

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Song v. Yongfeng Enterprises Inc.*,
2023 BCSC 1228

Date: 20230718
Docket: S179482
Registry: Vancouver

Between:

Yu Na Song and Bo Wei

Plaintiffs

And

**Yongfeng Enterprises Inc., Feifei Ren
and Shao Ming Wang**

Defendants

And

Michelle Wei

Defendant by Counterclaim

Before: The Honourable Mr. Justice Coval

Reasons for Judgment

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by Counterclaim:

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Place and Dates of Trial:

Vancouver, B.C.
February 21–24, 27–28, March 1–3,
6–10 and 29–31, 2023

Place and Date of Judgment:

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I. INTRODUCTION

[1] This trial arises from the construction of two houses by Yongfeng Enterprises Ltd. for Ms. Song, Mr. Wei and their adult daughter, Michelle Wei. One house is in West Vancouver and the other in Richmond, British Columbia.

[2] The West Vancouver house was built according to a signed building agreement between Michelle Wei and Yongfeng, which the parties generally followed until issues arose near the end of construction. Yongfeng alleges Ms. Wei owes \$273,000 for unpaid amounts under the agreement and extras. Ms. Wei opposes these claims and claims set-off for Yongfeng’s alleged deficiencies and delays.

[3] For the Richmond house, the parties did not sign a building agreement. They disagree about what they verbally agreed to regarding its construction. Yongfeng took construction to the point of obtaining municipal approvals for rough-in of the electrical, gas and plumbing systems. Mr. Wei and Ms. Song then instructed them to cease work and leave the property. Yongfeng claims \$1.5 million for unpaid work and lost profits. Ms. Song and Mr. Wei counterclaim for \$207,000 of alleged overpayments and deficiencies.

[4] For the reasons that follow, Yongfeng is awarded damages of \$239,834 from Ms. Wei for construction of the West Van house, and damages of \$1,154,150 from Mr. Wei for construction of the Richmond house. Ms. Ren is awarded \$2,500 from Ms. Song and Mr. Wei for abuse of process.

II. THE PARTIES

[5] Ms. Song and Mr. Wei are married. Together they own 11266 No. 2 Road, Richmond, British Columbia (“Richmond Property”).

[6] At the material times, Ms. Wei owned 1360 Ottaburn Road, West Vancouver, British Columbia (“West Van Property”). She sold it soon after Yongfeng completed construction.

[7] Yongfeng is a general contractor in the construction business. It is owned and operated by Ms. Ren and Mr. Wang.

III. BACKGROUND

[8] The parties met in around January 2015, when Ms. Song and Mr. Wei were about to purchase the Richmond Property.¹ Mr. Wang put them in touch with an architectural design firm, Bouthouse Design Group, to design the family home they wanted to build there. The offices of Bouthouse and Yongfeng were in the same building in Richmond, and Mr. Wang had a business relationship with Bouthouse. On February 5, 2015, Ms. Song and Mr. Wei engaged Bouthouse to design the Richmond house.

[9] On February 25, 2015, the Weis signed their contract to purchase the Richmond Property. The purchase closed in the summer of 2015.

[10] In March 2015, the Weis found the West Van Property. It was an empty lot. As part of the sale, the owners were including the municipally-approved plans for the design and construction of a new house. Mr. Wang's evidence was that, from the beginning, Mr. Wei told him this was an investment property that the family intended to sell when the house was built. The Weis' evidence was that they planned for the house to be a home for Ms. Wei, but in the end they sold it before she moved in because they were unhappy with Yongfeng's construction.

[11] On March 21, 2015, Ms. Wei entered into a contract of purchase and sale for the West Van Property together with the approved plans for the new home. Her purchase closed on April 18, 2015.

[12] On April 6, 2015, Yongfeng and Ms. Wei signed a fixed-price building agreement for Yongfeng to construct the West Van house in accordance with the plans that she had purchased ("West Van Contract"). Mr. Wang's undisputed evidence was that the West Van Contract was negotiated in meetings with Ms. Wei

¹ For convenience, I will sometimes refer to Mr. Wei and Ms. Song as "the Weis".

and her parents in Yongfeng's offices, where he put the documents up on what he called the "big screen" so the parties could discuss and revise the terms.

[13] The West Van Contract included the following key terms:

- i. Yongfeng was to build the home "strictly in accordance with the construction drawings and interior design plans";
- ii. Construction was to begin by May 1, 2015 and complete by June 30, 2016; and
- iii. The total construction price was \$1,221,380 (plus GST), paid by an initial deposit and seven milestone payments.

[14] In early 2015, Yongfeng demolished the existing Richmond house.

[15] Yongfeng could not begin construction of the West Van house until June 2015 because of the previous owner's delay in transferring the building permit to Ms. Wei.

[16] Also in June 2015, Bouthouse completed the final architectural drawings for the building permit for the Richmond house. Mr. Wang's evidence was that he then met Mr. Wei in Yongfeng's office to review these June 2015 drawings on the big screen. In the meeting, Mr. Wei asked him to prepare a budget, schedule and building contract for construction of the Richmond house.

[17] Mr. Wang testified that he and Mr. Wei met a few times in November 2015, to review these documents and negotiate a building contract for the Richmond house. He thought Ms. Song also attended one or more of the meetings. They once again used the big screen to review the architectural drawings and discuss and negotiate Mr. Wang's proposed building contract, budget and construction schedule. Mr. Wang testified that, although they did not sign the contract, by the end of their discussions they had reached agreement on all the terms in the building contract, budget and schedule. He made copies of the documents for Mr. Wei and Ms. Song to take with them.

[18] Mr. Wang put into evidence a copy of the unsigned building contract (“Richmond Contract”) that he claimed the parties agreed to, together with the budget and construction schedule which it expressly incorporated.

[19] Mr. Wang testified that, in December 2015, when the building permit for the Richmond house was obtained, Mr. Wei was in China. Mr. Wang contacted Ms. Song and told her Yongfeng was ready to start construction, and she told him to proceed. He told her that he could not start such a large project without the Richmond Contract being signed. She told him to contact Mr. Wei in China about that.

[20] Mr. Wang testified that he called Mr. Wei and told him the permit was issued but he did not want to start construction without the Richmond Contract being signed. He testified that Mr. Wei responded that he (Mr. Wei) had already agreed and approved the Richmond Contract and Mr. Wang should go ahead and start construction. Mr. Wei said he would send the deposit, and sign the Richmond Contract when he returned to Canada. Mr. Wang testified that Mr. Wei assured him he would keep his word by using the Mandarin phrase that “his word was like a nail”.

[21] On December 15, 2015, the Weis paid the deposit and Yongfeng started work on the Richmond house.

[22] The Richmond Contract was never signed. It is similar in form to the West Van Contract. It indicates the parties to be Yongfeng and Mr. Wei. It includes the following key terms:

- i. The home was to be built “strictly in accordance with the building construction drawings and interior design plans”;
- ii. The construction period was from December 1, 2015 to June 30, 2017; and
- iii. The construction price was \$4,499,201 (plus GST), paid through an initial deposit followed by six milestone payments.

[23] Mr. Wei and Ms. Song’s version of events was much different than Mr. Wang’s. They denied ever agreeing to Yongfeng building the Richmond house.

They testified that Mr. Wang mentioned that he wanted them to sign a building contract for the Richmond house, but they never discussed or reviewed the terms of the Richmond Contract with him. Mr. Wei testified that he never saw the Richmond Contract. Ms. Song testified that Mr. Wang gave her a copy of a building contract for the Richmond Property but she never looked at it, and Mr. Wang never said he needed them to sign it before Yongfeng could start work.

[24] Mr. Wei and Ms. Song testified that they were clear with Mr. Wang that they would not sign a building contract for the Richmond house until the West Van house was finished, as they wanted to assess Yongfeng's performance first. They testified that they took this position because they were losing trust in Yongfeng over the West Van construction, which they were beginning to suspect was poor quality. The Richmond house was very important to them. It was a larger, higher quality project which was to be a long-term home for their entire family. They were therefore unwilling to agree to Yongfeng building it until they could assess the West Van construction.

[25] They testified that their verbal agreement with Mr. Wang for the Richmond house was that Yongfeng could begin the initial phases of construction, such as excavation, foundations and framing. Mr. Wei said he saw this as letting Yongfeng "temporarily do the job". They testified that they saw this as simple work, checked by municipal inspections, so they were willing to let Yongfeng do it despite their growing concerns. They felt these things could not go wrong, and this would give them time to assess the West Van construction. They testified there was no agreement on the price to be paid for this work. Instead, they agreed with Mr. Wang that Yongfeng would bill them as work progressed.

[26] Mr. Wang denied the Weis' version of events. He testified that the only option the parties discussed was Yongfeng building the entire Richmond house pursuant to the Richmond Contract.

[27] In December 2015, construction of the Richmond house began in earnest, with earthworks and in-ground construction. The documents and photographs show

substantial excavation, and placement and compaction of structural fill and sand. From January to March 2016, formworks were done, concrete walls and lock-block walls for the pool constructed, piping installed, and backfill placed.

