IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *MacLean Bros. Drywall Ltd. v. 1114136 B.C. Ltd.*, 2025 BCSC 2222

Date: 20251110
Docket: S60477
Registry: Kamloops

Between:

MacLean Bros. Drywall Ltd.

Plaintiff

And

1114136 B.C. Ltd. and Lucas Siemens

Defendants

Before: The Honourable Justice Donegan

Reasons for Judgment

Appearing in person on behalf of the Plaintiff:	D. MacLean
Appearing in person on behalf of the Defendants:	L. Siemens
Place and Date of Trial:	Kamloops, B.C. July 2–5 and December 9–10, 2024
Place and Date of Judgment:	Kamloops, B.C. November 10, 2025

Introduction

[1] In 2021, the parties entered into one or more agreements for the plaintiff, MacLean Bros. Drywall Ltd. ("MacLean Bros."), to supply and install drywall at a home owned by the defendant, Lucas Siemens. The plaintiff contends two agreements governed the parties' relationship: (1) one reached on March 24, 2021 (the "Agreement") that required the plaintiff to install and finish drywall to a "level 4" finish for an agreed-upon sum; and (2) the other reached on or about April 27, 2021 (the "Additional Agreement") that required the plaintiff to upgrade the finish to "level

5” for an additional sum. The plaintiff says it performed all of its obligations under both agreements in a good and workmanlike manner, but the defendants, in breach of the agreements, have refused to pay the amounts owing. It seeks damages for breach of contract.

[2] The defendants contend only the Agreement governed the parties’ relationship and that the plaintiff, not them, breached that contract. They argue the plaintiff failed to perform and complete its work in accordance with the terms of the Agreement and seek damages for breach of contract. While they also plead the plaintiff failed to perform and complete its work in accordance with its duty of care and seek damages in negligence, they made no specific submissions in favour of this cause of action.

[3] MacLean Bros. is a British Columbia company in the business of drywall installation, commercial tenant improvements, and other construction activities. It is owned and operated by three brothers, one of whom is Dustin Maclean (“Mr. MacLean”). Mr. MacLean was the person who dealt with the defendant, Lucas Siemens, during the relevant times. He testified at trial.

[4] The defendant, 1114136 B.C. Ltd. (“136 B.C. Ltd.”), is a British Columbia company whose director and sole operating mind is the defendant, Lucas Siemens. Mr. Siemens is an experienced property developer who personally owns property located on Nicola Lake (the “Property”). He has been in the process of building a high-end vacation home on the Property for several years now. It is within this home (the “Home”) that the plaintiff installed the drywall at the heart of this dispute. Mr. Siemens testified at trial. He also tendered expert opinion evidence from a local drywaller, Cameron Frigon.

[5] In order to make the contested findings of fact necessary to resolve the issues in this dispute, I am required to first make determinations about the credibility and reliability of the witnesses who testified. However, before doing so, I must first address three preliminary questions.

Preliminary Questions

Should this action be removed from the application of Rule 15-1 of the *Rules*?

[6] The parties ask me to order this matter be removed from the application of Rule 15-1 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*]. To understand why they ask, and why I agree, it will be helpful to first summarize the procedural history of this litigation.

[7] The plaintiff commenced this action on August 30, 2021. Mr. Siemens filed a brief, and somewhat ambiguous (as to whether it related to both defendants or only himself), response to civil claim on September 14, 2021. Although the response pleads that the plaintiff did not complete the work they contracted to do and removed drywall that "should have remained onsite to finish", the defendants filed no counterclaim at that time. On February 25, 2022, the plaintiff, through its counsel at the time, filed a Notice of Fast-Track Action pursuant to Rule 15-1 of the *Rules.* This rule provides a process for a more efficient and economical litigation of those cases meeting certain criteria. Qualifying cases are relatively straightforward, can be prepared for trial and tried relatively quickly, and do not require as extensive a process as the more complex cases: *Shaker v. Chow*, 2012 BCSC 617 at para. 27.

[8] The litigation path has been anything but straightforward or smooth. Delays have resulted from various contested applications and procedural steps, including: (a) a default judgment and garnishing order after judgment (obtained against 136 B.C. Ltd. in the spring of 2023), which was ultimately set aside on application by Mr. Siemens several months later; (b) an application seeking additional examination for discovery time for Mr. MacLean; (c) Mr. Siemens' successful application to adjourn the first trial dates; and (d) Mr. Siemens' application to file a counterclaim, and to serve an expert report, outside the time limits set out in the *Rules*, to name a few.

[9] Regarding the last step, Mr. Siemens did not file a counterclaim until May 21, 2024. It was at this time, only a few weeks before the trial date, that the plaintiff learned the details of Mr. Siemens' allegations. In addition to claiming the plaintiff

removed drywall that should have remained onsite, he claims that "among other things": (a) areas of the Home, including the areas around the two fireplaces and a wall in the garage, are missing drywall; and (b) drywall "in the area behind the kitchen wall and laundry room wall was not sanded or completed".

[10] On May 21, 2024, Mr. Siemens was granted an order extending the time for him to serve an expert report to 4 p.m. on June 14, 2024. Two days before this deadline, on June 12, 2024, Mr. Siemens telephoned drywaller Cameron Frigon, who agreed to provide an estimate for the cost to repair/complete the drywall in the Home. Mr. Frigon attended the Home, conducted what he described as a "quick inspection", took some photographs, and prepared a very brief written "estimate and report" that same day. Mr. Siemens served this document, and ten of Mr. Frigon's photographs, on the plaintiff on the day of the deadline.

[11] Rule 15-1 imposes certain modifications to pre-trial procedures for actions proceeding under it. The parties, now self-represented, are unable to say with certainty whether their pre-trial procedures were conducted in accordance with the fast-track rule. My own review reveals that the parties followed the fast-track requirements in some instances, but not in others. In any event, the parties agree the circumstances of the fast-track rule no longer exist, if they ever did, and ask me to make an order, under Rule 15-1(6), that the action proceed as a regular action.

[12] When determining whether an action should proceed as a fast-track action, the court may consider a number of non-exhaustive factors, including: (a) the time required for trial; (b) whether all parties have consented or acquiesced to use fast track procedures; (c) the risk of prejudice to a party, including prejudice with respect to costs; (d) whether a party is using the application of fast track for an improper purpose; and (e) the interests of justice as informed by the purpose of Rule 15-1: *Bagri v. Bagri*, 2015 BCSC 2132 at para 19.

[13] I am satisfied the action should be removed from the operation of Rule 15-1. It is unclear whether the parties were aware the action was to proceed under the fast-track rules, particularly after they became self-represented. In any event, as the

litigation progressed, it is obvious the case no longer aligned with the purpose of Rule 15-1 or met the requirements of the rule. Rather than a straightforward action that could be tried quickly, this litigation has involved multiple applications, longer examinations for discovery, and the trial ultimately took six days to conclude. The parties consent to its removal from the operation of Rule 15-1 and have not identified any risk of prejudice that removal might cause to any of them. In these circumstances, I find it is in the interests of justice to remove this action from the operation of Rule 15-1, and so order pursuant to Rule 15-1(6).

Should the plaintiff be permitted to amend its pleadings?

[14] At trial, the plaintiff sought to amend its pleadings to add claims for aggravated and punitive damages to its relief sought. It did not propose any amendments that would plead any material facts in support of that relief. The defendants opposed the application. Neither party could provide any submissions on the legal principles engaged by such an application or how those principles applied in this case.

[15] Punitive damages are an extraordinary remedy awarded in exceptional cases for malicious, oppressive, and high-handed misconduct that offends the court's sense of decency: *Bao v. Welltrend United Consulting Inc.*, 2025 BCCA 3 at para. 37, citing *Hill v. Church of Scientology of Toronto,* [1995] 2 S.C.R. 1130 at para. 196, 1995 CanLII 59. Punitive damages are not compensatory. They are intended to punish the defendant for outrageous misconduct and act as a deterrent: *Hill* at para. 196.

[16] By contrast, aggravated damages are compensatory in nature. They are intended to compensate the plaintiff for intangible injuries caused by the defendant's malicious, oppressive, or high-handed behaviour: *Hill* at paras. 188–189. Generally, this requires some form of mental distress.

[17] With respect to amending pleadings, the court's authority to permit amendments to pleadings is discretionary with the overriding concern being whether the amendments are "just and convenient": *Cambie Surgeries Corporation v. British*

Columbia (Attorney General), 2018 BCSC 1141 at para. 26, citing *Chouinard v. O'Connor,* 2011 BCCA 161 at para. 21.

[18] An application for an amendment of the pleadings during a trial, as here, can be permitted in the following circumstances: *MacDonald v. MacDonald Estate*, 21 B.C.L.R. (3d) 379, 1996 CanLII 1360 (S.C.):

1. It is not inconsistent with the pleadings already filed on behalf the party seeking the amendment;
2. It is not inconsistent with the evidence already tendered by that party and his witnesses at trial and on discovery;
3. Had it been asked for at the outset of trial, it would not have changed the whole course of the trial;
4. To allow it would not be unfair to the opposite party; and
5. It can be shown that it is necessary for the purpose of determining the real issues raised or depending upon the proceedings.

[19] Having heard the evidence in this case, I would not exercise my discretion to permit the amendments sought. Aggravated and punitive damages both arise from conduct that the court has deemed "outrageous" or "reprehensible", such that an exceptional award is necessary to address the damage to the harmed party or adequately denounce the behaviour. Whether conduct is so outside the norm that it rises to that standard is a contextual inquiry that considers, for example, the intent and motive of the defendant and the vulnerability of the plaintiff: *Whiten* at para. 113. As my reasons will disclose, Mr. Siemens' conduct, while difficult and unwarranted, does not rise to this level. Allowing the amendments is not necessary for the purpose of determining the real issues raised in this litigation.

