

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Centura Building Systems (2013) Ltd. v.
601 Main Partnership,*
2023 BCSC 60

Date: 20230112
Docket: S164499
Registry: Vancouver

Between:

Centura Building Systems (2013) Ltd.

Plaintiff/
Defendant by Counterclaim

And

601 Main Partnership and 5264 Investments Ltd.

Defendants/
Plaintiffs by Counterclaim

Corrected Judgment: The text of the judgment was corrected on the front page on
January 24, 2023.

Before: The Honourable Madam Justice Warren

Reasons for Judgment on Interest and Costs

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Place and Dates of Hearing:

Vancouver, B.C.
December 6-8, 2022

Place and Date of Judgment:

Vancouver, B.C.
January 12, 2023

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Introduction

[1] This case concerned a dispute over work performed by the plaintiff, Centura Building Systems (2013) Ltd. (“Centura”), on a construction project (the “Project”) developed by the defendant, 601 Main Limited Partnership (“601 Main”). The other defendant, 5264 Investments Ltd., was the registered owner of the land on which the Project was built.

[2] Following a 35 day trial, I issued reasons for judgment indexed at 2022 BCSC 295 (the “Trial Reasons”). I granted judgment to Centura in the amount of \$575,576.62, and gave the parties leave to make additional submissions on two issues: Centura’s claim for contractual interest and the appropriate costs award. Those submissions have now been made; these are my reasons on those two issues.

Background

[3] The manager for the Project was Icon West Construction Ltd. (“Icon”), as agent for 601 Main.

[4] Centura was the initial framer, drywall installer, and insulation installer for the Project. Its work was governed by a modified form of CCDC-17 stipulated-price contract between it and 601 Main (the “Contract”).

[5] The Project was beset by delays and conflict between the parties from the outset. Centura alleged Icon’s mismanagement caused a number of events and conditions that interfered with its ability to complete its work in a timely way and caused it to incur increased costs. 601 Main alleged Centura did not have the workforce required to meet the schedule for the Project and failed to perform its work properly, which caused 601 Main to incur costs to retain an alternate contractor to complete and correct deficiencies in Centura’s work, as well as costs resulting from a four-month delay in completing the Project.

[6] On January 23, 2016, 601 Main terminated the Contract pursuant to GC 6.5.10 which provides:

Notwithstanding anything to the contrary in GC 6.5, if the Trade Contractor is delayed in the performance of the Work for more than 30 days, the Owner shall have the right to terminate the Contract and engage another party to finish the Work. Upon such termination, the Trade Contractor will be entitled to payment only in respect of the Work completed up to the date of termination.

[7] After terminating the Contract, 601 Main engaged Crystal Consulting Inc. (“Crystal”) to complete most of Centura’s work.

[8] 601 Main took the position that it was permitted to terminate the Contract pursuant to GC 6.5.10 because of delay caused by Centura. Centura’s initial position was that 601 Main did not have the right to terminate the Contract and that its purported termination amounted to a repudiation of the Contract.

[9] Centura filed a claim of builders lien and commenced this action alleging it was owed money for work it performed and materials it provided prior to the termination of the Contract; claiming damages for breach of contract for interference in its work; and claiming lost profits it said it would have earned had 601 Main not wrongly terminated the Contract.

[10] 601 Main counterclaimed, seeking damages for breach of contract associated with alleged delays and deficiencies in Centura’s work, as well as damages for abuse of process for what it said was the improper filing of the builders lien.

[11] In its original closing submissions, Centura maintained it was owed about \$630,000 in respect of the work it performed and materials it delivered under the Contract to the date of termination (about \$820,000 plus GST for work and materials within the original scope of work (“Base Contract Work”) and approximately \$215,000 plus GST for extra work and materials pursuant to change orders (“Extras”), less \$455,879.33 that had already been paid) (the “Contract Value Claim”). It claimed damages of about \$310,000 for interference in its work (the “Interference Claim”) and lost profits of about \$41,000 that it said it would have earned if 601 Main had not wrongly terminated the Contract (the “Lost Profit Claim”).

It asserted the right to interest in accordance with A 5.3.1 of the Contract (prime plus two percent for the first 60 days and prime plus four percent thereafter).

[12] The defendants' position in closing submissions was that 601 Main was entitled to terminate the Contract pursuant to GC 6.5.10 for delay caused by Centura, and alternatively for "fundamental breach".

[13] If 601 Main was entitled to terminate the Contract, then the defendants' position was that they were entitled to recover from Centura damages for breach of contract in the amount of \$707,216.58, comprising the incremental increased costs incurred to complete Centura's scope of work (\$157,341.60 plus GST) and additional expenses incurred as a result of a four-month delay in completing the Project (\$516,198 plus GST).

[14] If 601 Main was not entitled to terminate the Contract, then the defendants' position was that:

(a) Centura was entitled to be paid for work it performed and materials it delivered under the Contract to the date of termination, less the amount incurred by the defendants to have Crystal correct deficiencies in that work. The defendants quantified this aspect of Centura's claim at about \$290,000, valuing Centura's work before considering deficiencies at about \$450,000 after accounting for the \$455,879.33 that Centura had already been paid, against which the defendants submitted they were entitled to a setoff of \$157,594.40, representing the cost to repair deficiencies.