[28] The West Van house was completed in mid-June 2016. However, issuance of the occupancy permit was delayed until November 25, 2016, due to the District of West Vancouver's requirement of an environmental rainwater collection system, which the parties called the "Green Plan". Design of the Green Plan required consultations with the District and specialist landscapers and then substantial landscaping and related work.

[29] In November 2016, shortly after receiving the occupancy permit for the West Van house, Ms. Wei listed the property for sale. In the end, the Weis refused to pay Yongfeng's final invoice.

[30] Mr. Wang's evidence was that the Weis also consistently breached their payment obligations under the Richmond Contract by paying too little, too late. In their testimony, the Weis acknowledged paying less than Yongfeng's demands, but Mr. Wei said this was because he felt Yongfeng was overcharging. Having paid an initial \$300,000 in December 2015, and then around \$200,000 per month from January to August 2016, the Weis paid only \$200,000 from September 2016 to July 2017 when they ordered Yongfeng off the property.

[31] Mr. Wang and Ms. Ren testified that the parties met twice for dinner in October and December 2016. They put in evidence their credit card statements showing payment for the two dinners. They testified that, in the Chinese culture, when owners such as the Weis request their contractors to take them to dinner, it signifies they are about to pay their outstanding accounts. They testified that, at the dinners, the parties discussed the unpaid bills for Richmond, and Mr. Wei promised to pay the outstanding amounts in January. He told them he had money coming available from the sale of a hotel in China and from refinancing of the West Van Property now the house was built.

[32] Mr. Wei denied these dinners occurred. Ms. Song acknowledged there was at least one such dinner in late 2016, but she said it was purely an effort to ease tensions and no business was discussed.

[33] In January 2017, Ms. Song and Mr. Wei paid \$200,000 towards Yongfeng's work on the Richmond house, which was far less than the outstanding amount. Mr. Wang testified that he was disappointed by the payment but Yongfeng kept working based on Mr. Wei's assurances that he would pay in full once he had the money available.

[34] Mr. Wang testified that, in late April 2017, Mr. Wei agreed to meet in response to Mr. Wang's repeated calls seeking payment. Mr. Wei suggested restructuring the payment obligations under the Richmond Contract to reflect the current situation and help mend the relationship. Mr. Wang prepared an amending agreement ("Amending Agreement"). He testified that he and Mr. Wei met at Yongfeng's offices and put the document up on the big screen to once again discuss and negotiate terms. Mr. Wei denied any such discussions or meetings ever occurred regarding the Amending Agreement.

[35] Mr. Wang testified that, by the end of these meetings, he believed they had agreed on all amounts outstanding for work already done on the Richmond home and the terms of the Amending Agreement going forward. However, he said that, unlike the Richmond Contract, Mr. Wei never verbally confirmed his agreement to proceeding under the Amending Agreement.

[36] The Amending Agreement that Mr. Wang put in evidence set out the following material changes to the Richmond Contract:

- (a) Rondy Zhang, an interior designer, was added as a party to the contract. Mr. Wang's evidence was that he was added because Mr. Wei wanted to save money by importing interior materials and furnishings himself from China. Such purchases were to be funded by the Weis, and Yongfeng would be responsible for installation. Mr. Wang testified that he warned Mr. Wei such materials must meet Canadian standards or there would be major problems and costs. Mr. Wang suggested that, to avoid these issues, Mr. Wei should take Mr. Zhang with him to China to help select the interior

materials. Mr. Wei agreed, and Mr. Wang arranged for them to meet at Yongfeng's offices to discuss the arrangement.

- (b) The future payments dates and amounts were restructured. Mr. Wang testified that the new schedule was designed around Mr. Wei's expected cashflow. The contract price and budget were increased by \$27,239. A management fee of \$5,000 per month and security fee of \$3,000 per month were payable to Yongfeng. Mr. Wang testified that these fees were required because Yongfeng had exhausted its management budget.
- (c) The completion date was extended to July 30, 2018.

[37] In late April 2017, the West Van Property having not yet sold, the Weis decided to change realtors and retain Ms. Ren.

[38] By May 2017, Yongfeng obtained formal approval for the Richmond house's electrical and plumbing rough-in, and the HVAC system was also roughed in. The Weis expressed dissatisfaction with the cost and progress of the Richmond construction and decided to hire a quantity surveyor, Mr. William Lam, to value the work-in-place constructed by Yongfeng. Mr. Wang testified that around this time he told the Weis that, to help the situation, he was agreeable to the parties working together to have a quantity surveyor estimate the value of Yongfeng's work.

[39] On May 29, 2017, Ms. Ren wrote to the Weis about the issues between the parties. Ms. Song denied ever receiving this letter. The letter contained Yongfeng's perspective on the issues between the parties and indicated support for hiring a quantity surveyor:

You told us that you sold a hotel at the price of RMB 100 million, and you would pay us after the transaction is closed. We believed you and notified contractors that you would definitely pay and asked them to help and be patient. At the end of last year, the [West Van house] was finished. You asked us to assist you to refinance [the West Van Property], and guaranteed that you would pay us the project fund after obtaining the mortgage. At the end of December, [Mr. Wang] treated you to a meal. You ordered the food and invited some of your friends and we paid the bill. At that time, you have repeatedly promised that we would get the project fund before January 10, 2017. ... You also told to [Mr. Wang] that when you had enough cash flow at the end of March, you would make the payment. [Mr. Wang] believed you again. During that period, [Mr. Wang] contacted you many times, and you gave us the RMB amount which you believed is equivalent to CAD 200,000 dollars. [Mr. Wang] guaranteed to contractors with the reputation of our

company again that you would pay in May. Due to the lack of project fund, the project has been suspended, and the newly built houses have been continuously damaged. We have been repairing and maintaining them, resulting in additional costs.

...

I hope that you should consult with a formal evaluation company.

....

Mr. and Mrs. Wei, we treat you as friends for long-term cooperation, and that's why we made payment for you. You are the only customer for whom we made payments. I hope you can cherish it. That's all that we can say. Please carefully consider.

[40] In the end, the Weis retained Mr. Lam without involving Yongfeng. Mr. Lam completed his valuation in June 2017. He valued the work-in-place at approximately \$1.55 million—well below the \$1.9 million the Weis had paid thus far. Mr. Wang disagreed with the valuation. The parties stopped talking to each other and Yongfeng ceased work on the Richmond house.

[41] On July 4, 2017, the Weis' lawyer wrote to Yongfeng, alleging it had abandoned the Richmond construction in January and wrongfully requested payments. The letter terminated the parties' relationship and demanded Yongfeng demobilize within three days. The letter stated in part:

This is to advise I have been retained by Bo Wei and Yu Na Song, the owners of the above-mentioned property. I understand from my clients that they entered into an agreement with your company to construct a residential home on the above-mentioned property at a contract price of \$4,500,000.00.

I am further advised that my clients have advanced to your company, the sum of \$1,900,000.00 but no substantial work has been done on the project since the holiday season of 2016/17 and the structure has remained essentially abandoned and is deteriorating from the weather elements. I am further advised that you have made a further demand from my clients for a further \$500,000.00 before you will continue with the construction.

...

Your actions in stopping construction, letting the property deteriorate and demanding another \$500,000.00 in advance when the property is only one third completed is in my clients' view a breach of your contract and consequently my clients are treating the contract at an end.

Please remove your sign and any equipment that you have on the lands within three days from the date of this letter. After such time if you or your contractors or anyone operating under your control enters on the land, same

will be treated as a trespass and legal proceedings will be commenced against you.

[Emphasis in original.]

[42] On July 5, 2017, Ms. Ren replied:

[S]ince last autumn, we are keep asking Mr wei and Ms song for payment, their response is, will pay us, Mr wei said we should understand that some time business has difficulties with cashflow. ...

...

On last Friday night june 30 2017 around 10pm, under our demand, Mr wei e-mail us a work-in summary from Accutec Quantity Surveying. I don't understand what this summary about, there is no any explanation how he come to the result, we have offered the home owner many times that if they hire an quantity Surveyor[,]the person can contact us[. N]o contact information of William [L]am, and there are missing a lots items in the summary. There is not a correct report, just some numbers.

...

Please advise Mr Wei and Ms song, all the contractors, our staffs and workers worked hard for the two houses they should get paid for their work. we have send Mr wei a letter at end of may 2017 to his daughter's email, don't know if he has read it. If not, please advise Mr wei to read it.

[43] On September 29, 2017, a new lawyer for Mr. Wei and Ms. Song wrote to Yongfeng demanding an accounting of expenses for the construction of the Richmond house. Like the Weis' July 4 letter, it referred to a contract with Yongfeng for the construction of the house for \$4.5 million, saying in part:

We are legal counsel for Ms. Yu Na Song.

We understand that Ms. Song and her husband, Mr. Bo Wei, have entered into a contract (the "Contract") with YONGFENG ENTERPRISES INC. ("Yongfeng") through yourself and your husband, Mr. Shao Ming Wang, for the construction of a residential dwelling on the Land for the price of approximately \$4,500,000.

We also understand that Ms. Song has advanced to Yongfeng a total of \$1,900,000 under the Contract. But Yongfeng, contrary to its obligations under the Contract, proceeded to abandon the Land since around January 2017 (the "Abandonment"). At the time of Abandonment, Yongfeng has only completed a negligible portion of its obligations under the Contract, and after such time, the Land was left to deteriorate.

