IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *B.A. Blacktop Ltd. v. 1073661 B.C. Ltd.*, 2023 BCSC 2093

Date: 20231129
Docket: S2687
Registry: Powell River

Between:

B.A. Blacktop Ltd.

Plaintiff

And

1073661 B.C. Ltd.

Defendant

Before: The Honourable Justice Iyer

Reasons for Judgment

Counsel for Plaintiff:	J. Kinghorn
Representative for the Defendant:	A. Rebane
Place and Date of Trial:	Powell River, B.C. July 4-7, 10-11, 2023 November 6, 2023
Place and Date of Judgment:	Powell River, B.C. November 29, 2023

OVERVIEW

[1] This dispute arises from the development of a subdivision in Powell River. The plaintiff, B.A. Blacktop Ltd. (“Blacktop”), is a contractor specializing in road and services installations. The defendant, 1073661 BC Ltd. (“107”), is a company that builds residential homes. 107’s principal is Alan Rebane, who represented the company at trial.

[2] In 2016, the parties entered into a contract for Blacktop to install roads and related facilities, such as municipal services connections, lighting and a pathway, for the first phase of a residential subdivision called Westwood Creekside (“Subdivision”). As the Subdivision is located within the City of Powell River (“City”), the City imposed certain requirements with which 107 had to comply. The Subdivision is situated on sloped land, and, combined with persistent rain, this created challenges for excavation and construction.

[3] Blacktop’s work began towards the end of 2016. Although initially projected to run for three months, the project did not finish until October 2017. There were significant cost overruns. Blacktop billed 107 for the work it performed. 107 did not pay the last three of those invoices.

[4] Blacktop now sues 107 under the contract to recover the money it says it is owed. In the alternative, if the contract does not establish its claim, Blacktop pleads unjust enrichment. Blacktop also claims in negligence for the additional costs it incurred in responding to numerous washouts on the site. Blacktop says that 107 negligently misrepresented that there was no erosion control problem or that 107 had fully addressed the hazard posed by flowing water prior to Blacktop commencing work.

[5] 107 claims that Blacktop is only entitled to the contract price and to the few additional charges Mr. Rebane agreed that he had authorized, a much lower amount than what Blacktop actually incurred finishing the project. 107 denies that it was responsible for erosion control, saying that the contract placed that responsibility on

Blacktop. 107 also counterclaims against Blacktop for the lost profits from sales of the Subdivision properties that it says resulted from Blacktop's poor work and the delay in project completion.

[6] The issues between the parties are complicated by two factors. First, the core of the contract is a bid that Blacktop made on the project that 107 accepted. That bid was based on preliminary engineering drawings that subsequently changed. The parties agree that they entered into oral agreements modifying the bid but disagree about what those oral agreements were. This makes it challenging to determine the terms of their contract.

[7] Second, as the parties acknowledged in closing submissions, the evidence is incomplete. In particular, Mr. Rebane struggled to understand the difference between evidence and submissions and what proof of a claim or defence requires. This created significant gaps in 107's evidence. For example, Mr. Rebane did not ask questions in cross-examination that he would later give evidence about (such as conversations between himself and the witness), and he made general statements on various topics without identifying who was involved or exactly when they occurred. Mr. Rebane called no witnesses other than himself.

[8] In saying this, I mean no disrespect to Mr. Rebane. He was clearly doing his best in a difficult and stressful situation. However, as I explain below, the deficiencies in his evidence have significant adverse consequences for his defence and counterclaim.

BACKGROUND FACTS

[9] In mid-2016, Mr. Rebane entered into discussions with Les Rizcu, a general manager of Blacktop, to get a quote on the project. Mr. Rebane specified that the scope of Blacktop's work related to the installation of roads, sidewalk and lighting, as well as sanitary, sewer and water services for the Subdivision. Mr. Rebane specified certain tasks as outside Blacktop's scope of work. Mr. Rizcu's based Blacktop's

quote on engineering drawings that had been prepared by McElhanney Construction Services Ltd. (“McElhanney”) for a previous developer in 2010.

[10] 107 retained McElhanney to prepare revised preliminary drawings, and Blacktop revised its bid based on them. Specifically, on October 27, 2016, Blacktop provided a revised bid based on McElhanney’s revised preliminary drawings dated October 19, 2016 (“Preliminary Drawings”). On behalf of 107, Mr. Rebane accepted this bid on November 25, 2016 (“Accepted Bid”). The parties agree that the Accepted Bid forms part of the contract between them. The Accepted Bid consists of Blacktop’s estimate of the labour, equipment and materials required to construct the project based on the scope of work specified by Mr. Rebane and the Preliminary Drawings. The Accepted Bid sets out terms that reflect the scope of work specified by Mr. Rebane along with what I understand are Blacktop’s usual terms.

