

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Guardian Eavestrough Ltd. v. Pabla*,
2026 BCSC 1465

Date: 20260804
Docket: S02945
Registry: Abbotsford

Between:

Guardian Eavestrough Ltd.

Plaintiff

And

Parvinder Singh Pabla

Defendant

Before: The Honourable Justice Caldwell

Reasons for Judgment

Counsel for the Plaintiff:

P. Singh
M. Arora, Articled Student

The Defendant appearing in person:

P.S. Pabla

Place and Dates of Trial:

Abbotsford, B.C.
March 4-6, 2026

Place and Date of Judgment:

Abbotsford, B.C.
August 4, 2026

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Introduction and Background

[1] This trial involved a dispute between a contractor and a homeowner. The plaintiff claimed under breach of contract for monies owed on unpaid invoices and had filed a builder's lien to secure his claim. The respondent homeowner counterclaimed for damages allegedly caused by inadequate, delayed and incomplete work and improper filing of a builder's lien. The plaintiff subsequently amended their claim to add a claim for unjust enrichment against the respondent homeowner.

[2] The parties had enjoyed prior positive dealings. The respondent is involved in the real estate industry and has had the plaintiff do work on homes for him in the past.

[3] The project that gave rise to this claim involved the plaintiff providing certain construction services, including providing materials, related to specific parts of the construction of a house that the respondent was building. Mr. Taylor, the owner and operating mind of the plaintiff company, and Mr. Pabla, the respondent homeowner, met to discuss the project in the spring of 2021. Both testified at trial.

[4] Discussions regarding the type of work to be performed by the plaintiff company took place over several months.

[5] Up to three estimates may have been prepared by the plaintiff over that period of time. They included only cursory details regarding the scope of work to be undertaken. All estimates were dated September 2, 2021, although other details changed. The first estimate was for \$44,920.46 and stated that it would be for siding installation (supply and install prep materials, supply and install hardie siding (not including fir beam wrap) as well as an upgrade option for soffit). The second estimate contained slightly different details and a division of the total into labour and material costs and put the cost at \$45,392.96. Finally, on December 1, 2021, the plaintiff provided a third estimate to the respondent, again with some different details regarding the work to be done, for a total of \$45,098.13 (the "December 2021 Estimate"). That last estimate was the only one which was actually delivered to the

respondent and, although dated September 2, was not presented until early December.

[6] Unfortunately for both parties, the above estimate or estimates are the extent of what is available in writing prior to the project being undertaken. All other communications between the parties, including changes to costs and scope of work, were via text messages, phone calls or in-person meetings, and arose at various times thereafter.

[7] No contract was ever reduced to writing.

[8] Nevertheless, the plaintiff began work roughly in accordance with the scope of work suggested in the estimates sometime after early December 2021. The plaintiff claims that the work which he was expected to perform was completed by August 2022, but that the company has not been paid for a portion of the work performed.

[9] There were literally hundreds of texts or emails between the parties between mid 2021 and mid to late 2022, few, if any, of which add clarity to the situation. Many allude to in-person conversations or phone calls in which terms or costs were discussed. The text messages show both parties agreeing to at least some changes to costs and scope of work on an *ad hoc* basis starting almost immediately after the December 2021 Estimate was sent and allegedly agreed to.

[10] The plaintiff claims that, ultimately, there were many changes and additions to the original agreement and that, after subsequent in-person discussions, he and the defendant agreed on an amended final amount of \$58,500 – of which he has only received \$50,000. He now sues, not for \$8,500 but for \$7,619.63 which he says remains owing on one or other of the alleged agreements.

[11] The respondent acknowledges engaging the plaintiff to complete the installation of siding and related work, including the provision of certain materials, based on the September 2 estimate which was delivered in early December 2021. The respondent submits that that Estimate served as a fixed price contract and

appears to deny the existence of any supplementary or amended contract or agreement based on subsequent alterations to scope of work or cost.

[12] The plaintiff filed a Notice of Civil Claim in September 2022.

[13] In June 2025, after the matter had been set for trial, the plaintiff filed an Amended Notice of Civil Claim. In that amended claim, the plaintiff sought additional relief for unjust enrichment in the amount of \$14,914.43. This was an entirely new claim brought nearly three years after the initial claim arose and the original Notice of Civil Claim was filed.