(b) Centura failed to establish that the defendants caused any delay or are responsible for any event that resulted in Centura incurring increased costs. In any event, the defendants submitted that several provisions of the Contract operated to bar recovery for any delay or impact caused by them, including GC 6.5.4 which barred recovery unless Centura provided notice of a claim within ten working days of the commencement of the delay or impact, and Centura failed to provide any such notice.

[15] Irrespective of whether 601 Main was entitled to terminate the Contract, the defendants' position was that the builders lien was in an amount Centura knew was exaggerated, and that Centura exaggerated the amount to exert financial pressure and thereby create a litigation advantage. The defendants submitted this grounded a claim for damages for abuse of process which they quantified at \$262,525.32.

[16] On the last day of the trial, during reply submissions, Centura changed its position with respect to the validity of the termination of the Contract. It maintained that it was not at fault for any delay, but submitted that 601 Main was entitled to terminate the Contract for delay pursuant to CG 6.5.10 irrespective of fault. As a result, it abandoned the Lost Profits Claim.

[17] In the Trial Reasons, I framed the issues as follows:

[49] As a result of the late change in Centura's position, it is not necessary to determine whether 601 Main was entitled to terminate the Contract under GC 6.5.10. It is conceded that it was entitled to do so. However, it is not clear whether the parties agree that GC 6.5.10 is a "no fault" provision – in other words, whether it gives 601 Main the right to terminate the Contract for delay irrespective of the cause of the delay.

...

[52] It is necessary to decide whether GC 6.5.10 is or is not a "no fault" termination provision because the answer to that question shapes the framing and analysis of the other issues. The live issues, framed broadly, are:

1. Was 601 Main entitled to terminate the Contract pursuant to GC 6.5.10 irrespective of whether Centura was at fault for or the cause of the delay?
2. What, if anything, is Centura entitled to be paid in respect of the Contract Value Claim?
3. What, if anything, is Centura entitled to be paid in respect of the Interference Claim?
4. Have the defendants established that Centura breached the Contract and, if so, what damages flow from the established breach(es)?
5. Did Centura file a claim of builders lien in an amount that it knew or ought to have known was exaggerated and, if so, are the defendants entitled to damages for abuse of process?
6. What is the appropriate rate and method for calculating interest to be paid on any amounts found owing to either party?
7. What is the appropriate costs award?

[18] My conclusions on those issues, as expressed in the Trial Reasons, were as follows:

1. GC 6.5.10 is a no-fault termination provision; in other words, pursuant to GC 6.5.10, 601 Main had the right to terminate the Contract for a delay in the performance of Centura's work of more than 30 days irrespective of the cause of or fault for the delay (Trial Reasons, paras. 56 – 62).

2. Centura established that, before accounting for deficiencies, the work it completed up to the termination of the Contract had a value of \$1,037,692.95 including GST (\$794,000 plus five percent GST for Base Contract Work and \$194,279 plus five percent GST for Extras). From that amount \$6,237 had to be deducted to reflect deficiencies, and the \$455,879.33 Centura had already been paid also had to be deducted, leaving \$575,576.62 owing to Centura under GC 6.5.10 for the work it completed up to the termination of the Contract (Trial Reasons, paras. 63 – 143).

3. The Interference Claim was dismissed for reasons that included Centura's failure to give the notice required by GC 6.5.4 (Trial Reasons, paras. 144 – 164).

4. The defendants established that Centura breached the Contract as a result of deficiencies in its work, but there was an inadequate evidentiary foundation upon which to value most of the deficiencies. The defendants only established that certain deficiencies decreased the value of Centura's work by \$6,237. I found that the delay in the progress of Centura's work did not constitute a breach of the Contract by Centura. In case I was wrong about that and because of the significance of the fundamental breach allegation, I went on to analyze the defendants' claim for damages as if both breaches of contract (deficiencies and delay) had been established. I concluded that the increased costs incurred by the defendants to complete Centura's scope of work flowed not from any breach of contract by Centura but rather from 601 Main's decision to exercise its right of termination under GC 6.5.10. I then

considered whether the alleged breaches of contract could have amounted to a repudiation of the Contract, or “fundamental breach”, providing the defendants with an alternative justification for termination and a basis for recovering the incremental increased costs of completing Centura’s work as damages. I concluded that even if both breaches of contract had been established by the defendants, they would not have amounted to repudiatory breach. Finally, I concluded that even if delay in Centura’s work amounted to a breach of the Contract, that breach did not cause any overall delay in completing the Project (Trial Reasons, paras. 165 – 194).

5. I was not persuaded that Centura knowingly overstated the amount of its lien claim and, accordingly, I dismissed the defendants’ claim for damages for abuse of process (Trial Reasons, paras. 195 – 216).

6. No submissions had been made with respect to the appropriate rate and method for calculating interest to be paid on the amount I found was owing to Centura. I gave the parties leave to make submissions on that issue.

7. I granted the parties leave to make submissions on costs.

Interest

[19] Centura’s position is that it is entitled to pre-judgment contractual interest pursuant to clause A 5.1.3 of the Contract, which provides:

5.3.1 Should either party fail to make payments as they become due under the terms of the Contract or in an award by arbitration or court, interest at the following rates on such unpaid amounts shall also become due and payable until payment:

(1) 2% per annum above the prime rate for the first 60 days.

(2) 4% per annum above the prime rate after the first 60 days.