[20] The plaintiff's pleadings contain no material facts in support of a claim for aggravated and punitive damages. During the three-year course of litigation, the plaintiff availed itself of various pre-trial procedures, including a full day examination for discovery of Mr. Siemens, from which it could explore the factual basis for such claims. It had more than sufficient opportunity to seek to amend its pleadings. It is

reasonable to expect that the defendants would have brought forward different evidence and changed their position to respond to the plaintiff seeking aggravated and punitive damages. To allow the amendments at trial would be unfair to the defendants. In these circumstances, it would be neither just nor convenient to allow the amendments sought.

Should an adverse inference be drawn against the plaintiff for failure to tender independent expert evidence?

[21] The plaintiff asked someone who it considered to be an expert in the field of drywall installation and finishing to conduct an inspection of the Home in the latter part of June 2024. The plaintiff only did so at this time (a week or so before trial) in an effort to potentially respond to the very recently served counterclaim and report of Mr. Frigon. The plaintiff chose not to have this person prepare a report. Mr. Siemens, present while this person walked through the Home, is aware of their identity and asserts a belief they would have provided evidence to support his theory of the case.

[22] Mr. Siemens asks that I draw an adverse inference against the plaintiff for its failure to have this person prepare a report and provide evidence in this case. He did not articulate the precise inference(s) he wished me to draw, nor did he provide any submissions about the legal principles or how they should be applied.

[23] *Lucas v. Caniff*, 2021 BCSC 1014, provided a helpful summary on drawing adverse inferences:

> [69] An adverse inference may be drawn against a party if, without sufficient explanation, that party fails to call a witness who might be expected to provide important supporting evidence if their case was sound. The inference is not to be drawn if the witness was equally available to both parties and unless a *prima facie* case is established: *Thomasson v. Moeller*, 2016 BCCA 14 at para. 35; *Singh v. Reddy*, 2019 BCCA 79 at para. 27. Generally, an adverse interest cannot fairly be drawn except from the non-production of a witness whose testimony would be superior to the evidence already adduced in respect to the fact to be proved: *Andrews v. Mainster*, 2014 BCSC 541 at para. 175.

[24] I would decline to draw any adverse inference here. The person who inspected the Home at the plaintiff's request was not a material witness. They had no prior involvement in this matter and had no evidence relating to any material facts to give. The plaintiff engaged with this third party in contemplation of responding to the counterclaim. It is common for litigants to do so. The litigant decides whether to ask an expert for a report, whether to serve such a report on the other party, and whether to tender that report at trial. The plaintiff chose not to have a report prepared, as is entirely its right. Any communications between the plaintiff and this person would generally be protected from disclosure by litigation privilege.

[25] I would add that even if this person was prepared to offer an opinion, there is no rule that a party must rely on a witness who is unlikely to assist in proving their case. The nature of an adversarial system is that every litigant is expected to put before the court only evidence they believe will be probative of their position. There may be many reasons why a litigant decides not to tender certain evidence, and it is generally not the business of the court to ascertain those reasons. Courts are accordingly cautious in drawing adverse inferences: *Singh v. Reddy*, 2019 BCCA 79 at para. 25. As my reasons will disclose, the deficiencies in the defendants' expert evidence were obvious. The plaintiff did not need to call evidence from any independent expert to meet the defendants' allegations against it.

[26] I turn now to my assessment of the credibility of the witnesses and the reliability of their evidence.

Credibility and Reliability Determinations

General Principles

[27] The court's fact-finding role requires an assessment of the credibility of witnesses and the reliability of their evidence. Credibility refers to the honesty or truthfulness of a witness. Reliability refers to their accuracy, which engages consideration of a witness's ability to accurately observe, recall, and recount events in issue. While related, credibility and reliability are distinct concepts. Any witness whose evidence on a topic is not credible cannot give reliable evidence on the same

point. Credibility, on the other hand, is not a proxy for reliable evidence: a truthful witness may be mistaken about what they believe they saw or heard: *R. v. H.C.,* 2009 ONCA 56 at para. 41.

[28] The fundamental approach to assessing the credibility of a witness and the reliability of their evidence was articulated in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, 1951 CanLII 252 (C.A.) at 357:

> The test must reasonably subject [the witness's] story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[29] Both credibility and reliability are to be assessed in the context of the evidence as a whole. Factors that inform the assessment include: the opportunity and capacity of the witness to observe or perceive the events; the ability to remember those events; whether, or the extent to which, a witness can resist being influenced by an interest in a particular outcome when recalling those events; inconsistency in the witness's evidence at trial or between prior accounts; whether the witness's evidence harmonizes with, or is contradicted by, other reliable evidence; whether the evidence seems unlikely, unreasonable, or improbable in light of the probabilities affecting the case; and the witness's demeanour, meaning the way they presented while testifying: *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186.

[30] How a witness answers questions and some of these factors are captured by the notion of balance. Balance exists when a witness avoids exaggeration or minimization, acknowledges memory frailties, admits personally difficult facts, or credibly acknowledges weaknesses in their evidence. A balanced witness does not answer questions strategically, in the sense that they answer the questions asked and without attempt to unreasonably control the narrative. They do not appear to have an agenda: *R. v. S.S.M.*, 2024 BCCA 417 at para. 70, citing David M.

Paciocco, *"Doubt and Doubt: Coping with R. v. W.(D.) and Credibility Assessment"*, (2017) 22:1 Can. Crim. L. Rev. 31 at 68.

[31] The assessment itself is challenging because it requires me to simultaneously ground the assessment in the totality of the evidence, while evaluating the testimony of each witness and making determinations that are entirely personal and individual to that witness. The task is further complicated by my ability to accept some, all, or none of a witness's testimony, and to ascribe different weight to different aspects of their evidence: *R. v. Kruk*, 2024 SCC 7 at para. 81.

[32] It is with these principles in mind that I approach my assessment of the evidence of the witnesses, in light of the evidence as a whole.

Dustin MacLean

[33] I find Mr. MacLean was an honest witness whose evidence was trustworthy. He was balanced and careful. He did not exaggerate or minimize his evidence. While he was clearly passionate about defending his company's good reputation, he did not testify in such a manner that he appeared to have an agenda. He also holds negative views about Mr. Siemens' conduct and motivations, but it was evident to me that he did not allow those feelings to cloud his evidence. He was, at all times, fair and conscientious. Mr. MacLean was also careful not to give evidence in areas where he had no direct knowledge, such as when questioned about conversations his on-site foreman may have had with Mr. Siemens' on-site project supervisor. In short, I have complete confidence in the truthfulness of Mr. MacLean.

[34] I also have confidence in the accuracy of Mr. MacLean's evidence. While he was called upon to remember events from one particular job among many from years ago, his memories of what occurred were internally consistent and consistent with the documentary and other objective evidence in this case. He reasonably conceded times where details of his memory may be less than firm and did not try to guess or fill in the blanks. Mr. MacLean testified about numerous communications with Mr. Siemens before, during, and after the time his company installed drywall in the Home. Those conversations occurred over the telephone, email, and via text

messaging. Mr. MacLean had a good memory of central telephone conversations with Mr. Siemens and was careful, as is his usual practice, to follow up those conversations with email and/or text message communications to ensure the accuracy of his perceptions and to record the details of their discussions. He adduced a number of written communications into evidence. Mr. MacLean's evidence was supported by, and in harmony with, much of the uncontested documentary evidence in this case.

[35] I was also impressed by the manner in which Mr. MacLean testified in response to the report of Mr. Frigon. To understand why, some context is necessary.

[36] Mr. MacLean has worked in his family's business, the plaintiff, since he finished high school. There is no question that he is an expert in drywall and takes great pride in both his personal work and that of his company. The plaintiff finished its work in the Home on or about May 15, 2021. In the weeks that followed, Mr. Siemens did not suggest its work was incomplete or deficient. In fact, Mr. Siemens specifically advised Mr. MacLean in a text message on June 10, 2021 that he felt the plaintiff had done a "good job on a L4 finish" (referencing what the plaintiff agreed to provide under the Agreement). When refusing to pay the plaintiff's invoices after that time, Mr. Siemens made only vague assertions about alleged misconduct by the plaintiff's employees, being lied to, and work not being done. It was not until a short time before trial, through his counterclaim and Mr. Frigon's report and estimate, that Mr. MacLean finally learned details about what Mr. Siemens claimed the plaintiff had done wrong, and even some of that information was rather vague.

[37] To be called upon to defend the work his company had done in these circumstances has understandably caused Mr. MacLean frustration. Nevertheless, Mr. MacLean remained professional, reasonable, and fair in the manner in which he approached his response to the report of Mr. Frigon. He took the time to carefully consider each allegation (as general as they are) and each photograph (as devoid of context as they are) in an effort to both understand what the photos may depict more than three years after he had been in the Home and to explain why what was

depicted was not the plaintiff's obligation or fault. Despite the unfairness to him, Mr. MacLean showed remarkable fairness in his evidence. He conceded that a few photographs could show minor repairs necessary to the finishing work. These repairs could have easily been done within a few minutes had they ever been brought to his attention.

Lucas Siemens

[38] I reach different conclusions about the credibility of Mr. Siemens and the reliability of his evidence. There were several shortcomings in Mr. Siemens' evidence. Before discussing them, I must first briefly address one issue raised by the plaintiff.

