranteed the maximum price of the services and the work (as defined in the contract) would not exceed \$1.5 million and any amount in excess of the GMP would be paid by the plaintiff without reimbursement by the defendant.

April 2018 – December 2018

[50] On April 5, 2018, Craig Work of Herold Engineering became the engineer responsible for the engineering requirements of the Project. He had received plans prepared by Ms. Davies-Long but had difficulty preparing float plans because Ms. Davies-Long's plans were inconsistent and missing details.

[51] Between March 28 and April 9, 2018, Mr. Stevenson inquired about obtaining architectural drawings from Ms. Davies-Long that were overdue. In April 2018 Mr. Stevenson requested Ms. Davies-Long provide the architectural drawings by the end of that month.

[52] On or about April 12, 2018, Ms. Davies-Long conceded she did not have the ability to provide architectural plans for construction of the Lodge. This concession occurred more than six months after the design planning process began and after she missed a January 31, 2018, deadline for production of artificial drawings. In the result, the plaintiff took on the responsibility of retaining and instructing the new draftsperson, Rodney Shinkewski, who went on to prepare these plans on behalf of the defendant.

[53] Notwithstanding Ms. Davies-Long resiling from the work of preparing architectural plans, she retained responsibility for drafting interior design plans and specifications and provided a fifth set of conceptual design plans including the floor layout of the Lodge without dimensions. On April 17, 2018, Mr. Stevenson wrote to explain a shift in the process towards getting architectural plans for the Project. His layout of the process required Ms. Davies-Long's drawings. The next day, Ms. Davies-Long informed the Murrys and the plaintiff that many aspects of her drawings were still in the works but not completed. By the end of April she had been preoccupied with work on another project but committed to revising the plans in the following week.

[54] On April 24, 2018, Ms. Davies-Long asked the defendant if it was satisfied with the floorplan she had prepared. She sent a note to the plaintiff indicating she would add more dimensions; by May 1, 2018, John Lohsen, who was employed by

the plaintiff as project manager on the Project, continued asking her for rough dimensions.

[55] The plaintiff produced a set of timber frame shop drawings in April 2018 for use by Mr. Shinkewski.

[56] On April 25, 2018, Mr. Work determined a thickness of the concrete but could not finish the plan without Ms. Davies-Long's finalized layout plan. The next day, she said she was close to completing her final changes.

[57] On May 1, 2018, Mr. Stevenson emailed the Murrays and Ms. Davies-Long warning that every change to a layout of the structure or new ideas or shapes required changes to coordinated plans and every change causes a delay in the process. As a result of the circumstances, he said the float would not likely be available before June. In reply, Ms. Davies-Long said that she had sent dimensions of interior wall location changes to Mr. Lohsen.

[58] On May 8, 2018, Herold Engineering produced its preliminary plan for the float which was sent to Mr. Shinkewski; it was expected this would enable him to finalize the layout with specifications for built-in components. Mr. Work said that the float depths were not yet confirmed, and he required confirmation of the loading requirements before finishing the plans.

[59] On May 13, 2018, Mr. Work had a meeting with PIM and he concluded the float design was on the right track but that they needed the mooring details that had not yet been settled for the float.

[60] On May 15, 2018, Mr. Shinkewski produced his first set of preliminary architectural drawings.

[61] On May 16, 2018, Ms. Davies-Long sent preliminary drawings for review to Mr. Lohsen.

[62] On May 23, 2018, Mr. Stevenson reminded Mr. Work that he had been waiting five weeks to obtain plans for review that were necessary to complete the float engineering drawings.

[63] On May 25, 2018, Ms. Davies-Long produced a further revised partial set of plans with elevations and exterior finishes.

[64] On May 31, 2018, Mr. Stevenson reported to the defendant suggesting it schedule some production of panels offsite so as to minimize delays. They also provided an extensive report concerning the steps that had been taken in the Project.

[65] On June 11, 2018, Mr. Work explained that he was in the final stages of the float design plans but needed clarification on some issues before finalizing the document. On June 20, 2018, he produced Herold Engineering's initial structural plans which were sent to the Murrays.

[66] On June 14, the plaintiff requested its first draw on the construction management fee (for services) and costs. The construction phase of the project had not commenced by June 2018; prefabrication of the exterior walls would begin in or about October 2018.

[67] On July 7, 2018, Ms. Davies-Long and the Murrays directed changes to the design including relocating a loadbearing wall and adding a support beam, among other revisions to the plans. Mr. Stevenson said this would most likely require a redrawing of the structural plans.

[68] On July 16, 2018, Ms. Davies-Long discussed other changes she had made to the equipment and the structure. As of July 23, 2018, Ms. Davies-Long was changing electrical layouts and needed more time to finalize the ceiling plan and the floor layout.

[69] On July 17, 2018, Mr. Shinkewski produced a second set of preliminary issued architectural drawings based on the conceptual design revisions provided by Ms. Davies-Long.

[70] On July 23, 2018, Ms. Davies-Long made design changes to the lighting. Mr. Lohsen reminded her that he needed complete drawings for the reflected ceiling plan, bedroom layout, and bathroom layout.

[71] By July 24, 2018, the defendant was still uncertain as to the required depth of the float and Mr. Work recommended the plaintiff not send the plans to PIM until the defendant had resolved the issue of the float depth.

[72] Mr. Stevenson was concerned because the updated set of plans were not yet available in full, due in part to changes suggested by the defendant. Included in this was the defendant's concern regarding the location of the wine cellar and associated foundation details.

[73] Mr. Stevenson informed the defendant that changing float depths would have costs implications. Mr. Work sent plans for review to Mr. Stevenson and indicated that the location of a new hatch needed to be addressed. The final dimensions for the float (specifically the height) were necessary but not yet finalized.

[74] Eventually, Mr. Work sent review plans for the float but some details remained unclear.

[75] On August 6, 2018, Ms. Murray emailed Mr. Stevenson indicating a desire to have a larger door installed in the exit to the outside from the bakery.

[76] On August 8, 2018, Mr. Stevenson circulated a project schedule to Ms. Davies- Long.

[77] Early on August 14, 2018, PIM informed the plaintiff it could no longer accommodate the construction of the defendant's float into its schedule. Mr. Stevenson did not immediately report to the defendant that a new float builder would be required. He planned to meet the Murrays and discuss the issue with them,

with a view to finding a strategy to obtain a new float builder in the interim. He eventually met with the Murrays in September (after they had heard about the float delay from Ms. Davies-Long).

[78] Later that morning of August 14, 2018, Mr. Lohsen informed Mr. Work of the defendant's decision keep to one hatch, which was shown on the plan, but to add a second hatch.

[79] One hour later Mr. Lohsen wrote to Mr. Work saying said it had requested other potential float builders to quote the cost and said he would require the drawings for potential contractors to quote on the Project.

[80] On August 16, 2018, Mr. Lohsen requested information about the design of the fireplace to facilitate finalizing details for the float and foundation. On August 21, 2018, Ms. Davies-Long sent a response with the requested details; she said she could have given these details to the plaintiff long before but did not.

[81] On August 22, Mr. Lohsen wrote to Mr. Stevenson that the lighting plan was not sufficient to obtain quotes from prospective suppliers.

[82] On August 23, Mr. Lohsen wrote to the Murrays and Ms. Davies-Long stressing the need to finalize a coordinated set of plans by the end of August in order to maintain the critical path and schedule.

[83] On August 27, 2018, Mr. Work reported that the float had been made deeper to ensure it would be sufficient to accommodate the fireplace.

[84] By August 30, 2018, Mr. Work had made changes to the concrete slab as required.

[85] On September 20, 2018, Mr. Lohsen wrote to the Murrays and Davies-Long setting out a critical path that would give the project a chance of completing in May 2019. Several of the details in this critical path were items to be addressed by Ms. Davies-Long. Between August 14 and September 24, 2018, changes to the float

design were necessitated by changes and new considerations presented by the defendant for features such as a wine cellar.

[86] Ms. Davies-Long agreed to meet her requirements set out in the critical path plan that included providing basic conceptual design plans for cabinetry and millwork, providing an exterior schedule by September 27, and providing a final interior schedule by October 31.

[87] Also on September 27, 2018, Ms. Davies-Long reported she had missed doing a review of symbols for exterior finishes which were provided that day. Ms. Davies-Long remained in control of window procurement and other final decisions.

[88] Herold Engineering produced the issued for construction set of plans for the float on October 1, 2018. The final issued for construction architectural drawings were delivered October 11, 2018. On that date, Ms. Davies-Long indicated she was unable to meet the design deliverables set out in the critical path schedule prepared by Mr. Lohsen on September 20, 2018, more particularly that she would provide a basic conceptual design for cabinetry and millwork by October 15, 2018, provide a final exterior schedule by September 27, and provide a final interior schedule by October 31.

[89] On October 11, 2018, Ms. Murray communicated to the Project team, including the plaintiff, that they had decided to run their 2019 season without the Lodge, expecting to take delivery of the Lodge to October 2019. This unilateral change to the delivery date was made on the recommendation of Ms. Davies-Long. There were unresolved design and plans issues, and they could not meet the October 15, 2018, schedule for design production, although they hoped the Project could be finished by May 2019 while delaying delivery until October 2019.

[90] On October 16, 2018, Mr. Stevenson raised several issues with the defendant stemming from the decision to postpone the expected completion date to October 2019, including budgetary and scheduling issues.

[91] On October 17, 2018, Mr. Stevenson wrote to the defendant indicating that, absent a final set of plans, he could not confirm they were working within the budget. He also cautioned the defendant that the designer should consider the budget moving forward in providing finishing specifications.

[92] Mr. Lohsen opined that meeting the critical path schedule would allow the plaintiff to finish the Project by May 2019.

[93] In early November 2018 the plaintiff had begun pre-fabricating the exterior walls for the Lodge and 8-foot sections to be eventually reassembled on the float. On November 16, 2018, Ms. Davies-Long produced her first set of preliminary interior designs dated November 14, 2018, which plans lacked sufficient detail or dimensions to obtain quotes from third-party suppliers.

[94] The finished float was delivered to the plaintiff's premises on November 28, 2018.

[95] On December 10, 2018, Ms. Murray wrote the plaintiff to confirm it would deliver lockup budget when they met later that day. She also asked for a finished budget but recognized that there were items that had not been established. Mr. Stevenson replied that he planned to produce a lockup budget, but a finished budget was not addressed because the plaintiff was waiting on design decisions from the defendant's team and some pricing from their suppliers.

[96] On December 11, 2018, Ms. Davies-Long produced a second preliminary interior design plan, again without sufficient detail or dimensions to inform that aspect of the project.

[97] On December 12, 2018, the plaintiff produced a lockup budget of \$792,730. Ms. Murray could not recall receiving that budget, but in an email she referred to having seen and reviewed the document. It is important to stress that on December 21, 2018, Colin Lang, the senior project manager for the plaintiff, informed the defendant the project was slightly over budget but after factoring in the costs for heating, it would be substantially over budget.

January 2019 – April 2019

[98] Throughout the month of January some work was done, including pouring a foundation on the float. However, discussions with Ms. Davies-Long concerning design, layout, and specifications continued. In early February Ms. Davies-Long discussed changes to the design and layout. On February 13, 2019, Mr. Work completed the most recent set of shop drawings and forwarded them to the plaintiff.

[99] On March 2, 2019, Ms. Murray sought information concerning the budget from the plaintiff.

[100] On March 4, 2019, Ms. Davies-Long produced a further revised “preliminary interior design plan”. These plans were still incomplete and lacking in specifications, dimensions, and detail sufficient to obtain quotations from third-party suppliers.

[101] On March 12, 2019, the plaintiff issued a budget update estimating the total project cost to complete at \$1,713,427. Jake Zaiss, who was employed by the plaintiff as project coordinator on the Project, indicated in his letter that the costs could be reduced as much as \$110,000; he said the design was not yet complete and there were uncertain projections and costs relating to aspects of the estimates.

[102] On March 19, 2019, Ms. Davies-Long sent an email to, among others, Mr. Zaiss, apologizing for not sending information concerning countertops for the Lodge. She included new aspects of the building.

[103] On March 20, 2019, Ms. Davies-Long produced yet a further set of preliminary interior design plans. In May 2019 the plaintiff advised the defendant that the state of drawings and specifications given to prospective subcontractors was inadequate to enable the plaintiff to produce a final budget and questions concerning Ms. Davies-Long’s plans remained outstanding.

[104] Mr. Lang was concerned that the plaintiff required more from Ms. Davies-Long to assist in formulating budgets. She eventually confirmed she would produce

design plans and specifications issued in March 2019 but incomplete and subject to change.

[105] By April 23, 2019, the plaintiff had engaged the mechanical engineer working with a sheet metal company to install the HVAC system.

[106] Throughout the month of April 2019, the plaintiff was in communication with the defendant and with Ms. Davies-Long with regard to interior design plans and procurement of subcontractors and finishings. There were discussions about costs, changes, and layout, including some mishaps. The plaintiff agreed it would pay for its responsibility to correct errors made by its staff.

May 2019 – August 2019

[107] On May 3, 2019, Ms. Davies-Long informed the defendant finishing contractors needed more information and dimensions in order to provide quotations. She had submitted a new kitchen ceiling plan.

[108] On May 10, 2019, Mr. Lang wrote to the defendant informing it that another week had passed without receiving the information from Ms. Davies-Long needed to properly inform the finishing contractor's quotation on the work. He warned the defendant that the "window to lock-in our preferred finishers" was closing and that the state of drawings and specifications provided by Ms. Davies-Long was befuddling.

[109] In that email chain, Ms. Davies-Long said the following:

I have planned to have the interior finishing set of drawings finished and resubmitted this Thursday so they can be sent to the finishing contractor on Friday.

I will take this [opportunity] to [apologize] to Kinsol for the lack of detail I had previously shown. I should have asked for help earlier from another set of eyes to help me notice all the info left out. Everything is still as drawn but with more dimensions and specifications added. I assumed that I would have reviewed the drawings with the contractor to explain the scope, determine deficiencies and flesh out where I needed more clarity to express my intent.

[Emphasis added.]

[110] On May 12, 2019, Ms. Davies-Long issued another set of interior design plans which were adequate to permit the plaintiff to obtain quotes for finishing work and to produce its final budget.

[111] On May 13, 2019, Mr. Zaiss reported to the defendant he had submitted Ms. Davies-Long's most recent plans to sub-trades but had heard nothing back. He said he was sure that they would have a few questions before submitting a quotation, but he would not have the information to provide a cost or plan shortly.

[112] On May 16, 2019, Mr. Zaiss addressed the defendant's request to add some deck space at the front of the Lodge. He asked Ms. Davies-Long for her approval to extend the deck.

[113] On July 9, 2019, the plaintiff provided the defendant with its updated estimate of the cost to complete the remaining work on the Project with a list of allowances for items that had not been completed. The July 2019 budget estimated \$1,980,656 to complete the Project, which included an estimated at \$621,720 to finish the work, \$577,436 paid by the defendant to that date to third parties, and \$680,991 paid to the plaintiff. The defendant expressed its concern with this budget. Ms. Murray said she had learned from Mr. Walter the plaintiff intended to start finishing work on the Lodge in August whereas she believed she had been told it would be completed in August. In July 2019 windows were being installed by Mr. Walter and the Project was reaching a lockup stage.

[114] On July 15, 2019, Mr. Stevenson expressed to the defendant concerns with proceeding without design work being finalized and coordinated. He said he had cautioned them that cost and schedule would be unknown until the final specifications and choices for construction of the Lodge were hammered out. He invited the defendant to meet and discuss budget items that could be modified or changed to maximize their chances of meeting the budget.

[115] July 16, 2019, Mr. Lang wrote to the defendant outlining some savings that could be found in the budget to reduce the cost by \$70,000–\$75,000.

[116] On July 16, 2019, Mr. Stevenson communicated to the defendant that the plaintiff's focus over the next few weeks was to do everything to bring the Lodge up to a modified lockup state including electrical, mechanical and plumbing roughing work. The plan was to transport the float from the plaintiff's location at Bamberton to the plaintiff's premises.

[117] In the same email chain, Ms. Murray wrote to Mr. Stevenson about the schedule and said she had been told by someone with the plaintiff company that the Lodge was scheduled for completion at the end of August. She was unhappy to learn that that completion was then scheduled for September. The plaintiff did not accept that anyone on its behalf had said completion would happen by the end of August.

[118] The plaintiff's records for July 2019–August 2019 indicate that its work was proceeding during the month of July and into early August. These records indicate that the plaintiff had not stopped working on the Project in the sense that it had abandoned efforts to construct the Lodge.

[119] On August 8, 2019, the defendant ended the contract via a letter sent by counsel. In the letter, the defendant alleged that the plaintiff had repudiated the contract, with the defendant purporting to accept that repudiation. The plaintiff continued to provide staff to facilitate the defendant's takeover of the Project after August 8, 2019.

[120] The defendant eventually took possession of the float on September 5, 2019, and their newly retained contractor, Story Construction, entered into a new contract with the defendant to complete the Project.

Story Construction Completes the Project

[121] Story Construction began working on the Project in October 2019; Mr. Walter was the on-site manager and directed labourers and carpenters. It was clear from Mr. Walter's testimony that Ms. Davies-Long continued to provide plans necessary for the carpenters working on the Project after August 8, 2019, to perform their work.

Mr. Walter said her plans were deficient and frustrating for carpenters and the project manager because of a lack of finishing details. He said as she changed her plans, they rolled with the changes because nothing was impossible or unbuildable as a result of her work.

[122] He discussed the general practice of contractors at construction sites. He said if subtrades make mistakes or contractors make mistakes, the contractor will usually remedy the problem once it is identified. He did not believe the plaintiff was aware of any deficiencies in their work. It is noteworthy that when some deficiencies came to the attention of the defendant, they readily acknowledged their responsibility to correct those problems at their expense.

The Witnesses

[123] The plaintiff introduced testimony from:

- a) Steven Stevenson was a shareholder and co-owner of the plaintiff along with Michael Marshall, also a co-owner of the plaintiff. Mr. Stevenson and Mr. Marshall shared the role of managers of the plaintiff. Mr. Stevenson was a chief operating officer and guided the management team and staff in projects it undertook.
- b) John Lohsen was a carpenter specializing in timber frame building. He was employed by the plaintiff to serve as the project manager on the Project.
- c) Jake Zaiss was experienced in drafting construction projects and was employed by the plaintiff as project coordinator on the Project in 2018. He was regularly involved with Ms. Davies-Long in efforts to obtain complete and reliable plans from her.
- d) Michael Marshal had a lengthy history in the construction field and construction management. He was co-owner of the plaintiff with Mr. Stevenson and managed the overall business of the plaintiff. He was

not involved in the actual construction work, although he collaborated with Mr. Stevenson from time to time and filled Mr. Stevenson's role when he was on vacation.

[124] The defendant introduced testimony from:

- a) Ms. Murray was a co-owner of the defendant with her husband Fraser Murray. She and Mr. Murray operated the Resort prior to 2018. Ms. Murray testified to all of the defendant's dealings with the plaintiff but Mr. Murray did not testify.
- b) Stewart Story was the owner of Story Construction, a family-owned company he had taken over in 2010. He was an experienced builder and trained in project management, scheduling, and financial controls. He had been acquainted with the Murrays since 2016.

Story Construction entered into an agreement with the defendant to take over and finish the Project that was begun by the plaintiff. He testified about aspects of the plaintiff's work on the Lodge including his opinion that there were deficiencies in the work which his company remedied. There was no expert opinion evidence concerning those deficiencies.
- c) Steven Walter was a red seal carpenter with 25 years of experience. Initially, he worked in residential renovations but for 20 years had been involved in construction. He was self-employed and owned River Run Carpentry. In the years before August 2019, Mr. Walter had frequently done work for the Murrays at the Resort and had managed and coordinated subtrades working at the Resort. He worked on the Project in July 2019.
- d) Colin Lang was the senior project manager for the plaintiff on the project. We had experience in custom home building and timber frame construction.

