

CITATION: Atlas Dewatering Corporation v. Harvie Construction Inc., 2024 ONSC 1775
BARRIE COURT FILE NO.: CV-16-290-00
DATE: 20240325

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
Atlas Dewatering Corporation)	
)	
Plaintiff/Defendant by Counterclaim)	
)	Barry Greenberg, for the Plaintiff/Defendant
– and –)	by Counterclaim
)	
Harvie Construction Inc. and The)	
Corporation of the City of Barrie)	
)	Theodore Rotenberg and Connor Marino, for
Defendants/Plaintiff by Counterclaim)	the Defendant/Plaintiff by Counterclaim,
)	Harvie Construction Inc.
)	
)	
)	
)	HEARD: November 27, 28, 29, 30,
)	December 1, 4 and 5, 2023

REASONS FOR JUDGMENT

HEALEY, J.:

NATURE OF THE CASE

[1] On July 9, 2014, Harvie Construction Inc. (“Harvie”) was awarded a contract by the City of Barrie (“Barrie”) for work to be performed on and around Lakeshore Drive (the “Prime Contract”). Barrie’s tender documents and consultant’s reports referred to this project as the “Lakeshore Drive Reconstruction Project” (the “Project”).

[2] The description of the work contained in the instructions to tenderers was as follows:

The reconstruction and realignment of approximately 1km of Lakeshore Drive, Toronto Street to Tiffin Street, including grading and placement of granular road base and hot mix asphalt, concrete curb and gutter, concrete sidewalk, 500mm watermain, 200mm

watermain, Bunker's Creek culvert extension, Dymment's Creek culvert extension, Dymment's Creek pedestrian bridge foundation, creek channel improvements, underground electrical relocations, storm sewer installation, traffic signals, streetlighting, landscaping, irrigation, and all necessary restoration.

- [3] The tender documents required a fixed price for dewatering services. Harvie's accepted bid for the Project included \$350,000 for all dewatering services.
- [4] Dewatering consists of the installation of a system of well points, pumps and pipes to assist in lowering the groundwater table to a level below the lowest point of construction on the site, and subsequent removal of that equipment.
- [5] Harvie hired Atlas Dewatering Corporation ("Atlas") as its dewatering subcontractor. Atlas and Harvie disagree on the terms of their agreement.
- [6] Atlas delivered invoices to Harvie totalling \$1,133,760.18 between August 2014 to December 2015. The parties agree that Harvie has paid \$330,639.11 inclusive of HST.
- [7] Atlas alleges that \$950,509.91 remains unpaid. Atlas pleads breach of contract and, in the alternative, that Harvie has been unjustly enriched by Atlas' supply of materials and services.
- [8] Harvie asserts that it reached a "pay when paid" arrangement with Atlas, and that it will pay Atlas for some of the additional work performed outside of the scope of the contract when it is paid by Barrie. However, Harvie takes the position that Atlas has also invoiced for additional services or equipment that Harvie never authorized, and for which it is not obligated to pay.
- [9] Although allegations of deficiencies or unperformed work were initially part of Harvie's counterclaim, these were no longer being advanced by the time of trial.
- [10] Additionally, the parties dispute whether Atlas properly preserved its lien. The basis of the dispute is whether the dewatering work was performed on or in relation to the existing municipal roadway, or whether it was performed on land owned by Barrie and located to the west of the original roadway.
- [11] The action was discontinued against Barrie after Harvie posted a lien bond in 2016.
- [12] If Atlas cannot establish a valid lien, Harvie counterclaims for damages arising from its costs to discharge the lien and maintain the lien bond.

ISSUES TO BE DECIDED

- (1) Whether Atlas' lien was properly preserved. If the lien is not valid, the sub-issues are:

- (a) whether Harvie failed to mitigate its damages related to obtaining the lien bond; and
 - (b) the damages to be awarded to Harvie for discharging the lien and maintaining the bond.
- (2) The terms of the agreement made by the parties, and whether they included:
- (a) A fixed price of \$300,000 or a fixed price of \$300,000 plus additional dewatering and related charges outside the scope of the project documentation; and
 - (b) A “pay when paid” agreement for additional work.
- (3) Whether Harvie is estopped from asserting that it did not authorize additional work.
- (4) Whether all additional work claimed by Atlas was authorized by Harvie.
- (5) Whether Atlas has proven the value of the disputed work.
- (6) Whether a claim of unjust enrichment is available to Atlas.