[39] The plaintiff brought to my attention several reported decisions involving Mr. Siemens as a litigant (2011 BCSC 998; 2014 BCPC 22; 2023 BCSC 2356; and 2017 BCSC 587) and asks me to use findings made by judges in those cases to inform my determination about Mr. Siemens' credibility or the reliability of his evidence in this case. I decline to do so.

[40] Generally speaking, evidence is admissible if it is relevant to a fact in issue and not subject to a rule of exclusion: J. Sopinka, S.N. Lederman, A.W. Bryant, *The Law of Evidence in Canada*, 2nd Ed. (Markham: Butterworths, 1999) at 23. Cross-examination of a witness about whether the witness's testimony in previous proceedings was rejected or disbelieved is irrelevant and ought not to be permitted: *R.* v. *Ghorvei* (1999), 46 O.R. (3d) 63,1999 CanLII 19941 (C.A.) ; *R.* v. *Barnes* (1999), 46 O.R. (3d) 116, 1999 CanLII 3782 (C.A.); and *R.* v. *Schmidt*, 2001 BCCA 3.

[41] Similarly, previous judicial determinations about a witness's credibility or reliability in unrelated trials cannot be used to assess his or her credibility or reliability in a present trial. The most obvious reason is that there is no effective way of determining with certainty the factual foundation for the previous credibility or reliability findings. Even if the judgment explains the court's rationale for accepting or rejecting a witness's evidence, there may be compelling reasons why those

considerations would not apply to the present case: *R. v. Karaibrahimovic*, 2002 ABCA 102 at para. 9.

[42] In other words, I have no way of valuing what is, in essence, someone else's opinion on the credibility or reliability of unrelated testimony given by Mr. Siemens in the context of another case. I can only assess his credibility and the reliability of his evidence in the context of the present case.

[43] Mr. Siemens was not a balanced witness. His evidence, overall, left the impression he held a rather cavalier attitude toward this matter, and to his oath. Despite years of preparation time, Mr. Siemens made no effort to remind or inform himself about what occurred during the relevant time. His testimony largely involved him trying to explain what he believed certain written communications meant (or could have meant), parsing their language for potential meaning, largely untethered to any of the underlying context. Much of his evidence was qualified with the language of "could have", "would have", "probably", "might have", or "I believe". He also answered many questions with "I don't know", "I don't remember", or "I don't recall". Other answers were rambling, evasive, non-responsive, and/or sarcastic. Some of his evidence was internally inconsistent. Although there are many individual examples of each of these shortcomings, one area of Mr. Siemens' evidence exemplifies most, if not all, of them.

[44] Although Mr. Siemens tried to resile from this at one point, the evidence overall supports a finding that he is well-experienced in residential construction and presented himself as such to Mr. MacLean. Mr. Siemens refused to pay the plaintiff's post-completion invoices from the time he received them. While he has always disputed he agreed to any finishing upgrade, the evidence also supports a finding that his position on the plaintiff's performance of the Agreement has been inconsistent. Despite refusing to pay the invoice related to the Agreement, Mr. Siemens told Mr. MacLean very early on (in text messages sent on June 10, 2021), that he was satisfied the plaintiff had performed its contractual obligations. He wrote

that the plaintiff had done a “good job on a L4” finish, adding that it was “what I wanted and was quoted”.

[45] Given his contrasting position at trial, Mr. Siemens was, naturally, cross-examined on these text messages. The questioning revolved around both why he had written about his satisfaction with the plaintiff’s performance and whether he believed it at the time. Mr. Siemens’ answers to these questions were so inconsistent and vague that I had the distinct impression he was inventing them as he went along.

[46] At first, Mr. Siemens testified he believed what he wrote at the time he wrote it, but that his belief was derived “from a distance…without knowing more details”. This answer left the clear impression Mr. Siemens had personally inspected the plaintiff’s work at some point between May 15 (when the plaintiff’s work was complete) and June 10, 2021 (when Mr. Siemens sent the text message), albeit “from a distance”. When pressed on whether he actually attended the Home to inspect the drywall work during this timeframe, Mr. Siemens gave significantly different answers. His testimony varied from: (a) not being sure; (b) to being there, but not inspecting the drywall closely or for long; (c) to not being sure again; (d) to suggesting he “could have” gone to the Home before sending the text messages, but not believing he did; (e) to not going to the Home because he was “probably too busy”; and, finally, (f) to going to the Home “probably in June”, but not to look at drywall (although he was unable to say why he went there).

[47] Mr. Siemens gave equally confusing and inconsistent answers about whether he believed what he wrote. At first, he said his experience qualified him to inspect a drywall job and, from a distance, it looked like a good job on a level 4 finish to him. In other words, he believed what he wrote. To this, he sarcastically added a short time later that anyone, even his elementary school aged daughter, can inspect a drywall finish. Mr. Siemens then changed his evidence, varying between: (a) believing the plaintiff had done a good job on a level 4 finish; (b) to not being sure what kind of job it had done; (c) to only sending the message that the plaintiff had done a good level

4 job because of their reputation; and, finally, (d) to denying he actually believed what he wrote, adding simply that he "just said that" (referring to his text message).

[48] During his questioning of Mr. Siemens, Mr. MacLean said he found it difficult to obtain a straight answer from Mr. Siemens. I could not agree more. The above example is one among many. Mr. Siemens also claimed not to remember details of many important things, such as: material phone conversations with Mr. MacLean during the relevant time; when and why he first had concerns about the work that had been done; when he may have first looked at the drywall (if at all); the state of the walls and ceilings after the plaintiff left the Property; and what further work by other trades had been done on the Home afterwards, among other things. While some of these memory lapses could be the result of the passage of time, others appeared to be a more deliberate effort at vagueness.

[49] Mr. Siemens was also a witness who attempted to unreasonably control the narrative he was trying to advance. This caused him to provide testimony that was, at times, non-responsive or deliberately vague, and, at other times, clearly untrue. Mr. Siemens' evidence relating to the video recording he tendered capturing part of a conversation between two of the plaintiff's workers on April 26, 2021 is an example. Mr. Siemens alleged early in the litigation that the workers made statements that supported his view that the plaintiff did a deliberately poor job. As my findings will later detail, these workers did not say what Mr. Siemens claims. Even when the recording was played during the trial, Mr. Siemens refused to concede what he reasonably should have conceded.

[50] For all of these reasons, I can have no confidence in Mr. Siemens' credibility or the reliability of his evidence. Unless his evidence aligns with that of Mr. MacLean or runs contrary to his interests, I do not accept Mr. Siemens' evidence. I accept, without reservation, the evidence of Mr. MacLean. Where the evidence of Mr. MacLean and Mr. Siemens conflicts, I prefer and accept the evidence of Mr. MacLean.

Cameron Frigon

[51] Cameron Frigon is a 30-year-old drywaller who owns and operates his own business. In addition to his on-the-job training, Mr. Frigon obtained some formal education in this field through the Finishing Trades Institute of BC. He is clearly a man who takes great pride in his work and cares about his craft. Mr. Frigon had no involvement in this matter until approximately two weeks before trial. He prepared a brief report and repair cost estimate related to the drywall in the Home on the Property, at Mr. Siemens' request on June 13, 2024 (the "Report"). While I ruled the Report admissible at trial, I have determined that I can give it no weight. This is not a reflection on Mr. Frigon's honesty. It is a reflection of the terrible position he was unwittingly put in by Mr. Siemens. Before explaining why I give Mr. Frigon's opinion evidence no weight, I must first explain my reasons for admitting the Report.

Admissibility of the Report

[52] The plaintiff objected to the admissibility of the Report, raising concerns about Mr. Frigon's qualifications, impartiality, and independence, as well as deficiencies in the content of the Report and its non-compliance with the *Rules*. Mr. Siemens acknowledged some non-compliance with the *Rules*, but argued that they were technical or minor and should not preclude the admission of a central feature of the defence and counterclaim. Following a *voir dire* in which Mr. Frigon testified, I ruled the Report was admissible, for reasons I now set out below.

[53] Although the defendants' position has always been, generally, that the plaintiff's work was substandard and incomplete, Mr. Siemens (who acknowledges he is not qualified to give expert opinion evidence in this area) did not retain an expert or file a counterclaim until shortly before this trial. Following a contested application on May 21, 2024, the defendants were granted leave to file a counterclaim by the following day and to serve an expert report on the plaintiffs by no later than June 14, 2024.

[54] Mr. Siemens contacted Mr. Frigon only two days before this deadline. Prior to June 12, 2024, the two men were unknown to one another. Mr. Siemens called Mr.

Frigon that morning. He told Mr. Frigon the drywall in the Home did not meet his standards and asked if he would inspect the drywall and provide a cost estimate for any finishing or repair work he thought would be necessary. He asked Mr. Frigon to prepare a report outlining his opinions about the drywall repairs for the purposes of this litigation but did not tell him about what the *Rules* required for such a report. Mr. Frigon had never prepared such a report before, nor had he ever testified as an expert witness. Mr. Frigon was unaware that he might be required to testify at trial.

[55] Mr. Frigon attended the Home that same day, on June 12, 2024. Mr. Siemens did not join him, but the men texted back and forth while he was there. Mr. Frigon did not "dive into the project", but rather conducted a "quick inspection" or "walk through". He took a number of photographs. Although the Report is undated, he testified he prepared the Report the next day, on June 13.

[56] The Report is a two-page document, with ten photographs attached. Page one has three short paragraphs, outlining Mr. Frigon's general opinions about the quality of the drywall work as he observed it on June 12. Page two sets out a basic estimate of what he would charge to carry out the work he expected would be necessary to finish certain areas and repair other areas. Mr. Frigon divided his quote into two categories: (1) $5,000 to finish areas that had no drywall; and (2) $11,500 to repair deficiencies in finished drywall. These amounts included material, labour, and delivery costs, but Mr. Frigon provided no breakdown of these costs. Mr. Siemens served the Report, along with the ten selected photographs, on June 14, the deadline for service.