The Issues

[125] The plaintiff claims that as of August 8, 2019, the defendant was indebted to it in the amount of its outstanding and unpaid invoices totalling \$228,111.98, inclusive of GST. The plaintiff's invoice issued June 30, 2019, in the sum of \$80,457.13 including GST remained unpaid as of August 8, 2019. The plaintiff's invoice for work up to July 27, 2019, of \$103,580 inclusive of GST was also unpaid by August 8, 2019.

[126] The plaintiff contends the defendant wrongfully ended the contract based on its allegation the plaintiff had repudiated the contract. It claims the purported termination of the contract and the parties' future obligations under the contract was flawed. As a result of the defendant's actions, the plaintiff was no longer bound by the contract terms but was entitled to demand payment of its outstanding invoices.

[127] The plaintiff argues that on August 8, 2019, the defendant had expended \$577,000 directly to suppliers (avoiding \$60,000 in construction management fees) and incurred \$719,650 in charges from the plaintiff up to and including July 27, 2019. Thus, when the defendant purported to accept the plaintiff's repudiation of the contract, based in part on the allegation that the GMP had been exceeded, the total costs invoiced to the defendant plus direct costs it had paid totaled \$1,336,650. At that point, the plaintiff had not exceeded the guaranteed maximum price and was not in breach of the contract.

[128] The plaintiff further argues that the defendant's purported termination of the contract was ineffective as it did not comply with certain notice provisions of the contract, namely GC 7.1.2 and 7.1.4. The defendant takes the position that these provisions constituted one avenue of termination but did not foreclose other options available at common law.

[129] The defendant submits that on August 8, 2019, the plaintiff informed the defendant that "The cost to the defendant of completing the Project would now be approximately \$1.9 million: more than \$400,000 beyond the [GMP]" (emphasis added). Having purported that it would charge the defendant more than \$1,500,000

(before taking into account amounts the defendant paid directly to suppliers) to complete the construction, the plaintiff had committed an anticipatory breach and repudiated the contract.

[130] The defendant contends the pivotal issue in this litigation is whether the GMP Clause included any costs paid directly by the defendant to suppliers of goods or services to the Project with these amounts remaining accounted for within the total cost guarantee of \$1.5 million. The plaintiff contends the \$1.5 million GMP Clause applied only to things purchased and paid for by the plaintiff, in which case the price for services and price for work could have been \$2.077 million.

[131] The defendant claims damages in the amount of \$756,337.50, comprising the total cost to complete the Project (\$2,331,337.50) less the GMP + GST (\$1,575,000). Put simply, the figure of \$756,337.50 represents the direct and foreseeable cost to the defendant resulting from the plaintiff's refusal to honour the GMP Clause.

[132] The plaintiff contends that when the defendant paid a supplier directly for things used in construction of the Lodge, those acquisition costs were excluded from the plaintiff's guarantee that the sum of the price of the services and the price of the work would not exceed \$1,500,000 because of the definitions set out in the contract excluded costs paid by the defendant to third parties. The plaintiff argues that those things ceased to be "costs of the work" because "costs of work" were defined as "actual costs incurred by the construction manager in performing the work". Thus, amounts paid by the defendant were not "costs of the work", with a net effect that the guarantee was for \$1,500,000 not including purchases made directly by the defendant from suppliers. In the result, the plaintiff would not be liable until the actual costs paid by both parties exceeded \$1,800,000.

[133] Finally, the defendant argues that the cumulative impact of the plaintiff's actions set out in its submissions (in addition to charging it more than \$1.5 million) constituted repudiation of the contract by the plaintiffs, resulting in a complete

breakdown of the relationship between the parties culminating in the letter by the defendant's counsel on August 8, 2019, accepting the plaintiff's repudiation.

[134] The issues in this case can be succinctly articulated as follows:

1. Should the defendant's failure to call Mr. Murray and Ms. Davies-Long lead to an adverse inference against it?
2. What is the proper interpretation of the GMP Clause?
3. Should the contract be rectified to specify that any costs paid directly by the defendant would be counted towards the GMP?
4. Did the defendant fail to provide notice under GC 7.1.2 of the contract, thereby invalidating any purported termination?
5. Did the plaintiff breach the GMP Clause by advising the defendant that it would have to pay \$1.9 million to complete the Project?
6. Had the plaintiff repudiated the contract as of August 8, 2019, whether by a single action or through its actions to that point cumulatively, such that the defendant was entitled to accept the alleged repudiation and terminate the contract?

Adverse Inferences

[135] I will deal first with an evidentiary issue before moving on to the five contractual issues.

[136] The plaintiff contends that the defendant's failure call two important witnesses in support of its case should lead to an adverse inference that the evidence of these two persons would have been unhelpful to the plaintiff's case.

[137] In this case, Fraser Murray was a principal and primary shareholder of the defendant and husband of Ms. Murray. He attended various meetings with principals of the plaintiff and was privy to communications with Mr. Stevenson and

Mr. Marshall, including those concerning a schedule of the critical events that needed to be completed within certain timeframes.

[138] There was no explanation given for the failure to call Mr. Murray as a witness for the defendant given his intimate knowledge and involvement in the construction project.

[139] Second, the defendant did not call Ms. Sarah Davies-Long as a witness notwithstanding her critical importance to the concept, design, and execution of the construction of the Lodge. The plaintiff alleges that Ms. Davies-Long was a friend of the defendant and was intimately involved with Ms. Murray and Mr. Murray and took her instructions from the Murrays in performing her design and planning functions. In her role as friend and project designer she would have been able to give evidence explaining delays in producing the contract documents under her responsibility including, the design, design specifications, budgetary constraints and execution of the project, and the defendant's \$1.5 million budget.

[140] The plaintiff contends that this Court should infer that Ms. Davies-Long would not have provided evidence helpful to the defendant and would likely have provided evidence helpful to the plaintiff. In her involvement in the project, she was under contract to and reported to the Murrays. Moreover, after the defendant terminated the contract, Ms. Davies-Long continued to provide services to the defendant.

[141] When witnesses can be identified as being in alignment with one party in an action, the court retains discretion even where that witness could conceivably have been called by the opposite party.

[142] Based on an absence of an explanation for the defendant's failure to call either of these witnesses, there is discretion in the court to make a finding that their evidence would have harmed the defendant's case or would not have supported that case. Moreover, Mr. Murray was within the exclusive control of the defendant as a witness and Ms. Davies-Long was entirely in alignment with the defendant's position in this trial. Both witnesses would likely have had material evidence and would have

been among the best equipped people to provide important evidence on central issues.

[143] Importantly, at one stage Ms. Davies-Long confessed to her inability to provide architectural drawings for the Project and later apologized for failing to deliver design plans and specifications in a timely manner. It is not clear why she was frequently dilatory in performing her role on behalf of the defendant.

[144] In *Singh v. Reddy*, 2019 BCCA 79 at paras. 8–12, the Court of Appeal explained the principles governing when inferences may be drawn where a witness is not called to testify at the trial but would have had knowledge of the facts and could have been assumed to assist a party. A court is not required to exercise its discretion to draw an adverse inference when a party fails to call such a witness. The relevant factors to consider are:

- a) whether there was a legitimate explanation for failing to call the witness;
- b) whether the witness was within the exclusive control of a party or equally available to both parties; and
- c) whether the witness has key evidence to provide or is the best person to provide some evidence on a question.

[145] The defendant provided no explanation for Mr. Murray not testifying at this trial notwithstanding the fact that, on many days, he was present in the courtroom. Second, there were no persuasive reasons provided for why Ms. Davies-Long did not testify, particularly in light of her critical role in timing and delays experienced throughout the Project.

[146] Because of Ms. Davies-Long's relationship with the Murrays and her continuing and previous friendship with them before this project, I am satisfied she was not equally available to the plaintiff in this case and could have provided he evidence on multiple issues raised by the parties.

[147] In view of Mr. Murray's role as a shareholder and director of the defendant, his presence at numerous meetings with the defendant staff, and his involvement in decisions that were necessary during construction of the Lodge, I am satisfied that he would have had key evidence on all of the issues raised in this trial.

[148] I also have little difficulty concluding that there was no reasonable explanation for the failure to call Mr. Murray in view of the likelihood would have had key evidence with regard to most issues in this litigation.

[149] In the result, I conclude that if both Mr. Murray and Ms. Davies-Long had testified at this trial, their evidence would not have assisted the defendant's case.

Interpreting the Contract and the GMP Clause

[150] In mid-October 2017 the parties began discussing the type of contract they wished to use to govern their obligations during the anticipated construction of the Lodge. As early as December 2017 the Murrays raised the possibility of including a guaranteed maximum price clause in their agreement. Mr. Stevenson wrote to the Murrays concerning a proposed maximum cost to be included in the contract. He said:

Regarding the GMP's price... This can be initiated if you wish. It is going to be easier to do this the closer we get to finalizing the scope of work, i.e. finalizing all the things we are putting into the building; paint colours, tile choices between choices counters, etc. etc. etc. If we do this, we can initiate the option to do a fixed price once specifications are complete!

If we establish a GMP price right now, all it means is that I will recommend to you during design and specification which choices you should make to protect our budget... Which is what I will be doing anyway. We can certainly explore this option, but the GMP cannot be signed off until we are both satisfied with the level of specification. We will be able to get there after the tender process happens and we know little more information.

[151] On Mr. Stevenson's recommendation, the parties eventually entered into a CCDC 5B contract and Article A-8.2 set out the structure of the cost of the Project within a Guarantee Maximum Price Option. This clause was eventually included in the draft agreement signed in the afternoon of March 28, 2018. The guarantee clause contains the following:

The sum of Price of the Services and the Price of Work will not to exceed \$1,500,000.

Any amount, consisting of the Price of the Services and Price of the Work, in excess of this Guaranteed Maximum Price will be paid by Construction Manager without reimbursement by the owner.

[152] The contract also contained Article A-8.3.1:

At the conclusion of the Project.

.1 any amount, consisting of the sum of the Price of the Services and the Price of the Work, in excess of this Guaranteed Maximum Price will be paid by the Construction Manager (the plaintiff) without reimbursement by the Owner (the defendant)

[153] The defendant contends that the proper interpretation of the contract and the impact on the plaintiff's responsibilities to provide the completed project for costs to the defendant of not more than \$1.5 million is central to this dispute.

[154] It is noteworthy that after the contract was signed, the parties displayed a casual disregard for many of the contract terms. Moreover, the parties agreed they would each fulfil the role of consultant under the contract because Mr. Stevenson believed a "consultant" was a payment certifier as set out in the contract; he did not think this would be an applicable arrangement for them.

[155] Placing the parties in the role as consultants rendered many other terms of the contract ineffective insofar as those terms were meant to control performance of the contract obligations, including resolution of some disputes and management of the parties' obligations – these terms became unworkable with the parties as joint consultants: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, was a seminal case in the law of contractual interpretation. While underscoring the importance of unambiguous language in a contract, at para. 57 the Court affirmed the principle that contractual interpretation involves a "common sense approach not dominated by technical rules of construction". The overriding objective is to determine the objective intention of the parties. Surrounding circumstances must be taken into account when interpreting contracts but must not overwhelm the words of the agreement itself. The goal is to improve the court's understanding of the mutual

and objective intentions of the parties as expressed in the words of the contract: although surrounding circumstances are considered in the interpretation of terms, they are never allowed to alter words of that agreement.

[156] Considerations of surrounding circumstances can be reviewed but are limited to objective evidence of background facts extant at the time the contract was executed. Anything that might have affected the understanding of a reasonable person can be taken into account.

[157] Generally, pre-contract negotiations given to provide evidence of subjective intentions of the parties are inadmissible as opposed to objective evidence of surrounding circumstances or the factual matrix extant at the time when the contract was signed.

[158] Evidence concerning negotiation of the contract may be taken into account when those discussions might inform the analysis of the parties' goals and to understand the objective intentions of the parties regarding a commercial agreement at the time: see *Langley Lo-Cost Builders Ltd. v. 474835 Ltd.*, 2000 BCCA 365 at para 29.

[159] Interpreting contracts will not normally involve consideration of a party's behaviour after signing the contract unless special considerations are established. Subsequent conduct should only be admitted if the contract is found to be ambiguous after one has considered its text and the factual matrix surrounding the creation of the contract: *Re Canadian National Railways and Canadian Pacific Ltd.*, 95 D.L.R. (3d) 242, 1978 CanLII 1975 (B.C.C.A.), aff'd [1979] 2 S.C.R. 668, 1979 CanLII 229. In that case, Mr. Justice Lambert, writing for the majority of the Court of Appeal, explained the circumstances permitting the use of subsequent conduct (at 262):

In Canada the rule with respect to subsequent conduct is that if, after considering the agreement itself, including the particular words used in their immediate context and in the context of the agreement as a whole, there remain two reasonable alternative interpretations, then certain additional evidence may be both admitted and taken to have legal relevance if that

additional evidence will help to determine which of the two reasonable alternative interpretations is the correct one. It certainly makes no difference to the law in this respect if the continuing existence of two reasonable alternative interpretations after an examination of the agreement as a whole is described as doubt or as ambiguity or as uncertainty or as difficulty of construction.

[160] I conclude that the terms of the contract did not contain two or more alternative interpretations as to the application of the GMP Clause. The parties repeatedly discussed budget issues, budget allowances, and ways to reduce costs of the Project. Those discussions did not raise alternative interpretations of the contract or the application of the GMP. As is discussed in these reasons, the parties were both interested in finding opportunities to reduce costs; this did not suggest different interpretations of the contract that would override the clear and unequivocal covenant concluded in the plaintiff's guarantee to build the Lodge for \$1.5 million and pay for any costs that exceeded that amount.

[161] Although the contract was a standard form contract presented by the plaintiff to the defendant, there were several terms that were individually negotiated. The clear and unambiguous words of the contract established the plaintiff's promise to construct a Lodge for a price not exceeding \$1.5 million; costs over that amount would be paid for by the plaintiff.

[162] The plaintiff argues that the phasing provisions of the contract were never adhered to by either party. I infer from the plaintiff's submissions that because the design and costing process stipulated in Article A-3 had not been respected before the plaintiff began construction, the parties were in agreement to proceed with construction because the defendant was eager to have the Project completed by May 2019. The plaintiff was not bound by the guarantee to complete the construction at a cost to the defendant of \$1.5 million because Ms. Davies-Long had failed to produce all of the requisite details, specifications, and plans before the parties moved to Phase 2 of the Project.

[163] The plaintiff concedes that the GMP Clause is clear and unambiguous and guaranteed that the plaintiff would build the Lodge for a cost to the defendant not exceeding \$1.5 million.

[164] The plaintiff presented two other arguments concerning interpretation and application of the GMP Clause that would relieve it of any obligation to pay any amount for the construction of the Lodge above that amount.

[165] First, accepting that this clause was not ambiguous and should be given its plain meaning, the plaintiff contends that the GMP could not apply to amounts paid directly to other contractors for work performed on the Project under GC 3.2, which reserved to the defendant the right to award separate contracts in connection with other parts of the Project to other contractors and to perform work with their own forces.

[166] The plaintiff contends the defendant chose to make contracts with third parties for goods or services supplied to the Project in an effort to reduce its obligation to pay part of the construction manager's fee for services. Costs paid directly by the defendant to contractors would not attract the usual construction manager's fee for Services (Article A-5.1), in addition to time-based rates for personnel employed by the Construction Manager (Article 5.3.1). The defendant argues that it had an agreement with the plaintiff that the total cost to build the Project (including expenses paid by the defendant to third parties) would remain included in the \$1.5 million maximum costs to the defendant before the plaintiff was required to pay any costs in excess of that sum.

[167] The defendant contends that in July 2019, the plaintiff informed it that the Project would now cost the defendant \$1.9 million instead of \$1.5 million set out in the GMP Clause. The defendant said the plaintiff's statement of cost to the defendant in July 2019 "would now be" \$400,000 beyond the GMP. The defendant repeatedly told the plaintiff that \$1.5 million was a hard cap and there were no other funds available to build the Lodge. The defendant argued the plaintiff effectively

deprived it of the central benefit of the contract: a floating lodge within a \$1.5 million price.

[168] It is important to take into account the entirety of the contractual terms in interpreting the obligations between the parties. It is clear on any analysis of the objective intentions of the parties, the GMP Clause not ambiguous and conveyed the plaintiff's guarantee that the project would be completed for \$1.5 million but that if not completed for that price, the plaintiff was obliged to continue to construct the Lodge 's at a cost to the defendant that did not exceed \$1.5 million. Objectively, the intent of the parties was abundantly clear: the Lodge was to be built for a cost defendant of \$1.5 million and any costs in excess of \$1.5 million to complete the contract would be paid by the plaintiff without reimbursement from the owner.

[169] Recognizing that the parties did not include in the contract any mechanism to resolve disputes about choices that the defendant wished to make concerning the quality, quantity, or extent of things required to finish the Project and which might have increased the total cost of the Project rising above \$1.5 million, there is no clear process for resolving those disputes save and except the description of the completed Lodge as "high-end" quality.

[170] Although there were some discussions about a few features in the contract, nothing in the evidence indicated there was tension or disagreement on these points whereby the defendant's choices or decisions materially contributed to costs of the Project above \$1.5 million.

[171] Thus, until the Project was completed, the plaintiff was obliged to continue working under the terms of the contract and to bear all costs that exceeded \$1.5 million.

[172] Although the July 2019 budget projections of \$1,900,000 for the cost of the work would have exposed the plaintiff itself to pay an extra \$400,000 for the Lodge, the defendant incorrectly suggests that the plaintiff informed it that the defendant'

second costs to complete would be \$1,900,000. Even at that juncture, the plaintiff was suggesting cost savings that could have been ameliorative.

[173] Second, the plaintiff contends that the contract cannot be interpreted in such a way that bound the plaintiff to construct the Project for \$1.5 million (and be responsible for any costs exceeding that amount) at a time when the owner and its designer had not provided all of the requisite contract documents and the defendant was entitled to make procurement and construction decisions without the plaintiff's approval. Absent that interpretive restriction, the plaintiff contends the contract would make no commercial sense because the defendant could act irresponsibly in its design and procurement decisions in a manner that would inflate the cost above \$1.5 million.

[174] The plaintiff contends this interpretation is inconsistent with Article A-3 of the contract that allowed the defendant to terminate the contract if the "planning process results in a cost prohibitive result in the project goals" but no reciprocal provision protected the plaintiff from prohibitive costs that could have exceeded the GMP. Without any control of the planning or cost of procurement processes, the plaintiff could be required to pay for substantial expenses above \$1.5 million based on choices made by the defendant or other unexpected events; the plaintiff had agreed to the \$1.5 million GMP at a time before the design and specification process was completed.

[175] The plaintiff argued it had frequently warned the defendant of deficiencies and delays in design work causing ongoing impacts on scheduling and ultimately delaying completion of the Project.

[176] The plaintiff also argued that if the GMP was exceeded, when the defendant terminated the contract, it abandoned its claim to full performance of the contract and to demand the plaintiff pay costs above the GMP.

[177] When the defendant paid directly for necessary expenses the plaintiff could not be held responsible for the consequences of those design decisions made exclusively by the defendant and his designer.

[178] Moreover, the plaintiff rendered invoices to the defendant on March 1, 2019, for \$12,000 representing charges for the final two construction management fee payments due for January and February 2019, June 30, 2019, for \$76,625 and \$98,648 on 27 July 2019, neither of which was paid by August 8, 2019.

[179] It is apparent from the contract that payment of accounts was due on presentation to the defendant (or at the latest 20 days after presentation, as provided for in GC 5.4.7.3). As the defendant has pointed out, the payment provisions requiring the involvement of a consultant are not applicable to this contract because there was no consultant capable of addressing contentious issues assigned to a “consultant” in the contract.

[180] Contrary to Mr. Stevenson’s assertion to the defendant, the role of a consultant is referred to multiple times in the contract and was not restricted to certification of payments.

[181] Thus, at the date the defendant purported to terminate the contract, the defendant was in breach of its obligations to pay outstanding invoices, although the plaintiff did not allege that breach constituted a repudiation of the contract by the defendant.

[182] If the plaintiff’s contention is accepted, then the defendant seeks rectification of the contract because the defendant argues that, at the time of signing the contract, the parties were agreed that direct pay costs paid by the defendant would be included in the GMP of \$1.5 million notwithstanding the language in the written document.