[14] Given that the trial date had been set and notice provided, that amended claim should not have been accepted for filing as no order had been granted nor consent obtained for its filing as per Rule 6-1(1) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [SCCR].

[15] In December 2025, a consent order was filed which essentially validated the earlier filing of the amended claim. Although the respondent signed the consent order, he testified that he felt he had little or no choice and that he did not understand the significance of the order as he was, and remains, self-represented.

[16] The respondent in his counterclaim, sues for damages for breach of contract, negligence and wrongful filing of a builder's lien. He refers to various "implied" terms in the alleged agreement, particularly regarding timing and specific tasks not addressed in the estimate. He claims for the cost of work which, he says, was to have been performed by the plaintiff pursuant to the contract but instead had to be performed by others. He also claims other costs which he says he incurred due to the plaintiff's breaches.

[17] Neither party led evidence in the nature of a quantity survey regarding the value of work done or not done by the parties, nor what a reasonable cost of remediation would be.

Formation of Contract

[18] The initial, central question to be determined in this case is whether, at the outset or even at any point in time, these parties entered what can legitimately be referred to as an enforceable contract.

[19] The British Columbia Court of Appeal dealt with the issues of the formation and interpretation of a contract in the case of *Panesar v. Sidhu*, 2022 BCCA 397. In that case, the chambers judge had found that there was no meeting of the minds regarding an extension of time and thus the original contract lapsed. In its decision on the appeal, the Court said:

[33] Justice Grauer summarized certain principles relating to the formation of contracts in *1001790 BC Ltd. v. 0996530 BC Ltd.*, 2021 BCCA 321:

[40] The judge appropriately referred to the judgment of Justice Dickson, then of the BC Supreme Court, in *Le Soleil Hotel & Suites Ltd v Le Soleil Management Inc.*, 2009 BCSC 1303 at para 322:

For parties to be bound in a contractual relationship there must be a manifest meeting of the minds. They must express themselves outwardly in a manner that indicates both an intention to be bound and reasonably certain mutually agreed terms. [Citation omitted.]

[41] Where a contract has been wholly reduced to writing, as in this case, that outward expression is the contract itself, not the subjective views of the parties. This was discussed by Justice Newbury in *Berthin v Berthin*, 2016 BCCA 104:

[46] The test, of course, is not what the parties subjectively intended but “whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract”: see G.H.L. Fridman, *The Law of Contract in Canada* (6th ed, 2011) at 15. As stated by Mr. Justice Williams in *Salminen v. Garvie* 2011 BCSC 339:

The test for determining *consensus ad idem* at the time of contract formation is objective: it is “whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract”; it is “whether a reasonable... [person] in the situation of that party would have believed and understood that the other party was consenting to the identical term”: *Fridman, supra*, p. 15; see also *Smith v. Hughes* (1871), L.R. 6 Q.B. 597 at 607 adopted in *St. John Tugboat Co. Ltd. v. Irving Refining Ltd.*, 1964

CanLII 88 (SCC), [1964] S.C.R. 614, 1964 CarswellNB 4 at para. 19, and *Remington Energy Ltd. v. B.C. Hydro & Power Authority*, 2005 BCCA 191 at para. 31, 42 B.C.L.R. (4th) 31.... In short, if a reasonable person would find that the parties were in agreement as to a contract and its terms, then a contract would exist at common law: *Witzke (Guardian ad litem of) v. Dalglish*, [1995] B.C.J. No. 403 (QL), 1995 CarswellBC 1822 at para. 59 (S.C. Chambers). The test's focus on objectivity animates the principal purpose of the law of contracts, which is to protect reasonable expectations engendered by promises. [At para. 27.]

[20] This Court must determine whether there was an agreement on all essential terms regarding the alleged agreements, regardless of form: *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 at para. 323. A court won't be able to find or enforce a contract where the terms are "vague, ambiguous or incomplete", meaning that the parties must have expressed themselves to the extent that their meaning can be determined with a reasonable degree of certainty: *Le Soleil Hotel* at para. 339. That being said, the courts do not expect documents to be drafted with "strict precision" and will strive to preserve a contract where definite meaning can be determined on close analysis: *Le Soleil Hotel* at para. 324–325.