[57] I will first address the Report's admissibility under the *Rules*.

Non-compliance with the Rules

[58] In addition to the common law preconditions for the admissibility of expert opinion evidence, the *Rules* set out certain admissibility requirements as well. Rule 11-2 requires that in giving an opinion to the court, an expert has a duty to assist the court and not be an advocate for any party. In their report, the expert must certify

that he or she is aware of this duty, has made the report in conformity with this duty, and will give oral or written testimony in conformity with that duty.

[59] Rule 11-6(1) sets out what must be included in an expert's report that is to be tendered at trial. In addition to the certification set out in Rule 11-2(2), an expert's report must include:

> (a) the expert's name, address and area of expertise;
>
> (b) the expert's qualifications and employment and educational experience in his or her area of expertise;
>
> (c) the instructions provided to the expert in relation to the proceeding;
>
> (d) the nature of the opinion being sought and the issues in the proceeding to which the opinion relates;
>
> (e) the expert's opinion respecting those issues;
>
> (f) the expert's reasons for his or her opinion, including
>
> > (i) a description of the factual assumptions on which the opinion is based,
> >
> > (ii) a description of any research conducted by the expert that led him or her to form the opinion, and
> >
> > (iii) a list of every document, if any, relied on by the expert in forming the opinion.

[60] There can be no doubt the Report is non-compliant with the *Rules*, in several ways. It does not include the certification required by Rule 11-2. It does not include Mr. Frigon's address. It does not include his qualifications, employment, and educational experience. Other than writing that he was "called out by [Mr. Siemens] to repair drywall his new home", the Report does not include the specific instructions provided to Mr. Frigon in relation to the proceeding or any factual assumptions on which it is based. Nor does it set out precisely the nature of the opinion being sought, although this latter point might be inferred from its content.

[61] Mr. Siemens was quite nonchalant about the Report's non-compliance with the *Rules*, but as I tried to explain to him, these rules serve very important purposes. The Court of Appeal discussed these purposes in *Ford v. Lin*, 2022 BCCA 179:

> [75] Like its predecessors, the present rules with respect to expert evidence have two primary purposes. First, they are intended to ensure each

> party has full disclosure of the expert evidence the opposing party intends to tender, thereby avoiding trial by ambush or surprise. Second, they enable expert evidence to be tendered in writing, thereby reducing the length of a trial and the cost to the parties. In addition, they obviate or reduce the need for experts to spend time in courthouses either waiting to give or giving evidence…
>
> [Citations omitted.]

[62] The Report's non-compliance with the *Rules* is not necessarily fatal to its admissibility. Rule 11-7(6) enables the court to allow an expert to provide evidence, on terms and conditions, despite non-compliance. Such evidence may be admitted if new facts are uncovered, if the non-compliance is unlikely to cause prejudice to the objecting party, or if the interests of justice require it. In *Paur v. Providence Health Care,* 2015 BCSC 1008 at para. 78, Justice Griffin, as she then was, discussed Rule 11-7(6), saying that these "correcting provisions … illustrate the goals of the formalities in the *Rules*" but "also make it clear that technicalities should not defeat the interests of justice".

[63] Ultimately, I was of the view the Report's non-compliance is unlikely to cause prejudice to the plaintiff and that it is in the interests of justice to allow the evidence. Mr. Frigon was an honest witness. I asked him questions about his understanding and compliance with his duty to the court as set out in Rule 11-2. He satisfied me that: (a) he was aware of this duty; (b) the Report complied with this duty; and (c) he would comply with this duty in his testimony. His failure to include this certification in the Report was due to a lack of information provided by Mr. Siemens.

[64] I was also satisfied the more technical aspects of the non-compliance were unlikely to cause prejudice to the plaintiff. Mr. MacLean and his brother (who conducted this trial with him) both have extensive and considerable experience in the drywall industry. Through their questioning of Mr. Frigon, it was clear they had done some research into his background and were not surprised by evidence about his qualifications and the like. As well, the date of the Report was easily inferred from the date of Mr. Frigon's walk-through and the date of its service upon the plaintiff. Although not fulsome, the Report contains instructions Mr. Frigon received from Mr. Siemens and the nature of the opinion.

[65] Mr. Siemens' failure to provide Mr. Frigon with the information necessary to provide a compliant report led to these difficulties. I reject the assertion that Mr. Siemens was unaware of the Rule and/or unaware of the requirements of adducing expert evidence. Although he is a self-represented litigant, he brought an application that squarely engaged the application of Rule 11-6, along with other of the *Rules,* shortly before trial. Mr. Siemens is not an unsophisticated litigant and had very recent experience, in this very case, with this very Rule.

[66] Nevertheless, I decided it was in the interests of justice to admit the Report, despite its non-compliance. The lack of prejudice to the plaintiff and the Report's centrality to the defendants' defence and counterclaim support this determination.

Common law preconditions to admissibility

[67] Expert opinion evidence is presumptively inadmissible and may only be admitted when its admissibility is established: *Ganges Kangro Properties Ltd. v. Shepard*, 2015 BCCA 522 at para. 42. Expert evidence should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within their expertise: *White Burgess Langille Inman v. Abbott and Haliburton Co*., 2015 SCC 23 at para. 27 [*White Burgess*].

[68] *White Burgess*, at para. 23, sets out four threshold criteria the party seeking to adduce the expert opinion must establish, often referred to as the *Mohan* factors (in reference to *R. v. Mohan*, [1994] 2 S.C.R. 9, 1994 CanLII 80): relevance; necessity; absence of an exclusionary rule; and a properly qualified expert. Beyond these threshold conditions, the court must also decide whether the evidence is sufficiently beneficial to the trial process to warrant admission, despite the potential harm to the trial process that may flow from its admission: *White Burgess* at para. 24.

[69] The first three threshold criteria are not in issue and are clearly met. The focus of submissions related to the fourth–a properly qualified expert.

[70] An expert proposing to give opinion evidence has a duty to be: (1) impartial (i.e., the opinion must reflect an objective assessment of the facts at hand); (2) independent (i.e., the product of independent judgment, uninfluenced by the retaining party); and (3) unbiased (i.e., does not unfairly favour one side over the other). The "acid test" is "whether the expert's opinion would not change regardless of which party retained him or her": *White Burgess* at para. 32. This threshold requirement is not particularly onerous, and it will be rare for evidence to be inadmissible because of it: at para. 49.

[71] I was satisfied Mr. Frigon met the threshold for a properly qualified expert. Through his education and experience, Mr. Frigon possesses the qualifications necessary to give expert opinion evidence in the area of drywall installation and finishing. He expressed a clear understanding of his duty to the court and a willingness to comply with that duty. Although he was retained by Mr. Siemens, he was not promised any contract for his opinion, and there is nothing to suggest that he would not be able to provide the court with fair, objective, and non-partisan evidence.

[72] Finally, I was also satisfied the benefits in admitting this evidence outweigh the potential harm to the trial process. Mr. Frigon's evidence is relevant and central to the defence and counterclaim. It will not account for more than a day of trial time, and I see no risk of prejudice or confusion arising from it.

Weight to be afforded Mr. Frigon's evidence

[73] To begin, I must reiterate that Mr. Frigon is an honest witness. He did his best to provide trustworthy evidence in difficult circumstances. However, I find Mr. Frigon's opinions relating to the plaintiff's work on the Home so unreliable that I am unable to afford them any weight.

[74] Mr. Siemens put Mr. Frigon in a very difficult position, leading to much of the unreliability. He engaged Mr. Frigon's services on very short notice. Mr. Frigon had never prepared an expert report before. Mr. Siemens gave him no information about what the report required or that he may be cross-examined. He did not ask him to

offer any general opinions pertaining to the standard of care required of a reasonable drywaller. He did not ask him to conduct a careful and detailed inspection, offer detailed opinions, or to carefully document areas of concern or note. He did not provide Mr. Frigon with the necessary time, or instructions, for him to provide a thorough, fully informed, and supported opinion. For these reasons, the Report was an exceedingly brief "summary" of Mr. Frigon's general opinion, based only on a "quick inspection". His summary was supported by select photographs, some of rather poor quality and others devoid of context such that even Mr. Frigon could not discern their location in the Home. As well, Mr. Frigon provided only a general estimate of repair costs, with no breakdown of any details.

[75] Other information Mr. Siemens did, and did not, provide Mr. Frigon also contributed to the unreliability of Mr. Frigon's evidence.

[76] In terms of omissions, Mr. Siemens asked for a report and cost repair estimate but failed to provide Mr. Frigon with information integral to the reliability of any opinions he would offer. He did not tell Mr. Frigon: (a) the original drywall work had been done more than three years earlier; (b) the original drywallers were not afforded an opportunity to address typical minor deficiencies upon completion; (c) about any other trades who had done work after drywall installation, which could have impacted the state of the drywall as it appeared on June 12, 2024; (d) temperature conditions in the still unfinished Home in the years since the drywall had been installed; (e) areas the original drywallers left unfinished because they were not ready for drywall installation (and for which Mr. Siemens had been provided a price reduction); and (f) areas of the Home the plaintiff was not required to drywall under either of the agreements. As well, since Mr. Siemens took no photographs of the drywall (or had any taken) until years after the plaintiff left the Property, Mr. Frigon had no opportunity to understand the state of the drywall at the relevant time.