[183] The defendant also contends that the plaintiff’s actions listed in para. 92 of its closing argument considered cumulatively are evidence that the plaintiff had evinced an intention to no longer be bound by the contract in a way that deprived the

defendant of the benefit of the contract. The defendant accepted the plaintiff's repudiation of the contract and declared the contract at an end and seeking damages noted above.

[184] In this case, the plaintiff claims \$228,111.98 as a debt due and owing at the time the contract was terminated (after deducting subcontractor rates directed by the defendant). Conversely, the defendant claims it has suffered damages of \$756,337 comprising the total cost to complete the Project less the GMP plus GST of \$1,500,000 stemming from the plaintiff's repudiation of the contract by its actions.

[185] It is not clear from the plaintiff's submissions which interpretation of the contract it invites the Court to consider because at a para. 183 in its submissions, the plaintiff contends that a prerequisite to the parties being obliged to proceed with a cost-plus construction arrangement was the completion of the phase 1 design and costing process. The plaintiff contends this part of the contract was never completed and the conduct of the parties, including communications referring to signing off on the budget, confirmed the fact the contract was an evolving document dependant on the sequencing described in Article A-3.

[186] In the end, it is not clear whether the plaintiff was arguing that this was in fact a "cost-plus contract", with the defendant liable to pay all of the costs plus the plaintiff's fees, or not.

[187] Other than the GMP Clause, nothing in the contract suggests a formula or basis on how any costs over \$1.5 million to complete the construction of the Lodge should have been paid had the GMP been exceeded. Both parties ignored the Article A-3 phasing terms of the contract and their failure to enforce them has resulted in disappointment on the part of both parties on the question of how to proceed to finish the Project in the face of costs that might have exceeded GMP of \$1.5 million.

[188] For the Court to decide that Article 8.1 has no application to the contract would require the Court to rewrite a contract for the parties in a way that was not objectively intended by either of them.

[189] I find that the plain and ordinary meaning of the guarantee given by the plaintiff bound the plaintiff to perform the contract as written and abide by the GMP. I accept that there was much information exchanged between the parties in the months prior to March 28, 2018, that reflected the defendant's concern that the Project would cost it no more than \$1.5 million. The words of the plaintiff's guarantee were clear and unambiguous and not tied to any other terms of the contract that could have reflected a contrary intention. The state of the cost estimates given by the plaintiff prior to March 2018 were made in the context of the paucity of reliable plans and specifications.

[190] However, the parties' communications demonstrated a clear intention that their agreement included the GMP term and that owner-paid expenses would be part of the GMP. The defendant in this trial is seeking rectification of the contract because it failed to record that the agreement reflected in communications in the first three months of 2018. The plaintiff took no steps to seek rectification of the GMP to the extent that it was an unconditional promise to complete the Project within the GMP or to pay costs incurred above that amount.

[191] Post-contract, the parties discussed efforts to reduce costs in order to bring those costs within or close to the \$1.5 million GMP. There is no ambiguity in the contract concerning the GMP. However, absent a mechanism in the contract to resolve disagreements or disputes about choices and costs that took the budget above \$1.5 million, there was a gap in the contract. The Court is not permitted to rewrite the parties' bargain to address this gap in the face of the clear language of the GMP.

[192] Nothing in the parties' pre- or post-contract behaviours assist in resolving this gap in the contract. Cost-reduction strategies were not considered before the parties signed the contract, but those decisions do not assist in determining if the parties'

objective intentions at the time of signing could defeat the guarantee given by the plaintiff. The interpretation of how the contract would operate in the face of the parties' inability to agree on cost-saving strategies or resolve disputes affecting the costs is not assisted by the clear and unambiguous words of the GMP Clause or the parties' behaviour after execution of the contract.

[193] Thus, I am satisfied that plaintiff bound itself to complete construction of the Lodge for a cost to the defendant not exceeding \$1.5 million and the balance necessary to complete the construction project would be paid by the plaintiff. The parties had obligations to attempt to reduce costs where possible to bring the cost closer to \$1.5 million, in light of the parties' understanding that this Project was to produce a high-end, high-quality facility.

[194] The plaintiff held an expectation that the defendant would act in good faith, honestly, and reasonably to give appropriate considerations to the legitimate interests of both parties to the contract: *Bhasin v. Hrynew*, 2014 SCC 71 at paras. 69–70.

[195] There is no ambiguity on the issue of the GMP Clause and no argument advanced by the plaintiff that the defendant breached its duty to act in good faith to cooperate in making budgetary changes that would reduce costs. When the contract was signed, the parties were relying on Ms. Davies-Long's concept designs and plans for the Lodge and the backdrop of the general understanding that this Lodge would provide a high-end luxury resort. The parties never reached a point when there was a dispute concerning costs or the meaning of "high-end luxury" that might have resulted in costs exceeding the GMP.

Rectification

[196] The defendant seeks rectification of the contract on the basis that the finalized written agreement failed to accurately reflect the parties' intention that any costs paid directly by the defendant towards the project were to be included within the guaranteed maximum price of \$1.5 million.

[197] The leading authority on rectification remains the decision of the Supreme Court in *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56. There, the Court gave the following overview of the doctrine:

A. General Principles and Operation of Rectification

[12] If by mistake a legal instrument does not accord with the true agreement it was intended to record — because a term has been omitted, an unwanted term included, or a term incorrectly expresses the parties' agreement — a court may exercise its equitable jurisdiction to rectify the instrument so as to make it accord with the parties' true agreement. Alternatively put, rectification allows a court to achieve correspondence between the parties' agreement and the substance of a legal instrument intended to record that agreement, when there is a discrepancy between the two. Its purpose is to give effect to the parties' true intentions, rather than to an erroneous transcription of those true intentions (Swan and Adamski, at §8.229).

[13] Because rectification allows courts to rewrite what the parties had originally intended to be the final expression of their agreement, it is "a potent remedy" (*Snell's Equity* (33rd ed. 2015), by J. McGhee, at pp. 417-18). It must, as this Court has repeatedly stated (*Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157, at para. 56, citing *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678, at para. 31), be used "with great caution", since a "relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts": *Performance Industries*, at para. 31. It bears reiterating that rectification is limited solely to cases where a written instrument has incorrectly recorded the parties' antecedent agreement (Swan and Adamski, at §8.229). It is not concerned with mistakes merely in the making of that antecedent agreement: E. Peel, *The Law of Contract* (14th ed. 2015), at para. 8-059; *Mackenzie v. Coulson* (1869), L.R. 8 Eq. 368, at p. 375 ("Courts of Equity do not rectify contracts; they may and do rectify instruments"). In short, rectification is unavailable where the basis for seeking it is that one or both of the parties wish to amend *not the instrument* recording their agreement, but *the agreement itself*. More to the point of this appeal, and as this Court said in *Performance Industries* (at para. 31), "[t]he court's task in a rectification case is . . . to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other".

[14] Beyond these general guides, the nature of the mistake must be accounted for: Swan and Adamski, at §8.233. Two types of error may support a grant of rectification. The first arises when both parties subscribe to an instrument under a *common* mistake that it accurately records the terms of their antecedent agreement. In such a case, an order for rectification is predicated upon the applicant showing that the parties had reached a prior agreement whose terms are definite and ascertainable; that the agreement was still effective when the instrument was executed; that the instrument fails to record accurately that prior agreement; and that, if rectified as proposed,

the instrument would carry out the agreement: *Ship M. F. Whalen v. Pointe Anne Quarries Ltd.* (1921), 63 S.C.R. 109, at p. 126; *McInnes*, at p. 820; *Snell's Equity*, at p. 424; *Hanbury and Martin Modern Equity* (20th ed. 2015), by J. Glister and J. Lee, at pp. 848-49; *Hart v. Boutilier* (1916), 56 D.L.R. 620 (S.C.C.), at p. 622.

[15] In *Performance Industries* (at para. 31) and again in *Shafroon* (at para. 53), this Court affirmed that rectification is also available where the claimed mistake is *unilateral* — either because the instrument formalizes a unilateral act (such as the creation of a trust), or where (as in *Performance Industries* and *Shafroon*) the instrument was intended to record an agreement between parties, but one party says that the instrument does not accurately do so, while the other party says it does. In *Performance Industries* (at para. 31), “certain demanding preconditions” were added to rectify a putative unilateral mistake: specifically, that the party resisting rectification knew or ought to have known about the mistake; and that permitting that party to take advantage of the mistake would amount to “fraud or the equivalent of fraud” (para. 38).

[198] The defendant seeks rectification of the contract to include the following term:

Items paid directly by the owners will still be part of this contract, and will be included within the “Price of the Work” and the “Guaranteed Maximum Price” set out in Article 8. 2, but will not be subject to the Construction Manager’s fee for the work of 12.5%, set out in Article 5.3.

[199] The plaintiff contends that a clear reading of the contract provides that expenses paid by the defendant directly to a supplier (such as the float) were not payments made in accordance with the contract for the “price of the work” because those payments were not made by the plaintiff. According to the plaintiff, “price of the work” includes only those monies actually paid by the plaintiff in performing the work. Because the plaintiff did not pay the costs of the float, those costs never became part of the price of the work.

[200] The plaintiff contends that its reading of the contract is consistent with the evidence given by Mr. Stevenson, namely that payments made by the defendant would operate to reduce the construction management fee only and that any payments by the defendant would not operate to reduce the plaintiff’s obligation to complete the project for \$1,500,000. The GMP Clause stipulated that the price of the services and the price of the work were guaranteed by the plaintiff not to exceed \$1,500,000 and that any expense exceeding that sum would be paid by the plaintiff

without reimbursement by the owner. The contract also provided that if the price of the services and price of the work totalled less than the GMP, there would be no allocation of the difference to either party.

[201] The potential impact of the plaintiff's assertion was that the defendant could have been required to pay \$1.8 million to complete the Project before the plaintiff became obligated to honour its guarantee and pay costs exceeding the GMP.

[202] The defendant does not disagree with the plaintiff's submissions on the interpretation of the contract as written. The defendant's submission and counterclaim are that on March 28, 2018, there was an agreement that the defendant could pay certain costs directly to suppliers and those costs would not be subject to the plaintiff's construction manager fee for services. The defendant contends that any payments made directly by the owner would, however, still be taken into account in calculating the GMP and if the cost of the work, including costs paid directly by the owner, exceeded \$1.5 million, the plaintiff was obliged to pay all such costs of the work and construction manager's fees exceeding \$1.5 million. The defendant takes the position that its proposed rectification would bring the written agreement into conformity with this mutual understanding and agreement made shortly before the contract was signed.

[203] The question to be decided is whether the parties expressly agreed that those costs paid directly by the defendant would be included in the calculation of the GMP.

[204] It was clear from the early negotiations that the defendant had access to only \$1.5 million in order to complete the construction of their Lodge. This information was communicated by the defendant to the plaintiff in the person of Mr. Stevenson and was well understood by him well before March 2018.

[205] There were some confusing aspects of this issue, namely the concerns expressed by the defendant about costs exceeding \$1.5 million. Notably, one of the grounds given by the defendant for terminating the contract was an allegation that the plaintiff:

- a) failed to complete the Lodge within the GMP;
- b) failed to complete the construction within an agreed upon schedule; and
- c) failed to complete the Lodge as agreed upon in the contract generally.

[206] The defendant's August 8, 2019, letter asserts that the failure to complete the Lodge within the GMP was a repudiation of the contract on the part of the plaintiff.

[207] The defendant's claim for rectification of the contract depends on a finding that the GMP referred to in Article A-8.2 failed to specify that amounts paid directly by the defendant for the work would be considered part of the GMP. The defendant argues that Ms. Murray and Mr. Stevenson had made the agreement that, if the defendant paid for some of the costs to third parties, the Project would not cost more than \$1.5 million including the amounts paid to those third parties., Ms. Murray wrote to Mr. Stevenson on March 28 (1:29 PM): "I just wanted to make sure that this does not bring the total project budget to \$1,560,000 or is the fee inside the final budget?"

[208] Before signing, the defendants would not be required to expend any more than \$1.5 million to obtain a finished Lodge.

[209] Interestingly, throughout the course of events, including budgeting, the defendant was concerned about costs in relation to the \$1.5 million GMP. Both parties were focused on finding savings or allowances and it is hard to make sense of those concerns on the part of the defendant other than the parties' mutual interest in keeping the costs close to or at \$1.5 million.

[210] The defendant was entitled to demand completion of the contract with the plaintiff paying all costs of work and services above \$1.5 million, except that the parties more likely than not accepted their shared responsibility to make efforts at reducing costs.

[211] The plaintiff published a new budget in March 2019 reflecting estimated costs of \$1,700,000. The defendant did not raise a concern that the budget was now over \$1.5 million; rather, it suggested ways in which some components could be removed

from the calculations by moving cost items to Nimmo Bay Resort Ltd. as landlord and out of the GMP amount. The plaintiff also listed several cost-saving suggestions.

[212] Prior to execution of the contract, the plaintiff was informed that the defendant had no additional funds above \$1.5 million to complete the building of the Lodge contemplated in the agreement (as per emails sent December 18, 2017). The plaintiff contends that during the construction project, the defendant obtained additional funding and their financial constraints may have been eased. However, at the time the contract was signed the limitation on the defendant's resources was reiterated in the defendant's email of December 19, 2017, to Mr. Stevenson and was well known to the defendant.

[213] On December 12, 2017, Mr. Stevenson wrote to Ms. Murray:

If we establish a GMP price right now, all it means is that I will recommend to you and you design and specification which choices you should make to protect our budget... Which is what I will be doing anyway. We can certainly explore this option, but the GMP cannot be signed off until we are both satisfied with a certain level of specification! We will be happy to get there after the tender process happens and we know a little more information.

[214] On numerous occasions, Mr. Stevenson reiterated his understanding that this was a \$1.5 million project (on December 18, 2017) and that price was a "governing factor" (on December 20, 2017).

[215] On January 23, 2018, Mr. Stevenson wrote to Ms. Murray indicating that the contract allowed direct pay for items that "may help out the bottom line". He suggested the defendant request to pay for the concrete float and the shipping directly as the owners, writing that "[t]hose 2 items are going to free up about \$40k+/- in fee amounts". He reiterated that "the cost allowances that we have at this point are fairly solid" but that they would "need to keep our eye on the choices for level of finish".

[216] On December 22, 2017, Mr. Stevenson told the defendant that the current estimate for the project was \$1,495,855 and provided a breakdown of the line items, including the concrete float.

[217] On January 23, 2018, Ms. Murray responded that the defendant was prepared to pay the cost of constructing and delivering the float and deleting the cost of towing the float. She said this could provide something in the order of the contingency of \$100,000 based on the cost allowances provided by the plaintiff. Mr. Stevenson replied, “Sounds Great!”.

[218] In the email exchanges between January 23 and March 28, 2018, there were no discussions about decreasing the budget for the plaintiff’s work to finish the Project by \$300,000 or any amounts paid directly by the defendant toward costs of the work.

[219] Prior to signing the contract, Mr. Stevenson wrote the following to the defendant:

So, a couple of points that I think we needed to clear up ahead of signing.
This will mostly be around fee structure. I wanted to FIX our management fee of 5% based on the project value, so we don’t have any escalating fee costs if prices rise a little. I have talked with Mike and come up with the following:
Overall project value: \$1.5mil (stated as GMP in contract) Remove dock supply from fee evaluation: CREDIT \$300k Total fee evaluation based on \$1.2 mil value.

[220] In this case, the defendant contends that the contract was intended to reflect that the entire project would be completed for not more than \$1.5 million, which sum included the \$577,000 it paid directly to the float builder and other parties.

[221] The defendant argues the plaintiff knew or ought to have known that the contract contained an omission or mistake that would enable it to essentially avoid paying for any owner paid costs, if such costs were not included in the GMP. This omission would amount to fraud or the equivalent of fraud.

[222] The test for rectification that must be met by the defendant was set out in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19 at paras. 35–44:

- a) the defendant must show the existence and content of the inconsistent prior oral agreement.
- b) the defendant must establish that the written document does not correspond with the prior oral agreement but that the plaintiff knew or ought to have known of the mistake in omitting the oral terms in the written document. The defendant must show that the plaintiff is seeking to take advantage of its error in a manner amounting to fraud or the equivalent to fraud.
- c) merely making a unilateral mistake is not sufficient unless the defendant can show the plaintiff sought to take advantage of the mistake in a way that would be the equivalent of fraud.
- d) the defendant must demonstrate the “precise form” in which the written contract can be made to express the prior intention of what the parties had agreed to; and
- e) proof of the plaintiff’s intention must be “convincing proof” exceeding the “more probable than not” standard.

[223] In this case, the plaintiff was well aware, at the time of signing the contract that the defendant’s financial means were limited to \$1.5 million to complete construction of the Lodge.

[224] The plaintiff engaged in communications with the defendant endeavouring to assist in finding reductions in the costs of the work by reducing the construction management fees and to find other economies for the project. The plaintiff’s communications recognized that the GMP was \$1.5 million and that, if the cost of constructing the Lodge exceeded that amount, the plaintiff expressly agreed it would be responsible for paying all costs overruns exceeding the GMP to complete the project.

[225] The plaintiff had invested considerable time and effort in various stages of planning and preparation for construction of the Lodge without the benefit of a

written agreement. It was extremely anxious to obtain a written agreement to assure its investors that their efforts would not go unrewarded.

[226] I reject Mr. Stevenson's attempt to explain how his agreement permitting the defendant to pay costs directly could have increased the cost to build the Lodge before the plaintiff could be required to pay any portion of those costs exceeding the GMP. In my view, the plaintiff recognized that the defendant was not agreeing to terms of the contract that could expose it to costs of up to \$1.8 million if it paid some costs directly to third parties.

[227] The evidence is compelling that there was a guarantee that the defendant's costs to build the Lodge would total no more than \$1.5 million and they would not be faced with paying an additional \$577,000, the amount ultimately paid to third parties to complete the Project, before the plaintiff would have become liable to pay the costs to finish the Lodge.

[228] In my view, the parties may have signed the contract without turning their minds to the fact that the contract needed to be changed to reflect the agreement they had made before signing the document. The implications for the defendant paying third parties to perform some of the works to save fees payable to the plaintiff were not objectively reasonable. In view of the information the plaintiff received from the defendant and its recommendations concerning the budgeting process, the plaintiff knew or ought to have known about the mistake.

[229] Notwithstanding the opening terms of the contract that it superseded prior negotiations, representations or agreements, written or oral, the evidence is not compelling in favour of the plaintiff's position on this point. The plaintiff cannot be permitted to take advantage of this mutual error that would have exposed the defendant to an additional \$300,000 to \$577,000 to complete the Lodge within the GMP.

[230] In the result, the defendant will be entitled to rectification of the contract. However, I am not satisfied that the contract should be rectified in the terms set out in the defendant's claim.

[231] In my view, rectification of the contract should reflect the specific change requested by the defendant and agreed to by the plaintiff on March 28, 2018, to accomplish its objective. The contract will be rectified to read:

Article A-7.1 The Cost of the Work is the actual cost incurred by the Construction Manager in performing the Work and any payments made directly by the Owner to a third party for the Work.

Notice under GC 7.1.2

[232] The plaintiff argues the defendant's purported termination of the contract set out in counsel's August 8, 2019, letter failed to comply with GC 7.1.2 of the contract, which required the defendant to provide notice and an opportunity for the plaintiff to correct any alleged default of its contractual obligations. The plaintiff contends that compliance with this notice requirement was a prerequisite to terminating the contract.

[233] The defendant's August 8, 2019, letter alleged the defendant had repudiated the contract because it:

- a) failed to complete the Lodge within the Guaranteed Maximum Price.
- b) failed to complete the Lodge within the schedule agreed upon between the parties; and
- c) failed to complete the Lodge project as agreed upon in the Contract, generally.

[234] The plaintiff argues that the defendant misconstrued the contract and the termination letter was fatally flawed because it failed to give five days of the notice to correct the alleged default thus, absent the required notice any alleged default did

not trigger a right of termination. Moreover, the plaintiff argues the grounds set out in the letter never amounted to a repudiation of the contract by the plaintiff as alleged.