Such interest shall be compounded on a monthly basis. The prime rate shall be the rate of interest quoted by HSBC for prime business loans as it may change from time to time.

[20] Centura submits that its right to interest under A 5.1.3 was triggered upon termination of the Contract on January 23, 2016 or, alternatively, on April 19, 2019

which is 50 days after Centura's issuance, on February 29, 2016, of an invoice for its work up to the termination. It has calculated pre-judgment interest pursuant to A 5.1.3 from January 24, 2016 to the date of judgment as \$294,432.33.

[21] Centura submits that it is also entitled to post-judgment interest pursuant to s. 7 of the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

[22] The defendants take no issue with Centura's entitlement to interest pursuant to the *Court Order Interest Act*. The defendants dispute Centura's claim for pre-judgment contractual interest. The defendants submit that clause A 5.1.3 has no application for two reasons:

1. it does not survive termination of the Contract; and
2. alternatively, properly construed, it does not apply to an amount payable to Centura under GC 6.5.10.

[23] These two reasons are intertwined.

[24] The defendants rely on GC 13.10 which provides:

13.10 The provisions of this Contract relating to indemnification and warranty survive the termination of the Contract, even if such termination is pursuant to GC 7.2 [which concerns the right of Centura to terminate for cause].

[25] The defendants submit that if the parties intended A 5.3.1 to survive termination, they would have included the interest provisions of the Contract among those expressly preserved by GC 13.10. The defendants submit that to impose on them a contractual obligation to pay interest on amounts due *after* termination would require the Court to imply the existence of such a term in the Contract. They say the test for implying contractual terms that was reiterated by the Supreme Court of Canada in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 at para. 29, has not been met and, to the contrary, it would be commercially absurd to conclude that they intended to pay contractual interest on an amount that was not due before termination of the Contract.

[26] As I understood it, the defendants do not take the position that termination of the Contract had the effect of extinguishing amounts due under the Contract, including any contractual interest on such amounts, as at the time of termination. Clause A 5.3.1 expressly states that where that provision applies, interest is “payable until payment” which is a clear indication that, notwithstanding GC 13.10, the parties intended any contractual interest obligation that existed at the time of termination to survive termination. The real question is whether, *concurrent with termination*, 601 Main became contractually obliged to pay interest on the amount payable to Centura under GC 6.5.10.

[27] By its express terms, A 5.1.3 applies to amounts “due under the terms of the Contract or in an award by arbitration or court”. The defendants submit that this language stipulates two triggering events for the imposition of contractual interest: the first occurs where “a proper application for payment is made in compliance with the terms of the Contract” and the second requires a court order (or presumably an arbitration award). There has been no arbitration and my decision of February 25, 2022 is the only court order. According to the defendants, the question then is whether, in the absence of an arbitration award or court order, A 5.1.3 only applies where there has been “a proper application for payment made in compliance with the terms of the Contract”.

[28] The defendants observe that A 5.3.1 falls within a section of the Contract titled “Article A-5 Payment”, the first clause of which, A 5.1, identifies three types of payments the “Owner” must make: 1. progress payments on account of the Contract Price “when due in the amount certified by the Payment Certifier”; 2. upon substantial performance, “the unpaid balance of the holdback amount when due”; and 3. upon issuance of the final certificate, “the unpaid balance of the Contract Price when due”. Other provisions in the Contract specify a certification process to be followed for each of these three types of payments that expressly provides when the payment is due.

[29] Pursuant to GC 5.2 and 5.3, to receive a progress payment, the contractor must submit a request for payment, together with certain documentation. The “Payment Certifier” then issues a certificate of payment in the amount applied for, or in such other amount the Payment Certifier determines to be “properly due”. The owner is then required to make the payment “on or before 50 calendar days after the application for payment date ...”.

[30] Pursuant to GC 5.5, upon substantial performance the contractor must submit an application for payment of the holdback, which must include certain documentation. The construction manager or Payment Certifier then issues a certificate for payment of the holdback amount which, in common law jurisdictions, is “due and payable” on the first calendar day following expiration of the statutory holdback period.

[31] Pursuant to GC 5.7, to receive final payment, the contractor must submit an application together with certain documentation. If the Payment Certifier determines the application is “valid”, a final certificate for payment is issued and the final payment is due.

[32] The defendants emphasize that the Contract expressly provides that each of these three types of payments (those identified in A 5.1) are “due” upon completion of the applicable certification process. They observe that, in contrast, GC 6.5.10 does not state when the amount payable under that provision is “due”. They submit that this suggests the only “payments” that attract interest under A 5.3.1 are the three kinds of payments mentioned in A 5.1.

[33] I am not persuaded that this is so. Clause A 5.3.1 is not expressly limited in this manner. If the parties intended it to apply only to the three kinds of payments noted in A 5.1, they could have easily expressed that intention in the Contract. Further, by its express terms, A 5.3.1 applies where “either party” fails to make payments and each of the three types of payment noted in A 5.1 is payable by Centura. Nevertheless, the question of whether interest is payable under A 5.3.1 on

the amount to which Centura became entitled upon termination under GC 6.5.10 remains.