...

As Mr. Rosner has stated in his letter to you dated July 4, 2017, Ms. Song regarded Yongfeng's Abandonment as amounting to a repudiation of the

Contract. Consequently, Ms. Song hereby accepts Yongfeng's repudiation and thus elects to terminate the Contract.

[44] On October 12, 2017, the Weis commenced these proceedings. They registered certificates of pending litigation against two properties owned by Ms. Ren, alleging that she or Mr. Wang diverted funds intended for the construction of the Richmond house to the benefit of her properties. The Weis removed the CPLs in January 2019. At trial, Ms. Song and Mr. Wei acknowledged having no basis for the facts pleaded to support the CPLs.

IV. CREDIBILITY ASSESSMENT

[45] As indicated above, the parties have fundamentally different versions of what occurred between them regarding the key issues in the case. This includes whether they ever discussed, let alone agreed to, the Richmond Contract, and the alleged extras, defects and deficiencies for the West Van house.

[46] These issues turn almost entirely on the parties' credibility, i.e., on an assessment of who told the truth in their evidence about the dealings between them.

[47] There are no contemporaneous written communications about the key decisions and events in the parties' business relationship. Mr. Wei's evidence was that he did not have email and did not write letters. Mr. Wang testified that he was happy to communicate only verbally with clients who preferred it. He also testified that Yongfeng's management group was small enough not to record key events and decisions in writing. He said that when payment issues arose with clients, as in this case, he preferred dealing with them in person or over the phone, as this was friendlier than written correspondence.

[48] Credibility assessment is particularly challenging in a case such as this, where cultural differences are in play and the key witnesses testified by interpreter (see *Fu v. Zhu*, 2018 BCSC 9, paras. 39–42; *Wu v. Gu*, 2020 BCSC 396, paras. 102–4).

[49] The credibility of conflicting testimony should be assessed by determining what version of events is most consistent with the accepted, independent evidence and the preponderance of probabilities that a practical, informed person would recognize as reasonable in the particular situation (*Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.); *Bradshaw v. Stenner*, 2010 BCSC 1398, para. 186). A trier of fact may believe some, all, or none of a witness' evidence and attach different weights to different parts of their evidence (*R. v. R. (D.)*, [1996] 2 S.C.R. 291, para. 93, 1996 CanLII 207).

[50] By far the most significant credibility issue in the case – in terms of financial significance and time spent at trial – is whether the Weis agreed to Yongfeng constructing the Richmond house pursuant to the terms of the Richmond Contract.

[51] For reasons explained in the next section, on this key issue I find Mr. Wang and Ms. Ren credible and Mr. Wei and Ms. Song not credible. I find Mr. Wei and Ms. Song knowingly testified to a false version of events designed to avoid the legal effects of the contract they agreed to. Having made that finding, I have approached their evidence on the other credibility disputes with caution and generally not accepted it unless corroborated by independent evidence. Having found Mr. Wang and Ms. Ren entirely credible on this issue, I have accepted other aspects of their evidence without independent corroboration.

V. ANALYSIS

A. Richmond House

1. *What was the agreement?*

[52] Because there was no signed contract for construction of the Richmond house, I must consider what occurred between the parties, including subsequent conduct, relevant to the question of whether they reached a binding agreement, and if so on what terms (see *Broer v. Multiguide GmbH*, 2023 BCCA 134, paras. 53–55). More specifically, I must determine whether the parties agreed:

- (a) As Mr. Wang says, to Yongfeng building the entire Richmond house for \$4.5 million according to the terms of the Richmond Contract; or

- (b) As Mr. Wei and Ms. Song say, to Yongfeng performing only the initial stages of construction (such as demolition, framing and foundations) with no agreement as to the price for that work.

[53] An important consideration supporting the Weis' position is that the Richmond Contract says "[t]he contract is effective after Party A and Party B sign". This clause is an objective indication the parties intended the agreement to be binding if, and only if, the document was signed. This interpretation of their intentions is bolstered by the fact that the parties signed the West Van Contract. The question becomes whether the evidence, viewed as a whole, indicates that the parties nevertheless ultimately verbally agreed to be bound by the terms of the Richmond Contract despite never signing it.

[54] In my view, the most telling evidence on this issue are the letters and pleadings prepared on behalf of the Weis, stating that there was in fact a binding contract between the parties for Yongfeng to construct the Richmond house for \$4.5 million. This evidence supports Mr. Wang's version of events and contradicts the Weis' evidence about adamantly refusing to ever discuss, let alone agree to, such a contract. The Weis provided no compelling explanation for this strong evidence contradicting their version of events and supporting that of Mr. Wang.

[55] The relevant sections of the letters are as follows:

1. The July 4, 2017 letter from counsel stated that the Weis "entered into an agreement with [Yongfeng] to construct a residential home on the above-mentioned property at a contract price of \$4,500,000.00."
2. The September 29, 2017 letter from counsel said that "Ms. Song and her husband, Mr. Bo Wei, have entered into a contract ... with [Yongfeng] ... for the construction of a residential dwelling on the Land for the approximate price of \$4,500,000."

[56] In their notice of civil claim filed on October 12, 2017, Mr. Wei and Ms. Song pleaded the following regarding the contract for the Richmond house:

9. In or around October 2015, the Owners entered into a contract (the "Contract") with Yongfeng through Ms. Ren and Mr. Wang, for the construction of a residential home on the Land in accordance with the Contract (the "Improvement").

10. The parties to the Contract (the "Parties") agreed that Yongfeng would:
 - a. Complete the Improvement;
 - b. Provide all materials required for the Improvement;
 - c. Manage the Improvement; and
 - d. Act as a general contractor for the Improvement(collectively, the "Scope of Work").

11. In exchange for the performance of the Scope of Work, the Parties agreed that the Owners would pay Yongfeng a total of approximately \$4,500,000 according to a milestone schedule (the "Milestone Schedule"). The Parties further agreed that each instalment stipulated by the Milestone Schedule was payable after the completion of each milestone.

12. The Parties agreed that the Owners would pay the instalments required by the Milestone Schedule (the "Instalments") to Ms. Ren's personal Chinese bank account. In the alternative, the Parties agreed that the Owners would pay the Instalments to the Chinese bank account of an agent appointed by Ms. Ren.

[57] Even their final pleading, the amended notice of civil claim filed December 21, 2022, included paragraphs 9, 10 and 12 from above but amended paragraph 11 as follows:

In exchange for the performance of the Scope of Work, the Parties agreed that the Owners would pay Yongfeng a total of approximately \$4,500,000 according to a milestone schedule (the "Milestone Schedule") whereby Yongfeng would request payments from time to time, and the Owners would pay once satisfied that reasonable progress has been made on the construction.

[58] Importantly, the evidence was that the letter of September 29, 2017 and the pleadings were written on behalf of the Weis by Mandarin speaking lawyers, and so cannot be explained away by language difficulties.

[59] In final submissions, Mr. Ju tried to deal with this evidence by arguing that it reflected the Weis' agreement, not to the terms of the Richmond Contract, but only that: Yongfeng would build the house for \$4.5 million pursuant to the approved drawings; Yongfeng would bill the Weis when they need additional money to fund the construction; and, the Weis would pay so long as they were satisfied with the work.

[60] I do not accept this submission. It is inconsistent with the Weis' evidence that they were always clear with Mr. Wang that they were unwilling to negotiate terms for Yongfeng building the entire Richmond house, and only agreed to Yongfeng doing the initial stages of construction. I also find it implausible that the parties would have agreed to such a vague, problematic approach for a \$4.5 million project, particularly when they had made a detailed contract for the construction of the West Van house.

[61] Another source of telling evidence supporting Mr. Wang's version of events is the Amending Agreement prepared around April 2017.

[62] As with the Richmond Contract, Mr. Wei denied ever discussing the Amending Agreement or seeing the document itself. He testified to remembering very clearly there were no meetings about it with Mr. Wang and that he did not recall who Rondy Zhang was. Ms. Song's evidence was different. She testified that she did recall attending Yongfeng's office and Mr. Wang drafting the Amending Agreement. Like Mr. Wei, however, she denied knowing Mr. Zhang.

[63] Mr. Zhang's testimony supported Yongfeng and contradicted the Weis. He testified that he was added to the Amending Agreement because Mr. Wei wanted the two of them to go to China to purchase materials for the Richmond house, as this would be cheaper than Yongfeng sourcing them in Canada. Mr. Zhang recalled attending at least one meeting at Yongfeng's offices where Mr. Wei and Mr. Wang discussed payments being made in accordance with the amended payment schedule. He testified that at the end of the discussions, Mr. Wei said words to the effect of "OK, let's sign the contract".

[64] Although not an entirely independent witness because of having some business relationship with Yongfeng, Mr. Zhang did not appear to be slanting his evidence in Yongfeng's favour. Instead, his testimony was brief and reticent. His description of events was reasonable and consistent with his inclusion as a party to the Amending Agreement documentation. Cross-examination exposed no weakness or inconsistency in his evidence. For these reasons, I found Mr. Zhang a credible witness and I accept his evidence about the Amending Agreement.