[235] The notice provision in question is set out in the contract as follows:

GC 7.1.2

If the Construction Manager neglects to prosecute the Work properly or otherwise fails to comply with the requirements of the Contract Documents to a substantial degree, and if the Consultant has given a written statement to the Owner and Construction Manager that sufficient cause exists to justify such an action, the Owner may, without prejudice to any other right or remedy the owner may have, give the construction Manager Notice in Writing that the Construction manager is in default of the Construction Manager's contractual obligations and instruct the Construction Manager to correct the default in the 5 Working Days immediately following the receipt of such Notice in Writing.

GC 7.1.4

If the Construction Manager fails to correct the default in the time specified or in such other time period as may be subsequently agreed in writing by the parties, without prejudice to any other rights or remedy the Owner may have, the owner may:

- .1 correct such default and deduct the cost thereof from any payment then or thereafter due the Construction Manager provided the Consultant has certified such costs to the Owner and the Construction manager, or
- .2 terminate the Construction Manager's right to continue with the Work in the full or in part or terminate the Contract.

[236] The plaintiff argues this clause in the contract implies that the plaintiff did not have a right to terminate for reasons not included in the circumstances listed in its letter because it did not give the requisite notice. Further, the defendant did not give the plaintiff five working days notice to correct any default in performing its duties under the contract.

[237] At trial, the defendant contends that it accepted the plaintiff's repudiation of the contract and terminated the contract based on common law principles applicable to serious breaches of the contract. It did not rely on GC 7.1.4 to bring this contract to an end.

[238] The defendant relies on *Kaplun v. Mihhlailenko*, [2005] O.J. No. 1978 at paras. 118–121, 2005 CanLII 16625, for the principle that GC 7.1.4 cannot be invoked because of the parties’ decision to jointly assume the role of consultant. Per *Kaplun*, the role of consultant must be performed by an impartial individual and the appointment of a partial individual risks invalidating any clauses requiring action on the part of the consultant. Relying on *Kaplun*, the defendant argues that even if it would have generally been required to comply with the notice requirements of GC 7.1.2, this clause (among others) was rendered invalid by the improper appointment of the parties as consultants. Moreover, it relied on common law principles applicable to an innocent party’s right to terminate a contract when the other party has demonstrated an intention not to be bound by the contract.

[239] The plaintiff argues that *Kaplun* is a 20-year-old decision of a Master of the ONSC and is not binding this Court and does not free the defendant from the obligation to give the requisite notice requiring the plaintiff to correct any alleged defects in performance. The appointment of the parties jointly as consultant was intended to save the parties money while requiring them to fulfil the consultant’s role jointly.

[240] The plaintiff also argues that there are 17 instances in the contract setting out the role of a consultant in various aspects of the project. The plaintiff says it was never the intention of the parties that those critical aspects involving consultants would be inoperable.

[241] I share some of the plaintiff’s doubts concerning the persuasiveness of *Kaplun*. However, as I will discuss below, I find that the defendant’s right to termination was not limited to GC 7.1.2 and .4; as such, I need not decide what effect, if any, *Kaplun* may have on these provisions.

[242] I find that GC 7.1.2 and .4 apply to any instances where a construction manager has neglected to perform work properly or otherwise failed to comply with the requirements of the contract documents. Any neglect to perform work properly requires the construction manager to remedy defects on five days notice.

Interestingly, a failure to remedy such defects within 5 days of receiving notice under GC 7.1.2, entitles the other party to terminate the contract.

[243] Owners are not obliged to deal with construction manager's defaults under Clause 7.1.2 because it contains an important exception, namely that the owner may, without prejudice to any other right or remedy the owner may have, give 5 days notice of the construction manager to correct the default. If the nature of the construction manager's default is more important to the bargain, the defendant can terminate the contract on common law grounds. It is not limited to bringing the agreement to an end through GC 7.1.2 and 7.1.4 if the other party has repudiated the agreement.

[244] This principle is set out in *Pioneer Hi-Bred International, Inc. v. Richardson International Limited*, 2010 MBQB 161:

[114] Whether a party knew of a fundamental breach at the time of termination, or whether a party may have terminated the contract for different reasons, is not determinative with respect to a claim for fundamental breach. The important question is whether the allegedly aggrieved party has a right to terminate under the general law (as opposed to a right specifically conferred by contract), and, if the aggrieved party has such a right, it is immaterial that the aggrieved party chose to exercise a contractual right to terminate. See ***Carr v. Fama Holdings Ltd.*** (1989), 40 B.C.L.R. (2d) 125 (C.A.) and ***Celgar Limited v. Star Bulk Shipping Company***, [1979] 4 W.W.R. 248 (B.C.C.A.).

[115] I note as argued by PHI, that a contract can be terminated for fundamental breach despite the existence of termination provisions in the agreement, including termination through notice provisions. In that regard, PHI reminds the court that paragraph 16 of the 1996 agreement confirms this principle, namely, that the exercise by PHI of any right or remedy provided by the 1996 agreement does not prevent PHI from exercising any other right or remedy, either concurrently or separately. See also ***Norwood Construction Ltd. v. Post 83 Co-operative Housing Association*** (1988), 30 C.L.R. 231 (B.C.C.A.); ***Cheater (B.J.) Enterprises Ltd. v. Minox Equities Ltd.*** (1992), 79 Man.R. (2d) 167 (Q.B.).

[Emphasis added.]

[245] Applying this principle in reverse, if the contract allows for a party to choose between reliance on contractual rights to terminate and common law rights to terminate, the innocent party can rely on either remedy option.

[246] In this case the remedies were not interchangeable. Here, the defendant's stated grounds to terminate the contract for the plaintiff's breach of the contract depended on substantially different considerations than are described in GC 7.1.2. That is, the defendant invoked its rights flowing from the plaintiff's breach of contract based on common law principles as opposed to contractual grounds set out in rights GC 7.1.2. That term did not restrict the defendant's right to terminate to only those grounds set out in GC 7.1.2.

[247] When a party ends a contract for a repudiatory breach it is not obliged to communicate reasons for termination at the time of termination. This view was espoused by Lord Sumner in *British and Beningtons, Ltd. v. North Western Cachar Tea Co.*, [1923] A.C. 48 at 71–72 (H.L.), cited in *RS II Productions Inc. v. B.C. Trade Development Corp.*, 2000 BCCA 674 at para. 45:

I do not think...that a buyer, who has repudiated a contract for a given reason which fails him, has, therefore, no other opportunity of defence either as to the whole or as to part, but must fail utterly. If he had repudiated, giving no reason at all, I suppose all reasons and all defences in the action, partial or complete, would be open to him. His motives certainly are immaterial, and I do not see why his reasons should be crucial.

[Emphasis added.]

[248] The plaintiff referred the court to *Contura Building Corporation v. 0772551 Ltd.*, 2018 BCSC 466 [Contura], for the principle that the defendant in that case could not terminate the contract under GC 7.1.2 for reasons not included in the notice. However, *Contura* was not a case in which a termination notice was given under the common or general law entitlement to repudiate a contract. There, notice had been issued under GC 7.1.2, but the notice failed to comply with the terms of that clause. In this case, the clause was not invoked and *Contura* does not assist plaintiff.

[249] The defendant was not precluded from exercising “a right or remedy the owner may have” at the time when it alleged the more serious repudiation or fundamental breach of the contract. In this case, the contractual remedies are not mutually exclusive and it was open to the defendant to choose between its

contractual right to give notice to achieve corrections to unsatisfactory work under the contract or to terminate the contract because the plaintiff's breaches were sufficiently serious to deprive the defendant of the substantial benefit of the contract. Thus, the plaintiff's argument on this question cannot succeed.

Alleged Breach of the GMP Clause

[250] The defendant argues that the plaintiff informed it in July 2019 that the estimate of the defendant's cost to complete the Project had increased to \$1.9 million instead of the \$1.5 million set out in the GMP Clause.

[251] Ms. Murray testified that the reason the defendant terminated the contract was the fact that she anticipated the plaintiff intended to charge more than \$1.5 million to complete the Project. She recognizes the defendant did not give the required "immediate notice" to the plaintiff of this alleged breach of the contract.

[252] The defendant argued that the plaintiff had already charged the defendant for costs exceeding \$1.5 million, in breach of the contract. Alternatively, the defendant argued the plaintiff intended to require the defendant to pay all costs required to complete project without any regard to its guarantee that the defendant would pay only \$1.5 million, with the plaintiff paying any costs over that amount.

[253] Thus, the defendant claims that issuance of the \$1.9 million budget estimate in July 2019 budget was an unequivocal assertion—the plaintiff would not complete the Project at a cost within the GMP. Therefore the plaintiff was repudiating the contract by "evinced an intention not to be bound" by its guarantee to pay for any costs exceeding \$1.5 million – the very thing that was a core benefit to the contract.

[254] On the basis of the July 2019 budget, absent the GMP the only way the Project could have been completed by October 2019 would likely have required the defendant to find an additional \$400,000 in financing.

[255] The defendant argued the plaintiff was repeatedly told that \$1.5 million was a hard cap and there were no other funds if the cost exceeded the GMP. The

defendant argued the plaintiff's anticipatory breach of the contract would have deprived the defendant of the central benefit of the contract: a floating lodge within a \$1.5 million budget.

[256] It is important to understand the terms of this contract and how those terms operate within the contract on this point. The GMP Clause stipulated that the "price of the services" and the "price of the work" were guaranteed by the plaintiff not to exceed \$1.5 million subject to unrelated adjustments. The definition of "price of the services" included the construction manager's fee for services (12.5% of the charges actually incurred in performing services).

[257] The "price of the work" included the construction manager's fee and the cost of the work. This was determined by Article A-7, which defined the "actual costs incurred by the construction manager in performing the work" and was limited to the actual costs of listed items.

[258] After taking into account my decision above to grant the defendant rectification of the contract, the cost of constructing the lodge was guaranteed not to exceed \$1.5 million including the expenses paid directly by the defendant for amounts that would otherwise have been "expenses" incurred by the construction manager in performing the work (A-7.1).

[259] It is apparent that by August 8, 2019, the defendant had paid approximately \$577,000 of the "work" expenses (including \$ 430,000 for construction of the float), which would have reduced the remaining guaranteed cost of the Project to \$923,000. When the defendant terminated the contract, the plaintiff had invoiced the defendant \$808,000 for work performed at that point. Thus, at the date of termination, the actual amount expended on the Project was \$1,385,000. The defendant was neither invoiced nor had it paid \$923,000 and the guaranteed price had not been exceeded.

[260] In the July 2019 budget, the cost to the defendant to complete the project was recorded as \$28,005 and the cost to the plaintiff to complete was \$621,007.08. This

budget did not expressly or implicitly deal with the GMP aspect of the contract, but it was clear on August 8, 2019, that the plaintiff's communication to the defendant did not suggest that the defendant's costs to construct the Lodge would exceed \$ 1.5 million. At that point the total cost incurred was only \$1,385,000.

[261] Contrary to the defendant's assertions, the plaintiff had not informed the defendant that the Project would now cost the defendant \$1.9 million. The plaintiff had not overbilled the defendant for amounts in excess of the GMP, nor had it indicated an intention to charge the defendant for any amount in excess of the GMP when it issued the most recent budget estimate to complete the Project at that time. Therefore, the plaintiff had not "failed to complete" the construction project for \$1.5 million, nor had it evinced an intention to not be bound by the contract or the GMP.

[262] The defendant's claim that the plaintiff "failed to complete the Lodge within the GMP" at the date the contract was terminated is false. The plaintiff's promise in the contract was to guarantee that the Lodge would be completed and delivered to the defendant for a cost not exceeding \$1.5 million provided that if there were costs above that amount, the plaintiff would pay those costs.

[263] It is important to remember that the defendant previously extended the date for delivery of the Lodge to October 2019. There was nothing in the evidence to suggest that the plaintiff would not or could not deliver the Lodge to the defendant by or around that date. It is significant that the contract did not contain a "time of the essence" clause.

[264] The defendant insisted that the plaintiff was bound by the GMP Clause but throughout neglected to consider the plaintiff's promise to pay any costs over the GMP. It is necessary to take into account the entirety of the contract terms in interpreting the obligations between the parties. On a clear and objective interpretation, the GMP Clause was meant to convey the plaintiff's guarantee that the Project could be completed for \$1.5 million but that if not completed for that price, the plaintiff was obliged to continue to construct and deliver the Lodge to the defendant at a cost to the defendant that did not exceed \$1.5 million. The contract is

abundantly clear that any cost in excess of \$1.5 million to complete the Project would be paid by the plaintiff without reimbursement from the defendant.

[265] Thus, until the Project was completed, the plaintiff was obliged to continue working under the terms of the contract and to bear any costs that exceeded \$1.5 million.

[266] Although the July 2019 budget projection was \$1.9 million for the cost of the work, it was the plaintiff facing an estimated burden of \$400,000 to complete the work and the plaintiff that was suggesting cost savings that could be achieved.

[267] The plaintiff asserted in this litigation that the GMP would not become effective until the defendant had provided all of the contract documents referred to in Article A-3. The plaintiff viewed the contract and relationship with the defendant as a type of evolving process that could not reliably assess the costs to build the Lodge until all of the details of the plan's specifications and selections were finalized. It contends it would be commercially irrational to conclude that the guarantee it gave in 2018 would be binding more than one year into the future with so little reliable information in hand when the contract was signed.

[268] The plaintiff argues that when the parties signed the contract and immediately thereafter, the defendant had not produced the drawings, project specifications, and selections it was required to produce and both parties knew that the GMP was an aspiration but not a term of the contract.

[269] Mr. Stevenson was an experienced builder and was very familiar with the CCDC 5B form of contract. The plain meaning of the words in the GMP Clause are unambiguous. Ms. Murray had suggested the parties enter into two contracts: the first would take the parties through completion of the design and specifications and the second would have governed the construction. The plaintiff did not agree with that approach. Instead, the plaintiff guaranteed that the Lodge could be built for \$1.5 million.

[270] As I adverted to above, the signed contract was missing any mechanism to resolve tensions between the parties if the defendant's choices might have caused the total cost of the Project to balloon above \$1.5 million. The parties had discussions about the cost of some features, including door handles, and recommendations were made to choose less expensive products in an effort to protect the budget. The parties frequently discussed opportunities to reduce costs. There was no evidence of disputes between the parties concerning expensive choices the plaintiff believed would unreasonably cause problems with the budget and no explanation of the dramatic increase in the budget between December 2018, May 2019, and July 2019 was provided.

[271] In the end, I find the plaintiff gave a clear and unqualified guarantee that construction costs would not exceed \$1.5 million and, if those costs exceeded the GMP, the plaintiff was bound to pay those costs. If the July 2019 budget rose to \$1.9 million and these costs had eventuated, the plaintiff would have been liable for the difference.

[272] On the question of the allegation that the plaintiff breached the contract by failing to complete the Lodge within the GMP, I find that the defendant wrongly construed the circumstances existing on August 8, 2019, when it purported to accept the plaintiff's repudiation of the contract without a lawful basis. Providing a \$1.9 million budget could not have constituted an anticipatory breach in light of my findings on the GMP Clause. The defendant's actions breached the contract and the plaintiff was discharged from any further obligation to perform under the contract for that reason.

Repudiation of the Contract/Fundamental Breach

[273] The other issue in this trial is whether the defendant was legally entitled to declare that the plaintiff had repudiated the contract by evincing its intention not to be bound by the contract (and thus whether the defendant was in a position to accept that purported repudiation).

[274] The defendant did not rely on any of the legal principles relevant to fundamental breaches of contract. The legal framework dealing with questions of fundamental breaches of contracts and repudiations of contracts by actions are distinct. These differences focus on whether there has been a failure to perform a primary obligation under the contract (fundamental breach) or whether the actions or words of one party demonstrate a clear and unequivocal intention to refuse to perform its obligations under the contract (repudiation). In each case the contract is not terminated automatically; rather, the innocent party can elect either to affirm the contract or to treat the contract as at an end and claim damages from the breaching party, who remains liable to perform contractual obligations incurred up to the time the innocent party accepts the repudiation.

[275] The Court of Appeal in *Mantar Holdings Ltd. v. 0858370 B.C. Ltd.*, 2014 BCCA 361, discussed the considerations when a fundamental breach of a contract is claimed and where repudiation based on a party's expressed intention not to be bound by a contract. The following analysis is apposite to this case:

[11] Although circumstances constituting a fundamental breach of contract may sometimes also constitute a repudiation of the contract, the doctrines of fundamental breach and repudiation are distinct. A fundamental breach of a contract occurs where the failure of one of the contracting parties to perform a primary obligation under the contract has the effect of depriving the other party of substantially the whole benefit which the parties intended that party to receive: see *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 at 499, 57 D.L.R. (4th) 321. Repudiation occurs when a party to the contract, either by words or conduct, evinces an intention not to be bound by the contract: see *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at para. 40, 178 D.L.R. (4th) 1. The remedy for fundamental breach and repudiation is effectively the same – the innocent party may elect to terminate the contract or to accept the repudiation bringing the contract to an end. In either case, the parties are discharged from future obligations under the contract, and the innocent party may look to the other party for damages.

[276] Although there are distinctions between “fundamental breach” and repudiatory conduct, the discussions around the former assist in clarifying the defendant's position in this proceeding.

[277] In *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 at 499, 1989 CanLII 129, the Court described fundamental breach of a contract as occurring when “the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract” (emphasis in original). Inherent in a finding of fundamental breach is a conclusion that the thing bargained for was not provided; see also *Seagate v. Halifax*, 2024 NSCA 38 at para. 61.

[278] In *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, the Supreme Court of Canada expressed the view that weighing the gravity of fundamental breaches engages the proper interpretation of the entire contract in light of its purposes and commercial context.

[279] The defendant relies on a principle that fundamental breaches may be found in the cumulative effect of numerous breaches, even where each breach individually would perhaps not be fundamental: see *Kusmann v. AT & T Capital Canada Inc.*, 2002 BCCA 281 at para. 16.

[280] Although the defendant did not advance its counterclaim on the basis of the plaintiff’s fundamental breach of the contract, it referred to an anticipatory breach, which could be considered fundamental insofar as the defendant claims the plaintiff had resiled from its obligations under the GMP and its responsibility for costs exceeding the GMP.

[281] The analysis of the defendant’s claim that the plaintiff had fundamentally breached the contract takes into account the four-part test referred to by Joyal A.C.J.Q.B. (as he then was) in *Pioneer Hi-Bred International, Inc.* at para. 111, and referred to by Abrioux J. (then of this Court) in *Contura*. In that regard the following should be considered:

1. a fundamental breach can be described as one that has “frustrated the commercial purpose of the entire venture”;

2. the question of a fundamental breach must be reviewed contextually depending on the particular contract in question;
3. in determining the issue of fundamental breach, the court needs to consider the terms of the contract, the intended benefit to the innocent party, the purpose of the contract, and the extent to which the loss incurred by the innocent party can be remedied adequately by an order of damages; and
4. the concept of fundamental breach seems to transcend the normal issues of contractual interpretation insofar as it involves investigating the underlying nature and purpose of the contract into which the parties have entered and the respective benefits designed to be maintained or ensured by agreement.

[282] The principles to be considered in cases of alleged repudiation of contracts were discussed in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, 1999 CanLII 664:

40 Repudiation, by contrast, occurs “by words or conduct evincing an intention not to be bound by the contract. It was held by the Privy Council in *Clausen v. Canada Timber & Lands, Ltd.* [[1923] 4 D.L.R. 751], that such an intention may be evinced by a refusal to perform, even though the party refusing mistakenly thinks that he is exercising a contractual right” (S. M. Waddams, *The Law of Contracts* (4th ed. 1999), at para. 620). Contrary to rescission, which allows the rescinding party to treat the contract as if it were void *ab initio*, the effect of a repudiation depends on the election made by the non-repudiating party. If that party treats the contract as still being in full force and effect, the contract “remains in being for the future on both sides. Each (party) has a right to sue for damages for *past or future breaches*” (emphasis in original): *Cheshire, Fifoot and Furmston’s Law of Contract* (12th ed. 1991), by M. P. Furmston, at p. 541. If, however, the non-repudiating party accepts the repudiation, the contract is terminated, and the parties are discharged from future obligations. Rights and obligations that have already matured are not extinguished. Furmston, *supra*, at pp. 543-44.