PERFECTING THE CLAIM FOR LIEN

- [13] Throughout these reasons, references to the *Construction Lien Act*, R.S.O. 1990, c. C. 30 (the “*Act*”) are to the historical version in effect for the period July 1, 2011 to December 11, 2017.
- [14] The onus rests with Atlas to satisfy this court that it properly preserved its lien.
- [15] Harvie admits that Atlas completed its work on or about December 17, 2015, and that it preserved its lien within 45 days of the last supply of services.
- [16] It is not disputed that Atlas served its claim for lien by letter couriered to Barrie’s City Clerk’s office on January 25, 2016.
- [17] Harvie also admits that the original Lakeshore Drive as it existed at the time that Harvie was awarded the Prime Contract was a public highway that met the definition of “highway” in s. 1 of the *Municipal Act*, 2001, S.O. 2001, c. 25.

Position of the Parties

Atlas

- [18] Atlas’ position is that it provided its dewatering services for the Project, which consisted of the reconstruction and realignment of a portion of the then-existing Lakeshore Drive as reflected by the description of the work set out in the tender documents. The description of the premises in the tender documents were the lands in respect of which the dewatering

services were provided. The work performed is captured by the definitions of “improvement”, “premises”, and “supply of services” in s. 1 of the *Act*. The original Lakeshore Drive was never closed, and a news release dated October 5, 2015 stated that the “realigned Lakeshore Drive is ready for motorists to use”. Atlas continued to provide services and material to the Project for over two months after that date.

- [19] In its Statement of Defence, Harvie has admitted that Barrie was the owner of the portion of Lakeshore Drive from Toronto Street to Tiffin Street. Atlas submits that, because the land in respect of which the dewatering work was performed was owned by a municipality, pursuant to s. 16(3) of the *Act* the lien does not attach to the premises and registration of a claim for lien is not required. Instead, the proper way to preserve the lien is prescribed by s. 34(1)(b) of the *Act*, which only requires that the owner be provided with the claim for lien. Further, where the claim for lien is in respect of a public street or highway owned by a municipality, a copy of the claim for lien is required be given to the clerk of the municipality pursuant to s. 34(2) of the *Act*. This was the procedure followed by Atlas.
- [20] Atlas also relies on the Certificate of Substantial Performance published on March 18, 2016, which provides for preservation of a claim for lien by notice to the Clerk of the City of Barrie. Subsection 32(2)(e) of the *Act* requires that such a Certificate shall include a “concise description containing a reference to lot and plan or instrument registration number sufficient to identify the premises” where the lien attaches to the premises. In the Certificate of Substantial Performance published for the Project, the location of the premises is simply described as “Simcoe County, City of Barrie, Ontario”.
- [21] Finally, while Harvie alleges that the lien should have been registered on title to a separate parcel of land owned by the City, it has led no evidence of the legal description or address of that land.

Harvie

- [22] Harvie submits that the premises for which it made an improvement pursuant to the Prime Contract were outlined in Schedule A to its Statement of Defence and Counterclaim, which are the same premises that were within the scope of its subcontract with Atlas. Atlas was required to preserve its lien by registering a claim for lien against the title to the land in Schedule A, but erroneously served it on the City of Barrie. This was legally ineffective to preserve Atlas’ lien.
- [23] Further, Atlas’ employee and a professional engineer, Andy Lombardi, prepared the first quotation that was delivered to Harvie. It is admitted by Atlas that “it appears that the location of the new road...and the new sewer line” were known to Lombardi. Specifically, the “new road” was to be constructed west of the existing road. Harvie submits that the scope of the work under its subcontract with Atlas was with respect to the new road.
- [24] Harvie submits that it is the location where the dewatering work was done that defines the “improvement”, not the description of the work in the tender documents. It is an established principle that the work must be directly related to the construction of the improvement to

constitute a lienable supply of services or materials: *Toronto Zenith Contracting Limited v. Fermar Paving Limited*, 2016 ONSC 4696 (CanLII), at para. 26. Harvie also relies on *JVD Installations Inc. v Skookum Creek Power Partnership*, 2022 BCCA 81 for the same principle, and additionally for the proposition that work incorporated into an improvement on one parcel will be found to be an improvement on a different parcel only when it contributes in a direct and essential way to the improvement on the subject land. Because there was no interdependence between any work done in the vicinity of the existing Lakeshore Drive and the work done on the lands where the new roadway has been built, this is not a situation of a single, interdependent improvement that might allow for the adjacent land to be the subject of a lien.

- [25] Harvie also asserts that Atlas cannot rely on the provisions of the *Municipal Act* to establish that the new Lakeshore Drive is a highway. Section 26 of the *Municipal Act* requires that a highway be established by municipal bylaw, and there is no evidence that Barrie took that step after opening the road.
- [26] Further, it is Harvie's position that Atlas cannot rely on the Certificate of Substantial Performance to substantiate its lien rights, as it was published after Atlas' lien had to be perfected.