[65] I find that the Amending Agreement was created and negotiated to address the Weis' ongoing breach of the payment terms in the Richmond Contract which they had agreed to. I find Mr. Wei and Ms. Song not credible when they deny this.

[66] There are other considerations supporting Mr. Wang's version of events about the Richmond Contract over that of Mr. Wei and Ms. Song:

1. It is unlikely the parties would have agreed to the informal, vague arrangement described by the Weis, particularly regarding price.
2. The Weis' explanation for limiting Yongfeng to these initial steps was that they had lost faith in Yongfeng because of problems with the West Van house. But, as Mr. Wei acknowledged in cross-examination, the discussions about Richmond were in September 2015, well before any issues arose between the parties regarding West Van.
3. It is unlikely that Yongfeng would have continued to work on the Richmond house for almost a year, despite being underpaid throughout, if the agreement were for them to perform only initial work and to bill as they went. Their willingness is more likely explained, as Mr. Wang said, by the belief that they had an agreement to build the entire house for \$4.5 million.
4. In March 2017, Ms. Wei asked on the group's WeChat when rough-in for plumbing, electrical and gas would be completed. This suggests an expectation that Yongfeng was to do more than just the initial framing and foundations. It also suggests, as argued by Mr. Volk, that the Weis were monitoring completion of the fourth milestone under the Richmond Contract in order to know when their next large payment was coming due.
5. I accept Mr. Wang and Ms. Ren's evidence about the two dinners over that of the Weis. Mr. Wang and Ms. Ren testified that, as part of the Weis' explanation of how they would pay Yongfeng their arrears in January, they mentioned the imminent sale of their hotel in China. Initially, Mr. Wei denied owning any such hotel but later admitted that he did and that it was leased to a hospital. That Mr. Wei told them of his hotel supports Mr. Wang and Ms. Ren's version that they discussed payment at the dinners.

Ms. Song's evidence that the parties did not discuss business at the dinners is not credible given all the business they had had between them at that time and particularly the Weis' arrears. Mr. Wei's evidence was not credible in that he changed his story about owning a hotel, and his evidence was that he did not even recall any dinners where they discussed payment difficulties is not credible.

6. The update of the schedule that Mr. Wang had initially created in conjunction with the Richmond Contract indicated the Richmond Contract would be signed on February 23, 2016. This is consistent with Mr. Wang's evidence that this was his understanding of when Mr. Wei would be back from China. He testified that he gave this updated document to Ms. Song in February at the site.
7. The Weis retaining Ms. Ren as their realtor to sell the West Van house in late April 2017 is consistent with them owing Yongfeng money and inconsistent with their claim of lack of trust by that point.
8. The Richmond Contract was in the Weis' list of documents, even though at times in their evidence both Mr. Wei and Ms. Song denied ever seeing it before.
9. The Weis' expert witness, Mr. Lam, stated in his June 24, 2017 report that "[t]he property owners (Bo Wei and Yuna Song) agreed with [Yongfeng] to have [Yongfeng] manage and construct the subject residential structure". It was not until Mr. Lam's August 19, 2022 report that there was any reference to the agreement being unsigned.

[67] The Weis argue it is implausible for Yongfeng to have undertaken a \$4.5 million project based on an unsigned contract and promise over the telephone, particularly given the absence of a single email or note confirming the alleged oral agreement. While I agree that is unusual behaviour, indeed highly unusual for experienced business people like Mr. Wang and Ms. Ren, on the strength of the evidence described above I find that is what occurred.

[68] The Weis argue that the parties did not follow the Richmond Contract on the timing and amount of payments, which suggests it was never agreed to. On this point, I accept Mr. Wang's evidence that he frequently called Mr. Wei to press for payments pursuant to the milestones in the Richmond Contract, and that Mr. Wei responded with explanations and promises sufficient to convince Mr. Wang to carry on.

[69] In sum, I find the objective evidence indicates that the parties agreed to be bound by the Richmond Contract. I accept Mr. Wang's version of events regarding the parties negotiating and agreeing to construction of the Richmond house pursuant to the terms of the Richmond Contract. The parties to the Richmond Contract were

Yongfeng and Mr. Wei, as indicated on the front page of the agreement. I find that, at the dinners in October and December 2016, Mr. Wei and Ms. Song promised to make up the arrears owing under the Richmond Contract by January 2017. I find that in April 2017, the parties negotiated amending the Richmond Contract by the Amending Agreement, as described by Mr. Wang, but in the end Mr. Wei never confirmed his commitment to the Amending Agreement.

2. Was the Richmond Contract certain?

[70] On behalf of the Weis, Mr. Ju argued that the Richmond Contract, even if agreed to, was unenforceable for uncertainty.

[71] In Yongfeng's standard form building contract (from which the Richmond Contract was derived), almost all of the terms were set out twice – once in Mandarin and once in English. For the Richmond Contract, the Mandarin terms were then translated for trial by a certified translator. Mr. Ju pointed to differences between the Mandarin wording, as translated for trial, and the English wording for what were supposed to be the same terms. He also pointed to differences between the building construction drawings and interior design plans annexed to the Richmond Contract and the ultimate construction drawings regarding the material used for facades, the dimensions of interior doors and the area of the house itself.

[72] Counsel agreed on the law applicable to certainty of a construction contract as stated in *Hodder Construction (1993) Ltd. v. Topolnisky*, 2021 BCSC 666:

[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 v. Legaspi*, 2007 BCSC 1944] 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 (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.

[73] In my view, the Richmond Contract was clearly certain enough to be performed and enforced. It specified the size and design of the house to be built,

and the timeline, price and payment schedule for construction. It expressly incorporated the budget and schedule that Mr. Wang prepared. The construction details were set out in the architectural and structural drawings submitted for the building permit and referred to in the Contract. Other details were described in the Contract, including the materials for the foundation, exterior, facades, counter-tops, cabinetry, windows, doors, floors, stairs, details of the appliances, hot water heating system, bathroom fixtures, entertainment systems, built-in vacuum system and much more.

[74] To the extent there were inconsistencies between the Mandarin and English versions of certain terms, I accept Mr. Wang's evidence that the Mandarin version governs because those were the terms that he and Mr. Wei negotiated and revised, while ignoring the English translations.

[75] As for the discrepancies between the construction drawings and interior design plans referred to in the Richmond Contract and the later versions of some of these drawings (which indicated different materials for facades, dimensions of interior doors and area of the house), the differences were minimal and far from sufficient to create contractual uncertainty between parties who, as I have found, intended to be contractually bound.

3. Which party repudiated the Richmond Contract?

[76] Yongfeng alleges that the Weis repudiated the Richmond Contract by their lawyer's letter of July 4, 2017, ordering Yongfeng off the property. It says the Mr. Wei is therefore liable for the work Yongfeng completed, at the stipulated price in the Richmond Contract, and for the profits Yongfeng lost from being prevented from completing construction of the house as contemplated in the Contract.

[77] The Weis argue that, if the Richmond Contract was a binding agreement, it was Yongfeng that breached it by overcharging and then slowing down work in early 2017 before stopping altogether in June 2017.

[78] When a party repudiates its contract, the other party has the right to terminate and seek damages (*Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, para. 144, Cromwell J. concurring). Repudiation occurs when a party, by words or conduct, indicates its intention not to perform or not to be bound by provisions of an agreement that require performance in the future, or breaches the contract to such an extent that there is a substantial failure of performance, an event that is also referred to as a “fundamental breach” or “repudiatory breach” (*Potter*, paras. 144–149).

[79] I find that the Weis repudiated the Richmond Contract by their lawyer’s letter of July 4, 2017, demanding that Yongfeng demobilize from the property and stating that the Weis were “treating the contract at an end”. By demobilizing as demanded, Yongfeng accepted the Weis’ repudiation, bringing the Richmond Contract to an end and entitling Yongfeng to compensation for its resulting damages. Up to that point, Yongfeng had neither breached the Contract nor indicated an intention not to be bound to perform its obligations.

[80] To the contrary, Yongfeng continued to perform under the Richmond Contract until June 2017 (as indicated by its site records), despite the Weis’ breach of their payment obligations. By June 2017, the Weis were in substantial arrears under the Contract. Their only payment since August 2016 was \$200,000 paid in January 2017. They had breached their promises made in October and December 2016 to make up their arrears by January 2017. These promises to pay their arrears contradict Mr. Wei’s evidence that, starting in or around August 2016, he believed that Yongfeng was charging too much for its work, as does his negotiation of the Amending Agreement in April 2017. I therefore do not accept that he held that view. Rather, I find that he hired Mr. Lam, in May 2017, hoping to obtain leverage in negotiating with Mr. Wang and reducing what was owed under the Richmond Contract.

[81] In these circumstances, Yongfeng slowing its work, and even stopping work over the final month or so, was not a breach of its contractual obligations, let alone a

repudiation. I accept Mr. Wang’s evidence that he told the Weis that work was slowed because Yongfeng needed to be paid and was unable to pay the subcontractors. Ms. Song acknowledged this in her testimony. On the evidence, Yongfeng never indicated an intention not to be bound by the Richmond Contract. Yongfeng’s decision to slow down and then cease work while demanding payment of substantial arrears was a justified response to the Weis’ longstanding, ongoing breaches of their contractual payment obligations and failure to honour their subsequent promises of payment in October and December 2016.