[283] In this case, the Court is confronted with an argument that the plaintiff’s actions or inactions after the signing of the contract amounted to a repudiation of the parties’ bargain. The defendant contends that the plaintiff evinced an intention not to be bound by the agreement based on 10 items enumerated below and says it was substantially deprived of the benefit of the bargain the parties made.

[284] In addition, the defendant claims that the plaintiff had, in effect, refused to build the Lodge at a cost to the defendant not exceeding \$ 1.5 million.

[285] The defendant claims it was the innocent party throughout the parties' relationship and was reliant on the plaintiff to perform its obligations to ensure the successful completion of the Project. In the end, the defendant claims it was entitled to accept the plaintiff's behaviour as expressions that it no longer intended to perform the contract in accordance with its terms; by expressing this intention to no longer be bound by the contract, the plaintiff had repudiated the agreement. After terminating the parties' mutual ongoing obligations, the defendant as innocent party remained entitled to damages. In this case, those damages are the difference between the GMP and its actual costs in completing construction of the Lodge had the contract been performed.

[286] The defendant's claim that the plaintiff repudiated their contract must be proved by clear and unequivocal evidence: *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp.*, 2007 BCCA 88 at para. 109; *Kuo v. Kuo*, 2017 BCCA 245 at paras. 39–40.

[287] Whether the impugned conduct can be construed as repudiation of the agreement involves an objective inquiry that takes into account the context and the circumstances that would convince a reasonably informed person that the allegedly repudiating party no longer intended to perform the contract in accordance with its terms: *Clarity Architectural Products Inc. v. Gryphon Corporate Construction Ltd.*, 2026 BCSC 699 at para. 82; *Chitchot v. 0998823 B.C. Ltd.*, 2025 BCSC 742 at para. 112, citing *Spirent Communications of Ottawa Ltd. v. Quake Technologies (Canada) Inc.*, 2008 ONCA 92 at para. 37, leave to appeal to SCC ref'd 32550 (17 July 2008).

[288] Where one party alleges the other party expressed an intention not to be bound by the contract, the conduct in issue must be "serious" and "must deprive the innocent party of substantially the whole benefit of the contract" before it will be said to amount to repudiation: *Kaur v. Bajwa*, 2020 BCCA 310 at para. 14, citing *Remedy Drug Store Co. Inc. v. Farnham*, 2015 ONCA 576 at para. 50. Again, while fundamental breach and repudiation are distinct doctrines, both require that the party

in breach deprived the innocent party of substantially the whole benefit of the contract (or, put another way, both require that the conduct goes to the root of the contract). The innocent party must prove that the other party's actions clearly and unequivocally deprived the innocent party of substantially the whole of the benefit of the contract and of the practical ability to insist on performance: *Parker Cove Properties Limited Partnership v. Gerow*, 2024 BCCA 316 at para. 27.

Analysis

[289] The defendant contends that the plaintiff's refusal to "honour the GMP Clause" and further actions cumulatively constituted a repudiation of the contract, which repudiation was accepted by the defendant. I have addressed the issue of the plaintiff's alleged failure to abide by the GMP Clause above, finding that no such breach occurred.

[290] The question is whether the plaintiff's other actions during the period starting March 28, 2018, and ending August 8, 2019, "evinced an intention" to not be bound by the terms the contract to the extent that substantially the whole of the benefit of the contract was lost to the defendant.

[291] The defendant listed the following items it contends form the legal basis for purportedly accepting the plaintiff's repudiation of the contract on August 8, 2019:

- a) The plaintiff invoiced the defendant without providing a construction schedule indicating the time-sensitive major activities of the work. It failed to provide sufficient detail of critical events and their interrelationship such that the work could be performed in conformity with the "contract time", thereby breaching GC 3.5.1.
- b) The plaintiff commenced the construction phase of the Project without seeking approval from the defendant, nor notifying the defendant in advance.

- c) The plaintiff sent a series of 5 flawed \$1.421 million budgets between June 23, 2018, and October 24, 2018, that misrepresented the financial state of the Project.
- d) The plaintiff misled the defendant by informing it that there was a deal in place to secure production of the float at a good price when in fact no deal was in place, and nothing was secure.
- e) The plaintiff's delay in securing a float caused serious financial and scheduling risks to the Project. Further, the plaintiff took active steps to conceal the fact of delay to the defendant for approximately one month.
- f) The plaintiff failed to send budgets to the defendant, despite repeated requests, between October 24, 2018, and March 12, 2019.
- g) The plaintiff significantly overbilled the defendant beyond its contractual entitlement under the contract.
- h) The plaintiff informed the defendant in July 2019 that the project would now cost \$1,900,000 instead of the \$1,500,000 maximum set out in the GMP Clause.
- i) The plaintiff informed the defendant in July 2019 that the Lodge was scheduled to be completed in August when it knew, in mid-June, that August 19 was the start date for finishing work.
- j) The plaintiff stopped working on the Project.
- k) The plaintiff threatened to cut the Lodge loose into Saanich Inlet.

[292] I will address the defendant's submissions that each of these complaints evinced an intention by the plaintiff not to be bound by the contract. The defendant did not advance submissions that any single action of the plaintiff constituted a "fundamental breach" of the contract; rather, the thrust of the defendant's argument is that these failures viewed cumulatively deprived the defendant of substantially the

whole of the benefit of the contract. I will address each of the defendant's complaints in turn before proceeding to consider their cumulative impact.

[293] There was no evidence to suggest that the plaintiff had committed any anticipatory breach of the contract by refusing to continue constructing the Lodge at a cost to the defendant within the GMP.

The plaintiff invoiced the defendant without first providing an adequate construction schedule, meaning the work could not be performed in conformity with the "contract time" as contemplated by GC 3.5.1

[294] GC 3.5.1 provided that the plaintiff would submit a construction schedule indicating the timing of major activities of the work before its first application for payment. The work is defined as "the total construction and related services to be performed by the construction manager...but does not include services".

[295] GC 3.5.1 applies to applications for progress payments for work under GC 5.4. The contract did not require a construction schedule to be submitted when the only application for payment concerned the services and not work. Budgets were not prerequisites to invoicing for services performed.

[296] The contract documents defining the work were not produced in complete or final form until May 10, 2019, when Ms. Davies-Long produced the finalized interior design plans and specifications, which were prerequisites to producing a construction schedule. There were charges for construction services performed prior to the finalizing of these documents.

[297] Nevertheless, the plaintiff produced preliminary construction schedules in August 2018 and September 2018. The second schedule contained Mr. Lohsen's critical path email setting out the construction schedule going forward. Prior to September 20, 2018, the plaintiff had invoiced only for the fixed-fee portion of its entitlement before any Work had been performed. The first invoice issued for work was provided November 11, 2018, which was after the first and second preliminary schedules were submitted.

[298] This allegation is, for a number of reasons, incapable of constituting an indication that the plaintiff did not intend to be bound by the contract terms. In particular, the “contract time”, defined in the contract, is not specified in the agreement except to the extent that the services were to commence by November 15, 2017, and continue in accordance with any schedule provided under Article A-3.

[299] There was no “time of the essence” clause in the contract, nor was there any specific date for completion of the Lodge construction although the defendant had initially discussed completion for its “season” beginning in the spring of 2019.

[300] The plaintiff’s aspiration for completion of construction of the Lodge by May 2019 was hampered by the defendant’s inability to produce the contract documents required from it under the contract. Moreover, any oral commitment for finishing the Project was abandoned by the defendant when it unilaterally decided to change its desire for completion of the Lodge from May 2019 to October 2019 and without regard to the impact of this change on the plaintiff.

[301] The plaintiff’s first invoice after March 28, 2018, was dated June 30, 2018, which included a small sum for costs and construction management fees. By August 31, 2018, the plaintiff had invoiced the defendant for \$56,987.

[302] It was the defendant’s obligation to provide architectural and structural drawings and specifications. It was contemplated from the outset that all documents would be produced during Phase 1 of the Project. The defendant contends the plaintiff failed to meet its obligations under Article A-4 including GC 1.5.1 – Contract Documents because it invoiced the defendant without providing a construction schedule dealing with major activities and critical events as required by the contract.

[303] When the plaintiff’s first invoices were delivered, the defendant had not produced the requisite architectural or structural drawings, project specifications, project schedule, or project budget. The architectural engineering aspects of the project were not the responsibility of the plaintiff and were prerequisites to producing a comprehensive construction schedule. In the absence of adequate plans and

drawings, it would not have been possible for the plaintiff to have provided the details ascribed in G.C. 3.5.1.

[304] The defendant's design processes were not completed until May 2019 when the last of Ms. Davies-Long's interior design plans were delivered. Any suggestion that the plaintiff assumed responsibilities as a designer of the project is unfounded in the evidence.

[305] Moreover, the defendant did not object to payment of the plaintiff's invoices on the basis that the plaintiff had not provided schedules at that time as required under the contract. Nor did the defendant comply with GC 2.1.8 requiring it to "immediately notify the construction manager" if the owner observes or otherwise becomes aware of any default or defect in the Project or any nonconformity with the requirements of the contract.

[306] Thus, it is clear the defendant was aware that the plaintiff proposed to begin pre-fabricating components of the Lodge and never objected to that work beginning. Any actions taken by plaintiff at the time of the first and subsequent invoices that may not have been in strict conformance with Article A-3 did not constitute a repudiation of the contract by either party.

The plaintiff had commenced the construction phase of the Project without seeking approval from the defendant, nor even notifying the defendant in advance

[307] The defendant argued that the plaintiff had commenced the construction phase of the Project without seeking its approval or even notifying the defendant in advance. On July 24, 2018, the defendant was informed of the plaintiff's plan to pre-fabricate walls before the arrival of the float in order to mitigate delays. On that day, Ms. Murray stated she was terrified that the project would not be complete for their season starting in May 2019; the defendant's entire season for 2019 was dependent on delivery by this date. Prefabrication of the exterior walls began in October 2018, around the time when the architectural plans for construction were made available.

[308] Article A-3 provided that cost and schedule would be confirmed following each phase of work. The parties were also required to confirm project feasibility after each phase of work was complete and before work began on subsequent phases of the Project.

[309] It is clear that neither party considered that the phasing provisions in Article A-3 should impede progress on the Project as the defendant was hoping for completion of the Project by May 2019. Although the plaintiff took steps to move the Project forward without conforming to the contractual term that work under one phase shall not take pace until the parties had signed off on the completion of the prior phase, the defendant was at all times after March 28, 2018, concerned with completion for their season beginning May 2019.

[310] It is most likely the parties acceded to moving on to subsequent phases without first concluding the prior phase because the defendant was anxious to move forward with the Project and needed to have construction finished by May 2019. Moreover, Ms. Davies-Long's dilatory production of contract documents, including plans and specifications, was impeding the plaintiff's ability to move the Project forward.

[311] As was apparent since March 28, 2018, no part of the work had been started due to delays in obtaining plans. Mr. Stevenson wrote to the Murrays July 19, 2018, explaining where things stood in the schedule and suggesting a meeting to go over their budget and other matters. He also sent a list of milestone dates, some of which were not realistic at the time. He indicated an estimated delivery of the finished Lodge would be March 28, 2019.

[312] The defendant's perception that the plaintiff had evinced an intention not to be bound by the contract when it proceeded to commence construction of the exterior walls before all of Ms. Davies-Long's production of plans and specifications was not accurate or correct. More accurately, the defendant was satisfied with the plaintiff's decisions moving forward to phases 2 and 3 without signing off on completion of the previous phases. In the face of Ms. Murray's anxiety about completing the Project, it

was disingenuous to suggest the plaintiff's steps taken to advance the Project before all phase 1 steps in been completed could be construed as its intention not to be bound by the contract. Nothing in the plaintiff's actions were "clear and unequivocal" gestures that amounted to repudiation of its obligations under the contract.

The Plaintiff had sent a series of 5 flawed \$1.421 million budgets between June 23, 2018, and October 24, 2018, to the defendant that misrepresented the financial state of the Project

[313] There was no definition or clarity in the required information flow from the plaintiff to the defendant. Budgets are estimations of incomes and expenditures over specific time periods. Budget-like documents were prepared by the plaintiff beginning in 2017 (reflecting money spent and estimations of future costs), but little reliable background information supported Mr. Stevenson's estimates prepared at the outset. At that time, his estimates were based on his experience in construction and timber frame building.

[314] The contract described the plaintiff's obligation to "assist in design and budgeting for construction of the new Lodge building". It also contained a requirement that the plaintiff "create financial tracking documents, and report to owner on financial health of project on regular intervals".

[315] As the Project proceeded, the financial information became available to the plaintiff and was incorporated into budgets or discussions with the defendant. The budgets sent to the defendant were in a form that included references to costs already incurred and costs anticipated but not incurred. Thus, the document was not a true budget but was intended to communicate a financial status of the Project from time to time. It was open to the plaintiff to assess progress in the Project and decide when there were sufficient changes to report to the defendant. There were numerous emails exchanged and discussions between the parties and Ms. Davies-Long that would have informed the defendant on financial issues.

[316] The contract did not contain any specific terms concerning budgets except Article 3.1 that required "report[ing] to the owner on financial health of the project on

regular intervals”. The contract defined “Construction Cost Estimate” as documents that would be provided based on the class and phase of the Project. Importantly, the plaintiff was obliged to inform the defendant if construction cost estimates might exceed a Project budget. This first occurred in December 2018 and again in March and July 2019.

[317] In January 2018, the plaintiff supplied a budget-like document showing total cost for the project of \$1,996,584. By January 22, 2018, a new budget was produced at a value of \$1,495,854. A budget-like document dated June 14, 2018, was sent to Ms. Murray, indicating a cost to complete of \$1,421,847 (with \$250,000 allocated to the float). At that point, \$21,241 had been invoiced to the defendant.

[318] On June 30, 2018, a budget-like document was sent to Ms. Murray with no changes to the estimated costs of construction. Another report dated July 31, 2018, contained the same estimated cost to complete the project but reflected other expenses invoiced to the defendant.

[319] The next budget-like document produced by the plaintiff was dated September 19, 2018. This document reflected a total Project lockup cost of \$755,403 not including \$250,000 (January 2018), the cost to be paid by the defendant for the float. In a November 10, 2018, report “as of 30 September 2018” the estimated costs of the Project remained at \$1,421,847 (including float costs at \$250,000). However, at that juncture \$112,231 had been invoiced by the plaintiff.

[320] On October 17, 2018, Mr. Stevenson wrote to Ms. Murray and discussed the lack of final plans available at that time. He said without final plans “we cannot confirm we are working within the budget”. He was seeking a finalized set of specifications for interior finishes and mechanical and electrical specifications in order to assess the budget. He also warned Ms. Murray that they needed to obtain the final specifications, absent which there would be continuing uncertainty about final costs.

[321] An October 30, 2018 budget was prepared and showed a “cost to lock-up” at \$1,479,087.

[322] The next budget sent to the defendant Ms. Murray was dated December 12, 2018. She acknowledged receiving this budget from the plaintiff in December 2018. This December 4, 2018, budgets contained a report captioned “Lock Up Only” and a separate document “to finishing” indicating an amount of \$290,508 required to finish the Project. These documents forecast a total cost for the Project at \$750,430 to lockup and \$290,508 to finishing, not including the cost of the float. By this juncture, \$430,000 had been spent on the float and the total costs were estimated at \$1,513,000.

[323] The plaintiff followed up with Ms. Murray and on December 21, 2018, Mr. Lang reported to Ms. Murray that:

In order to keep the information flowing Jake [Zaiss] will follow-up with mechanical quote that came in this week, the most notable items to discuss finalizing the lockup budget. It is slightly over budget in relation to original scope and substantially overbudget when the hydronic heating is factored in. I suggest you review it and follow up with us after the break to discuss ways of finding costs savings.

[Emphasis added.]

[324] This email to Ms. Murray was sent nine days after the plaintiff’s December 12, 2018, budget estimating costs to lockup and costs to finish the Project.

[325] Contrary to the defendant’s submissions that the plaintiff had failed to send budgets to the defendant despite repeated requests between October 24, 2018, and March 2019, there were no requests for budgets between December 21, 2018, and March 1, 2019. Further, the defendant ignored the fact Ms. Murray had received the December 2018 budget.

[326] On March 2, 2019, Ms. Murray requested information regarding the budget for the Lodge. She recognized that the process of obtaining specifications was progressing and the parties might be getting closer to a fully informed budget. On March 12, 2019, the plaintiff issued a budget summary and a projected budget for

the Project at \$1,713,427. Ms. Murray requested a budget in a different format to allow her to cross-reference the increase in \$200,000 dollars for the Project. She was provided an estimate sheet in the previous format on March 13, 2019.

[327] On May 8, 2019, Ms. Murray asked for an updated budget for a proposed meeting on May 14. On May 14, the defendant received a cost to complete report similar to the March 2019 budget; this budget was contained in its May 2019 report, also estimating costs to complete the Project exceeding the GMP. The contract also required the plaintiff to take steps to recommend corrective actions, which presumably included efforts to find savings.

[328] The next cost to complete report was issued to the defendants in July 2019, estimating a total of \$1,908,656 to finish the Lodge.

[329] On July 10, 2019, Mr. Zaiss provided a list of items that previously were contained in the budget numbers as “allowances” but where details were expected to be provided. Mr. Lang wrote to the defendant on July 16, 2019, outlining a number of expenses that could result in cost savings of between \$70,000 and \$75,000. On July 11, 2019, Ms. Murray said the defendant was uncertain of its ability to finish the Project within the budget. Mr. Stevenson explained on July 15, 2019, that absent availability of the required finalized designs their ability to estimate costs and schedules was limited.

[330] Even if the plaintiff’s performance insofar as providing budget information was concerned it was clear that from the outset of the Project and the plaintiff’s involvement until June 2018, amounts included in various budgets comprised of estimates based on Mr. Stevenson’s judgment. However, without completed plans and specifications, more reliable budget estimations were hampered. The defendant argues that the plaintiff did not produce accurate updated budgets.

[331] The defendant was provided a budget for the cost of completion as of July 10, 2019 (\$1,908,656). This report was similar to the cost to complete report from March 12, 2019 (\$1,706,010). Each of these documents contains a column “Kinsol Cost to

Complete”. The plaintiff’s cost to complete was \$39,330 in May 2019 and \$28,500 by July 10, 2019.

[332] In this litigation, the defendant relies on the contractual provision that the plaintiff was responsible for any costs exceeding \$1.5 million. Ms. Murray did not object to the budgets delivered in March 2019; she asked questions about the differences between the it and the December 2018 budget but did not complain about the supply of financial information from December 2018 to March 2019. The defendant did not allege plaintiff’s performance was not conformity with the contract any of the requirements of the contract it was required to do under by GC 2.1.8.

[333] Under Article A-3 the defendant was always at liberty to bring a third-party evaluator to assess the cost of work should the need arise; this option was never taken by the defendant.

[334] The plaintiff’s format for preparing budgets changed during the course of the Project. There was a continuing stream of plans presented by Ms. Davies-Long for the defendant incorporating changes which impacted the plaintiff’s budgeting for the project.

[335] In May 2019 Ms. Davies-Long conceded she had been delinquent in preparing and delivering plans and specifications. The plaintiff frequently warned the defendant that delays in obtaining final plans or making changes in plans caused delay and increased expense.

[336] In the course of the relationship between the parties, budgeting and estimates were, in part, dependent on plans and specifications that the defendant was required to produce. Regular reports of costs spent and anticipated costs were not produced on a scheduled basis; the Project started with estimates from Mr. Stevenson and evolved throughout the Project as information and planning became available. The defendant complained that budgets were inaccurate or deceiving when they were based on estimates that depended on complete plans and information.

[337] For example, it was clear that by December 2018 the budget-like document reflected costs that exceeded the GMP with the potential of costs substantially over budget due to the hydronic heating costs. Throughout much of 2018 and 2019, the parties discussed strategies and ways to reduce costs or increase allowances with obvious concerns for the GMP.

[338] Although the defendant contends there were flawed budgets that misrepresented the financial state of the project, the evidence presented did not persuade me that documents produced by the plaintiff, often based on estimates at times before plans were issued, were indications that the plaintiff was misleading the defendant or did not intend to be bound by the contract.