[11] Key terms of the Accepted Bid are:

> Unless noted, [Blacktop has] made no allowances for excavation sub-base grading, drainage works, wood or concrete curbing, testing costs, crossing permits or fees, parking-stall line painting or making good damage to existing pavement.
>
> Unless otherwise expressly provided [Blacktop] assumes no responsibility for the suitability of the surface or area upon which materials to be supplied will be used and particularly of any grading or soil conditions of the sub-base.
>
> Complete run-off water from paved surfaces having a slope of less than 1% is not guaranteed.
>
> The Customer will provide proper access for trucks and equipment to the point where materials are to be delivered or work is to be done and will pay for the cost of any delay caused by its failure to do so.
>
> The Customer shall give reasonable notice of time or times it requires materials to be delivered or work commenced.
>
> Subject to relative plans and specifications being provided to [Blacktop] before commencement of work.
>
> The undersigned hereby expressly consents to [Blacktop’s] terms of payment which are net 30 days after purchase invoice date unless arranged differently and listed in this contract. The undersigned also agrees to pay a service charge of two percent (2%) per month on all balances overdue. Effective Interest Rate Charged = 26.82% per annum.

[12] The total price set out in the Accepted Bid is $509,654.10.

[13] The Accepted Bid was entered into before the engineering drawings were finalized. Importantly, the City had not yet approved the Subdivision project. The City demanded changes leading to negotiations between the City and 107. McElhanney then prepared a set of final, "issued for construction" engineering drawings dated November 30, 2016 ("Final Drawings").

[14] A number of identical notes or comments appear in the margins of both the Preliminary and Final Drawings. These notes cover topics such as environmental protection, traffic safety and siltation control.

[15] Note 1.1 under the heading "General Siltation Control Notes" states:

> Civil Contractor shall be responsible to provide site erosion and sediment control (ESC) as necessary to prevent the release of sediment or sediment laden waters from entering the City drainage systems during cleaning and grubbing, and civil construction stages of the subdivision. Erosion and sediment control (ESC) during the project's maintenance period stage shall be the responsibility of the developer (through his civil or building contractor(s).

[16] Blacktop began construction on the Subdivision in mid-December 2016.

[17] Blacktop billed 107 periodically for the work it performed. Blacktop used the unit prices listed on the Accepted Bid. Where the Final Drawings required work (including labour, transportation and/or materials) different from the Preliminary Drawings, Blacktop prepared an "extra work order" ("EWO") to document the work. Other unanticipated work, arising from unanticipated site conditions or additional requests by 107, was also documented and billed using an EWO. 107 signed none of the EWOs. Each EWO was listed on the invoices provided by Blacktop to 107.

[18] Construction did not finish in the spring of 2017 but continued until approximately October 2017. In part, this was due to problems caused by a great deal of water running over the site. This water filled excavation areas, washed out

material and ran onto neighbouring properties. Blacktop billed 107 for all of the costs of the cleanup work it performed.[1]

[19] There is no dispute that Blacktop performed all of the work for which it invoiced 107. Although Mr. Rebane questioned some of Blacktop's decisions about how to do certain tasks, he agreed that Blacktop did them. Mr. Rebane led no evidence to support his beliefs about the necessity of the work and admitted that he contracted with Blacktop because of its expertise in this area.

[20] 107 paid Blacktop's first two invoices and made partial payments on the next two. 107 did not pay Blacktop's last three invoices. Nevertheless, Blacktop completed its work on the Subdivision.

[21] In total, Blacktop billed $801,014.81, representing $291,360.71 over the amount quoted in the Accepted Bid. 107 paid $349,208.45, leaving an outstanding balance of $451,806.36, plus contractual interest of $199,190.90. Blacktop seeks recovery of this amount.

[22] Blacktop also seeks to recover the amount of $181,995.13, representing the cost of the cleanup work it performed as a result of washouts on the site.

[23] 107 counterclaims for $188,000, which it says are the damages it suffered because Blacktop breached the contract.