[21] The British Columbia Court of Appeal in *Sojka v. Sojka*, 2023 BCCA 446 at para. 15, helpfully laid out the principles applicable when examining whether an oral contract has come into existence:

- If a party to an oral agreement acts as though there were a binding contract or the other party relies on the agreement to their detriment the party is unable to rely on the lack of a written agreement as a defence: *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 at paras. 342–345 [*Le Soleil*];
- An enforceable agreement is reached where parties have reached a meeting of the minds and the parties express themselves outwardly in a manner that indicates an intention to be bound: *Le Soleil* at paras. 322–323;
- Reasonable certainty of the terms of the agreement are required: *Le Soleil* at paras. 339–340;
- The existence of an oral agreement is determined by applying the objective reasonable bystander test to consider how the promisor's

conduct would appear to a reasonable person in the position of the promise: *Le Soleil* at paras. 324–325;

- The party alleging the oral agreement must be able to prove its existence on the balance of probabilities: *Bell v. Bell*, 1998 CanLII 3194 at para. 14, [1998] B.C.J. No. 1457 (S.C.).

[22] In *Hodder Construction (1993) Ltd. v. Topolnisky*, 2021 BCSC 666, the Court commented on the formation of contracts in the construction context, saying:

[115] ... In this regard, part performance can be a good indication of the intention of the parties to create a binding contract: *Rafal v. Legaspi*, 2007 BCSC 1944 [*Rafal*] at para. 21–22.

[116] Nonetheless, in the construction context, the fact that the parties have agreed to work together on a building project is not enough to create a legally enforceable contract: *Rafal* at para. 23. There is ample authority for the proposition that an enforceable construction contract generally requires agreement as to the nature of the construction, the timeline for completion, and the price: *Rafal* at para. 23 citing *Fame Construction Ltd. v. 430863 B.C. Ltd.* 1997 30 B.C.L.R. (3d) 68(B.C. S.C.) at para. 47, aff'd [1998] B.C.J. No. 2300 (C.A.); *Limen Forming West Ltd. v. Stuart Olson Dominion Construction Ltd.* 2017 BCSC 1485 at para. 33. [Emphasis added.]

...

[118] Having said this, there are cases where the courts have found a binding contract without any express terms of remuneration, in which case the courts have invoked the principle of contractual quantum meruit. These cases seem to be limited to situations where the parties had a clear meeting of the minds on essential terms including the terms and scope of the work, together with "an implied term for reasonable payment arising from a contractual relationship": *Infinity Steel Inc. v. B & C Steel Erectors Inc.* 2011 BCCA 215 [*Infinity Steel*] at para. 12; see also *Greenhill Properties* at para. 106.

[119] Where a binding contract is found to exist, a further issue that arises with some frequency in the context of residential construction is the proper characterization of the contract. More specifically, questions often arise as to whether the agreement between the parties is properly characterized as a fixed price contract, a cost-plus contract, or something in between. ...

[23] In *C.J. Smith Contracting Ltd. v. Kazem-Pour*, 2014 BCSC 689, Justice Adair lays out the framework of analysis to be applied in determining what kind of construction contract is before the court. The Court cited the following questions for the court to consider:

[79] ...

1. Did the agreement provide for a percentage of the project cost as a fee to the contractor?
2. Was price of overriding importance for the owner and was that communicated to the contractor?
3. Was an estimate provided and did the owner rely on the estimate?
4. Did the owner require the contractor to design a project at a specified cost or seek assurances as to what the project would cost?
5. Did the contractor pay for the materials and labour and then bill the owner on a regular basis for the work done?
6. Did the contractor make it clear that it was not assuming any of the risk that the final price would exceed the estimate?
7. Did the contractor provide the owner with information regarding rates for labour and equipment rental etc.?

[80] The invoices delivered by the contractor can provide evidence of the terms of the contract between the parties: see *Greenhill Properties (1977) Ltd. v. Sandcastle Recreation Centre Ltd.*, 1998 CanLII 4687, (1998), 39 C.L.R. (2d) 205 (B.C.S.C.), at para. 92.

[81] The concept of a "cost-plus" contract carries with it the assumption that the "plus" portion will only be applied against that which is an actual cost: see *Greenhill Properties*, at para. 102.