[339] The overarching factor relating to “budgets” was that the costs to the defendant were guaranteed not to exceed \$1.5 million and the plaintiff was responsible for any costs above that amount.

[340] The behaviours of the parties concerning the budget and costs has convinced me that each party was under an obligation to reduce costs wherever possible to ensure the Project could be completed within the GMP. However, as noted above there was no contractual provision to address circumstances where either party insisted that a proposed cost could not be agreed upon. The contract was clear in that the plaintiff was responsible for paying any costs exceeding the GMP necessary to complete construction of the Lodge. Nothing in the evidence suggests to me that the parties had any disagreement about costs in relation to decisions or specifications issued by Ms. Davies-Long.

[341] Differences on these budget issues did not emerge before August 8, 2019. The contract does not contain any description of the standards or quality of components of the Project that were agreed upon. The parties had a discussion and understanding that the Lodge was to be used by high wealth people and the finishings would be “high-end and refined”.

[342] The plaintiff had made proposals that it believed could have operated to reduce costs substantially. The defendant was receptive to proposals to reduce costs, although before August 8, 2019, there had been no resolution on the cost-reduction issue and at that time, the plaintiff remained liable to pay any costs exceeding the GMP for the construction project.

[343] In my view, the plaintiff did not demonstrate any clear and unequivocal refusal to meet its obligations under the contract through its budgeting practices. The parties were engaged in cooperative communications addressing issues including budget concerns. In light of all of the interactions between the parties as reflected in the many hundreds of emails exchanged between March 28, 2018, and July 2019, nothing evinced the plaintiff's clear and unequivocal intention not to be bound by the contract, most importantly its obligation to pay construction costs exceeding \$1.5 million dollars. Shortcomings in the plaintiff's production of financial information and warnings concerning budget issues did not deprive the defendant of substantially the whole subject matter of the contract insofar as budgeting was concerned.

[344] The defendant does not point to any adverse consequences experienced as a result of a lack of information concerning the evolution of the financial picture for the Project. I infer that the defendant was not overly concerned because the GMP assured it that its costs would not exceed \$1.5 million.

[345] In the end, the budgets and financial health of the project were discussed and acted on by the parties. Nothing in the budget-like statements issued from time to time nor anything in the plaintiff's efforts indicated clearly and unequivocally that the plaintiff did not intend to be bound by the terms of the contract. To the contrary, the plaintiff remained focused on the float construction that was eventually delivered in November 2018 and was pressing on to advance the Project to a lockup state and readiness for the final completion work.

The plaintiff misled the defendant by informing it that there was a deal in place to secure production of the float at a good price when in fact no deal was in place, and nothing was secure

[346] The defendant contends that the plaintiff acted in a misleading manner by writing to the defendant that it “[had] a deal in place now” and that it “did a thing to secure the closest float production at a good price”.

[347] Mr. Stevenson conceded in cross-examination that there was no deal for a fixed price for construction of the float when he wrote his July 24, 2018, email. Mr. Stevenson had made contact with Brian Thacker, the proprietor of PIM, a float builder, early in 2018 to construct the defendant’s float.

[348] It was clear the defendant’s plans for building the float remained tentative well into July 2018. Mr. Work, the engineer with Herold Engineering, met with the owner of PIM on May 13, 2018, and confirmed the construction methodology to be used for the float. The proposed float builder wanted to have plans before issuing a quote.

[349] Mr. Stevenson had obtained a rough estimate concerning possible cost from Mr. Thacker based on a 3500 square foot surface and costs of \$90–\$100 per square foot, but no firm agreement had been reached.

[350] Mr. Stevenson was attempting to establish a relationship with PIM. He believed the two companies were a “good fit” for a future relationship. It is clear that at this stage of the float planning details and engineering were difficult problems (including design finalization) delaying the plaintiff negotiations for the price of the float and commissioning construction.

[351] This became more problematic when by early August 2018, PIM indicated that the plaintiff had lost the window of opportunity to engage it to construct the float; the plaintiff immediately set about a search for an alternate construction company.

[352] It is clear that Mr. Stevenson’s assertion of a deal in place was an aspiration and not a certainty, which in part was influenced by the design shortcomings and uncertainty at that time. If his assertion could have misled the defendant concerning

the schedule for completion of the float, the plaintiff was not in a position to obtain a quote from PIM before obtaining final engineering plans that were not completed until late August 2018. The plaintiff needed further instructions from the defendant concerning the aspects of the float relating to hatches and a potential wine cellar discussed with the Murrys. Without updated plans the plaintiff was unable to obtain pricing.

[353] When the plaintiff learned that the proposed float builder was unable to accommodate the Project on August 14, 2018, it immediately began searching for a new float builder. The plaintiff was surprised when PIM declined to accept an engagement to build the float. I accept that the plaintiff was overoptimistic in communicating information about PIM's involvement in the float construction. In my view, its report to the defendant on his expectations regarding the float construction did not demonstrate any intention to not be bound by the contract or to proceed as efficiently as possible to obtain float builder.

The plaintiff was responsible for considerable delay in securing the float; additionally, the plaintiff took steps to conceal delay from the defendant

[354] The defendant contends that the plaintiff was dilatory in obtaining quotations for a float and created a risk of increased cost and delay. The defendant contends the plaintiff deliberately deceived it when the delay became apparent and the plaintiff consciously withheld information from the defendant for approximately one month.

[355] The defendant contends that the delay in the commencement of float construction was caused by the plaintiff's failure to take steps to secure a contract with PIM that was identified as the candidate in early 2018 to build the float. The plaintiff did not ultimately enter into any contract for the construction of the float; by agreement the defendant chose to purchase and pay for the float in order to save itself some of the construction manager's fees.

[356] Initially, the defendant had contemplated purchasing a used float for \$250,000. The defendant decided to reject the possibility of a used float, and the plaintiff pursued a new float builder.

[357] The float was the foundation of the entire Project because the Lodge would be constructed in accordance with plans specifically crafted to ensure that the structure would be integrated to the float and built on it. The plaintiff engaged the firm Herold Engineering to prepare plans ensuring the capacity of the float to support the structure.

[358] On January 23, 2018, Mr. Stevenson began to send the details required to obtain the form drawings to obtain costs of construction of the float. On January 22, 2018, the plaintiff informed the defendant that its current cost estimate for building the Project was \$1,495,855. This did not reflect any contingencies. Mr. Stevenson went on to describe the differences between budgets described as Class A, Class B, Class C, and Class D. Later in January, the parties discussed the prospect of the defendant obtaining the float and excluding the cost of towing the float to the Resort. The parties believed this measure could reduce the cost of budgeted costs \$70,000.

[359] In early March, the plaintiff obtained the proposal for the structural design services associated with the float. Stability of the float would be dependent on the weight distribution of the building and contents, noting the type of allowances that might be necessary or changes in design. Towing design, building design, and weight takeoff distribution were excluded from the services quoted by Herold Engineering.

[360] On March 22, 2018, Mr. Stevenson wrote the defendant that he expected a draft plan of the float and would assist the defendant in finding a float builder.

[361] Also in March 2018, Mr. Stevenson spoke to Brian Thacker of PIM over the telephone. Mr. Stevenson then had a meeting in person with Mr. Thacker and determined that PIM would be able to build the float. Mr. Thacker gave an approximate allowance based on square footage of the surface required. Sometime

in April 2018, Mr. Work spoke to Mr. Thacker about construction methods and whether the mooring details would be required.

[362] Mr. Thacker would not give a final price for the float until he received copies of the structural plans. Between mid-April 2018 and August 2018 there were substantial conversations and exchanges between the witnesses concerning the steps necessary to obtain a completed float.

[363] On April 12, 2018, Mr. Stevenson informed the defendant that he did not believe Ms. Davies-Long was the right person to prepare the architectural plans and that much time had been lost due to Ms. Davies-Long's inability to provide plans, including the architectural plans. The defendant decided to assign the responsibility for architectural plans to the plaintiff to obtain plans on its behalf. The plaintiff did not assume any responsibility for design work.

[364] On April 17, 2018, Mr. Stevenson discussed the shift in plans for someone else to provide architectural plans. Ms. Davies-Long remained tasked with the job of providing interior design drawings and elevations and other tasks necessary for construction of the float.

[365] On April 18, Ms. Davies-Long continued to work on some design drawings. Ms. Davies-Long indicated she would be providing more dimensions of notes for the plaintiff. On May 1, Mr. Stevenson wrote to the defendant with concerns that when changes were made to the building layout because of changes to interior design, the structural engineer would be required to assess those changes to be reflected in their structural drawings to ensure that the float design remained acceptable.

[366] From April 24, 2018, until July 24, 2018, there were exchanges concerning a number of issues that implicated the preparation of final plans for the float. These impacted the plaintiff's ability to retain a float construction company to quote on the cost of the new float.

[367] By July 24, 2018, the plaintiff was considering changes in a hatch related to the wine cellar requested by the defendant. There were different aspects of this

problem that were to be decided by the defendant on July 25. At that point, the defendant's instructions were needed to prevent finalization of drawings necessary to proceed with the float construction.

[368] On July 19, 2018, Mr. Stevenson informed the defendant that the float planning was finished, and he was expecting a quotation or approval. In that email Mr. Stevenson set out a general schedule for upcoming events notwithstanding that further changes in the float were contemplated by the defendant and additional details required from Ms. Davies-Long.

[369] As late as August 16, 2018, Mr. Lohsen wrote to Ms. Davies-Long requesting design information concerning the fireplace. He said he would need engineering to look at the fireplace design including the foundation requirements to support the fireplace and potentially a wall. He also needed updated architectural drawings to reflect design and costing. Ms. Davies-Long responded by saying she was "on this and it has taken some time as it's complicated". She said she was on her third mason but thought he was a good one. She anticipated having enough info to send to Mr. Lohsen the next week. There were clearly design issues that interfered with preparation of final plans necessary to contract with a float builder.

[370] Changes in design of the float were requested by the defendant and multiple exchanges between the plaintiff's staff and its engineer reflect delays caused, in part, by the defendant.

[371] By August 14, 2018, the plaintiff had learned that PIM no longer had room in its schedule to construct the float for the Project. The plaintiff delayed informing the defendant about its inability to engage PIM to build the float. The defendant argues that the decision to delay informing the defendant amounted to deliberate failure to secure the float builder. The plaintiff considers it to have been a strategy and contends it acted promptly to locate another float builder before meeting with the Murrays.

[372] The Murrays learned about the requirement to find a new builder from Ms. Davies-Long and were upset. However, within less than 1.5 months a new builder was engaged and the float was delivered before the end of November 2018.

[373] The record of communications suggests that Herold Engineering had been somewhat dilatory in finishing plans for the float; nonetheless there were changes in the defendant's instructions that resulted in changes to the float plan completed by Mr. Work on August 27, 2018. He increased the depth of the float to accommodate the fireplace.

[374] As noted above, the process for obtaining a float builder was encumbered, in part, by the engineer's inability to produce final plans until August 27, 2018, due to changes or potential changes in the defendant's requirements for a second hatch in the middle of the float, which information was communicated to the engineer on August 14, 2018. Further, Ms. Davies-Long was dilatory in providing further information concerning the fireplace that had implications for the float construction.

[375] The final requirements for the float including instructions from the defendant were not made available by August 14, 2018. Ms. Davies-Long had not yet forwarded some details concerning the Rumford fireplace for the engineer's consideration. On August 21, 2018, Ms. Davies-Long sent information concerning the fireplace to Mr. Lohsen and told him she was sorry; she "could have given it to him long ago". She said she was still working on obtaining details and could not get approval until August 31.

[376] It is apparent the plaintiff was not in a position to obtain quotations for the float due to ongoing changes in instructions from the defendant and delays in Ms. Davies-Long providing details necessary for the float. Ms. Davies-Long apologized for her delay in producing interior finished drawings with dimensions and specifications.

[377] The delay in obtaining a contract to build the float alleged by the defendant is not proven to be the responsibility of the plaintiff. The plaintiff could not send the

plans for the float to PIM until the defendant's plans were settled and further changes would not be requested. The plaintiff acted reasonably in its management of the float issue and nothing in its actions suggest it was not intending on completing this Project.

[378] Thus, the delay in obtaining the finished float due to PIM's inability to undertake the work in August 2018 was minimal. The final engineering plans for the float were settled on September 24, 2018, following which the builder and the defendant were ready to conclude their agreement for construction of the float on September 26, 2018. Construction of the float was fundamental to the Project and, at most, was delayed by the loss of the previous builder by one month.

[379] Eventually International Marine Floatation Systems Inc. (IMFS) provided its proposal to build the float on September 24, 2018, with an anticipated completion date of December 20, 2018.

[380] The defendant signed the agreement for construction of the float on September 26, 2018, for a total price of \$430,000.

[381] The defendant contends the plaintiff took active steps to conceal the fact that the original float builder, PIM had declined the opportunity to build the defendant's float. That information was received August 14, 2018, and communicated to the defendant after it was informed that PIM was no longer interested in the work.

[382] Mr. Stevenson conceded that he had not immediately informed the defendant about PIM withdrawing from the Project because he was attempting to locate a new float builder and discuss the next steps in person with the Murrays. After August 14, 2018, the plaintiff took steps to obtain quotations from new float builders.

Mr. Stevenson was obviously concerned that PIM had abandoned its interest in the Project and wanted to discuss the issue with the defendant. He did not disclose the information to them until September 2018, but the defendant's proposed changes to the float that had not been incorporated into plans, delaying any completion of those plans until the end of September, in any event.

[383] Mr. Stevenson's explanation for delay in communication with the defendant concerning the necessity for obtaining a new float builder was not, in my view, a deceitful or prejudicial decision on his part. While he may have been embarrassed that PIM withdrew from the project in August 2018, the plaintiff acted swiftly to minimize any delay and push the Project forward. Mr. Stevenson's decision did not evidence any deceit or rejection of the plaintiff's contractual obligations and did not signal a repudiation of those obligations.

[384] Nothing in the plaintiff's actions concerning the float caused any significant delay in the schedule or construction of the float. Ongoing changes in the defendant's requirements contributed to delays in obtaining the engineer's plans for the float. This would have impaired the defendant's ability to enter into a contract with PIM in August 2018 because the information available and changes under consideration would have delayed any contract to build the float.

[385] Ultimately, the consequences of obtaining the services of IMFS to build the float in September 2018 may have contributed to a modest delay in obtaining the float. The services of PIM were lost because adequate plans were not available to obtain a quotation by mid August 2018. These events beyond the plaintiff's control.

[386] In the case of the plans and drawings and changes to final planning for the float, the necessary final plans were not, in any event, available to obtain a quotation in August 2018. The defendant retained a new float builder before the end of September 2018. The delay was not caused by the plaintiff and the evidence did not support any inference that the plaintiff had abandoned its obligations under the contract or intended to not be bound by the contract.

[387] There was no evidence that the delivery of the float in November 2018 caused the defendant any losses or risk of losses. Moreover, any delay in procuring a builder of the float was caused, in part, by the Ms. Davies-Long's delay in providing adequate plans and changes being proposed by the defendant.

Despite repeated requests, the plaintiff sent no budgets to the defendant between the date that the last \$1.421 budget was sent on October 24, 2018, and March 12, 2019

[388] The defendant's submission that the plaintiff did not submit any budgets between October 2018 and March 2019 is incorrect. On March 12, 2019, Ms. Murray wrote to Mr. Zaiss requesting a budget in the format that she had received at or around December 12, 2018. In cross-examination, Ms. Murray could not confirm receiving that budget because of a poor memory. It is clear from her correspondence she received this budget.

[389] I find budgets were sent to the defendant in December 2018, May 2019, and July 2019. The costs on completion were expected to be \$1.7 million in May 2017 and \$1.9 million in July.

[390] In December 2018 the defendant was informed that the budget estimates exceeded \$1.5 million and that there was an additional expense that would dramatically increase the budget. It would have been obvious to the defendant that the costs of the Project were likely to be exceeding the GMP of \$1.5 million by a considerable margin, but interestingly, neither in March nor May 2019 did the defendant express a concern that the anticipated cost was anticipated to go over \$1.5 million.

[391] Between January and March 2019, there were multiple exchanges involving all of the interested participants in the Project concerning design, procurement, costs, and budget concerns. It is reasonable to infer that if it had believed its maximum exposure of \$1.5 million was threatened or that it would be exposed to costs exceeding the GMP that issue would have been raised with the plaintiff by the defendant.

[392] There were no discussions or communications from the defendant to the plaintiff concerning differences between the budgets from October 2018 to December 2018 and March 2019. The defendant's first request for a financial report was sent March 2, 2019. The plaintiff did not at any time express concern that it was

required to pay for any costs of the Project exceeding \$1.5 million notwithstanding the state of the budget in December 2018.

The plaintiff significantly overbilled the defendant beyond its contractual entitlement under the contract

[393] The defendant contends the plaintiff had significantly overbilled the defendant, far beyond what it was contractually entitled to under the contract.

[394] The defendant argued that the plaintiff overcharged the defendant for the charge-out rates for employees working for the plaintiff on the Project. It complained that the plaintiff unilaterally assigned workers to a category of staff, for example as “carpenters”, without a fair assessment of that person to ensure rates were paid to staff who were in fact qualified. It contends there was a wide discrepancy between wages paid to employees and charges for those employees. In the result the defendant was charged labour costs that were indefensible or unjustified.

[395] The plaintiff argues that, in the contract, labour rates payable by the defendant were settled by agreement and it complied with that term of the contract. Schedule B to the contract sets out the rates to be charged; the plaintiff would assign a status to a worker and the defendant would be charged the rate set out in the schedule.

[396] Article A-7 defines the cost of the work (to be paid by the defendant) as:

salaries, wages and benefits paid to personnel in direct employ of the Construction manager under a salary or wage schedule agreed upon by the Owner and the Construction Manager.

[Emphasis added.]

[397] In this case, Schedule B prescribes the rates to be paid. There was no complaint from the defendant during the life of the contract that incorrect rates were charged to the defendant and no evidence to suspect the plaintiff was using unqualified individuals to perform work at a status not warranted by their skill.

[398] The defendant argued the plaintiff charged for services performed by its personnel for project administration/supervision and shop labour that exceeded the January 22, 2018, budget for these items by \$150,000 as of May 31, 2019. The defendant contends the plaintiff wrongly billed the defendant for hours spent performing construction management services for which it was being paid under the heading “construction management costs” set at a lump sum of \$60,000. The plaintiff argued that a proper interpretation of the contract permitted both charges to be assessed.

[399] Articles A-5.1 and 5.2 in the contract set out the construction manager’s fee as follows:

5.1 The Construction Manager’s Fee shall be equal to the sum of the fee for the Services as specified in paragraph 5.2 and the fee for the Work as described in paragraph 5.3.

5.2 The Construction Manager’s Fee for the Services is comprised of one or more of the following:

1. A fixed amount of sixty thousand dollars (\$60,000); and
2. An amount based on the time-based rates for personnel employed by the Construction Manager as described in Schedule B to the Agreement and engaged in performing the Services to the level of effort agreed prior to the commencement of the Services. The Owner may by written request require the Construction Manager to provide prior to commencement of the Services and an estimate of the total fee for Services to be performed based on the time-based rates for evaluation and verification purposes.

[Emphasis added.]

[400] The plaintiff contends that the services under A-1 coupled with Article A-5.2 authorized the plaintiff to charge the defendant for time spent by personnel in performing the services “based on the time-based rates” for personnel employed by the plaintiff in addition to the charges permitted under Article A-5.2. Thus, the plaintiff’s charges to the defendant are based on these terms of the contract.

[401] Services are defined in the contract to include all services described in Schedule A1, which includes a wide range of activity including scheduling, construction document management, estimating and cost control, construction

procurement construction, general services, control, and accounting. The defendant did not argue that the time spent by various staff of the plaintiff did not involve providing the services. It did not argue that if the contract permitted the plaintiff to charge for these services, the plaintiff had not performed the services to the extent claimed.

[402] If the defendant's allegation had substance it was required to "immediately" inform the plaintiff of its non-conformity with the contract. Again, the defendant did not meet its obligation under the contract to inform the plaintiff immediately of any nonconformity it observed. The plaintiff provided estimates of those services and the defendant did not complain about overcharging until the submissions made in this trial.