POSITIONS OF PARTIES

[24] Blacktop submits that the contract included implied terms that Blacktop would perform the work described on the Final Drawings and any additional work authorized or directed by 107. In the alternative to its claim in contract, Blacktop submits that 107 would be unjustly enriched if it did not have to pay for the benefit of the work Blacktop performed. Blacktop also claims that it incurred additional costs cleaning up after washouts on the site, for which 107 is liable in negligence.

[1] Counsel for Blacktop clarified that this amount is in addition to the invoiced amounts.

[25] 107 argues that the contract includes the comments of the Preliminary and Final Drawings which, it says, make Blacktop responsible for erosion control and the costs resulting from inadequate erosion control measures. As I understand it, 107 argues that Blacktop was required to perform the work entailed by the Final Drawings, but at the price set out in the Accepted Bid (based on the Preliminary Drawings). However, 107 agrees that it is liable for any extra work that it authorized through Mr. Rebane.

WHAT WERE THE CONTRACTUAL TERMS?

Extra Work

[26] The evidence establishes that, at the time the Accepted Bid was concluded, both parties contemplated that there would be further changes to the engineering drawings on which the Accepted Bid was based. The Preliminary Drawings were marked "preliminary." Both parties were aware that the City had not approved the Subdivision on the date of the Accepted Bid and that the project could not proceed without its approval.

[27] It would make no commercial sense to interpret the contract as committing Blacktop to do work based on drawings not yet approved by the City. Nor would it make sense to accept 107's argument that the Accepted Bid committed Blacktop to billing only the price set out in the Accepted Bid regardless of the scope of work eventually approved by the City. Nothing in the Accepted Bid says or implies that the price remains firm, even if the work changes.

[28] I find that the contract required Blacktop to do the work, including labour, equipment and materials, specified in the City approved Final Drawings.

[29] There is no dispute that Mr. Rizcu invoiced 107 using the unit prices set out in the Accepted Bid. I agree that the Accepted Bid required him to do so.

[30] The Accepted Bid is silent on how to treat additional work outside the scope of the Preliminary Drawings. This consisted of work required by the Final Drawings that was not in the Preliminary Drawings, unanticipated work and work that was

expressly excluded from the Accepted Bid (set out in para.11 above) but which 107 asked Blacktop to perform.

[31] Where a contract does not expressly provide for extra work, allocation of such costs may be implied by the conduct of the parties if the owner knew about the work and acquiesced in the contractor doing it: *Fast Trac Bobcat & Excavating Service v. Riverfront Corporate Centre Ltd.*, 2009 BCSC 268 at paras. 79-82 and the authorities cited therein; *Polygon Metalworks Int'l Inc. v Ellisdon Corporation*, 2018 BCSC 1448 at para. 53.

[32] 107 argues that it should not be liable for any extra work because it did not sign any of the EWOs issued by Blacktop. However, the Accepted Bid does not require written authorization for extra work. The evidence establishes that 107, through Mr. Rebane and/or McElhanney, verbally approved or directed Blacktop to perform at least some of the extra work. I find that it was an implied term of the contract between the parties that such verbal direction or approval was sufficient.

Erosion Control

[33] 107 argues that the contract allocated responsibility for erosion control to Blacktop based on a note in the Preliminary and Final Drawings. For ease of reference, I reproduce it here:

> Civil Contractor shall be responsible to provide site erosion and sediment control (ESC) as necessary to prevent the release of sediment or sediment laden waters from entering the City drainage systems during cleaning and grubbing, and civil construction stages of the subdivision. Erosion and sediment control (ESC) during the project's maintenance period stage shall be the responsibility of the developer (through his civil or building contractor(s).

[34] I agree with 107 that this clause makes Blacktop responsible for erosion control during construction. The Preliminary Drawings, on which Blacktop based the Accepted Bid, contained this note. This note remained unchanged in the Final Drawings. It was therefore continuously part of Blacktop's scope of work. In its written closing submission, Blacktop simply denied that this clause was part of the

contract but did not say why. I find that Blacktop was contractually responsible for erosion control.

WHAT IS 107'S LIABILITY UNDER THE CONTRACT?

[35] The Accepted Bid amount was $509,654.10 plus applicable interest.

[36] The actual amount invoiced by Blacktop exceeded the contract amount by $291,360.71. In order to recover this amount, Blacktop must prove that that 107 knew about any additional work before it was performed and that 107 acquiesced to that work being done.

[37] Most of the EWOs concerned additional work required by the City, such as paving of a pathway that was originally to be gravel and installing street lighting and a crosswalk. Other work was necessitated by site conditions, such as building a retaining wall and additional excavation.