[34] The portion of A 5.3.1 that is material to Centura’s claim for contractual interest reads: “Should either party fail to make payments as they become due under the terms of the Contract”. Clause A 5.3.2 clarifies that interest is payable under A 5.3.1 on disputed claims that are “resolved ..., from the date the amount would have been due and payable under the Contract, had it not been in dispute”. Thus, the fact that the amount claimed by Centura under GC 6.5.10 was in dispute is irrelevant. Interest is payable under A 5.3.1 on any unpaid amount that became due under the Contract from the date it became due, even if that amount was initially in dispute. What must be determined is whether the Contract stipulates when the amount to which Centura was entitled under GC 6.5.10 “[became] due”.

[35] Centura submits that under the terms of the Contract the amount to which it was entitled under GC 6.5.10 became due as of the moment of termination. It relies on GC 7.1.10 which provides that “...in the event that Owner terminates this Contract for any reason, Owner shall pay the Trade Contractor for all Work performed to date”, and GC 6.5.10 itself which provides that “[u]pon such termination, the Trade Contractor will be entitled to payment only in respect of the Work completed up to the date of termination”.

[36] These provisions clearly create a contractual entitlement to payment for the work performed up to the date of termination that is triggered “upon”, or contemporaneously with, termination under GC 6.5.10. In other words, upon termination Centura became entitled, under the terms of the Contract, to payment for the work it had performed. The more difficult question is whether these provisions also stipulate that such payment became due upon, or contemporaneously with, termination. Put another way, properly construed, do these provisions address both Centura’s *entitlement* to payment and *when* 601 Main is required to make the payment or do they address only the former?

[37] Each party relies on a case that it says supports its construction, but neither case was of assistance in undertaking the contractual interpretation analysis required here.

[38] Centura cites *First Queensborough Shopping Centres Limited v. Wales McLelland Construction Company (1988) Ltd.*, 2014 BCSC 764 [*First Queensborough*], for the proposition that an interest provision that was substantially the same as A 5.3.1 resulted in interest accruing as a debt obligation that was not extinguished by a contractual release that took effect as of the date of the final certificate of payment. The question was whether the contractual release extinguished the contractor's entitlement to interest on earlier certificates for progress payments that had indisputably accrued prior to the contractor's final certificate for payment. *First Queensborough* does not assist in the determination of whether the Contract in this case stipulated that the payment to which Centura was entitled under GC 6.5.10 became due upon, or contemporaneously with, the termination of the Contract by 601 Main.

[39] The defendants cite *JM Bay Properties Inc. v. Tung Cheng Yuen Buddhist Association*, 2022 BCSC 81 [*JM Bay*], for the proposition that no interest is due under an interest provision that was substantially the same as A 5.3.1 before the amount owing (which was in dispute) has been quantified (in that case by reference to the Registrar) (see paras. 151-152). However, *JM Bay* is of limited assistance because the conclusion in para. 152 is not accompanied by a contractual interpretation analysis and the amount in dispute arose under a provision that was worded differently than GC 6.5.10 and GC 7.1.10.

[40] As an aside, I have not overlooked the fact that, as noted by Centura, there is nothing in *JM Bay* to indicate whether the contract in issue in that case contained a provision similar to A 5.3.2, which provides that interest is payable on disputed claims from the date the amount would have been due and payable under the Contract had it not been in dispute. Ultimately, I did not find this to be significant to my analysis because, as already explained, A 5.3.2 provides that interest is payable

under A 5.3.1 on any unpaid amount that became *due under the Contract* from the date it became due, even if that amount was initially in dispute, which leaves the question of whether the amount became due under the terms of the Contract to be answered.

[41] I summarized the principles of contractual interpretation in the Trial Reasons at para. 56:

[56] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [*Sattva*], the Court endorsed a “practical, common-sense approach” to the interpretation of contracts, “not dominated by technical rules of construction”, with the meaning of the words “often derived from a number of contextual factors”. The principles, as drawn from *Sattva*, include the following:

- a) the goal of contractual interpretation is to ascertain the objective intentions of the parties (para. 55);
- b) in ascertaining the parties’ intentions, a practical, common-sense approach not dominated by technical rules of construction is to be adopted (para. 47);
- c) the contract must be read as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of contracting (para. 47);
- d) the surrounding circumstances (such as the purpose of the contract and the nature of the relationship created by it) inform the analysis because words in isolation do not have an immutable or absolute meaning and often take their meaning from the context (paras. 47–48);
- e) the goal in considering the surrounding circumstances is to acquire a deeper understanding of the objective intentions of the parties, but the interpretation of a written provision must always be grounded in the text and read in light of the entire contract; the surrounding circumstances cannot be used to deviate from the actual words used (para. 57); and
- f) in ascertaining the surrounding circumstances the only evidence that may be relied upon is objective evidence of the background facts at the time the contract was made; in other words, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting (para. 58).

[42] Again, the narrow question is whether the payment to which Centura was contractually entitled upon termination of the Contract “[became] due under the terms of the Contract” as that phrase is used in A 5.3.1. Specifically, does GC 6.5.10

or GC 7.1.10, properly construed, provide that upon termination pursuant to GC 6.5.10 Centura became entitled to the payment and, concurrently, the payment became due, or do they provide only the former such that the Contract contains no agreement between the parties as to when the payment is due?

[43] For ease of reference, clauses 6.5.10 and 7.1.10 provide:

6.5.10 Notwithstanding anything to the contrary in GC 6.5, if the Trade Contractor is delayed in the performance of the Work for more than 30 days, the Owner shall have the right to terminate the Contract and engage another party to finish the Work. Upon such termination, the Trade Contractor will be entitled to payment only in respect of the Work completed up to the date of termination.