[403] The defendant received invoices from the plaintiff from time to time, which also disclosed charges under both clauses of Article A-5.1 of the contract without issuing complaints or questions about those charges from the defendant. The defendant was entitled to object to the plaintiff's actions it claims violated the contract and had the right to retain a third-party evaluator to assess the cost of the work. It took neither step.

[404] The defendant also alleged that differences between amounts referred to in various budgets were shown to have exceeded the budgeted sums, thereby demonstrating an intention not to be bound by the terms of the contract.

[405] In my view, budgeted amounts in prior budgets were not included as guarantees that those costs might not increase above the budgeted sums later in the Project. In the context of this Project and the evolution of the design and planning, the budgeted sums represented estimates of costs until those costs were actually incurred.

[406] In my view, the defendant's submission on this issue is without merit. The plaintiff's management of the Project, including its budgeting and invoicing practices were not contrary to the terms of the contract, nor did they deprive the defendant of

the substantial benefit to which it was entitled under the contract such that its action amounted to a total rejection of its contractual obligations. Moreover, the plaintiff's actions did not evince a clear and unequivocal intention not to be bound by the contract.

The plaintiff informed the defendant on July 10, 2019, that the Project would now cost the defendant \$1.9 million, well above the \$1.5 million maximum set out in the GMP Clause

[407] The plaintiff did not inform the defendant that its cost for the Project would be \$1.7 million or \$1.9 million. The provision of budget-like documents containing costs incurred and cost to complete the Project exceeding \$1.5 million did not represent a charge, demand, or an intention to charge the defendant more than the GMP. Moreover, Ms. Murray testified that the plaintiff did not tell her that the defendant would be required to pay more than the GMP; she said she considered the July 2019 budget a "signal that the plaintiff's view of the GMP had changed".

[408] This July 2019 budget represented the plaintiff's assessment of all the information made available up to those dates that could inform the parties of the expected costs to complete the Project. The defendant decided to part ways from the plaintiff because it believed it had received an invoice exceeding the GMP. Ms. Murray inferred from the July 2019 budget the plaintiff was not willing to complete the project within the GMP.

[409] There were many discussions between the parties about strategies to reduce costs and to assist in reducing the total cost of the Project to something closer to \$1.5 million.

[410] In this proceeding the defendant relies on the contract stipulating its maximum cost to build the Lodge at \$1.5 million, with any costs above that amount to be borne by the plaintiff without reimbursement by the defendant. The plaintiff contends that Ms. Davies-Long did not produce sufficiently detailed interior design plans and specifications prior to May 10, 2019, while recognizing those plans were necessary to obtain quotations from suppliers required to do the work referred to.

[411] Both of the parties and their principals knew that the final cost for completing the Project was uncertain until all plans, drawings, and specifications had been received from all subtrades for the work to be completed in addition to the work performed. The final design was received from Ms. Davies-Long on May 10, 2019, after which a revised cost to complete was included in the plaintiff's new budget estimates. This eventually led to the plaintiff producing a summary of the cost to complete at \$1.9 million. The plaintiff informed the defendant that these were costs that would likely be incurred under the latest design and specifications provided by Ms. Davies-Long. There was never a request for payment by the plaintiff, nor any intimation that the defendant would be obliged to pay any amount over the GMP; the contract clearly stipulated that the plaintiff would pay for any costs in excess of \$1.5 million.

[412] If anything could be taken from the July 2019 budget, it would have been that Kinsol's cost to complete was \$621,720 and Oliphant's cost to complete was \$28,500. This statement in the budget did not, in any way, suggest there was an expectation the defendant would be required to pay for costs exceeding \$1.5 million dollars.

[413] The plaintiff described difficulties it had encountered in obtaining quotations from subtrades due to deficiencies in those plans. It is noteworthy that on May 8, 2019, Ms. Davies-Long wrote to Ms. Murray and included the following comment:

I will take this [opportunity] to [apologize] to Kinsol for the lack of detail I had previously shown. I should have asked for help earlier from another set of eyes to help me notice all the info left out. Everything is still as drawn but with more dimensions and specifications added. I assumed that I would have reviewed the drawings with the contractor to explain the scope, determine deficiencies and flesh out where I needed more clarity to express my intent.

[414] Ms. Davies-Long's candid admission in this email underscores the plaintiff's ongoing struggles to obtain sufficient detail from her to properly tender the work to be done and to establish costs that would be incurred.

[415] It is obvious that Ms. Davies-Long's plans essential to the Project were under revision well into the fall of 2019. Overall, I do not accept the defendant's assertion that the plaintiff was "scapegoating" Ms. Davies-Long. She was a major impediment in the Project proceeding in a timely way, and her delays were significant impediments to better budgeting, scheduling, and completing the Project within the defendant's expectations.

[416] Colin Lang, the project manager on the defendant's Project in 2018 and 2019, was called to testify by the defendant and confirmed that Ms. Davies-Long was the person responsible for the design specifications that were essential to the preparation of the architectural plans. He said she was the primary source of ongoing delays impacting the plaintiff's scheduling/critical path set out to guide the construction project.

[417] Mr. Lang observed that in September 2018 design changes had caused concerns for the float designs. He recalled that design and specifications, both exterior and interior, impacted the preparation of the plans necessary for the construction of the float and were not finalized. The defendant was aware that changes made by Ms. Davies-Long could cause delay, inefficiency, and increased costs.

[418] Mr. Lang also observed that shortcomings in Ms. Davies-Long's drawings left the potential subcontractors befuddled and unable to give quotes for the work required. Those delays impacted the budget considerations because, without reliable plans, allowances for specific items would not have been accurate.

[419] Although the December 2018 budget forecast a cost to completion exceeded \$1.5 million, it was not until March 2019 the plaintiff's cost to complete the Lodge was estimated to be more than \$1.7 million. The defendant did not immediately notify the plaintiff's it's budgeting was faulty or defective or failed to conform to the requirements of the contract. At that point, the plaintiff had not repudiated the contract, nor had it expressed any intention not to be bound by the contract. It

appeared to be focused on completing the Project and remain in communication with the defendant.

[420] On August 8, 2019, the defendant had not paid or been requested to pay sums exceeding \$1.5 million (including costs paid directly to third parties) and the plaintiff had not breached the GMP Clause of the agreement. Again, the defendant did not immediately notify the plaintiff of defects in the Project or nonconformity with the requirements of the contract.

[421] On this issue raised by the defendant, the plaintiff's actions did not evince an intention to not be bound by the contract in a way that would have contributed to depriving the plaintiff of the benefit of the contract. The plaintiff had not repudiated the contract nor had it informed the defendant it would be obliged to pay any part of the construction costs over \$1.5 million.

The plaintiff informed the defendant in July 2019 that the Lodge was scheduled to be completed in late August when it knew, in mid-June, that August 19 was the start date for finishing work

[422] The defendant contends that sometime in July 2019 it was informed that the Lodge was scheduled to be completed in late August at a time when the plaintiff knew that August 19 was the anticipated start date of finishing work.

[423] I do not accept the defendant's assertion of this fact. On July 10, 2019, Mr. Lang sent a cost to complete report and schedule for the remaining work on the Project to the defendant. He said there were substantial details to be worked to arrive at that point, but he was confident "in many of the estimated line items, there are still some things that we're carrying allowances for".

[424] On July 16, 2019, the plaintiff provided a forecast of the cost to completion at \$1,908,656 at that time. In the previous May budget, the plaintiff's estimated completion cost was \$1,706,110.

[425] The evidence concerning the defendant's suggestion that a commitment had been made to finish the Lodge in August 2019 occurred in a telephone conversation

with someone speaking on behalf of the plaintiff who told Ms. Murray that August was a scheduled completion date. She could not recall who imparted this information to her or when the conversation took place. This conversation was not put to any of the plaintiffs' witnesses and seems contradicted by Mr. Lang's email.

[426] There were exchanges between July 11, 2019, and July 15, 2019, in which the plaintiff informed the defendant of its concerns and the defendant was informed of the costs of roofing, mechanical/electrical/plumbing installation, the Rumford fireplace, siding, and remaining windows and doors to be installed. Mr. Lang attempted to identify items within the budget that could be modified to bring the cost down with modifications and changes. These issues were discussed at a subsequent meeting.

[427] On July 16, 2019, Mr. Stevenson wrote the defendant indicating his efforts to find potential savings to be reviewed by the Murrays with Ms. Davies-Long. He informed the defendant that the facility where the float was moored was needed for another customer and put pressure on the plaintiff to complete the project by mid-September or move. They warned that the foreshore space would be available only until the end of September.

[428] The plaintiff was focusing efforts on bringing the Lodge to a modified lockup state meaning that all electrical, mechanical, and plumbing rough-in would be complete. Exterior doors would be installed, the roof put on, and the building envelope "buttoned up".

[429] The strategy was to get the Lodge transported to Bamberton where essential work could be completed. Mr. Stevenson offered the defendant an opportunity to take over some of the finishing work if doing so would work better for the defendant with a view to saving costs against the Project budget.

[430] The defendant responded asserting that the plaintiff's schedule to complete the Project by the end of August was a misrepresentation because Mr. Walter

informed them finishing work would not start until August 19. She believed that finishing would take longer than five weeks.

[431] In terms of scheduling, the parties were aware from October 11, 2018, that Ms. Davies-Long had advised the defendant that her finalized plans were behind a previously set October 1 deadline, and plans had not been integrated with mechanical, electrical, and plumbing plans and other details. She recommended the project be taken off the May 1, 2019, delivery deadline. Later, on October 11, the defendant sent an email that it would be moving the scheduled delivery of the Lodge to October 2019. Ms. Murray said the timelines were too tight to have the Lodge completed by May 2019. At that time, the defendant also was seeking quotes from the plaintiff on construction of another structure.

[432] Mr. Marshall was opposed to the extension of the time for completion due to delay and increased costs and instructed staff not to agree to this change.

[433] On December 11, 2018, the plaintiff warned the defendant that an update on a lockup budget would include allowances only and serious financial decisions would remain to be made once the design plans were available. Mr. Lang recommended pushing towards finalizing specifications by the end of the year to enable him to obtain firm prices from material suppliers.

[434] This did not happen. Even if someone had informed Ms. Murray in error that the Lodge would be finished in August 2019, failure to meet that target would not in any way constitute a breach of the contract nor evidence the plaintiff did not intend to deliver a completed Lodge by October 2019 as requested by the defendant in October 2018.

[435] Additionally undermining the defendant's position on this issue is Ms. Murray's inability to remember who informed her about the supposed scheduled completion date for this part of the construction schedule nor when the conversation took place. Moreover, none of the plaintiff's witnesses were asked in cross-

examination whether this representation had been made or whether it was in fact true.

[436] Overall, Ms. Murray's evidence was punctuated with assertions she could not recall many events communications; she said her memory was not good. On other occasions she demonstrated a troubling lack of candour and reliability. Most notably Ms. Murray testified that the defendant paid Story Construction \$14,160 to rent a 2018 Yamaha generator received by Story Construction to provide power to the Lodge site. This is one charge the defendant claimed should be paid for by the plaintiff as part of its damages claim.

[437] Under cross-examination, Ms. Murray changed her evidence to say that the generator had been purchased rather than rented, but she did not know where it was located. Initially, she could not describe the appearance of the generator but later said it was a large square box.

[438] Next, she was asked about an invoice for the item purchased for \$14,160; her responses became completely unreliable until she was confronted with the actual invoice for this 2018 Yamaha generator, indicating that she purchased tan, outboard motor with the same invoice number included on the invoice received by Story Construction. She was asked if she had purchased this outboard motor in 2020; she said she did not remember. She said she could not remember her testimony from the day before when she claimed the invoice was for a generator; she said she did not remember purchasing an outboard motor.

[439] In further testimony she said she did not know where the outboard motor was located currently. She said she believed this motor was a Project expense, but she asserted having no memory of making the purchase, although the purchase documents recorded her as the purchaser, alongside her phone number, her email, and her address. She did not recall this motor being given as an inducement to Mr. Story for work on the Project.

[440] Later, Ms. Murray asked to vacate her statement concerning her evidence from the previous day. She said that the outboard motor was in Mr. Story's possession and she had a vague memory of what had happened; she felt she had done something wrong in her testimony. She said the motor was purchased for recreational purposes and not part of the construction of the Lodge. She said she had not spoken with her husband while she was under cross-examination. Ms. Murray was also referred to an invoice included in the claim from individuals known as Angela and David. She said those persons had no connection with the Lodge and this invoice was included in the defendants claim in error.

[441] Apparently, the outboard motor was eventually given to Mr. Story as part of a set-off for costs incurred by Story Construction in completing the Project.

[442] Ms. Murray's testimony was most concerning. But for defence counsel's effort to locate the actual invoice for the item revealing it was not "generator" but an outboard motor, the defendant intended the plaintiff to bear the cost of this item. Her testimony was overall unreliable and at this point untrue. Applying the principles of credibility assessment as summarized in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, [2012] S.C.C.A. No. 392, Ms. Murray's testimony is inherently unbelievable.

[443] Ms. Murray holds a Bachelor of Arts degree from the University of Victoria, has a certificate in business administration, and began working with Nimmo Bay Resort as general manager from 2011. In 2017, she became the director of finance and operations for the Resort. She was more involved in the financial aspect of the resort after 2017. Ms. Murray is a shareholder and director of the defendant corporation and is intimately involved in the business operations of its high-end resort. Ms. Murray had experience in working with contractors who performed renovation work at the Nimmo Bay Resort in the years before 2017.

[444] I am satisfied that before entering into the contract, Ms. Murray took legal advice and became familiar with the CCDC 5B form of contract and frequently requested changes t before the defendant signed.

[445] Ms. Murray acknowledged that prior to May 31, 2019, the defendant had all invoices received from the plaintiff without asking any questions of the plaintiff, although she could not remember if the invoices had been paid in full.

[446] In any event, Ms. Murray made the decision in October 2018 to delay delivery of the completed Lodge until October 2019 without consultation with the plaintiff. In light of this, even if someone had informed her that the Lodge would be completed by August 2019, nothing turned on the fact that the plaintiff had actually intended to have it completed by October.

[447] Furthermore, but for the decision to end the contract on August 8, 2019, there would have been ample time to complete construction of the Lodge with delivery to the defendant in October 2019.

[448] On the whole, any such delay in completing construction of the Lodge until October 2019 does not support the defendant's assertion that the plaintiff's actions were in any way inconsistent with its continued efforts and intentions to complete the Project. These assertions, even if true, would not have deprived the defendant of substantially the whole of the benefit of the contract and completion of the Lodge.

The plaintiff had stopped working on the Project

[449] The defendant claimed that the plaintiff had stopped working on the Project at some time prior to August 8, 2019. The only evidence to support this claim was given by Mr. Walter, who said he did not see anyone working on the Lodge when he met with the plaintiff at their facilities at some point in July 2019. He was unable to identify when the meeting occurred. In cross-examination Mr. Walter conceded that he was working on the Lodge on behalf of the plaintiff in the second week of July 2019 and that the meeting must have occurred later.

[450] This allegation that the plaintiff had stopped working on the Project in July was not canvassed in cross-examination with any of the plaintiff's witnesses. It was apparent from the plaintiff's invoices that the plaintiff's personnel were working on the Project through July 2019 into the first week of August 2019.

[451] Mr. Walter did not give any detail concerning his observations of the work at the time of his observation in July 2019. Nothing in Mr. Walter's recollection confirmed that the plaintiff had stopped work permanently on the project or that the plaintiff had abandoned the Project for any significant period of time. Mr. Walter did not comment on the presence or absence of the plaintiff's staff throughout July 2019 into August 2019 except as to one day. At one point, Mr. Walter mentioned that the ramp to the float was not in use, but nothing in his testimony provided sufficient detail that would demonstrate the plaintiff had stopped working in a substantial way.

[452] Mr. Walter had an extensive history working for the Murrays at their Nimmo Bay Resort. Prior to 2019, they were his main client and paid him between \$50,000 and \$80,000 per year to work at the Resort.

[453] Between July 1 and July 10, 2019, Mr. Walter worked on the Lodge with the plaintiff's staff installing windows, though he did not keep timesheets and did not have records of the dates of his attendance.

[454] Mr. Walter's testimony was at times unreliable and his recollections were contradictory. At other points he lacked credibility. At one juncture, he misstated how his bills to the defendant were paid. On another occasion, he could not recall meeting with the plaintiff's engineer; subsequently he changed his testimony on that point.

[455] Before August 2019, the Murrays felt that the plaintiff exceeded its GMP by \$100,000. Mr. Walter went to the worksite in the hopes of being retained by the defendant to manage the finishing work on the Lodge.

[456] After his meeting with some of the plaintiff's staff, the Murrays told him not to have any discussion with the plaintiff's staff.

[457] The question of when, or if, the plaintiff stopped working on the Lodge was not put to Mr. Stevenson, Mr. Lang, or Mr. Lohsen. Mr. Zaiss testified that the plaintiff had proposed to achieve lockup July 2019. He said the plaintiff's crew were working significant hours onsite until August 2019.

[458] Although the work stoppage claim was not put to the plaintiff's witnesses, it is clear by August 8, 2019, the defendant was also in breach of the contract for not having paid the May and June 2019 invoices. This point was not argued at trial, but it could have been relevant because when a party suspends construction work under a contract until the other party pays an outstanding account, the unpaid contractor has not evinced an intention to not be bound by the contract. In such circumstances, the clear intention is to continue with the contract on payment: *Kuhn v. Union Securities Ltd.*, 2002 BCSC 979 at paras. 56–58; *Norwood Developments Ltd. Paquette*, 2024 SKKB 47 at para. 144.

[459] On balance taking into account all of the evidence, the defendant has not proved the plaintiff stopped working on the Lodge in circumstances that would demonstrate the plaintiff was refusing to be bound by the terms of the contract. The emails indicate the plaintiff was working on a strategic plan to build the Lodge to the lockup stage with two months or more to complete the Project. Mr. Walter and Mr. Zaiss confirmed that work was being done in and throughout July 2019 and I find the allegation that the plaintiff's work stoppage constituted a repudiation of the contract is not made out. On the balance of probabilities, the standard of clear and unequivocal proof necessary to establish a repudiation of the contract has not been met.

The plaintiff had threatened to cut the Lodge loose into Saanich Inlet

[460] In a meeting in mid-July 2019, Mr. Walter offered to speak with the plaintiff about the defendant's unhappiness and a possible handoff of the Project because work had stopped. Mr. Walter wanted a better understanding of the costs issues and to obtain names and phone numbers of some trades that were working on the project. Mr. Stevenson told Mr. Walter it would be a difficult project to take over.

[461] Mr. Walter testified that during the meeting Mr. Stevenson "threatened to cut the Lodge loose into Saanich Inlet". Mr. Walter recalled Mr. Stevenson being distressed, agitated, and frustrated and said he was fed up with Oliphant and ready

to push the float off of the dock. Mr. Walter did not take Mr. Stevenson seriously; he said no one was that dumb.

[462] Mr. Stevenson denied making the statement. I am not satisfied that if Mr. Stevenson made the comment attributed to him, it was a serious comment. Overall, the plaintiff was frustrated with the defendant and Ms. Davies-Long, but the remark was not taken seriously by Mr. Walter and was not made with the intention of the plaintiff repudiating the contract.

Discussion and Conclusion re: Repudiation

[463] The overarching issue to be decided in this case is whether the plaintiff's actions throughout the time from March 28, 2018, until August 8, 2019, can be construed as actions that alone or cumulatively evinced an intention not to be bound by the contract. This would have occurred if the plaintiff's actions were serious and deprived the defendant of substantially the whole benefit of the contract which the parties intended would come from the contract. If the impugned actions frustrate "the commercial purpose of the entire venture", the innocent party will have been deprived of "substantially the whole benefit".

[464] Ms. Murray conceded that the plaintiff never said or wrote to her it was not prepared to fulfill its contractual obligations to the defendant. Only if the plaintiff's actions or absence of action threatened to deprive the defendant of substantially the whole of the benefit of the contract can the defendant succeed in establishing that the plaintiff had clearly and unequivocally refused or was refusing to perform its obligations to such an extent that it had repudiated the contract.