[38] Mr. Rizcu testified that Mr. Rebane agreed to all of the EWOs, either directly or through McElhanney. Mr. Rebane did not clearly deny this. Rather, he said that he never signed any EWOs. Mr. Rebane admitted that he saw the EWOs on the invoices he received from Blacktop, complaining that the actual EWO documents were not attached to the invoices he received. Notably, Mr. Rebane did not say that he questioned the inclusion of these amounts on the invoices at the time.

[39] Mr. Rebane's evidence about his discussions about additional work with Mr. Rizcu or Blacktop's site supervisor, Brent Watson, was vague and inconsistent. While he denied being aware of and approving some work initially, Mr. Rebane later agreed that he knew about it and that it had to be done. Because of these inconsistencies, Mr. Rebane's evidence is unreliable. Further, Mr. Rebane's evidence does not clearly support his own position. Subject to the exception discussed below, I accept Mr. Rizcu's evidence that 107 authorized the additional work documented in the EWOs.

[40] Mr. Rizcu testified that two EWOs, for $4,919.83 and $2,160.91 respectively, were charges for hauling material to the onsite dump. However, he also testified that he and Mr. Rebane had agreed that the quote in Accepted Bid would be based on 107 providing an onsite dump area. It follows from this that onsite dumping was within the scope of the Accepted Bid, not additional work. 107 is not liable for these amounts.

[41] In conclusion, I find that 107 is liable for the extra work performed by Blacktop, less $7,080.74.

[42] 107's liability to Blacktop is also reduced by errors Blacktop made in the Accepted Bid. Blacktop invoiced 107 for all actual quantities. To the extent that these differences arose because of additional work required by the Final Drawings or authorized by 107, Blacktop was entitled to bill for the actual quantities installed. However, Mr. Rizcu admitted that he made an error in his estimate of 76 metres of 375 mm storm pipe in the Accepted Bid. In fact, the Preliminary (and Final) Drawings required 174.6 metres. There is no evidence that Blacktop informed 107 of this error or that 107 agree to pay the additional cost. Blacktop bears the risk of errors in the estimate it provided to 107 for acceptance. I find that 107 is not liable to Blacktop for $25,463.06, representing the amount in excess of the estimate.

[43] Blacktop's alternative unjust enrichment claim for amounts it is not owed under the contract fails. To succeed in unjust enrichment, a plaintiff must show not only enrichment of the defendant and a corresponding deprivation of the plaintiff, but also that there is no juristic reason for the enrichment. Here, the contract provides the reason because the cost of onsite dumping and errors in the estimate were contractually allocated to Blacktop.

WHAT IS 107'S LIABILITY IN NEGLIGENCE?

[44] To make out negligent misrepresentation, Blacktop needs to establish: that there was a duty of care based on a special relationship between itself, the representor, and Blacktop, the representee; the representation was untrue,

inaccurate, or misleading; the representor was negligent in making the representation; the representee reasonably relied on the misrepresentation; and that reliance resulted in damage to the representee: *Queen v. Cognos Inc.,* [1993] 1 S.C.R. 87 at para. 34.

[45] Although Blacktop's closing submissions address negligence rather than negligent misrepresentation, Blacktop's Notice of Civil Claim alleges the latter. It pleads that 107 owed it a duty of care to ensure that representations it made to Blacktop were accurate. Specifically, Blacktop pleads that, on July 6, 2016, 107 made representations to Blacktop to induce it to enter the contract, including that 107 would "establish a drainage plan for the property to prevent water runoff" before Blacktop commenced work on the property.

[46] Mr. Rizcu was not asked about any representations made by 107 to him on this date. There is no document in evidence with this date. Mr. Rizcu testified about a conversation that he had with Mr. Rebane some time before mid-June 2014. He said that Mr. Rebane asked him to leave a number of items out of his quote; however, none of those items related to erosion control.

[47] Blacktop points to Mr. Rebane's evidence that he was aware that excessive water was draining onto the site from a neighbouring school property located above the site and that he implemented some erosion control measures to address this problem before construction began. I agree that Mr. Rebane testified that he *believed* that he had adequately addressed the problem. However, Mr. Rebane did not clearly testify that he ever *represented to Blacktop* he had fully addressed the erosion control problem, such that it would not pose a significant problem during construction. Mr. Rebane's evidence on erosion control was confusing; however, he consistently maintained that, regardless of any measures he had put in place before construction started, Blacktop was contractually responsible for such measures.