[77] Through the course of his cross-examination, it became clear that Mr. Frigon was embarrassed by what he had produced and that his approach to the preparation of his opinions would have been different had he received the information he

needed. The first aspect of his opinion, his criticism of the original drywallers for leaving small areas unfinished in the Home, was completely undermined during cross-examination when it became evident, even to Mr. Frigon, that he had been deprived of information vital to that opinion. He was unaware the plaintiff was not required to finish some of those areas he identified (e.g., the sauna room). He was also unaware that other areas were left unfinished because they had not been ready for drywall installation (e.g., a small area in the garage) and that others yet may not be suitable for drywall (e.g., the two fireplace walls). Indeed, Mr. Siemens seemed to ultimately concede this point when he withdrew his claim for damages in relation to the work Mr. Frigon originally opined had been unfinished.

[78] The second aspect of his opinion, which related to deficiencies in the drywall, was significantly undermined as well. Mr. Frigon seemed genuinely taken aback that the original drywall work had been done more than three years earlier. He agreed that many factors unrelated to the plaintiff's work could have impacted the state of the drywall as he observed it on June 12, 2024, including: settlement in the Home (wood framed structures are often subject to settlement, especially in high moisture areas such as next to a lake); unknown temperature conditions in the unfinished Home over the years since the drywall was installed; and the work of other trades subsequent to drywall installation (i.e. "trade damage" by for example, painters or electricians moving outlets). He also agreed that small areas he identified in need of minor repairs could be done in a matter of minutes, had they been brought to the plaintiff's attention at the time.

[79] The information Mr. Siemens provided also undermined the reliability of Mr. Frigon's evidence. While I was satisfied of Mr. Frigon's independence and impartiality at the admissibility stage, I am entitled to consider these factors when assessing the weight to be given the opinion as well: *White Burgess* at para. 45. Mr. Siemens undermined Mr. Frigon's independence and impartiality when he told Mr. Frigon at the outset that the drywall needed repair and that the previous work was "not up to his standards". Mr. Frigon clearly approached his task that day through

that lens–that the drywall work (which he did not know had been done years ago) was substandard and in need of repair.

[80] I have taken some time to explain why I can give Mr. Frigon's opinions no weight in this case. As I hope I have communicated, the shortcomings in those opinions do not reflect Mr. Frigon or the quality of his work. They are a reflection of the untenable situation in which he was placed by Mr. Siemens.

[81] I turn now to make my findings of fact, which I will endeavour to make chronologically. I will make additional findings during my consideration of the questions I am to answer.

Findings of Fact

[82] In 2021, Mr. Siemens was a few years into constructing the Home. Busy with other priorities, he was in no hurry to complete the project, and it remains unfinished at the time of trial. Mr. Siemens lives in the lower mainland and rarely attended the Property, so he employed a site supervisor, Simon Krahn, to deal with the day-to-day work and act on his instructions. Mr. Krahn lived in a trailer on the Property during the relevant times and was on site daily, dealing with the various workers on site for the various trades, including those of MacLean Bros. Mr. Krahn continued to live on the Property and work for Mr. Siemens on the Home's construction until Mr. Siemens fired him in the summer of 2023. Mr. Krahn did not testify in this trial.

[83] Sometime prior to March 8, 2021, Mr. Siemens contacted MacLean Bros. for an estimate to supply and install drywall in the Home. On March 8, 2021, MacLean Bros. emailed Mr. Siemens a written quote proposing to "supply labor and materials necessary to complete the following scopes of work as per plans dated Dec. 03, 2020 as outlined below". The balance of the one-page document detailed the proposed scope of work, certain conditions under which it would be performed, and payment terms.

[84] On March 24, 2021, Mr. Siemens accepted the March 8, 2021 quote by endorsing, dating, and emailing it back to the plaintiff that same day. There is no

issue that requirements of contract formation were met at this time and that a contract between them was formed. The material terms of the Agreement were as follows:

a) MacLean Bros. would install drywall and remove gypsum waste, pursuant to various terms and conditions set out under the headings “Scope of Work” and “Conditions” (the “Work”). It is uncontroversial that there was an implied term the Work would be done in a good and workmanlike manner; and

b) Mr. Siemens would pay a total of $39,500.00, plus GST, for the Work, with a 50% deposit to be paid upon the material arriving at the Property; and the outstanding balance to be paid upon the completion of the Work and the receipt of an invoice.

[85] In the same email, Mr. Siemens asked MacLean Bros. to invoice his company, the defendant 136 B.C. Ltd., under the Agreement. MacLean Bros. agreed to do so, thereby making 136 B.C. Ltd. a party to the Agreement.

[86] On or about April 8, 2021, MacLean Bros. loaded the necessary material under the Agreement and sent it to the Property. As per the Agreement, it then invoiced 136 B.C. Ltd. that same date for the 50% deposit amount, $20,737.50, and began the Work shortly thereafter. MacLean Bros. had a site foreman at the Property who managed the day-to-day work and had dealings with Mr. Krahn while there. The site foreman did not testify. 136 B.C. Ltd. paid the deposit required under the Agreement, in full, by way of a cheque dated April 13, 2021. MacLean Bros. did not receive the cheque until some days after this date.

[87] Among its various terms, the Agreement required MacLean Bros. to complete the drywall to a “level 4” finish, which was detailed and explained in a document from the British Columbia Wall and Ceiling Association linked into, and forming part of, the Agreement (the “Finishing Guidelines”). In brief, the Finishing Guidelines explains the industry standards for the various levels of drywall finishing, which are 1 to 5, with 5 being the highest quality. Each level has its own criteria, which are

intended to achieve certain appearance and functional requirements. In very basic terms, level 1 is a one-coat application with no wiping. Level 2 is a one-coat application with taping and wiping only. Level 3 is a two-coat application with wiping and sanding. Level 4 is a three-coat application with wiping and sanding. Level 5 includes the same system as a level 4, but also includes a skim coat over the face of all exposed drywall surfaces to reduce the texture difference from the paper fibre and mudded area.

[88] Installation of the drywall (i.e. boarding) occurs before the finishing process starts. On April 21, 2021, Mr. Siemens was advised by email that the plaintiff was unable to board certain areas of the Home because Mr. Siemens did not have them ready for drywall installation, namely: the top floor shower and sink area; the third floor back kitchen corner; the second floor mechanical room; the basement mechanical room; and the pressure washer line area at the front of the garage.

[89] Sometime prior to April 22, 2021, while the Work was ongoing, Mr. MacLean and Mr. Siemens discussed upgrading the drywall finish from level 4 to level 5. Such a scenario was specifically contemplated in the Agreement where the parties agreed: “At times depending on the sheen, color of the paint or natural and artificial lighting a level 5 might be requested. A price per foot can be quoted upon request”.

[90] Mr. MacLean sent Mr. Siemens an initial quote of $14,000 for this upgrade on April 22. Mr. Siemens said he was not interested at that price.

[91] On April 26, 2021, a doorbell camera on the Home captured a brief conversation between two men working for the plaintiff (the “Recording”). Neither of these men testified. Mr. Siemens was unclear about when he first viewed the Recording. I will return to discuss the details of the Recording shortly.

[92] The parties agree they had further discussions about the price for a level 5 finish but disagree about whether those discussions resulted in consensus. Mr. MacLean says the parties entered into the Additional Agreement on April 27, 2021 in their communications over the phone and in writing. The Additional Agreement

provided that the plaintiff would finish all walls and ceilings receiving drywall in the Home, with the exception of the master ensuite walls, to a level 5 finish for an additional $11,000, plus GST. Mr. Siemens could not recall details of their phone conversations, but asserts they only discussed a potential upgrade and did not reach any agreement about it.

[93] On Wednesday, April 27, 2021, the two men had the following text message exchange:

> Mr. Siemens: If you can do level 5 for $11k I will do it. Originally figured would be less than $10k.
>
> Mr. MacLean: We are pretty tight in there. Does garage need to be level 5? What about bathroom walls? How much tile is being installed? What about shop bunker? If there is a few areas we could delete we could definitely do it for that price.
>
> Mr. Siemens: Want it all level 5. Master bath wall is tile.

[94] Mr. MacLean spoke to Mr. Siemens on the phone that same day and told him the plaintiff would accept that offer and perform the upgrade as requested for $11,000.00, plus GST. He then sent Mr. Siemens an email confirming the agreement that same day. His email also provided Mr. Siemens with other information, including steps he should take to preserve the level 5 finish if the work of subsequent trades impacted the drywall. His April 27, 2021 email to Mr. Siemens reads as follows:

> Hey Lucas,
>
> Just to confirm if this is all agreeable with you, we will level 5 all exposed walls and ceilings in the house with the exception of the master ensuite walls (full height tile all walls).
>
> We would request the balance paid out on the base contract when the level 4 is completed. (May 7-10th)
>
> The change order amount for the level 5 can be remitted after all work is complete and the painter/client has reviewed the work.
>
> Keep in mind when patching over a L5 finished wall/ceiling, as soon as it is painted and then patched for any reason it really should have the whole surface skimmed again for a true L5 finish. This is only applicable if you have to move fixtures, change plumbing, etc.
>
> The agreed extra total is for $11,000.00
>
> Thank you

[95] Mr. Siemens did not respond to this email. Although he cannot be sure, Mr. Siemens claims he may not have replied to this email because of his concerns about the quality of the plaintiff's workers based on the Recording. I do not accept this evidence. Mr. Siemens testified the men said they were "not going to do this house [the Home] anywhere near as nice as the house they had done in Victoria, and that they [Mr. Siemens] won't be able to tell the difference". The men did not say this. They said:

> Speaker 1: Hey, hey. There's no point in fucking doing this fucking Calgary way. This cut-out was bad. We're just going to fucking [inaudible]…fucking…or not Calgary, I mean, the Victoria way. You know how they want to cut everything out. The guys out here don't expect that, so let's just do what we can to fucking speed it up.
>
> Speaker 2: Well, then, hey! You gotta get some of these [gesturing to an unidentified object he was carrying].
>
> Speaker 1: Yeah, I know. Ah, not necessarily [indiscernible] so the scaffold work. What [or perhaps "When"] am I supposed to fucking scaffold? There's a lot to do.