4. What are Yongfeng’s damages?

[82] Clause 7 of the Richmond Contract sets out the payment terms of the deposit and then six construction milestones. They are:

1. A deposit of 6% + GST when the contract is signed.
2. 20% + GST after obtaining the demolition permit.
3. 20% + GST after the house's main structure is completed.
4. 20% + GST after the acceptance of water, electricity, air conditioning, monitoring, TV, computer, central vacuuming and other rough-in.
5. 20% + GST after completing the drywall and insulation.
6. 10% + GST after completing the marble on the floor, cabinets, washrooms, marble on the countertop.
7. Final amount within 30 days of final acceptance by the City.

[83] These terms create a “milestone contract”, meaning payment is due upon the completion of specified milestones. This approach was described in *Homewood v. 2010999*, 2013 ONSC 4441:

[54] Payment milestones provide cash flow to a contractor during construction. Without them Homewood would have to fund the entire construction project. The parties did not contract for Homewood to act as 201’s source of construction financing. By contracting for milestone payments with substantial completion of distinct stages of the project triggering payment, the parties intended for 201 to pay Homewood as the project progressed, with fixed prices attached to each stage. In effect, the contract was structured as a series of fixed price contracts and substantial completion

of each milestone contractually triggered payment of the fixed price attached to the milestone.

[55] This contract structure is different from a fixed price contract where installment payments are in the form of progress payments tied to the percentage of work completed. Had that been the case then Homewood would have been required to provide proof of its costs and percentage completion throughout the project. The parties instead put their minds to it and decided to attach specific values to substantial completion of various stages of the work.

[Emphasis added.]

[84] Yongfeng seeks the following damages for breach:

1. \$1.07 million for unpaid work done. This is the difference between the \$2.97 million owed for substantial completion of milestones 1–4 as of March 2017, less the \$1.9 million already paid.
2. \$232,284 for lost profits it would have made from completing the rest of the construction. This is based on a 15% profit margin on the contractual price for milestones 5–7, which were not performed; and,
3. \$57,657.60 for the construction of drop ceilings, which it says was beyond the scope of the Richmond Contract.

[85] The Weis concede that Yongfeng completed milestones 2 and 3 (obtaining the demolition permit and completion of main structure), and so, if the Richmond Contract is binding, these milestones require payment of 40% of the \$4.5 million contract price, or \$1.8 million.

[86] Their position on the damages sought by Yongfeng is as follows:

1. Yongfeng should not be paid for milestone 1 because cl. 7 says this is due when the Richmond Contract is signed. To require this payment would be to create a new contract for the parties.
2. No payment is owed for milestone 4, as it is unclear and so void and unenforceable. They argue that the City does not inspect houses for air conditioning, security monitoring, televisions, computers or central vacuuming.

The result, they say, is that the 20% payment for milestone 4 should be treated as payable after final completion, and so due at the same time as the payment for milestone 7. Alternatively, they argue that if milestone 4 is enforceable, Yongfeng is not entitled to payment because not all of these

components were inspected and approved. Finally, they argue that the air conditioning, central vacuum and security monitoring systems were not completed and so deductions must be made for that.

3. The lost profits should be calculated assuming a 6% profit margin, based on the evidence of the quantity surveyors.
4. The cost of the drop-ceiling is not an extra, but rather subsumed by milestone 3.

[87] Regarding milestone 1, I reject the Weis' argument. I have found that Mr. Wei agreed to pay the milestone 1 deposit in the phone call from China when he told Mr. Wang he accepted the Richmond Contract and said Yongfeng should commence work. Mr. Wei then paid the equivalent of the deposit in Chinese yuan on December 23, 2015, consistent with milestone 1.

[88] I find that milestone 4 is enforceable. Giving the words their ordinary and grammatical meaning, and avoiding commercial absurdities (*Canaccord Genuity Corp. v. Reservoir Minerals Inc.*, 2019 BCCA 278, paras. 19–21), in my view the parties' intended that payment for milestone 4 was required after inspection and approval of the water, plumbing and electrical rough-in for the house, which includes the rough-in wiring for the other items listed in the clause (air conditioning, monitoring, TV, computer and central vacuuming). (See *Yongfeng Holdings Inc. v. Zheng*, 2019 BCSC 1534, paras. 122–132, for a similar interpretation of this clause.)

[89] I find that milestone 4 was substantially completed by Yongfeng. The undisputed evidence was that the municipal inspections were successfully completed for the house's water, electrical and plumbing systems, and some of the ducting for the HVAC system. Mr. Wang testified that Yongfeng completed the associated rough-in and he submitted photographs of extensive electrical, plumbing and ductwork throughout the house, and the installed shower bases and bathtubs.

[90] Ms. Ren put into evidence the following approvals obtained by Yongfeng before it ceased work:

- (a) On March 14, 2017, Yongfeng’s electrical subcontractor, AA Electrical Services Ltd., submitted its electrical inspection request for completion of all rough-in wiring to the BC Safety Authority;
- (b) On March 27, 2017, the City of Richmond provided documentation indicating that the result of the inspection for “305 (Rough In)” was “Approved”. According to the City of Richmond’s inspection guide, which was put in evidence, this refers to approval of the plumbing rough-in, which is an inspection of whether “all drains, vents and water piping is completed with all required tests applied and prior to covering”.
- (c) On March 27, 2017, the City of Richmond provided documentation indicating inspection for “310 (Shower/Bath)” was “Approved”. According to the City of Richmond’s inspection guide, the inspection for Shower/Bath is an inspection as to whether “all shower bases, bathtubs and required drip edges [have been] installed to manufacturers’ installation requirements with all required tests applied”.
- (d) On April 7, 2017, the City of Richmond Site Visit Notice for gas stated “Gas Vent/Pipe Complete”.
- (e) On April 11, 2017, the City of Richmond Site Visit Notice for sheathing shows five items still to be completed.

[91] I accept Ms. Ren’s evidence that municipal permitting for the electrical and plumbing utilities and inspections for sheathing do not occur until after all rough-in of the HVAC and air conditioning systems is complete. Her testimony is consistent with the City of Richmond inspection guide, which indicates that rough plumbing, gas and electrical wiring must be inspected before the sheathing inspection can be requested.

[92] I have found that Yongfeng completed milestones 1–4, which call for payment of 66% of the project’s \$4.5 million total cost, or \$2.97 million. The Weis have paid \$1.9 million to date. I therefore award Yongfeng \$1.07 million as damages for its unpaid work under the Richmond Contract due from Mr. Wei.

[93] Turning to Yongfeng’s lost profits, as a matter of contract damages Yongfeng is entitled to be put in the financial position it would have been in had the Richmond Contract been performed according to its terms (*Bank of America Canada v. Mutual*

Trust Co., 2002 SCC 43, para. 26). This would have included Yongfeng earning some profit from the contractual work not performed due to the Weis' repudiation.

[94] Yongfeng seeks lost profits of \$232,284, equivalent to 15% of the contract price for the unperformed work. Mr. Wang's evidence was that Yongfeng's \$4.5 million budget included a 15% profit margin.

[95] The Weis argue that there is no evidence of the profit margin that Yongfeng would actually have made on the remaining work. In their submission, the 15% profit margin was just an aspirational budgetary projection unsupported by any evidence that it would have been achieved. Yongfeng provided no evidence that it typically achieved such a profit margin for this type of construction or that it earned this type of profit margin on the work it performed on the Richmond house before termination.

[96] Based on Mr. Wang's construction experience, and the overall construction competence he displayed in his testimony, I find that Yongfeng would have made a profit margin on this work, but I accept the Weis' argument that 15% may have been only aspirational.

[97] The parties' respective quantity surveyors gave opinion evidence that, in their experience, contractors performing this sort of work in this geographic area budgeted profit margins of 5–6%.

[98] Taking all this into account while endeavouring to be fair to both sides, in my view the reasonable approach is to use the evidence of the typical range of budgeted profit margins for contractors performing this sort of work. I therefore find that Yongfeng would have made a profit margin of 5.5%. I will use this same profit margin for the unpaid extra work that it performed.

[99] The calculation of Yongfeng's lost profits would therefore be as follows:

1. Milestones 5–7 call for payment of 34% of the contract price of \$4.5 million, or \$1.53 million;
2. A 5.5% profit margin on \$1.53 million is \$84,150.

[100] Regarding the drop ceilings, I find that Yongfeng did construct them. It was referred to in their construction records, and neither Ms. Song nor Mr. Wei disputed that it was done.

[101] The issue is whether this ceiling work was included in the contractual scope of work or was an extra. For the value of this work to be an extra, Yongfeng relied on the evidence of its quantity surveyor, Mr. Jack Chen. He described the drop ceilings depicted in the interior design drawings as requiring special skills and having a value in place of \$45,760 (not including profit).

[102] There was no evidence, however, from Yongfeng's witnesses that the work actually fell outside the scope of work in the Richmond Contract or that Yongfeng discussed it being an extra with Ms. Song or Mr. Wei, or that they agreed to it being extra work. Nor was there evidence of what the work actually cost Yongfeng in time or money. Thus, in my view, the necessary elements of an extra were unproven and so damages are not awarded.