[82] Contractual quantum meruit (as opposed to restitutionary quantum meruit) is, in effect, a principle of contract construction or interpretation, to the effect that, where the parties to a valid contract have agreed for the provision of goods or services, clearly intended to be paid for, but have failed to provide for the terms of remuneration, then they may be presumed to have intended a reasonable price and, on that basis, a contractual term to pay a reasonable price may be implied. There is no room for this doctrine, or for such an implication, where the contract explicitly provides for the amount of remuneration, or for the method for determining the same. See *Infinity Steel Inc. v. B & C Steel Erectors Inc.*, 2011 BCCA 215, at para. 12 (quoting from *CH2M Hill Energy Canada Ltd. v. Consumers' Co-operative Refineries Ltd.*, 2010 SKCA 75, at paras. 23-24).

[83] In *Fairwood Construction Ltd. v. Lin*, 1997 CanLII 4292, 33 C.L.R. (2d) 111 (B.C.S.C.), Madam Justice Satanove summarized the elements required to be proved by a plaintiff asserting a claim for contractual quantum meruit, and provided guidance on the assessment of reasonable remuneration, at paras. 32 and 34. Among other things, a plaintiff in a contractual quantum meruit action must prove that the parties agreed that certain work was to be done but failed to agree on all aspects of the contract (for example, the price to be paid), and prove that the payment sought was reasonable remuneration for the work done. For the assessment of reasonable remuneration, expert evidence is often desirable but not necessary.

[84] On the other hand, homeowners in the position of the defendants are entitled to know what they are paying for. Moreover, since Smith Contracting has brought this action, it must prove that the amounts it claims are properly owing, either in contract or on the basis of *quantum meruit*. See *Northern Sun Developments Ltd. v. Cook*, 2011 BCSC 384, at para. 45. As the plaintiff, Smith Contracting bears the onus to establish the terms of the contract it relies upon and has the burden to prove that the defendants owe it money.

[24] A somewhat analogous set of circumstances to the case before me arose in *Hodder Construction*. In that case, the plaintiff builder agreed to be the general contractor for the construction of a home for the respondent. There was no written contract. The construction ran into trouble, and the respondent fell behind in making payments and started asking questions about billing practices and final cost, which was then going to vastly exceed early estimates. Eventually, the plaintiff withdrew and filed a lien. The plaintiff filed a claim for an unpaid balance of \$359,400 of unpaid invoices on the base of breach of contract or else as remuneration based on *quantum meruit*. The respondent counterclaimed for work that was within the scope of work of the plaintiff in excess of an alleged agreed on maximum of \$850,000. The builder provided two documents which contained estimates to the homeowners before work began, but the court found these did not constitute agreements and were created only to help obtain financing. The court found that, while the scope of work was initially clear, as time went on, certain elements were removed from the scope of work by the homeowner and the cost implications were not spelled out. The court found there was no “meeting of the minds” on certain key terms essential to the formation of a binding contract including completion date and, more importantly, contract price and remuneration. The homeowner took the position that contract price was fixed cost or capped, while the plaintiff believed they would be remunerated via their standard fee structure. The court found the estimate figures were not part of any agreement on remuneration. The Court found there was no binding contract.

[25] In the present case, the evidence discloses:

- no written contract was ever created or signed;

- the written estimate contained no, or very few, particulars regarding timing or work to be undertaken;
- the e-mail and text communications between the parties disclosed extensive disagreement regarding expectations as to, among other things, performance and price, confirm that the project was proceeding on an *ad hoc*, day by day basis and that terms were being adjusted regularly, based on changing specifications and supplier difficulties;
- Mr. Taylor, of the plaintiff, testified at different times that the contract was a cost-plus contract and also that it was a fixed price contract with modifications and additions. Mr. Taylor was unable, at any point, to identify what the “plus” aspect of the contract was, that is, what percentage or profit margin was to be added to what aspect of his costs to arrive at the amount to be paid for the provision of what benefit;
- it was unclear, from the evidence, what method or criteria Mr. Taylor used to determine which increased costs, whether labour or material, would be passed on to the respondent in the increase to the total price of the work;
- Mr. Pabla testified that the contract was one of fixed price, established by the December 2021 Estimate, while simultaneously complaining of delays and timing issues not referred to in the Estimate and demanding particulars of materials purchased for the project and of labour expenses, feeling that materials were being diverted and labour not being performed on the project;
- the parties were in complete disagreement as to whether any form of modification or agreement ever arose regarding the payment of \$8,000 to resolve any and all disputes; and

- unlike in *Greenhill Properties (1977) Ltd. v. Sandcastle Recreation Centre Ltd.*, 1998 CanLII 4687 (B.C.S.C.), the invoices provided are not so clear as to provide compelling evidence of the terms of the agreement.