[48] Absent any evidence of this representation, Blacktop's claim of negligent misrepresentation claim fails.

CAN 107 SUCCEED IN ITS COUNTERCLAIM?

[49] In its counterclaim, 107 seeks damages for breach of contract for non-performance and loss of sales, costs of erosion control, costs of engineering surveys and geotechnical expenses.

[50] The only evidence of these amounts is a letter written by Mr. Rebane to Mr. Rizcu and Mr. Watson dated March 12, 2018. In it, Mr. Rebane says that Blacktop did not perform its obligations under the contract to an acceptable standard, did not implement appropriate erosion control and lost interest in the project, which led to excessive delay and Mr. Rebane missing the opportunity to sell the sub-division lots during the summer. The letter quantified 107's losses as follows:

Non-performance	$75,000
Loss of sales	$30,000
Erosion control	$15,000
Extensive surveying	$4,000
Geo-technical expenses	$4,000
Hold back until October, 2018	$60,000[2]

[51] There is no objective evidence to support these amounts.

[52] Before assessing damages, 107 must establish that Blacktop breached the contract. 107 did not tender any evidence that Blacktop failed to perform its obligations to an acceptable standard. Although Mr. Rebane provided his own opinions about the quality of the work, he was not qualified as an expert and his opinion evidence is not admissible.

[2] This breakdown differs from that in 107's July 10, 2023 submission and what Mr. Rebane stated during the trial.

[53] 107 also relies on a letter from Geopacific commenting on an instance where Blacktop encountered clay during excavations. Geopacific described Blacktop as having "overexcavated approximately 1.8 metres and the clayey silt appears continuous to this depth." The letter goes on to recommend measures to protect the stripped subgrade. Mr. Sanderson, a McElhanney engineer who worked on the Subdivision, testified that overexcavation is necessary when soft soil is encountered during an excavation. Mr. Rizcu testified that the overexcavation in this instance was done at McElhanney's or Geopacific's direction. This evidence does not establish that Blacktop breached the contract.

[54] Water runoff was a significant and persistent problem throughout construction. Mr. Rizcu testified about the erosion control measures that Blacktop took when it performed cleanup work after washouts, and he acknowledged that these measures did not prevent further washouts. The representatives of each party blamed the other for a problem that no one could fix. I have already found that Blacktop was responsible for erosion control and dismissed its claim to recover those amounts from 107. 107 has not provided any proof of damage in addition to those amounts. Mr. Rebane's claim that it was the clean up work that caused the delay in completing Blacktop's work rather than anything else is speculative.

[55] Turning to 107's claims about delay, it has not proved that the contract included any term requiring completion within a particular time. Mr. Rebane testified that there was a verbal agreement that Blacktop would complete the work by March 2017. He said this date was later extended to the end of July:

> Um, as this went on for -- for many months and we were supposed to be done in – we were supposed to be done in March, but because of the rain, all understood it was not going to happen. We went through May and into June and we had a meeting, Brent and I had a meeting. I believe there were some other people there but I cannot remember anymore. Um, but I very clearly had a meeting that it would be done by the end of July.

[56] Mr. Rebane was not asked about this on cross-examination; no one questioned Mr. Rizcu about it and Mr. Watson was not called as a witness.

[57] The only other evidence about a construction schedule is found in Mr. Rebane's Mach 12, 2018 letter, which diverges from his testimony. It refers to a completion date of March 16, 2017 as being set out in a construction schedule that Blacktop provided on July 6, 2016. However, that was well before the date of the Accepted Bid. There is no evidence of a construction schedule forming part of the Accepted Bid. Mr. Rebane's letter does not say anything about an agreement that the work would be completed by the end of July. Instead, he wrote that he considered a reasonable completion date to be the end of June.

[58] This evidence fails to establish that the contract required Blacktop to complete the work by any particular date.

[59] I conclude that 107 has failed to establish that Blacktop breached the contract and its counterclaim must fail.

CONCLUSION

[60] In conclusion, I make the following orders:

a) 107 is liable to Blacktop under the contract in the sum of $419,262.56 plus contractual interest of 2% per month (26.82% per annum);

b) Blacktop's claims in unjust enrichment and negligence are dismissed;

c) 107's counterclaim is dismissed in its entirety.

[61] As the successful party, Blacktop is entitled to its costs on Scale B; however, if there are matters relating to costs that the parties wish to address, they may provide me with written submissions, not exceeding five pages.

"Iyer J."