[103] In sum, Yongfeng's total damages against Mr. Wei for breach of the Richmond Contract are \$1.07 million for unpaid work and \$84,150 for lost profits.

5. What was the value of the work-in-place?

[104] Both sides submitted substantial expert evidence and argument regarding the value of Yongfeng's work-in-place for the Richmond house, should the Richmond Contract be found not binding.

[105] The Weis argued that Yongfeng's work-in-place should be valued at \$1,770,236, meaning Yongfeng had overcharged by around \$130,000. Yongfeng claimed damages for unpaid work-in-place of approximately \$1.03 million.

[106] Having found the Richmond Contract binding, I will not address this aspect of the case.

6. Were there any deficiencies in construction?

[107] The Weis claim deficiencies on the Richmond house of \$77,455.

[108] Ms. Song put in evidence an invoice from a contractor, dated August 15, 2017, which she testified included: fixing a leak and mold on the balcony (\$3,800); remedying a door installed in the wrong location and a window installed inside out (\$1,575); replacing unstable wooden beams with steel beams required in two places (\$4,800); and performing janitorial services for site clean-up (\$2,280).

[109] She also raised two other deficiencies: an issue with a subcontractor who liened the property and settled for \$5,000; and removal of unsightly debris left onsite (wood, tiles and concrete pieces), for which she had a May 7, 2018 invoice for \$27,599 (though she said the total cost was closer to \$60,000).

[110] I do not accept that these claims are made out on a balance of probabilities. I am not prepared to accept them based only on Ms. Song's testimony because of the findings I have made about her credibility, particularly when her evidence about these issues was vague and unpersuasive. Other than that, the Weis led no evidence to establish that the invoiced work was done to correct Yongfeng's deficiencies or breach of contract. The May 7, 2018 invoice was almost a year after Yongfeng left the site. Despite retaining Mr. Lam, they submitted no expert evidence, or even photographic evidence, of deficiencies other than a picture of some debris.

[111] Furthermore, by demanding that Yongfeng leave the property immediately in the middle of construction, some debris, defects and deficiencies would be expected to be left behind, which Yongfeng would have dealt with had it been allowed to complete its work.

[112] I therefore dismiss these claims for a lack of credible evidence of actual defects and deficiencies in Yongfeng's work and because, to a certain extent, such problems would be expected when a general contractor is wrongfully ordered off a construction site on short notice in breach of contract.

7. Can Yongfeng claim its foreign exchange costs?

[113] Yongfeng claims \$13,349.64 in foreign exchange costs due to the Weis paying most of the \$200,000 installments for work on the Richmond house in Chinese yuan, which was not contemplated in the Richmond Contract.

[114] Mr. Wang testified that this created two problems for Yongfeng. It was exposed to currency fluctuations and the cost of exchanging Chinese yuan to Canadian dollars when bringing the funds to Canada. The Weis countered that the parties agreed to this form of payment and Yongfeng actually profited from the currency exchange.

[115] In my view, this claim fails because, at the time, Mr. Wang accepted these payments as payment in full of the Canadian dollar amounts. Each time the Weis made their yuan payments, Mr. Wang provided them signed receipts from Yongfeng, stating that they were accepted as payment in full for the \$200,000 and \$300,000 instalments. In my view, having accepted these payments at the time as payment in full of the Canadian amounts, Yongfeng cannot now take the position that they were not.

B. West Van House

[116] Yongfeng says it constructed the West Van house in accordance with the West Van Contract and without deficiencies or delays. It seeks damages of \$272,788, made up of \$153,308 outstanding under the Contract and \$119,480 for unpaid extras. This includes a 20% profits and overhead margin for the unpaid extras.

[117] Ms. Wei acknowledges the \$153,308 outstanding under the Contract, but denies the extras and seeks set-offs against Yongfeng's claims of \$25,000 for alleged construction deficiencies and almost \$500,000 for delay based on the West Van Contract's liquidated damages clause.

1. Did Yongfeng perform work outside the scope of the West Van Contract?

[118] Yongfeng seeks \$119,480.88 for extra work, beyond the scope of what is contemplated in the West Van Contract. Around \$81,500 of this is for payment to subcontractors, \$18,000 for cost of Yongfeng labourers, and \$20,000 for overhead and profit margin.

[119] The Weis accept the authenticity of the subcontractor invoices in issue and that Yongfeng paid them. Their position is that Yongfeng has not established that these costs were for work falling outside the West Van Contract's scope of work or, if they were outside the scope of work, that they were reasonable or accepted by the Weis as extras.

[120] The West Van Contract does not address how extras will be dealt with between the parties in terms of notice, approval or cost. Counsel agreed that the test to establish entitlement to extras, in the absence of a contractual arrangement for them, comes from *Kei-Ron Holdings Ltd. v. Coquihalla Motor Inn Ltd.* (1996), 29 C.L.R. (2d) 9, para. 41, 1996 CanLII 3443 (B.C.S.C.).

[121] According to *Kei-Ron*, Yongfeng must establish that:

- (a) The work fell outside the contractual scope of work;
- (b) The owner expressly or impliedly authorized the contractor's performance of the work;
- (c) The owner knew, or should have known, the work would increase the cost of construction; and,
- (d) The owner waived, or acquiesced to ignore, any provision requiring changes to be made in writing.

[122] Mr. Wang's evidence was that he kept the Weis apprised throughout of whatever he saw as extra work and its associated costs, including the items in dispute here. He testified that Mr. Wei's instructions in response to these updates were that Yongfeng should do what was necessary, and the extra costs would be discussed at the end and charged on a cost-plus basis, i.e., to include Yongfeng's

profit margin. Based on my credibility and competence findings regarding Mr. Wang, I accept his evidence that, regarding the extras in issue, he kept the Weis generally apprised of these additional issues, Mr. Wei or Ms. Song agreed Yongfeng should perform them, and Yongfeng ensured the work was done for a reasonable price.

[123] Ms. Ren gave evidence about the invoices for these alleged extras. She did not have first-hand knowledge of the work involved. In some cases, she offered a general description of the nature of the work based on what the invoice said or what her employees told her about it at the time. The Weis argued that this was all hearsay, or double hearsay, and so inadmissible to establish the nature of the work or why it was required. Regarding some of these extras, Mr. Wang gave evidence of what was done, why and whether it was charged to the Weis as an extra.

[124] I find that Yongfeng should be awarded \$86,526 for these extras, as follows.

a. Professional Fees and Permitting (\$25,784)

[125] These fees are for appearance renderings, envelope consultants, roof inspectors, site surveying, engineering of stormwater, erosion and traffic control, and landscape architecture. The permitting is for temporary permits required during construction.

[126] Yongfeng argues that it paid these costs to keep the project moving but is not responsible for them because they were extras reflecting changes made after the execution of the West Van Contract. Consultants and design were not part of that Contract, and there is no design phase in the milestone payments. Yongfeng says it was to construct the house strictly in accordance with the Weis' construction drawings and interior design plans, pursuant to cl. 2 of the West Van Contract. Accordingly, the milestone payment structure does not include a design phase or otherwise contemplate that Yongfeng would complete any design work.

[127] The Weis argue that there was no admissible evidence about the details of the work done, whether the price was reasonable, or whether they agreed to its performance.

[128] In my view, the permitting fees fall to Ms. Wei under cl. 3, which states that she is responsible for “the charges of various departments of the provincial and municipal governments”. Similarly, cl. 4 says that “all the fees requested by the City of Vancouver and the government” are not included in the West Van Contract.

[129] Regarding the architect, engineering and consultant fees, I agree with Yongfeng that such charges were not allocated to it under the West Van Contract. The general structure of the Contract was that the house was designed and ready to be built. Under cl. 2, Yongfeng is to build the house “strictly in accordance with the building construction drawings and interior design plans”, which were obtained by the Weis. There is no suggestion in the milestone payments of Yongfeng’s involvement in design. This contractual structure fits with Mr. Wang’s evidence that, from the outset, the arrangement that he and Mr. Wei discussed was the Weis obtaining the plans for construction and design and Yongfeng building in accord with them.

[130] Clause 4, which sets out Yongfeng’s responsibilities, does refer to “overall house planning, measuring, design [and] application at city hall”. However, in my view, reading the West Van Contract as a whole, this clause refers to Yongfeng’s construction responsibilities, not its responsibility to pay for renderings or design costs.

[131] Yongfeng is therefore awarded \$25,058 for the architect, engineering and consultant fees and \$725 for permit costs.² It is also awarded a 5.5% profit margin of \$1,418 for this work.

b. Green Plan (\$22,517)

[132] These costs were incurred from July to September 2016, for specialized design work to meet the District’s requirements, and then the construction of

² The original claim was for \$997 in permit costs, but counsel for Yongfeng withdrew an invoice for \$272 after Ms. Ren acknowledged that she did not know about it.

retaining walls, rainwater storage tanks, and extra sprinklers tying the storage tanks into the property's irrigation system.

[133] According to Mr. Wang, in the summer of 2016 city inspectors required these changes as a condition of the house's occupation permit. He said Yongfeng sent three employees to over six hours of meetings with the District, while keeping the Weis apprised of the situation.