[26] I find that the evidence establishes that there was never any distinct meeting of the minds by the parties as to the essential terms which would govern their relationship regarding the project. While I accept that there was agreement that the plaintiff was to complete work on the respondent's project, this was not enough to create a binding contract. Neither party succeeded in establishing, on a balance of probabilities, that an enforceable contract, oral or written, was ever established on the evidence. Neither established that there was certainty as to the essential terms of the agreement including the scope of work to be performed, the timetable and the remuneration. Each of the parties took a different position as to the contractual relationship at different times and as one position or the other would favour them at the given time. While part performance can be an indication that the parties intended to create a binding contract, the "factual matrix ... cannot result in the creation of a new agreement for the parties. The terms of the contract must always be gleaned from the agreement itself": *All Out Contracting Ltd. v. Gurlay*, 2020 BCSC 481 at para. 32 citing *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 at paras. 57–58.

Unjust Enrichment and Limitation Issues

[27] In June 2025, the plaintiff filed an Amended Notice of Civil Claim which significantly changed the nature of the claim in at least one regard – it added an entirely new equitable claim of unjust enrichment.

[28] The actual amendment of the claim followed an unusual path.

[29] Somehow, plaintiff's counsel managed to file the amended claim after the matter had been set for trial, after a Notice of Trial had been filed and without the consent of the defendant. Such filing was clearly done in breach of Rule 6-1(1) of the SCCR.

[30] Subsequent applications were filed by the parties. The plaintiff filed for leave to amend and the defendant filed seeking dismissal of the claim by summary trial. In December 2025, when the defendant was self-represented, a consent order was filed authorizing the filing of the amended Notice of Civil Claim.

[31] Given that the allegations of loss arose during the period of late 2021 and the first half of 2022, that amendment and claim arose for the first time approximately three years after the alleged loss and the filing of the original pleading by counsel for the plaintiff.

[32] The *Limitation Act*, S.B.C. 2012, c. 13, provides as follows:

6 (1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.

(2) The 2 year limitation period established under subsection (1) of this section does not apply to a court proceeding referred to in section 7.

...

22 (1) If a court proceeding has been commenced in relation to a claim within the basic limitation period and ultimate limitation period applicable to the claim and there is another claim (the "related claim") relating to or connected with the first mentioned claim, the following may, in the court proceeding, be done with respect to the related claim even though a limitation period applicable to either or both of the claims has expired:

- (a) proceedings by counterclaim may be brought, including the addition of a new party as a defendant by counterclaim;
- (b) third party proceedings may be brought;
- (c) claims by way of set off may be advanced;
- (d) new parties may be added or substituted as plaintiffs or defendants.

...

(5) In any court proceeding, the court may, on terms as to costs or otherwise that the court considers just, allow the amendment of a pleading to raise a new claim even though, at the time of the amendment, a court proceeding could not, under section 6, 7 or 21, be commenced with respect to that claim.

...

24 (1) If, before the expiry of either of the limitation periods that, under this Act, apply to a claim, a person acknowledges liability in respect of the claim,

- (a) the claim must not be considered to have been discovered on any day earlier than the day on which the acknowledgement is made, and

(b) the act or omission on which the claim is based is deemed to have taken place on the day on which the acknowledgement is made.

[33] In *Manterra Technologies Inc. v. Verathon Medical (Canada) ULC*, 2022 BCSC 98, Justice Milman dealt with a somewhat similar situation:

[19] Verathon argues that the impugned paragraphs in the amended NOCC advance a new cause of action after the expiry of the governing limitation period, giving rise to a need for leave. Manterra disputes that the amended NOCC advances any new claim.

[20] In *Swiss Reinsurance Company v. Camarin Limited*, 2018 BCCA 122, Garson J.A., writing for the Court of Appeal, had occasion to consider the test to be applied in determining whether a proposed amendment to a pleading raises a new cause of action. At paras. 27-28, she adopted both parties' suggested descriptions of what must be pleaded to raise a cause of action, seeing "little difference" between them:

- a) "every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court"; and
- b) "a factual situation the existence of which entitles one person to obtain from the court a remedy against another person."

[21] In the following paragraphs, Garson J.A. cited earlier jurisprudence holding that an amendment will not be taken to raise a new cause of action simply because it "take[s] the cause of action from being one entirely in contract to being one also in tort" or where "a party merely pleads a new or alternative remedy based on the same facts already pleaded" (para. 31). More generally, an amendment will not be taken to raise a new cause of action as long as it does not "change the substance of the issues" (para. 30).