...

7.1.10 The Trade Contractor acknowledges that, in the event that Owner terminates this Contract for any reason, Owner shall pay the Trade Contractor for all Work performed to date.

[44] I start by observing that there is no express statement of when the payment in question is “due”. For example, it would have been easy to include language in the Contract to the effect that notwithstanding the termination, the amount the Trade Contractor is entitled to be paid under GC 6.5.10 is due within 30 days (or some other period) of the date that an invoice is submitted by the Trade Contractor for the Work completed up to the date of termination. If words to that effect were contained within the Contract and if 601 Main did not pay by the deadline because of a dispute about the quantum of the claim, A 5.3.2 would be engaged and interest under A 5.3.1 on any subsequent “settlement amount” would apply from the date the payment would have been due had it not been in dispute.

[45] The significance of the omission of any express statement of when the payment is due is heightened by a consideration of the Contract as a whole. As already discussed, other provisions in the Contract do expressly provide when amounts claimed are “due” which suggests that when the parties intended to impose an obligation to pay by a particular time they did so expressly.

[46] In my view, it cannot be said that it is obvious the parties intended the payment contemplated by GC 6.5.10 to become due concurrently with termination

even though the Contract does not say so expressly. Such a construction does not meet the test for implying a contractual term reiterated in *M.J.B Enterprises Ltd.* at para 29: “where necessary to give business efficacy to the contract or where it meets the ‘officious bystander’ test”. A construction reflecting an intention of the parties not to stipulate a due date for the payment to which Centura was entitled under GC 6.5.10 cannot be characterized as inefficacious given that on termination of the Contract under that provision (which is effective immediately, without notice) neither party would know the amount to be paid.

[47] That is not to suggest that it would necessarily be unreasonable to have a payment under GC 6.5.10 due concurrently with termination. This would engage the contractual interest obligation in A 5.3.1 which would provide an incentive for 601 Main to promptly pay the amount ultimately claimed. On the other hand, it would not be unreasonable to omit a contractual due date because this would disentitle Centura to contractual interest which would provide an incentive for Centura to ensure the accuracy and legitimacy of its claim. The point is that it is not necessary to construe the Contract as providing that a payment under GC 6.5.10 is due “upon termination” in order to give the Contract business efficacy.

[48] For these reasons, it is my view that interest is not payable under A 5.3.1 of the Contract on the \$575,576.62 owing to Centura for the work it completed up to the termination of the Contract because payment of that amount did not “become due under the terms of the Contract”.

[49] As mentioned, there is no dispute that Centura is entitled to post-judgment interest under the *Court Order Interest Act*.

Costs

Positions of the Parties

[50] Centura’s position is that it was the successful party because it established liability and obtained a remedy. Citing *Loft v. Nat*, 2014 BCCA 108, it submits that

the fact that the judgment awarded was in an amount that was less than it sought is not a basis upon which the court could deprive it of its costs.

[51] Centura acknowledges that the more flexible “substantial success” test described in *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 45, is usually more appropriate where the litigation concerns multiple causes of action, but submits that this case should not be characterized as one involving multiple causes of action because the counterclaim was intertwined with the claim, and the claims advanced by the defendants in the counterclaim were pleaded as set-off defences. As I understood the argument, Centura says that because the claim and counterclaim arose from the same factual matrix and involved much of the same evidence, and the counterclaim was largely responsive to the underlying claim, they should be considered together for the purpose of costs, such that Centura should be considered the successful party under the *Loft* standard for the purpose of determining the appropriate costs award for the entire action. Alternatively, Centura submits that it was substantially successful even under the *Fotheringham* substantial success approach.

[52] Both parties submit that this case was of more than ordinary difficulty such that any ordinary costs award should be fixed at Scale C.

[53] In the result, Centura seeks costs of the entire action at Scale C.

[54] The defendants submit that success must be determined by application of the *Fotheringham* substantial success test. They say that they were substantially successful and accordingly should be awarded costs of the entire action.

[55] The defendants also assert that Centura engaged in reprehensible conduct. Specifically, they say that Centura’s primary witness, Mr. Bowie, gave deliberately false evidence on a central issue and Centura belatedly abandoned its allegation that the termination of the Contract was wrongful which compromised the defendants’ defence of the remainder of the case.

[56] The defendants submit that if they are found to have been substantially successful, the reprehensible conduct warrants an award of special costs of the entire action or, alternatively, of those parts of the proceeding informed and supported by the false evidence of Mr. Bowie, plus costs thrown away for those parts which concerned the abandoned wrongful termination claim, with the balance at Scale C. They submit that if Centura is found to have been substantially successful, the reprehensible conduct warrants an order depriving Centura of the costs it would otherwise have been awarded. Finally, they submit that if neither party is found to have been substantially successful, the reprehensible conduct warrants an award of costs to the defendants for a portion of the proceeding at Scale C or assessed as special costs.

Analysis

What is the appropriate standard to use in determining success for the purpose of costs?

[57] Pursuant to Rule 14-1(9) of the *Supreme Court Civil Rules*, costs in a proceeding must be awarded to the successful party unless the court otherwise orders.