[134] The Weis argue that there is no documentation to support any of this, apart from one field report from Yongfeng's employee, Mr. Bo. There are no written communications with the District, no design drawings for the tanks, sprinklers or retaining wall, and no communications with the subcontractors.

[135] I find the Green Plan was an extra. Under the West Van Contract, Yongfeng's scope of work was restricted to building the house "strictly in accordance with the building construction drawings and interior design plan". I accept Yongfeng's evidence that the drawings and plans on which the West Van Contract was based did not contemplate the Green Plan because this was a novel requirement from the District imposed only at the end of construction.

[136] I accept Mr. Wang's evidence that Yongfeng worked with the District, a specialist landscape designer, and additional contractors to develop a plan satisfactory to the District. It then organized and oversaw the additional work, including excavation and construction of retaining walls. I accept his evidence that he consulted with Mr. Wei, who agreed that Yongfeng should do the work since it was required, and they would work out the price for Ms. Wei to pay for this extra work at the end of the project. It only makes sense that Mr. Wang would have done so. This finding is supported by Mr. Wang's letter to the Weis addressing these issues, which I accept he hand-delivered.

[137] Yongfeng is therefore awarded \$22,517 for its costs, plus a 5.5% profit margin of \$1,238.

c. Interior Sprinklers (\$11,361)

[138] Regarding the interior sprinkler work, I accept Mr. Wang's evidence this was not included in the West Van house's construction drawings. Rather, it was added later by the District's staff after the West Van Contract was made. Accordingly, the interior sprinkler work was not contemplated in Yongfeng's original scope of work under the West Van Contract.

[139] I accept Mr. Wang's evidence that the Weis were aware of and authorized this extra work, and the amount sought was a reasonable payment price for the supply and installation of these interior fire sprinklers.

[140] Yongfeng is therefore awarded \$11,361 for its costs, plus a 5.5% profit margin of \$625.

d. Steel Beam (\$10,316)

[141] Mr. Wang testified that Yongfeng discovered an error in the structural drawings after framing was well underway, which led to the installation of a steel support beam that was too short. Mr. Wang testified that the engineer acknowledged his error and said the steel beam must be removed and replaced, basically halting construction in the meantime.

[142] The Weis argued that Yongfeng was in a better position to assess the accuracy of the drawings and so should bear the loss. I do not accept that argument. The drawings belonged to the Weis, not Yongfeng, and the West Van Contract did not allocate this role or risk to Yongfeng.

[143] I accept Mr. Wang's evidence that he informed the Weis of this issue and was instructed to have the remedial work done right away. It would make no sense for him not to have raised this issue with Mr. Wei. Based on my assessment of Mr. Wang's credibility and competence, I find that Yongfeng would have obtained the replacement beam at a reasonable price.

[144] Yongfeng is therefore awarded \$10,316 for its costs, plus a 5.5% profit margin of \$567.

e. Cleaning Services (\$2,940)

[145] I accept Ms. Ren's evidence that Yongfeng hired Happy Bee Cleaning at the Weis' request to prepare the house for real estate showings as part of her efforts to sell the house. Preparing the house for sale was outside the contractual scope of work.

[146] Yongfeng is therefore awarded \$2,940 for its costs, plus a 5.5% profit margin of \$162.

f. Tree Cutting (\$1,800)

[147] Mr. Wang testified that high winds knocked over trees on the West Van Property. Because the District protected trees on construction sites, Yongfeng reported the fallen trees. According to Mr. Wang, the District's inspector identified several other trees that were at risk and directed Yongfeng to remove them, which Yongfeng hired a contractor to do.

[148] Hao Xu, Yongfeng's former supervisor, supported this testimony. He said some trees were blown over, some were cut down by a professional tree cutting company and a few of the smaller trees he cut down himself.

[149] Ms. Ren testified that Yongfeng paid the contractor \$1,800 in cash. She put in evidence a payment application by one of Yongfeng's employees that was for reimbursement of the tree contractor.

[150] Ms. Song testified that the trees were knocked over by construction equipment, so Yongfeng should be responsible for the costs.

[151] I accept Mr. Wang and Mr. Xu's evidence about what happened with the trees and Ms. Ren's evidence that Yongfeng paid the tree removal company \$1,800 cash. This was outside Yongfeng's contractual scope of work and I accept Mr. Wang's evidence that he discussed it with Mr. Wei before proceeding.

[152] Yongfeng is therefore awarded \$1,800, plus a 5.5% profit margin of \$99.

g. Soil (\$5,196)

[153] Yongfeng claims for these expenses for soil purchased from Fraser Richmond Organics Ltd. The invoice was paid by a Yongfeng employee whom Ms. Ren reimbursed. In cross-examination, Ms. Ren acknowledged that she had no first-hand knowledge about how the soil was used.

[154] I therefore find Yongfeng has not provided admissible evidence to establish the facts that would support this as a compensable expense for which the Weis should be responsible.

[155] This claim is therefore dismissed.

h. Electricity from Neighbour (\$599)

[156] Ms. Ren testified that Yongfeng paid \$599 to a neighbour for temporary power.

[157] In cross-examination, Ms. Ren acknowledged that she had no first-hand knowledge about this situation. Her evidence was based solely on what a Yongfeng employee told her about this expense when seeking reimbursement. I therefore find Yongfeng has not provided admissible evidence to establish the facts that would support this as a compensable claim for which the Weis should be responsible.

[158] This claim is therefore dismissed.

i. Collection Agency (\$722)

[159] Ms. Ren testified that Yongfeng was contacted by a collection agency, Wiggins Adjustment Ltd., demanding payment for something associated with the West Van Property. She testified that she thought the invoice was for a utilities charge, but was unsure.

[160] I find Yongfeng has not provided admissible evidence to establish the facts that would support this as a compensable claim for which the Weis should be responsible.

[161] This claim is therefore dismissed.

j. Yongfeng's Labour Costs (\$18,060)

[162] Yongfeng claims its own labor costs for relocations of the front gate and for tree cutting after the wind storm.

[163] For the metal gate in the front driveway, the Weis say that Yongfeng failed to install it, despite this work being required under the West Van Contract, and therefore they claim for it in their deficiencies.

[164] Mr. Wang testified that Yongfeng did install the gate. He said that, after it was initially installed, Mr. Wei wanted it relocated outside the property line like some other front gates in the neighbourhood. Mr. Wang testified that some homeowners in West Vancouver had gotten away with installing gates beyond their property lines, but not on active construction sites that the District was actively inspecting like the West Van Property. He testified to warning Mr. Wei that the District would see the infraction and require the gate be removed and returned inside the property line, but Mr. Wei insisted Yongfeng move it, saying he would take responsibility. Mr. Wang testified that, shortly after Yongfeng relocated the gate as instructed, an inspector ordered it moved back inside the property, so Yongfeng returned it to its original location. When Mr. Wang attempted to discuss the costs of this extra work with Mr. Wei, Mr. Wei instructed him not to “make it complicated” and said such costs should be dealt with at the end of the project.

[165] Yongfeng's employee, Mr. Xu, testified to a similar version of events as Mr. Wang. He said he was involved in relocating the gate onto District property and then moving it back again. He recalled understanding this was requested by the owner.

[166] The Weis claim that Mr. Wang and Mr. Xu fabricated this entire story of installing and moving the gate. They put in evidence photographs of the front driveway without a gate across the entrance to support their claim that Yongfeng never installed the gate. They argue that Yongfeng's version should be rejected due

to a lack of supporting documentation, such as invoices, photographs or other evidence of communications with the District or between the parties.

[167] Though the lack of documentation is troubling, I accept Mr. Wang's version of events regarding the front gate. I base this, firstly, on my findings above regarding the parties' respective credibility. Second, Mr. Wang's version was supported by Mr. Xu, who was involved in these events and gave credible evidence of the installation and moving of the gate. Third, given the overall evidence of Yongfeng's performance, it is unlikely it would simply fail to install the front gate called for in the drawings. The evidence disclosed no such conduct by Yongfeng on either project. Fourth, regarding the Weis' photographs, I accept Mr. Wang's evidence that they were taken approximately a year after construction was finished, i.e., after someone had removed the gates Yongfeng installed. Fifth, there were other photographs put into evidence showing part of the front gate installed and part of it stored on the property, which is consistent with it being installed and then later dismantled.

[168] I accept that the Weis agreed to pay Yongfeng its costs of performing this work as an extra. The question is whether Yongfeng has proven its associated internal costs.

[169] Yongfeng submitted no contemporaneous documentation to assist with assessing its internal costs for this work, such as employee timesheets or estimates from those who performed or oversaw it. Its evidence was limited to Ms. Ren testifying that the \$12,600 figure in the Scott Schedule prepared by Yongfeng's counsel reflected Mr. Wang's estimate of the labour costs. Ms. Ren had no first-hand knowledge of the work involved or how Mr. Wang estimated these costs. Neither Mr. Wang nor Mr. Xu gave evidence about the time or cost involved in Yongfeng's work. Alternatively, Mr. Lam could have provided expert opinion evidence about this.

[170] I accept Mr. Ju's argument that Ms. Ren's evidence is, at best, hearsay opinion evidence and so inadmissible.

[171] Having found that Yongfeng performed this moving of the gate outside the property line, and then re-installing of it back along the property line, as an extra, in my view the appropriate approach, in the absence of admissible evidence about the time and effort required, is to award only nominal amount of \$2,500.