[22] Applying that test to the pleadings in issue in this case, I am satisfied that in the impugned paragraphs of the amended NOCC, Manterra raised an entirely new cause of action in breach of confidence. The only misconduct alleged in the original NOCC was Verathon's failure to follow through on its commitment to order a minimum quantity of product. The NOCC, as originally filed, contained no reference to confidential information or the MNA. It was only in the amended NOCC that the essential elements of a cause of action in breach of confidence were alleged and associated remedies sought. Although Manterra has continued to allege a breach of contract arising from the same factual matrix, the essential nature of the breach, and even the agreement alleged to have been breached, are now different.

[23] In summary, the impugned paragraphs have clearly "changed the substance of the issues", thereby meeting the test set out in *Swiss Reinsurance*.

[34] Justice Milman found further that the failure to get leave to amend was not a mere irregularity and that Verathon was not precluded by Rule 22-7(4)(b) of the

SCCR from seeking remedial relief because it had responded to the amended pleading.

[35] He found that Manterra's claim that its failure to obtain leave was a failure to comply with the SCCR, thus triggering the application of Rule 22-7, was not sustainable. The requirement for leave in such situation was not set out in any Rule but flowed from the *Limitation Act*, and the associated common law. He found that the amendment was a nullity unless and until leave was granted.

[36] In considering whether leave should be granted, Justice Milman reviewed the authorities:

[30] The test to be applied on an application such as this for leave to amend a claim pursuant to that provision is well-settled. The factors to be considered were set out by the Court of Appeal in *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282, [1996] B.C.J. No. 234 (C.A.) and *Letvad v. Fenwick*, 2000 BCCA 630 and include the following:

- (1) the extent of the delay;
- (2) the reasons for the delay;
- (3) any explanation put forward to account for the delay;
- (4) the degree of prejudice caused by delay; and
- (5) the extent of the connection, if any, between the existing claims and the proposed new cause of action.

[31] Justice Groberman, writing for the Court of Appeal more recently in *Chouinard v. O'Connor*, 2011 BCCA 161, reiterated that the list of factors set out in those cases is not to be treated as exhaustive. The overriding concern is whether it would be "just and convenient" to grant leave.

[32] In *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329 at para. 47, the Court of Appeal enumerated the following options that are available to the court on an application of this kind, where there is or may be an accrued limitation defence:

- a) if it is clear there is an accrued limitation defence, the question is whether it will nevertheless be just and convenient to allow the amendment to be made, notwithstanding the defendant will lose that defence, applying the *Letvad* non-exhaustive list of factors;
- b) if the parties disagree as to whether there is an accrued limitation defence, and the court cannot determine this issue on the application, the court should proceed by assuming that there is a limitation defence, and consider whether it is just

- and convenient to allow the amendment, even though the result will be the elimination of that defence; and
- c) alternatively, when the limitation issue cannot be determined on the application, and the applicant had not established that considerations of justice and convenience justified extinction of the limitation defence under s. 4(1) of the *Act*, judicial discretion may be exercised to permit the amendment on terms that the limitation defence would be preserved and determined at trial.

[37] In the present case, the delay is extensive and amounts to almost three years from the filing of the original pleading. No reason or explanation for the delay was provided save for vague reference to the discovery process. There may be significant prejudice to the defendant given the original position, which was grounded solely in the long-standing claims in contract without any reference to equitable principles or causes of action. The new claim relies on different legal, factual and evidentiary tests and requirements.

Decision

[38] On the basis of the evidence as outlined above, I find as follows:

1. Based on the evidence, neither party established on a balance of probabilities that there was any enforceable contract or agreement between the parties regarding this project.
2. The amendment of the original Notice of Civil Claim was improperly done and added a new claim beyond the applicable limitation period of two years. Such amendment was not a mere irregularity but rather was a nullity unless and until leave was granted. On the evidence before me, I would not and do not grant leave for such amendment.
3. If I am wrong in denying leave to amend, I would grant leave subject to the defendant having leave to raise a limitation and a laches defence at trial and would find that such defences succeed on the evidence before me.

4. I dismiss the claims of the plaintiff and the counterclaim of the defendant in their entirety.
5. Each party shall bear their own costs.

“Caldwell J.”