[58] While success may be assessed on the basis of whether liability was established and a remedy awarded, in some cases a more flexible approach is required. The Court or Appeal addressed the distinction in *The Owners, Strata Plan LMS 3259 v. Sze Hang Holdings Inc.*, 2017 BCCA 346 [Sze Hang]:

[90] At its most basic, the successful party is the plaintiff who establishes liability under a cause of action and obtains a remedy, or the defendant who obtains a dismissal of the plaintiff's case: *Loft v. Nat*, 2014 BCCA 108 at para. 46.

[91] Different considerations, however, arise when the litigation concerns multiple causes of action. In such cases, the more flexible "substantial success" test will usually be more appropriate. The "substantial success" standard was described by Bouck J. in *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 45:

[45] Gold now seems to say that substantial success in an action should be decided by the trial judge looking at the various matters in dispute and weighing their relative importance. The words "substantial success" are not defined. For want of a better measure, since

success, a passing grade, is around 50% or better, substantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when looked at all the disputed matters globally.

[59] I have no difficulty concluding that the more flexible “substantial success” test is appropriate in this case.

[60] In my view, the fact that the claim and counterclaim are intertwined does not provide a basis for concluding the substantial success approach does not apply. In *Sze Hang*, the Court found the claims were “completely intertwined” (para. 96) but adopted the substantial success approach in concluding that neither party was substantially successful.

[61] This case involved multiple causes of action. Among other things, Centura advanced a claim in debt, quantified at about \$630,000, for the amount to which it was entitled for the work completed up to the termination of the Contract; damages of about \$310,000 for 601 Main’s breach of contract representing increased costs it incurred as a result of alleged mismanagement that interfered with its ability to complete its work in a timely way; and damages of about \$41,000 representing lost profits flowing from 601 Main’s breach of contract in allegedly wrongfully terminating the Contract. Each of these is a separate cause of action, based on related but not identical facts, that was said to have entitled Centura to a distinct remedy, and that required separate analyses. In addition, although the claims advanced by the defendants in the counterclaim were pleaded as set-off defences, they were grounded in distinct causes of action. Centura’s delay was said to provide a basis for the termination of the Contract, but also to ground a substantial claim for damages for breach of contract, and the abuse of process claim was entirely distinct. Although there was factual overlap between Centura’s Interference Claim and the defendants’ claim for damages arising from delay allegedly caused by Centura, the factual analysis of the former focussed on the conduct of 601 Main/Icon while that of the latter focussed on Centura’s conduct, and the legal analyses were different.

Which party was successful?

[62] In *Fotheringham*, Justice Bouck articulated a three-step process for determining whether a party has obtained substantial success in a proceeding:

- a) First, consider the “matters in dispute” at trial. These may or may not include the “issues” explicitly mentioned in the pleadings.
- b) Second, assess the relative weight or importance of these matters to the parties.
- c) Third, with respect to all the matters in dispute at trial, determine on a global basis whether any party was “substantially successful”.

[63] As explained by Justice Burke in *Belpacific Excavating & Shoring Limited Partnership v. Crown and Mountain Creations Ltd.*, 2022 BCSC 412 at paras. 9 and 10:

[9] Courts should avoid a purely arithmetical analysis in applying these factors, whereby the issues or awards are simply counted-up and success is determined on the basis of which party prevailed on the most issues or earned the greatest damages award: *Reid v. Reid*, 2017 BCCA 191 at paras. 7-11. Rather, where there are multiple issues at trial, the court should identify which issues were of the greatest importance to the parties and determine, on a global basis, whether any litigant obtained substantial success on these grounds. As the Court stated in *Aschenbrenner v. Yahemech*, 2010 BCSC 1541, “[s]ubstantial success is not determined by counting up the number of issues and allocating success on each, or by comparing dollar amounts, but by assessing success in the major issues of substance”: para. 17.

[10] Where there is a claim and counterclaim, the standard approach is to treat each claim as separate for costs purposes: *Litt v. Gill*, 2016 BCCA 288 at para. 55. However, if the claims are “completely intertwined” and are “mirror images” of each other, the court retains the discretion to consider them together: *Sze Hang* at para. 96.

[64] I start by finding that the claim and counterclaim were sufficiently intertwined to be considered together for the purposes of costs. Although the case involved multiple causes of action, they arose out of the same general factual matrix and several of the witnesses gave evidence relevant to more than one cause of action.

Accordingly, in assessing success on a global basis, I will consider the claim and counterclaim together.

[65] It is important to bear in mind that the late change in Centura’s position on the validity of the termination had only a minor impact on its case as a whole. It resulted in the abandonment of the Lost Profits Claim, which was relatively small, but it had no impact on the importance of the “cause of the delay” allegations and associated evidence. This is because Centura maintained its claim for damages for 601 Main’s alleged breach of contract arising from interference with Centura’s ability to complete its work in a timely way and 601 Main maintained its claim for damages for Centura’s alleged breach of contract arising from the delay in the performance of its work.

[66] As mentioned, in the Trial Reasons at para. 52, I identified seven broadly-framed issues. I would characterize the “matters in dispute” for purposes of determining whether a party has achieved substantial success slightly differently:

1. Was 601 Main entitled to terminate the Contract pursuant to GC 6.5.10 irrespective of whether Centura was at fault for or the cause of the delay?
2. What, if anything, was Centura entitled to be paid in respect of the Contract Value Claim, before considering deficiencies?
3. What, if anything, was Centura entitled to be paid in respect of the Interference Claim?
4. Did the defendants establish that Centura breached the Contract by performing deficient work and, if so, what damages flow from that breach?
5. Did the defendants establish that Centura breached the Contract by delay in the progress of its work and, if so, what damages flow from that breach?
6. Did the defendants establish that Centura’s breaches of contract amounted to fundamental breach?