[96] Mr. Siemens was clearly incorrect about what the men said. Their conversation was devoid of any context that would enable the listener to understand what it meant, and it occurred prior to any agreement about an upgrade to the finish. However, Mr. Siemens unreasonably maintained this conversation provided evidence the plaintiff never intended to do a level 5 finish and did a deliberately substandard job. It does not.

[97] Mr. Siemens had the Recording for years and many opportunities to watch it. His adherence to his erroneous view about what was said, even after the Recording was played in court, further supports my findings about his credibility and the reliability of his evidence.

[98] Despite his alleged concerns about the plaintiff's workers, Mr. Siemens did not communicate any of those concerns to the plaintiff, and the Work continued. Sometime in the day or two following April 27, one of the plaintiff's tapers (one of the men from the Recording) became sick. Mr. MacLean decided, for safety reasons (this was during the COVID-19 pandemic), to replace him and the others working

there with a new crew. At this time, the original taping crew had only just begun the taping process. The new crew continued the Work.

[99] On Wednesday, May 5, 2021, Mr. MacLean emailed Mr. Siemens to advise him about the replacement crew and to ask him to "confirm our agreement" by responding to his previous email of April 27, 2021. Again, Mr. Siemens did not respond. The plaintiff continued to do the Work. They also began level 5 finishing work in some areas.

[100] The plaintiff's workers went home for the weekend. Mr. MacLean planned for them to return to the Property on Wednesday, May 12, 2021.

[101] Mr. MacLean attended the Property and walked through the Home with his site foreman on or about May 10, 2021. At that time, he confirmed the Work was done, with only some sanding remaining, and that the level 5 finishing work as per the Additional Agreement had already begun. He and his site foreman took some photographs, which are in evidence. From these photographs, Mr. MacLean explained the process of level 5 finishing work and how he knew it had already begun. I accept this evidence and find the level 4 finishing, the Work, was complete (except some sanding that was soon to be done) and that level 5 finishing work had begun at the time he walked through the Home.

[102] By Monday, May 10, 2021, Mr. MacLean had doubts about Mr. Siemens' honesty due to his lack of written communication about the level 5 finishing. Confident the Work was done, the remaining sanding would be done very shortly, and the level 5 finishing work was well underway, he invoiced Mr. Siemens' company for the balance owing under the Agreement. Mr. MacLean emailed Mr. Siemens at 11:23 a.m. that day, advising him the Work was done and the plaintiff would now bill him for the outstanding balance according to the Agreement. He also asked Mr. Siemens to respond to his previous messages, to "make sure we are all on the same page before they [the plaintiff's employees] come back up [from the lower mainland] Wednesday [May 12] to continue with the level 5 work". At 1:03 p.m. Mr. Siemens replied, cryptically, "Yes only want the level 4. Did they do 3 coats?"

[103] Mr. MacLean was concerned by this response because it was not consistent with the Additional Agreement terms, and the plaintiff had already begun the level 5 finishing work. He now believed Mr. Siemens was "trying to go back on" the Additional Agreement. Later that same day, and the following day, the men communicated over the phone, by email, and by text messaging. Through their text message exchange the evening of May 10, 2021, it is evident Mr. Siemens believed the Work was complete and did not want the plaintiff to do anything further. Mr. MacLean, now concerned about Mr. Siemens' "honesty as a person", thought a phone conversation would be best. Their text message exchange the evening of May 10 was as follows:

> Mr. Siemens: Hi Dustin, I don't want any tappers or drywaller at house this week. Getting conflicting information on where things are at next week Monday.
>
> Mr. MacLean: Let's talk tomorrow.
>
> Mr. Siemens: No one is to go to the house tomorrow [Tuesday May 11]. I think Chris [referring to the plaintiff's site foreman] was going to come up with some guys. I think it's fair to see where things are at first.
>
> Mr. MacLean: Yes they were booked for Wednesday anyways
>
> Mr. Siemens: Yes but level 4 is complete so no reason to come back until we see the need for deficiencies which will look at on Monday.
>
> Mr. MacLean: It's not sanded. Let's talk in the morning.

[104] The men spoke by telephone the following morning, May 11. Mr. MacLean followed up their conversation with an email confirming their discussion where he advised Mr. Siemens about the status of the project and the plaintiff's position about completing its obligations under both agreements. He advised Mr. Siemens: (a) "a lot" of the level 5 finish was already complete; (b) the tapers were on site to complete the "level 5 skimming"; (c) the sanding would start May 12; and (d) it "is too late to go back to a level 4 finish at this time". Mr. MacLean also referred Mr. Siemens to the Finishing Guidelines in the Agreement and wrote "We have followed these procedures to a tee." The plaintiff's workers continued to finish their work over the next few days. Once completed, they cleaned up, removed their materials and left the site on or about May 15, 2021.

[105] The plaintiff sent an invoice to 136 B.C. Ltd. dated May 10, 2021, requiring payment of $20,212.50. This amount represents the remaining 50% owing under the Agreement, less a $500 deduction (the “First Invoice”). The plaintiff provided this deduction in recognition that it could not install drywall in some discrete areas in the Home, as Mr. Siemens did not have those areas ready for drywall installation. Those areas were set out, in writing, to Mr. Siemens in an email dated April 21, as I have previously found. Mr. Siemens did not advise the plaintiff this credit was insufficient.

[106] The plaintiff sent a second invoice to 136 B.C. Ltd. a few days later. This invoice, dated May 14, 2021, required payment of $11,550.00, representing the amount owing by the defendants under the terms of the Additional Agreement (the “Second Invoice”).

[107] Mr. MacLean testified, and I accept, that it is standard in the industry for home owners or their agents to inspect the drywall work before proceeding to next steps, such as priming and painting. Such inspections may reveal the need for minor touch ups or repairs, which are not uncommon and would be rectified by the drywaller before any priming and painting occurs. The plaintiff would have done so in this case, had any touch ups or repairs been identified. Mr. Siemens did not ask Mr. MacLean to do a walk-through to identify any deficiencies for repair or advise him of any areas he considered incomplete. Nor did anyone on Mr. Siemens’ behalf.

[108] The plaintiff has demanded payment of the total balance owing under both agreements, $31,762.50. The defendants have refused to pay any of this amount.

[109] Mr. Siemens did not attend the Home after the plaintiff’s departure on or about May 15 for quite some time. From his evidence, I am unable to determine precisely when he next attended the Home but, at the earliest, it was several weeks later. In any event, whenever it was that he next went to the Home, Mr. Siemens did not specifically inspect the drywall at that time. In fact, the first inspection of the drywall, albeit not a thorough one, did not occur until Mr. Frigon walked through on June 12, 2024.

[110] Mr. MacLean made efforts early on to understand why Mr. Siemens refused to pay. On June 3, 2021, he emailed Mr. Siemens a screenshot of his April 27, 2021 email to remind him of the Additional Agreement. To this, Mr. Siemens responded: "Bathroom is at the top of the driveway! Fuck it am going to piss in the garbage pile". Mr. MacLean was unsure what he meant by this and did not respond. Mr. Siemens now says his text message referred to a statement by one of the plaintiff's workers, although he was unable to provide details about when or how he heard this, who said it, or the context in which it was allegedly said.

[111] Mr. MacLean reached out to Mr. Siemens again on June 10, 2021 to see if a compromise could be reached before the plaintiff would have to seek legal recourse. Mr. Siemens responded that same day. Among other things, Mr. Siemens told Mr. MacLean that he would pay "what we agreed" but would not pay for a level 5 finish, as "that was not done". After making some generalized assertions about wrongdoing by the plaintiff's workers evidenced by some unidentified "recordings", Mr. Siemens then wrote: "What was done is a good job on a L4. Is what I wanted and was quoted".

[112] Despite the clear acknowledgment by Mr. Siemens that the plaintiff performed its obligations under the Agreement, the defendants have refused to pay any amount on the First Invoice. The defendants have also refused to pay any amount on the Second Invoice as well. Mr. Siemens did not provide the plaintiff with meaningfully detailed information about what he alleged was not complete or deficient until shortly before trial, more than three years after the plaintiff left the Property.

[113] Construction on the Home continued after the plaintiff's departure on May 15, 2021, yet the Home remains unfinished as of the time of trial. Although Mr. Siemens employed Mr. Krahn as his site supervisor for more than two years following the plaintiff's departure, Mr. Siemens was unable or unwilling to provide evidence about work done by other trades after the plaintiff's departure. While he feigned ignorance about such things, it is clear from the photographs Mr. Siemens chose to tender (e.g., showing areas of drywall with pencil markings near a kitchen faucet installed

after drywall installation, and cuts and patches in the drywall where an electrical outlet has been moved) that other trades have done work affecting some of the drywall the plaintiff had installed.

[114] I turn now to determine whether the parties entered into any binding and enforceable contracts.

Did the parties enter into one or more binding and enforceable contracts?

[115] I am satisfied the plaintiff has established the parties entered into two binding and enforceable contracts—the Agreement and the Additional Agreement.