[465] In the preceding section I have addressed each of the defendant's complaints individually; I have found that none on them individually evinced an intention on the part of the plaintiff to not be bound by the contract. I will now consider whether cumulatively these alleged breaches amounted to a repudiation by the plaintiff.

[466] For the reasons that follow, I find that the plaintiff's actions highlighted in the defendant's submissions, even considered cumulatively, did not establish clearly

and unequivocally that the plaintiff had evinced an intention not to be bound by the contract and had repudiated the contract. As of August 8, 2019, the plaintiff's actions had not deprived the defendant of substantially the whole benefit of the contract; the contract was in place and the plaintiff was obliged to finish constructing the Lodge.

The Project and the GMP

[467] The genesis of the project began with Ms. Davies-Long's conceptual drawings produced in 2017. The plaintiff offered its initial estimate of the cost to construct the Lodge at a time when the plans and specifications were ill defined and vague in many aspects. Ms. Davies-Long was responsible for producing the contract documents including architectural drawings, structural drawings, project specifications, and selections.

[468] The Project was ongoing from September 2017 until August 2019. The volume of emails and discussions reveal this was a dynamic project that had many diversions due to delays in the defendant's production of plans and specifications through Ms. Davies-Long. The events leading up to August 8, 2019, must be considered in light of the manner in which the events unfolded.

[469] By August 8, 2018, the defendant assumed that the plaintiff would not complete the construction contract by October 2019 or within total costs payable by the defendant of \$1.5 million; that assumption was ill conceived, inaccurate, and not proved on the evidence. I have concluded, based on the plaintiff's actions and representations, it was likely the Lodge would have been completed in October 2019 on the terms set out in the contract.

[470] I have also concluded the GMP clause was binding on the plaintiff and it was required to bear any costs exceeding \$1.5 million to complete the Project. The distinction between "cost-plus" contracts and contracts with "GMP clauses" that created high risks to the builder/contractor was underscored by the evidence of Mr. Story, who explained the risks to builders of agreeing to a GMP (fixed price) contract. He testified that the CCDC 5B contract may have been appropriate after "issued for construction plans" have been issued. Nevertheless, he said contractors

never get a complete set of plans with final details included. Mr. Story testified about the work his company performed on the Project and the \$873,158 total charged to the defendants (about \$100,000 less than his budget).

[471] The defendant's claim that the plaintiff had informed the defendant that its cost to complete the Lodge would be \$1.9 million was not proved and I have rejected that submission. The plaintiff's budget issued July 10, 2019, simply informed the defendant that the estimated cost to complete the Project was \$1.9 million; it made no claim or assertion that this was the anticipated cost to be paid by the defendant.

[472] The July 2019 budget set out the plaintiff's cost to complete at \$631,728 and there was nothing in the communications from the plaintiff to the defendant that suggested any costs exceeding \$1.5 million were to be paid by the defendant. That allegation was an assumption made incorrectly in the face of the GMP Clause guaranteeing the plaintiff would pay costs over and above \$1.5 million.

[473] The defendant's suspicion that the plaintiff intended to put the burden of costs over \$1.5 million on the defendant's shoulders was not supported by the evidence and fell well short of proving the plaintiff clearly and unequivocally intended to refuse to pay costs exceeding \$1.5 million. There was no anticipatory breach by the plaintiff.

The Allegation of Cumulative Events as Repudiation of the Contract

[474] Second, the defendant's complaints about the plaintiff's actions between March 28, 2018, and August 8, 2019, did not alone or cumulatively demonstrate that the commercial purpose of the entire Project had been abandoned by the plaintiff. The commercial purpose of this contract was always to build a Lodge on a float for the defendant suitable for the purposes of serving wealthy people in a luxurious recreational setting at a cost to the defendant not exceeding \$1.5 million.

[475] The evidence did not establish that the plaintiff had acted or communicated in any way suggesting it did not accept its obligations to perform the contract and to build the Lodge to its completion. I conclude that but for the defendant's actions in

misconstruing the plaintiff's actions purported to be in repudiation of the contract, the Lodge could have been completed by some time in October 2019.

[476] Even if the plaintiff's actions were deficient, it did not clearly or unequivocally demonstrate its intention not to be bound by the contract and did not justify the exceptional remedy of putting an end to the contract. The plaintiff had not breached the contract in a way that went to the root of the bargain between the parties.

Scapegoating Ms. Davies-Long

[477] Ms. Davies-Long's role in providing adequate plans, drawings, and specifications were a major problem in the unfolding events surrounding work on the Project. Many delays in the construction progress by the end of July 2019 were due in large measure to the defendant's failure to comply with the terms of the agreement insofar as they failed to ensure timely production of plans, details, and specifications to be provided by Ms. Davies-Long. The defendant was contractually bound to provide this information and Ms. Davies-Long's failure to provide this information was a flaw in the defendant's performance under the contract.

[478] The plaintiff's history of discussions with the Murrays based on the conceptual plans presented by Ms. Davies-Long in the fall of 2017 reflects an unusual process the led up to the contract signing in March 2018. Early on, the plans and specifications were sparse and did not contain sufficient detail to enable the plaintiff to provide a truly informed estimate of the cost that would be required to build the defendant's Lodge. There were many pre-contractual exchanges of information and negotiations that eventually resulted in the parties signing the contract.

Mr. Stevenson provided several estimates of the costs of the Project based largely on his experience and the dimensions in Ms. Davies-Long's conceptual drawings.

[479] I reject the defendant's assertion that the plaintiff was "scapegoating" Ms. Davies-Long's role in the delays encountered in the Project. From the outset she was responsible for conceptual design and planning and failed repeatedly to perform those responsibilities in a timely way at least until May 2019. Changes made to the plans by Ms. Davies-Long delayed many of the steps to be taken by the plaintiff in

furtherance of the construction of the Lodge. Some of the changes were also initiated by the defendant from time to time in circumstances where it knew that changes or delays would increase the cost of the Project.

[480] The defendant was reliant on Ms. Davies-Long to deliver a suitable design concept and the full range of contract documents (until April 2018 when Mr. Shinkewski was retained) to be provided by the defendant to facilitate construction of the high-end resort it wished to build and operate.

[481] Ms. Davies-Long's performance in her roles was deficient throughout the Project. On one occasion, further requests were made of Ms. Davies-Long for architectural drawings; she had been distracted by another project.

[482] Architectural drawings were essential to construct the float and the Lodge. Ms. Davies-Long delayed in preparing these documents and eventually resiled from providing architectural drawings and was replaced by Mr. Shinkewski.

[483] Mr. Zaiss witnessed many delays that occurred when Ms. Davies-Long failed to meet deadlines or schedules for delivery of her plans and specifications. He explained the process involved when changes to Ms. Davies-Long's plans occurred. For example, prior to construction of the float, the engineers needed to be informed about the major features of the Lodge to ensure that the float was capable of bearing the weight of the structure.

[484] She presented changes to her plans that had knock-on effects on the float's design. Even after the float was completed, further changes to the structure needed to be referred to engineers to ensure that the float, as built, could carry the weight involved.

[485] Design issues including changes to load-bearing walls affected engagement of a float builder until October 1, 2018. On October 11, architectural drawings for construction were revised based on changes to Ms. Davies-Long's revised conceptual design. On that date the defendant unilaterally changed the date for delivery of the Lodge from May to October 2019. Ms. Davies-Long produced further

preliminary interior design plans in November 2018, December 2018, and March 2019. She delivered further plans in May 2019, after which the plaintiff was able to obtain quotes for finishing work. Its final budget for completion of the Project of approximately \$1.9 million was delivered in July 2019.

[486] Mr. Zaiss described multiple changes made by Ms. Davies-Long that impacted the float plans. He said he could not order decking without the requisite plans from her that were not available in a timely way.

[487] Ms. Davies-Long's plans for features such as windows, ceiling lighting, and procurement were important. Ms. Davies-Long's delay in providing ceiling and lighting plans significantly impaired the plaintiff's ability to procure electrical work. By April 2019, Mr. Zaiss said the plaintiff's usual subcontractors previously used by the plaintiff become unavailable to quote on the Project. Moreover, some of the plans sent to the plaintiff's subcontractors could not be relied upon as bases for quotations.

[488] I accepted Mr. Zaiss's testimony and Mr. Lang's testimony concerning their dealings with Ms. Davies-Long and her inability to achieve deadlines she agreed to meet. Mr. Zaiss was cross-examined extensively on his involvement, and his testimony was clear that Ms. Davies-Long was dilatory in providing details and information that factored into ongoing delay. As an example, he said she was late in providing details concerning the fireplace; those details were necessary to ensure the engineer could approve the impact of that layout on the float. Ms. Davies-Long commented that she had some of the information concerning the fireplace but had neglected to provide the information to the plaintiff after it was requested.

[489] The burden of architectural and engineering aspects of the Project was not the responsibility of the plaintiff. The defendant was obliged to provide the plaintiff with copies of the construction documents to perform the work.

[490] In this case, the defendant's designer and person responsible for plans and specifications was Ms. Davies-Long and by October 2018 she declared her inability

to perform some of the services required; she could not prepare the necessary architectural plans for construction. Thus, the plaintiff assisted in retaining a draftsman to provide those plans for construction but Ms. Davies-Long remained in the role of preparing some plans and specifications necessary to complete the construction project causing delay in execution of the Project.

The Project

[491] If the plaintiff started out in this Project with a view that the Lodge might cost the defendant between \$2.0 million and \$2.5 million there was nothing in the pre-contractual circumstances known to both parties to suggest the defendant would have proceeded with the Project that could cost over \$2 million. On the other hand, the defendant needed an assurance that its costs would not exceed the GMP. In the context in which the parties made their agreement, the defendant clearly stated that \$1.5 million was the maximum money available to it and the plaintiff understood that limitation.

[492] It is not clear what would have happened if either party had insisted on enforcing Article A-3 and in particular the requirement that the conceptual design, costing, procurement, and planning phases be completed before construction of the Lodge could begin.

[493] I conclude that once the contract was signed the plaintiff was bound to build the Lodge for a price not exceeding \$1.5 million because there was no mechanism in the contract to have revisited the maximum price after plans were presented. The parties proceeded with this contract knowing that there were deficiencies in the plans, drawings, and specifications. It was open to the defendant to terminate the contract if there was a cost-prohibitive result based on the planning process; there was no reciprocal right for the plaintiff to terminate the contract if its exposure to costs became prohibitive.

[494] Regrettably, the contract contains enormous amounts of detail that did not have any practical utility to the parties in the execution of their respective roles. The plaintiff's recommendation that the parties be jointly named as the "consultant"

deprived the parties of many of the avenues for dispute resolution that would have otherwise existed.

[495] The plaintiff seems to have approached the contract with a view that the GMP Clause had no application to its responsibilities until all of the plans and specifications necessary were available in sufficient detail to inform respective suppliers who would provide quotations for services or goods.

[496] In analysing the underlying nature and purpose of this contract, it is clear the defendant had, before entering into the contract, secured financing of \$1.5 million to construct this Lodge. That limitation was objectively the reason the defendant insisted on a maximum cost to them of constructing the Project.

[497] The phasing provision of the contract might have ameliorated some of the difficulty in estimating the cost of the contract prior to obtaining adequate contract documents before construction commenced. However, the plaintiff gave its guarantee concerning the maximum cost of the Project (to the defendant) knowing it did not have adequate plans and making no provision for the possibility that costs would exceed the GMP. This was a major component of the agreement requested by the defendant by way of a GMP cap on its costs. The plaintiff's eagerness to obtain a written agreement with the inclusion of the GMP Clause was deliberate. It took on considerable risk in the face of shortcomings in the contract documents and the defendant's dilatory approach to production of reliable architectural plans, design plans, and specifications necessary to create reliable budgets and estimations.

[498] Had the phasing provisions been enforced, this would have ensured that all of the contract documents – which included architectural drawings, structural drawings, project specifications, and selections – were available before any steps toward actual construction of the Lodge began. The contract gave the defendant the right to terminate the contract if the project planning process could result in a cost-prohibitive outcome.

[499] Overall, Mr. Zaiss's observations chronicled the persistent shortcomings in obtaining plans and specifications necessary to move the project along.

[500] Communications between the parties between April and July 2019 show the plaintiff's assiduous attempts to advance the construction project and pursue cost reductions. When confronted with some errors requiring reframing costs, the plaintiff agreed to bear the extra expenses of errors it may have made.

[501] During June and July 2019 the plaintiff was actively procuring building materials for inclusion in the Project.

[502] Even if the plaintiff's response to Ms. Davies-Long's shortcomings in performing her role before August 8, 2019, was not perfect, it did not constitute a repudiation of its intention to be bound by the contract to the extent necessary to justify bringing the contract to an end.

[503] Delay in the plaintiff's performance under the contract would, in any event, not have constituted repudiation of the contract.

[504] The defendant's financing was known by late December 2017. The plaintiff produced varying budgets (including estimates only). As the process progressed throughout January to March 2018, the plaintiff stressed its request for architectural drawings and details, with Ms. Davies-Long promising same by the end of January. She apologized for her delay in producing these plans at the end of January and produced further plans by mid-February. These plans were still deficient.

[505] The plaintiff continued in its preparations with the engagement of the engineering firm in early spring 2018. By March 2018 the plaintiff had engaged PIM to construct the float but without plans, a quotation could not be obtained.

[506] The plaintiff questioned whether the GMP Clause was operable in the circumstances and took the position that the \$1.5 million guarantee did not include any payments made by the defendant directly to suppliers. This argument has been rejected.

[507] Interestingly, the contract was not described anywhere as “cost plus”. Story Construction completed the construction of the defendant’s Lodge after the contract between the parties was ended. Mr. Story described his experience in working with CCDC contracts and indicated he would never use such an option because it functions as a fixed-price contract that is usually made when sufficient information is not available. He was risk-averse and did not wish to take the chance offered by a fixed-price contract. Thus, he generally enters into cost-plus contracts that require clear indication. When prices are fixed, the contractor needs a contingency to protect against losses.

[508] On July 10, 2019, the plaintiff delivered a cost to complete report with a cost to complete of \$1,908,656; \$621,728 represented Kinsol’s costs to complete and \$28,500 represented the defendant’s costs for remaining work on the Lodge. The plaintiff made various suggestions to the defendant on July 16, 2019, to reduce costs by as much as \$75,000. The same day, Mr. Stevenson wrote to the Murrays suggesting a strategy to move the construction of the Lodge to a modified lockup state and transport the float to a place where the essential work could be completed. He recognized the defendant’s concern about the anticipated cost of completion, noting that the plaintiff had worked through a substantial amount of detail to be able to arrive at the July 10, 2019, cost to complete report.

[509] As I have concluded the plaintiff remained bound to complete the Project, costs in excess of the GMP would be paid for by the plaintiff without contribution from the defendant.

[510] The events transpiring after the contract was signed, the communications between representatives of each party in many hundreds of email exchanges, and the testimony of the witnesses provide the context of the purpose of the Project and the context of the events that unfolded before August 8, 2019.

[511] The defendant was expecting completion of a refined high-end Lodge at a cost to it of \$1.5 million, underscored with the plaintiff’s guarantee that it would pay any costs above that amount. Taking into account the underlying purpose and

nature of the contract, the route to a completed Project was not fundamental; rather, the timely completion to the required standard was the goal: see *Pioneer Hi-Bred International, Inc.* at para. 111.

[512] I conclude that the defendant has not proven that the plaintiff's impugned actions, considered separately or cumulatively, rise to the level of clear and unequivocal evidence of an intention to not be bound by the terms of the contract. The plaintiff's performance did not undermine or threaten to deprive the defendant of "substantially the whole of the benefit of the contract". Insofar as it may have been remiss in the execution of its contractual obligations, its actions did not undermine the root purpose of the contract.

[513] There was never any communication by the plaintiff to the defendant that it would not honour its guarantee of the GMP nor that it had evinced an intention not to be bound by the contract.

[514] The plaintiff's conduct was not always beyond criticism. However, shortcomings in the plaintiff's conduct did not rise to the level of conduct evincing an intention not to be bound by the terms of the contract. The plaintiff was conscientiously moving forward with the Project and was subject to issues and delays caused, in part, by the defendant and its designer, Ms. Davies-Long.

[515] As of August 8, 2019, there was a reasonable probability that the Lodge could be completed by the end of October 2019 and any costs exceeding the GMP would be paid by the plaintiff. The Lodge would have been ready for its intended use by the defendant well before the Nimmo Bay Resort 2020 season.

[516] I have concluded the defendant has not met its burden of proof to establish that the plaintiff had evinced an intention it no longer intended to be bound by the contract.

GC 7.1.2

[517] Finally, I have addressed and rejected the plaintiff's contention that the defendant's termination of the contract was unlawful because it did not follow the procedure set out in GC 7.1.2. In this case the contract was ended because the plaintiff purportedly evinced its intention not to be bound by the contract indicating it was repudiating the contract. The defendant did not invoke GC 7.1.2 because it chose to accept the plaintiff's repudiation of the contract as a repudiation under the common law and thereby invoked "another right or remedy the owner may have" to end a contractual relationship. The defendant's choice not to invoke GC 7.1.2 did not preclude its right to end the contract based on the plaintiff's repudiation at common law (had such a right properly arisen).

Conclusion

[518] To briefly restate my conclusion on each of the issues:

- 1) Should the defendant's failure to call Mr. Murray and Ms. Davies-Long lead to an adverse inference against it?

Yes, I draw an adverse inference that Mr. Murray's and Ms. Davies-Long's evidence would not have been of assistance to the defendant. I can infer that Mr. Murray's testimony would not have supported the defendant's claims, particularly where Ms. Murray's evidence was unreliable. I can infer that Ms. Davies-Long's evidence would not have supported the defendant's submission that she was simply scapegoated by the plaintiff. As discussed above, I have accepted that she was a principal cause of the delay of the Project and the plaintiff's inability to provide more timely and accurate estimates of the costs of construction; I infer her testimony, had she been called as a witness, would not have displaced these conclusions.

- 2) What is the proper interpretation of the GMP Clause?

I find that the GMP Clause is unambiguous: the plaintiff was bound to complete the Project for a cost to the defendant not exceeding \$1.5 million. The parties were both obliged to act in good faith and take reasonable steps to minimize costs; however, this never became a significant issue.

- 3) Should the contract be rectified to specify that any costs paid directly by the defendant would be counted towards the GMP?

Yes, the contract will be rectified in terms set out above.

- 4) Did the defendant fail to provide notice under GC 7.1.2 of the contract, thereby invalidating any purported termination?

No, GC 7.1.2 and 7.1.4 create a scheme whereby the owner could, but not must, put the construction manager on notice of any deficiency and require remediation of that deficiency (7.1.2), failing which the owner may terminate the contract (7.1.4). Crucially, these clauses operate without prejudice to any other right that the defendant may have had – they are but one option at the disposal of the owner and do not oust any right that may exist at common law to end the contract.

- 5) Did the plaintiff breach the GMP Clause by advising the defendant that it would have to pay \$1.9 million?

No, there was no communication from the plaintiff to the defendant to that effect. The July 2019 budget was not a breach, nor did it signal any breach of the contract by the plaintiff. Had any costs over \$1.5 million come to fruition, the plaintiff and not the defendant would have been responsible for shouldering these costs.

- 6) Had the plaintiff repudiated the contract as of August 8, 2019, whether by a single action or through its actions to that point cumulatively, such that the

defendant was entitled to accept the alleged repudiation and terminate the contract?

No, the plaintiff had not repudiated the contract, either through a single action or through the cumulative impact of many actions. The defendant was not in a position to treat the contract as at an end when it did so.

[519] Thus, the defendant's counterclaim is dismissed.

[520] The plaintiff will have judgment against the defendant for \$228,111.90 after adjustments for expenses paid by the defendant. Interest at the rate set out in Clause 9.3 of the contract will be added to this judgment. If there is any disagreement concerning the calculation of interest under the contract, the question shall be referred to the Registrar for an inquiry and accounting of the amount of interest owing by the defendant under this judgement. The result of this inquiry is to be certified by the Registrar.

[521] The usual order is for costs is to be awarded to the substantially successful party. In this case, absent submissions by either party within 30 days, the plaintiff will have its costs at Scale B.

"Armstrong J."