7. Did Centura file a claim of builders lien in an amount that it knew or ought to have known was exaggerated and, if so, are the defendants entitled to damages for abuse of process?

8. What is the appropriate rate and method for calculating interest to be paid on any amounts found owing to either party?

[67] I found that 601 Main had the right to terminate the Contract for delay in the performance of Centura's work of more than 30 days irrespective of the cause of or fault for the delay. Again, Centura's position throughout the trial, up to reply submissions on the last day, was that 601 Main wrongly terminated the Contract. Although the defendants consistently maintained that 601 Main was entitled to terminate the Contract pursuant to GC 6.5.10, their position was based on a construction of GC 6.5.10 that gave 601 Main that right for delay caused by Centura. In these unusual circumstances, neither party can fairly be said to have been successful on the first issue.

[68] Centura was successful on the second issue. Before considering deficiencies, Centura established that the work it completed up to the termination of the Contract had a value of \$1,037,692.95. There was no dispute that it had already been paid \$455,879.33, leaving a balance owing of \$581,813.62. This was less than the amount claimed by Centura, but more than the amount the defendants admitted was owed.

[69] Centura's Interference Claim, the third issue, was dismissed. The defendants were successful on this issue.

[70] The defendants were successful on the fourth issue. I found that Centura breached the Contract by performing deficient work. Although the defendants only established that certain deficiencies decreased the value of the work by \$6,237, Centura did not concede any deficiencies in its work.

[71] The defendants failed to establish that Centura breached the Contract by delay in the progress of its work. Centura was successful on the fifth issue.

[72] The defendants failed to establish that Centura's breaches of contract amounted to fundamental breach. Centura was successful on the sixth issue.

[73] The defendants failed to establish that Centura filed a claim of builders lien in an amount that it knew or ought to have known was exaggerated. Centura was successful on the seventh issue.

[74] Centura failed to establish its claim for contractual interest. The defendants were successful on the eighth issue.

[75] Ultimately, issues 2 through 8 were all important to the case advanced by each of the parties. Centura was successful on four of those (issues 2, 5, 6, and 7). The defendants were successful on three (issues 3, 4 and 8). On this basis, Centura comes out slightly ahead, but not substantially so.

[76] If success was assessed on the basis of the major factual issues that occupied most of the evidentiary phase of the trial, Centura would again come out ahead. The major factual issues were the cause of the delay on the Project, the value of Centura's work after accounting for deficiencies, and whether Centura knowingly inflated its lien claim. Neither party was successful on the cause of the delay, both succeeded to some extent on the value of Centura's work, and Centura successfully defended the allegation that the lien was inflated. However, the defendants succeeded on the interest issue, which was a substantial one in terms of quantum even though it did not feature in the evidentiary phase of the trial.

[77] In all the circumstances, it cannot be said that either party achieved substantial success on a global basis.

Did Centura engage in conduct that is properly characterized as reprehensible?

[78] The defendants' submission that Centura engaged in reprehensible conduct deserving of an award of special costs or the imposition of some other cost consequence has two bases: first, Centura's primary witness, Mr. Bowie, gave deliberately false evidence on a central issue (the allegation that 601 Main delayed

and interfered with Centura’s ability to do its work), and second, Centura belatedly abandoned its allegation that the termination of the Contract was wrongful which compromised the defendants’ defence of the remainder of the case.

[79] There is no dispute about the meaning of “reprehensible” in the sense that word is used in determining whether to award special costs: it refers to conduct that “encompasses scandalous or outrageous conduct but ... also ... milder forms of misconduct deserving of reproof or rebuke”: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3rd) 242 (C.A.) at para 17.

[80] In my view, Centura’s late abandonment of its allegation that the termination of the Contract was wrongful cannot be characterized as reprehensible. As already discussed, it had only a minor impact on its case as a whole. I was not persuaded that it compromised the defendants’ defence of the remainder of the case. There was nothing to suggest that the timing of the change in position was strategic.

[81] I turn then to Mr. Bowie’s evidence.

[82] A deliberate attempt to mislead the court through false evidence is the kind of conduct that can justify an order for special costs. In *Behan v. Park*, 2014 BCSC 1982, Voith J. (as he then was) reviewed the relevant caselaw and then concluded, at para. 49:

What flows from the foregoing discussions is a recognition that an award of special costs is an “extraordinary measure”: *Grewal* at para. 107, and limited to “exceptional circumstances”: *Westsea* at para. 39. Such an order is, however, warranted where a party gives:

- i. false evidence that has been contrived, concocted or fabricated;
- ii. with an intention to mislead: *Marchen* at para. 70, *Unternaher* at para. 12;
- iii. on an issue that is central to the matter before the court: *Waters v. Michie*, 2013 BCCA 441 at paras. 39-40, and, which if accepted, would “drive [the opposing party] from the judgment seat”: *Marchen* at para. 73.