[116] A contract is formed when the parties "have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract", and the surrounding circumstances may be considered: *Oswald v. Start Up SRL*, 2021 BCCA 352 at para. 33, citing G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011) at 15. The court must consider "how each party's conduct would appear to a reasonable person in the position of the other party": *Oswald* at para. 33, citing *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp.*, 2020 SCC 29 at para. 33. The question is not what the parties subjectively had in mind, but whether their conduct was such that a reasonable person would conclude that they intended to be bound: *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 at para. 37 [*Ethiopian Orthodox*]. In other words, the question in every case is: "what intention is objectively manifest in the parties' conduct": *Ethiopian Orthodox* at para. 38.

[117] In *Oswald*, Justice Harris summarized the applicable legal principles to determine whether an enforceable contract has been formed:

> [34] The applicable legal principles to determine whether an enforceable contract has been formed were succinctly set out in Mr. Mhamunkar's factum at para. 67 as follows:
>
> (a) there must be an intention to contract;
>
> (b) the essential terms must be agreed to [by] the parties;

> (c) the essential terms must be sufficiently certain;
>
> (d) whether the requirements of a binding contract are met must be determined from the perspective of an objective reasonable bystander, not the subjective intentions of the parties; and
>
> (e) the determination is contextual and must take into account all material facts, including the communications between the parties and the conduct of the parties both before and after the agreement is made.

[118] There is no issue the first contract between the parties, the Agreement, was formed on March 24, 2021. The evidence clearly establishes the parties had an intention to contract. The essential terms, all sufficiently certain, were set out in writing in the document prepared by the plaintiff on or about March 8, 2021, and endorsed by Mr. Siemens on March 24, 2021. It is uncontroversial the conduct of the parties, both before and after it was made, was such that a reasonable objective bystander would conclude they intended to be bound by the terms of the Agreement.

[119] I am also satisfied a second contract, the Additional Agreement, was formed on April 27, 2021. The evidence establishes the parties intended to contract for an upgrade to the drywall finishing in the Home. The essential terms—the plaintiff would finish all walls and ceilings receiving drywall in the Home, except the master ensuite walls that were to be tiled, to a level 5 finish for an additional $11,000.00, plus GST– were all sufficiently certain and agreed to by the parties on April 27, 2021. I am satisfied the parties' conduct, both before and after it was made, was such that a reasonable objective bystander would conclude they intended to be bound by the terms of the Additional Agreement.

[120] All of the material facts I have earlier found (and those I now make), including the verbal and written communication between Mr. MacLean and Mr. Siemens and the conduct of the parties both before and after their discussions of April 27, support this determination.

[121] On or about April 22, 2021, while the Work under the Agreement was underway, Mr. MacLean and Mr. Siemens discussed upgrading the drywall finish, a

scenario they had expressly contemplated in the Agreement. Mr. Siemens is an experienced builder and portrayed himself this way to Mr. MacLean. As such, their written communications occasionally contained a shorthand they both understood. Mr. Siemens requested a quote for the upgrade and, on April 22, Mr. MacLean provided one, in the amount of $14,000. Mr. Siemens rejected that offer and the men continued to negotiate the cost of the upgrade, over the phone and in writing.

[122] On April 27, 2021, Mr. Siemens advised Mr. MacLean via text message that he would pay an additional $11,000 for a level 5 finish. Mr. MacLean agreed to that price, as long as there were areas in the Home that could be exempt from the upgrade, such as bathroom walls that required tile. Mr. Siemens responded that he wanted it all to have a level 5 finish, except the master ensuite wall that was to be tiled. Following this text message exchange, I accept Mr. MacLean's evidence that the men then spoke on the phone that same day and confirmed their consensus that the plaintiff would finish all walls and ceilings receiving drywall in the Home, with the exception of the master ensuite walls that were to be tiled, to a level 5 finish for an additional $11,000.00, plus GST. Mr. MacLean sent Mr. Siemens a follow-up email confirming this. Although Mr. Siemens had verbally agreed to the terms of the Additional Agreement, he did not respond to Mr. MacLean's email.

[123] The conduct of the parties following the Additional Agreement objectively demonstrates they reached this agreement. After April 27, 2021, the plaintiff continued to perform the Work under the Agreement. Mr. Siemens' site supervisor, Mr. Krahn, operated as his agent on site and oversaw the Work. He received instructions from Mr. Siemens and was in regular communication with him. As he admitted, Mr. Siemens was also on site occasionally. Mr. Siemens was therefore, either personally or through Mr. Krahn, clearly aware the Work was continuing. In the days prior to May 10, 2021, as the Work was advancing and approaching completion, the plaintiff began the level 5 finishing work in some areas that were ready, as per the Additional Agreement. Mr. Siemens, either personally or through his agent, was aware this was occurring. He made no objection to this upgrading work being done.

[124] By the time Mr. MacLean attended the Home on or about May 10, 2021, the Work under the Agreement was complete (other than some sanding that was soon to be done), and the level 5 finishing work under the Additional Agreement was well underway. Again, Mr. Siemens, either personally or through his agent, was aware of this. Again, he made no objection to this upgrading work being done.

[125] That Mr. Siemens ignored Mr. MacLean's requests for written confirmation subsequent to their verbal agreement of April 27 does not alter the fact the Additional Agreement had been made. Following April 27, both parties conducted themselves in a manner consistent with the terms of the Additional Agreement.

[126] Mr. Siemens argues that his May 10, 2021 email response to Mr. MacLean ("Yes only want the level 4…") is evidence that objectively shows the parties did not reach any agreement about the upgrade. I disagree. Mr. Siemens sent this email after ignoring Mr. MacLean's requests for written confirmation of their verbal agreement for two weeks. During this time, the plaintiff had continued its Work to completion (except some sanding in some areas which was soon to be done), and the level 5 finishing work under the Additional Agreement was very visibly and obviously well underway. Viewed in its proper context, Mr. Siemens' email of May 10 does not evidence any lack of intention to contract but is rather evidence of the defendants' repudiation of the Additional Agreement.

[127] When one party repudiates a contract, the innocent party has a choice. It may either accept the repudiation or affirm the contract. If the innocent party accepts the repudiation, the contract is at an end; both parties are relieved of their obligations under it; and the innocent party may sue for damages immediately. If the innocent party chooses to affirm the contract, the contract remains alive in all respects for both parties. Once made, the election is irrevocable: *Dosanjh v. Liang*, 2015 BCCA 18 at para. 33.

[128] Mr. MacLean chose to affirm the Additional Agreement, keeping it alive for both parties. He communicated this election on behalf of the plaintiff to the defendants very quickly, on May 11, both over the phone and in writing as I have

outlined earlier. The plaintiff carried on and, by May 15, 2021, it had completed both the Work under the Agreement and the upgrade to the finish under the Additional Agreement.

Did either party breach the Agreement or the Additional Agreement?

[129] The parties each seek to establish that the other breached both the Agreement and the Additional Agreement. Under the Agreement, the plaintiff was required to supply and install drywall in the Home in a good and workmanlike manner. The plaintiff's obligations to do so were subject to the terms and conditions set out in the Agreement, including that it would finish the drywall to a level 4 finish as set out in the Finishing Guidelines. Under the Agreement, the defendants were required to pay $39,500, plus GST, in two installments: (1) the deposit upon delivery of materials; and (2) the balance upon completion and invoicing. Under the Additional Agreement, the plaintiff was required to upgrade the finish to all walls and ceilings receiving drywall in the Home, with the exception of the master ensuite walls that were to be tiled, to a level 5 finish as set out in the Finishing Guidelines. The defendants were required to pay an additional $11,000.00, plus GST, in exchange.

[130] I am satisfied the plaintiff met its obligations under both the Agreement and the Amended Agreement, but the defendants did not meet their obligations under either one.

The plaintiff did not breach either contract

[131] Although Mr. Siemens' submissions on this point lacked substance, I understand him to contend the plaintiff breached the Agreement in two central ways: (1) by failing to install drywall in certain areas required under the Agreement, such as the two fireplace walls, a small area in the garage, a small area underneath the basement stairs, the basement mechanical room, and a small ledge next to the stairs; and (2) by failing to finish the drywall to a deficiency-free, level 4 finish as the Agreement required.

[132] The plaintiff did not breach the Agreement in either of those ways, or at all. Regarding the first allegation, it is uncontentious that some discrete areas in this spacious Home did not receive drywall. This was not, however, due to any breach of the Agreement by the plaintiff. Rather, the absence of drywall was due to: (a) the defendants' failure to prepare some areas for drywall installation (e.g. the small area of a garage wall and the mechanical room); (b) the inability of some areas to receive drywall for safety and compliance reasons and were thus not subject to the Agreement (e.g. the two fireplace walls and small ledge by the stairs); and (c) the likely removal of some drywall by others to facilitate other construction work (e.g. the small area around the stairs).

[133] The plaintiff provided the defendants with a price reduction for those areas where it was prevented from installing drywall. It communicated this in writing to Mr. Siemens in April 2021. Mr. Siemens did not object to the amount of the reduction or suggest there were other areas he considered unfinished under the terms of the Agreement. In fact, he took no photographs of areas he claimed were unfinished in breach of the Agreement until March or April 2024. I am satisfied the plaintiff installed drywall in all areas it could, as required by the Agreement, and that it provided a reasonable price reduction for those areas in which it was prevented from doing so.

[134] Regarding Mr. Siemens' second allegation, the evidence falls far short of establishing a breach of the Agreement. I am satisfied the plaintiff performed the Work in a good and workmanlike manner in accordance with the terms of the Agreement, including to a level 4 finish. Indeed, as my reasons below will also explain, I am also satisfied the plaintiff finished the installed drywall to a level 5 in a good and workmanlike manner, in accordance with the Additional Agreement.