[172] Turning to Yongfeng's claim for \$5,200 (plus GST) for the trees which it cut down after the wind storm, Mr. Wang and Mr. Xu gave first-hand evidence that this was performed. Mr. Xu referred to his cutting down a few small trees that the District wanted removed.

[173] Ms. Ren's evidence was that she arrived at her figure by using the bill from the professional tree cutter who removed some of the trees. The professional charged \$1,800 per tree. Ms. Ren then discounted this by \$500 for the trees cut down by Yongfeng because Yongfeng dealt with the smaller, easier trees. She then multiplied this \$1,300 by the four trees she understood Yongfeng to have removed, to arrive at \$5,200.

[174] I accept this as a reasonable method of calculating Yongfeng's internal costs. I award Yongfeng \$5,200 for the tree removal.

[175] Yongfeng is therefore awarded labour costs of \$7,700 .

2. Were there any deficiencies in construction?

[176] Ms. Wei claims a \$25,000 set-off for alleged construction defects and deficiencies relating to the front gate, fencing, the finishing inside the home, and damage caused to a neighbour's property because a tree fell.

[177] Regarding the front gate, I have already found against the Weis' claim that Yongfeng did not install the gate as designed.

[178] On the fencing, Ms. Wei claimed that the back fence Yongfeng constructed was not "modern" as was required by the West Van Contract. On this issue, I find the fencing was consistent with the construction drawings. Also, no evidence was

offered of any damages from this issue, bearing in mind that they sold the property before moving in.

[179] Regarding the allegations of defective finishing work inside the home, the Weis' evidence was vague. Ms. Wei and Ms. Song referred to leaks on a deck where water should have been running down the drain pipes, doors that did not close properly and garbage left behind. They claimed \$12,500 of repair costs for these issues. The only documentary evidence were some photos and a \$4,200 invoice.

[180] I find the evidence does not establish a breach of contract by Yongfeng or that its work fell below the standard expected of a reasonable construction contractor. The photographic evidence was unpersuasive, depicting some debris, paint drips, and posts and flooring that had supposedly been repaired. Ms. Song identified them but did not say when they were taken or by whom.

[181] I also do not accept the Weis' evidence of damages regarding these issues. Ms. Song testified that, before they sold the West Van Property, they paid a contractor over \$10,000 to rectify these problems, but she provided no documentary or other evidence to support this expense. Based on my findings regarding her credibility, I am not prepared to accept her evidence about this without objective corroboration.

[182] Finally, Ms. Song alleged that Yongfeng's equipment caused a tree to fall on their neighbour's property causing \$3,900 of damage for which her family had to pay. Again, without any other evidence in support, such as photographs or evidence of payment, I am not prepared to accept her evidence.

[183] Ms. Wei's set-off claims for defects and deficiencies in the construction of the West Van house are dismissed.

3. Is Yongfeng liable for delays?

[184] The parties agreed that the certificate of occupancy for the West Van house was obtained November 25, 2016, some 147 days after the contractual deadline of June 30, 2016.

[185] As part of her set-off, Ms. Wei alleges this delay was a breach of contract by Yongfeng that caused her financial loss by prolonging expensive construction financing. She also relies on the liquidated damages clause for delay in the West Van Contract:

Party B must ensure the completion and acceptance for use on time. If the construction is not completed on time, Party B shall pay liquidated damages to Party A. The daily amount is calculated based on the total contract price plus 1 % and then divided by 365.

[186] Yongfeng denies causing the delay. Regarding damages, it says the Weis provided no evidence of additional financing costs, and the liquidated damages claim was neither pleaded nor raised until final argument, making it unfair to allow it.

[187] I do not accept the Weis' claim of additional financing costs because they provided no evidence of any such loss. There was no evidence adduced of the terms of their construction financing, including the amount of financing, the interest rate, when it was paid off, or what replaced it. Ms. Song testified that they paid "extra interest" on their construction loan, but she did not know what the interest rate was.

[188] Nor do I accept the claim for \$496,817 for delay under the liquidated damages clause. That claim was neither pleaded nor raised until final argument and caught Yongfeng by unfair surprise.

[189] The Weis' pleadings for delay are limited to those found in their response to the amended counterclaim and refer only to the construction carrying costs:

6. Yongfeng failed to reach the Completion by June 30, [2016,] and in doing so breached the Agreement (the "Delay").

7. As a result of the Delay, Michelle has incurred increased carrying costs in relation to the bank loan used to pay for and finance the construction of the Residence (the "Delay Costs").

[...]

6. Further, and in the alternative, if any monies are owing to Yongfeng, which is denied, such monies are subject to a set-off, in part, for the Deficiency Costs and Delay Costs resulting from Yongfeng's breaches of the Agreement.

[190] Neither party called evidence relating to this clause or canvassed the law regarding liquidated damages clauses and unenforceable penalties. Importantly, in final argument, Mr. Volk provided alternative translations of the Mandarin version of the liquidated damages clause, which cast serious doubt on the wording of the certified translation in evidence. These additional translations suggested that, properly translated, the clause contained important limitations on Yongfeng's liability for delay that would have applied on the evidence. I accept Mr. Volk's argument that, had Yongfeng had notice of the liquidated damages claim, it would have pursued this translation issue in its case.

[191] In my view, Yongfeng was taken by surprise by Ms. Wei's reliance on the liquidated damages clause and was prejudiced by the lack of notice. It would therefore be unfair to award damages under this clause.

[192] I also accept Mr. Wang's evidence that Yongfeng did not cause the delays in issue and kept Mr. Wei apprised of them, which may well have been a defence under the properly translated clause. There was no dispute that the initial delay of 1.5–2 months occurred because the Weis did not obtain the previous owner's authorization to use its drawings to apply for a building permit until June 7, 2015.

[193] Another delay of 1.5–2 months occurred because of the error in the engineer's structural drawings described above, which I have found was not attributable to Yongfeng.

[194] The final delay, which arose at the end of construction when only landscaping remained, was due to the need to implement the District-imposed rainwater collection Green Plan. I have accepted Mr. Wang's evidence that this was a novel requirement from the District not contemplated in the West Van Contract. I therefore accept that this delay should also not be allocated to Yongfeng under the Contract.

[195] Ms. Wei's set-off claim for delay is therefore dismissed.

[196] Having failed to prove her set-off claims for deficiencies or delays by Yongfeng in the construction of the West Van house, Ms. Wei must pay Yongfeng the full \$153,308 for unpaid amounts due and owing under the West Van Contract.

C. Abuse of Process

[197] Ms. Ren claims \$50,000 from Ms. Song and Mr. Wei in abuse of process, for filing unjustified CPLs against the titles of two Richmond properties she owned.

[198] The CPLs were filed based on the allegation in the Weis' notice of civil claim that Ms. Ren and/or Mr. Wang used trust funds beneficially belonging to Mr. Wei and Ms. Song to make mortgage payments or to maintain, repair or improve the two Richmond properties. Ms. Song and Mr. Wei removed the CPLs in January 2019.

[199] At trial, they conceded having no factual support for the allegations used to register the CPLs. Their evidence was that they saw the CPLs as justified to ensure they had security for their claims against Yongfeng.

[200] I agree with Ms. Ren that, on the evidence, the CPLs were illegitimately obtained and used for an improper purpose (*Drein v. Puleo*, 2016 BCSC 593, para. 8).

[201] Ms. Ren provided no evidence of the CPLs causing her any inconvenience, harm or expense. Nevertheless, she seeks \$50,000 for abuse of process, arguing that such damages are at large and not limited to proven financial loss (*D.K. Invt. Ltd. v. S.W.S. Invt. Ltd.* (1986), 6 B.C.L.R. (2d) 291 at 305, 1986 CanLII 920 (C.A.)).

[202] Yongfeng did not provide guidance from the case law regarding the appropriate amount for such an award in these circumstances. In my view, \$50,000 is excessive given no evidence of any inconvenience, damage or loss.

[203] An award for abuse of process is nevertheless appropriate to condemn and deter such conduct. Bearing in mind that the CPLs were ultimately removed

voluntarily, I award Ms. Ren \$2,500 from Mr. Wei and Ms. Song, jointly and severally, for their abuse of process.

VI. CONCLUSION

[204] Under the Richmond Contract, Mr. Wei is ordered to pay damages to Yongfeng of:

- i. \$1.07 million for unpaid work; and,
- ii. \$84,150 for lost profits.

[205] Under the West Van Contract, Ms. Wei is ordered to pay damages to Yongfeng of:

- i. \$153,308 for unpaid work;
- ii. \$86,526 for unpaid extras.

[206] Ms. Song and Mr. Wei are ordered to pay Ms. Ren \$2,500 for abuse of process.

[207] Ms. Song and Mr. Wei's claims against Yongfeng are dismissed.

[208] I will leave it to counsel to deal with GST on the amounts awarded. If they are unable to do so, they can speak to this issue or any other mathematical issue or concern raised herein.

[209] Subject to the parties wishing to speak to costs, Yongfeng is awarded costs at Scale B against Mr. Wei for the Richmond Contract issues and against Ms. Wei for the West Van Contract issues.

“Coval J.”