[83] The third component referred to by Justice Voith emerges in part from *Marchen v. Dams Ford Lincoln Sales Ltd.*, 2010 BCCA 29, which he summarized in

para. 47 of *Behan*. It is apparent from that summary that the focus is on the offending party's intention or purpose. In para. 73 of *Marchen*, the Court emphasized what the offending party "sought" to do, characterizing the offending conduct as seeking "to mislead the court and to drive [the other party] from the judgment seat".

[84] I have concluded that Mr. Bowie's conduct rose to the level of "reprehensible". Much of his evidence concerned the manner in which 601 Main/Icon allegedly delayed and interfered with Centura's ability to complete its work. I found that a memorandum he prepared to record the facts supporting that allegation was misleading and based, in part, on an email he altered to align with his narrative. In his testimony at trial he maintained that the memorandum was correct. In light of my finding that he altered the email, I am satisfied that he knew his testimony was not truthful when he gave it and he sought to mislead the Court. I was so troubled by this that I concluded I could not rely on his evidence except where it was corroborated by evidence I did accept.

[85] Mr. Bowie's testimony about the manner in which 601 Main/Icon allegedly delayed and interfered with Centura's ability to complete its work was a central pillar of the case Centura advanced at trial. It was the foundation of the Interference Claim and it was key to its initial position that the termination of the Contract was wrongful. Ultimately, this evidence was not central to the outcome because Centura changed its position on the validity of the termination and because I found that Centura's failure to provide the delay and impact notice required by GC 6.5.4 of the Contract was fatal to the Interference Claim. In other words, even if accepted it would not have driven the defendants from the judgment seat. However, that does not significantly diminish the egregiousness of Mr. Bowie's conduct because the false evidence he gave was clearly intended to provide the foundation for a substantial component of the case Centura advanced at trial.

[86] The next question is whether the defendants should bear the consequences of Mr. Bowie's reprehensible conduct.

[87] It is clear that a corporate party may be held accountable through a costs award for a witness who gives intentionally false evidence in support of the party's case. In *Unternaher v. Wheat Sheaf Inn Ltd.*, [1998] B.C.J. No. 2568 (C.A.), the false evidence of two witnesses for the corporate defendant was held to warrant an award of special costs. One of the witnesses was a shareholder and employee of the corporate defendant and the other was employed by the corporate defendant "from time to time". Although the analysis is brief, it appears that the Court concluded, from the nature of the evidence the witnesses gave, that their misconduct was at the behest of the defendant. In *Concord Pacific Acquisitions Inc. v. Oei*, 2021 BCSC 129, the false evidence of the corporate plaintiff's "principal witness" was found to warrant an award of special costs against the plaintiff. The witness in question was a vice-president of the plaintiff. The fact that the plaintiff appreciated that the success of its case depended on the witness's evidence was a factor in the decision (see para. 65).

[88] Mr. Bowie was Centura's most senior employee on the construction site. Centura appointed Mr. Bowie as its representative for examination for discovery and thereby agreed to be bound by the evidence he gave and admissions he made on discovery. Centura relied heavily on Mr. Bowie's evidence at each stage of the litigation, including by instructing its expert, Evan Stregger, to rely on Mr. Bowie's account of the progress of the Project. Centura clearly appreciated that Mr. Bowie's evidence was a central pillar of the case it advanced at trial. The defendants were forced to challenge and respond to Mr. Bowie's evidence which, because of its broad scope, was a substantial undertaking. In all the circumstances, I am satisfied that fairness requires Centura to bear the consequences of Mr. Bowie's misconduct.

What costs award is appropriate?

[89] The final task is to determine the particular cost consequences that should be imposed on Centura for Mr. Bowie's conduct.

[90] I have found that neither party was substantially successful. But for Mr. Bowie's reprehensible conduct, each party would bear their own costs. Pursuant to

Rule 14-1(14), I may nevertheless award costs to the defendants arising from or associated with an improper act by or on behalf of a party.

[91] In my view, the deterrence and chastisement objectives of an award of special costs can be adequately met in this case through an award of ordinary costs, to which the defendants would not have been entitled but for Mr. Bowie's conduct. The parties agree that if ordinary costs are awarded they should be awarded at Scale C given the difficulty of the matter. In all the circumstances, I conclude that the appropriate order is for Centura to pay costs at Scale C that relate to Mr. Bowie's evidence.

[92] It is not an easy task to determine what portion of the total costs relates to Mr. Bowie's evidence. His evidence was relevant to several of the issues and it provided a considerable part of the foundation of Centura's case from the commencement of the litigation. The portion of Mr. Stregger's evidence relating to the Interference Claim was based on the accuracy of Mr. Bowie's memorandum.

[93] I consider it fair to use the portion of the trial time occupied by Mr. Bowie's testimony plus 50 percent of the time occupied by Mr. Stregger's testimony as a guide. Mr. Bowie was on the stand for nine of the 35 days of trial while Mr. Stregger testified for about two and a half days. Counting 50 percent of Mr. Stregger's time, this is 10.25 days or almost 30 percent of the total trial. On this basis, I award the defendants 30 percent of their total costs at Scale C.

Conclusion

[94] Interest is not payable under A 5.3.1 of the Contract on the \$575,576.62 owing to Centura for the work it completed up to the termination of the Contract. Centura is entitled to post-judgment interest on that amount under the *Court Order Interest Act*.

[95] The defendants are entitled to 30 percent of their total costs at Scale C.

“Warren J.”