[135] As I have endeavoured to communicate, Mr. Siemens' complaints about alleged deficiencies in the plaintiff's work under both agreements have evolved considerably over time. They remained imprecise and difficult to follow at trial. I can find no better way to describe the challenge in trying to identify and assess Mr.

Siemens' complaints other than to say it has been akin to the effort I would imagine is required to pin Jello to a wall—lacking substance, ever shifting, and impossible to pin down.

[136] Mr. MacLean personally observed the drywall in the Home when the Work was very nearly finished and the upgrade under the Additional Agreement was well underway. He was satisfied the completed Work and the level 5 finishing was all of a good and workmanlike quality and accorded with the plaintiff's obligations under both agreements. Given the support his evidence finds in the photographs taken at the time, along with his personal expertise, on the whole of the evidence, I am satisfied that if he had seen any areas of deficiency, or had any been brought to his attention, he would have rectified them. He saw none and none were brought to his attention at the time, or in the days and weeks that followed, because there were none.

[137] Mr. Siemens' position relies primarily on two features of the evidence. First, he relies on an alleged absence of evidence. Mr. MacLean's observations of the drywall occurred a few days before completion, so Mr. Siemens claims that Mr. MacLean cannot give evidence about the state of the drywall after the work, under both agreements, had been completed.

[138] There is no absence of evidence on this point. To the contrary, there is clear probative evidence that I accept, from Mr. Siemens himself, of my conclusion that the plaintiff performed its obligations under the Agreement. As I have previously found, Mr. Siemens advised Mr. MacLean in writing on June 10, 2021 that the plaintiff had done a good job on a level 4 finish. This acknowledgment by the defendants of the plaintiff's compliance with its obligations under the Agreement occurred three weeks after the plaintiff had finished the Work. Mr. Siemens (personally or through his agent) had ample opportunity during this time to identify any alleged deficiencies. He identified none and communicated this to the plaintiff. Given his alleged concerns about the plaintiff's workers at the time, I have no doubt that if Mr. Siemens had any concern the Work suffered from deficiencies or was not

done to at least the level 4 finishing the Agreement required, he would have said so. He would have required the plaintiff to perform a walk-through at the time, to ensure any deficiencies would have been repaired. Mr. MacLean took Mr. Siemens at his word, as Mr. Siemens' view of the Work aligned with his view when he observed it personally in the days before completion, and what he expected would soon be complete.

[139] If there are any deficiencies or areas in need of repair in the drywall now, years later, I am satisfied they are not the result of anything the plaintiff did, or failed to do, under the Agreement. They are more likely than not the result of work done by other trades and/or natural settling in the Home. While the Home remains unfinished, it is clear from the whole of the evidence that work by others has continued in the Home in the three years since the plaintiff's completion of the Work. Mr. Siemens did his best to avoid answering questions about the nature and extent of that other work, but it is clear there has been some priming and painting, installation of fixtures, electrical work requiring outlets to be moved and drywall cut, and undoubtedly other things impacting the current state of the drywall. In any event, even if there were small areas in need of repair at the time of the plaintiff's work, I am satisfied they were typical and minor, would have been easily and quickly repaired had they been brought to the plaintiff's attention, and would not constitute any breach of either of the agreements.

[140] The second, and central, feature of the position taken by Mr. Siemens relates to his erroneous beliefs about the alleged statements and conduct by the plaintiff's workers. He uses these alleged statements and conduct to support his untenable inference that the plaintiff intended to do (and did) substandard work under the Agreement or failed to perform a level 5 finish under the Additional Agreement. Specifically, Mr. Siemens asserts: (1) the Recording captures two of the plaintiff's workers admitting they were going to do a substandard job; (2) an unidentified worker of the plaintiff said to someone, at some point, that he planned to urinate in a "garbage pile"; and (3) some unidentified workers of the plaintiff, some months after the Work was complete, vandalized the Home and Mr. Krahn's vehicle by throwing

eggs on them. These claims are all completely unsupported in the evidence. I have already discussed the Recording and how it does not support Mr. Siemens' perception of what was said. He has adduced no admissible evidence to support his other two claims and, even if he had, they would not support the inferences he seeks.

[141] I also conclude the defendants have failed to establish the plaintiff breached any terms of the Additional Agreement. I accept Mr. MacLean's evidence that the level 5 finishing work was well underway when he attended the Home a short time before completion. After electing not to accept the defendants' repudiation of the Additional Agreement on May 12, 2021, he instructed the plaintiff's workers to continue the level 5 finishing. I easily infer they did so, completed their work, cleaned up, and left the Property a few days later.

[142] Mr. Siemens contends level 5 finishing work requires a standard of "perfection". The evidence does not support such a standard. Neither the Agreement, the Finishing Guidelines, or the Additional Agreement require this, nor would it be reasonable to hold the plaintiff to such an unattainable and subjective standard.

[143] Mr. Siemens also contends he knows "for sure the level 5 finishing was not done" because he was "told through recordings" it was not. This position refers to, again, his wrongly held perceptions of the Recording of April 26, 2021, the day before the parties agreed to the Additional Agreement. I also reject Mr. Siemens' suggestion that some of the photographs, taken years later, show the absence of a level 5 finishing. For the reasons I have explained, I can give Mr. Frigon's evidence no weight.

[144] I also decline to give the evidence offered by Mr. Siemens, which is based on guesswork, any credit. Leaving aside his lack of qualifications to provide opinion evidence in this area, some of the photographs he points to show that priming or painting has been done over the drywall, which prevents any kind of assessment of the level 5 skimming that had been done. Other photographs, as I have previously

described, show alterations to the state of the drywall by other trades. As Mr. MacLean made clear to Mr. Siemens in his April 27, 2021 email, in such circumstances (e.g., patching when fixtures are moved), the area "should have the whole surface skimmed again for a true L5 finish". If any areas need such "re-skimming", the obligation to do so does not rest with the plaintiff.

[145] In the end, I easily conclude the plaintiff performed its obligations under both the Agreement and the Additional Agreement and did not breach any of their terms. Although the defendants made no submissions in favour of their claim in negligence, I will add here for completeness the evidence falls far short of establishing such a claim.

The defendants breached both contracts

[146] The Agreement required the defendants, accounting for the $500 reduction, to pay the plaintiff a second installment of $20,212.50 upon completion of the Work and receipt of an invoice. The Work was completed as required under the Agreement on or about May 15, 2021, and the defendants received the Second Invoice. Despite demand and without excuse, they have failed to pay the amount required, in breach of the Agreement. The Additional Agreement required the defendants to pay $11,000, plus GST, upon completion of the level 5 finish and invoicing. The level 5 finish was completed, as required under the Additional Agreement, on or about May 15, 2021, and the defendants were invoiced accordingly. Despite demand and without excuse, the defendants have failed to pay the amount required, in breach of the Additional Agreement as well.

What damages should be awarded?

[147] Damages for breach of contract are generally awarded to put the plaintiff in the position it would have been had the contract been properly performed: *Barcelo v. Bogujevci*, 2022 BCSC 1079 at para. 94, citing *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12 at 25, 1993 CanLII 145. Damages are generally assessed as of the date of the breach: *Dosanjh v. Liang*, 2015 BCCA 18 at para. 55.

[148] The plaintiff completed the work under both the Agreement and the Additional Agreement by May 15, 2021. The contracts obliged the defendants to pay the balance owing on the Agreement (less the deduction provided by the plaintiff for those areas where drywall could not be installed) and the amount owing under the Additional Agreement, in the total amount of $31,762.50 when it was due on May 15, 2021. The plaintiff is entitled to damages in that amount, plus pre-judgement interest from the date of May 15, 2021 until the date of this judgment according to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79 [*COIA*]. I calculate pre-judgment interest to be $4,430.

Disposition

[149] Judgment is granted in favour of the plaintiff. The plaintiff is awarded damages against the defendants, jointly and severally, in the amount of $31,762.50, plus pre-judgment interest under the *COIA* from the date of this judgment to May 15, 2021 in the amount of $4,430, and costs as per below. The counterclaim is dismissed.

Costs

[150] As the successful party, the plaintiff is entitled to its costs of the proceeding, to be assessed by the Registrar. While I appreciate the parties made some submissions regarding an award of special costs at the conclusion of trial, I do not consider these submissions sufficient for me to make an informed determination on this issue at this time.

[151] In the event the plaintiff wishes to pursue its claim for an award of special costs and/or there are matters either party wish to bring to my attention that may also impact the costs award (such as formal offers to settle), I grant the parties leave to file additional evidence, in affidavit form, addressing those matters, along with written submissions in support of the awards they seek. Such evidence and submissions are to be exchanged between the parties and filed by no later than 60 days following the date of this judgment. Written submissions are limited to three pages in length. If no additional materials are filed or the parties agree, the plaintiff

will be entitled to its costs of the proceeding on the ordinary scale, to be assessed by the Registrar.

Funds Held in Court

[152] Finally, there is the matter of the funds paid into court by 136 B.C. Ltd. on May 29, 2023, in the amount of $34,408,57 in accordance with a garnishing order after judgment. Although the default judgment and garnishing order underlying this payment into court was set aside on November 2, 2023, the defendants have continued to agree to the funds being held in court since that time. The plaintiff applied at the conclusion of trial for an order that these funds be paid out to the plaintiff in the event of its success at trial. After finding judgment in their favour, I see no good reason for this order not to be made at this time. I order the funds paid into court in this action are now to be paid out to the plaintiff in partial satisfaction of this judgment.

"S.A. Donegan J."

DONEGAN J.