Analysis

- [27] The evidence establishes that the Project for which Atlas supplied services and materials under its contract with Harvie was a realignment and reconstruction of approximately one kilometre of the existing Lakeshore Drive, as set out in the tender documents. Nick D'Urzo, who is the President and sole director of Harvie, admitted that the description of the work in the instructions to tenderers accurately described the work undertaken by Harvie. Ivan Haferer, who was Harvie's project manager, confirmed the same.
- [28] Neither party provided engineering evidence sufficient to prove where the dewatering work was done in relation to the existing or reconstructed portion of Lakeshore Drive, or to show exactly how the roadway was realigned.
- [29] Haferer is a Certified Engineering Technologist who has worked in the civil construction industry for 33 years. He first testified that the Project did not require construction of a brand-new road, but rather a realignment and addition to what was previously Lakeshore Drive. On re-examination he altered that characterization somewhat by saying that Harvie was required to construct a new road by moving a portion of it "toward the lake". He also stated that the redesigned Lakeshore Drive covers a larger area than the original roadway. It was his evidence that work was done on both sides of the original Lakeshore Drive.
- [30] D'Urzo said that water had to be pumped out of the Dymont's and Bunker's Creek bypass, areas that were not part of what he called the new road, and agreed that there was water removal from the area of the existing road. He also testified that Lakeshore Drive was never closed during the Project.

- [31] D’Urzo also agreed that the August 11, 2011 report from Barrie’s geotechnical consultant and engineering firm, Peto McCallum, set out the work encompassed by the Project. This report was included in the information to bidders that was part of the bidder’s website created by Harvie. The Peto McCallum report states that the project components would include “reconstruction of about 1 km of Lakeshore Drive from Toronto Street to Tiffin Street. The alignment of Lakeshore Drive will be shifted approximately 20 m to the west. The road will be divided with a centre median with two lanes on either side. The realignment will locate the centre median over the recently completed trunk sanitary sewer”.
- [32] Additional project components described in that report were the installation of three sections of storm sewer along the east side of the proposed Lakeshore Drive alignment, replacement of the Dymment’s Creek and Bunker’s Creek culverts, and construction of a pedestrian bridge over the open channel portion of Dymment’s Creek.
- [33] Under Part 5.3 of the Peto McCallum report, the author notes that excavation from a depth of 3 to 5 metres was anticipated for the storm sewer and culvert excavations, and that it would be necessary to temporarily lower the ground water table through the use of well points to ideally lower the ground water table to 0.5 m below the bottom of the deepest excavation. It also states that the dewatering system must be designed and installed by a specialist in this field.
- [34] The Dewatering Plan created by Atlas and submitted to Harvie for Barrie’s approval reflects the description of the work in the tender documents. Better understanding of the dewatering work that Atlas expected to perform comes from this document. Under Part 2, “Dewatering Objective” is the following:

Construction dewatering or groundwater management is a short term operation where groundwater is removed to facilitate construction of engineering structures. The sections identified in this Dewatering Plan are:

An open-cut excavation for the construction installation of new storm sewers approximately 1000 meters along Lakeshore Drive.

An open-cut excavation for culvert construction.

An open-cut excavation for open channel construction at Dymment’s Creek.

.....

The wellpoint dewatering system will be installed along the respective excavation segments and trenches for temporary groundwater level lowering during construction, trench bedding and pipe laying during the installation of the proposed storm sewers, culverts and during backfilling activities. In order to ensure a dry

working environment during construction installation, the groundwater level must be lowered to approximately 1.0 meters below the deepest point of the excavation.

- [35] As there is no claim for deficiencies and it is admitted by D’Urzo that Atlas performed all required work under the subcontract, this court infers that Atlas carried through with this or a similar dewatering plan in the areas outlined, in support of and in furtherance of the work that Harvie was required to complete under the Prime Contract.
- [36] The only place where the reconfigured Lakeshore Drive is described as a “new” road is in the affidavits filed on behalf of Harvie, and in an email from Brian McCormack, who was Barrie’s Project Manager. He informed Harvie in September, 2015 that “the City would like to stage a small media event to acknowledge the opening of the new road the day before it is opened to the general public”. There is no evidence that Barrie took any steps to pass or publish a bylaw to dedicate it as a public highway at any time before or after. Atlas’ work continued past this “opening”, until the end of 2015.
- [37] Accordingly, I find that the evidence establishes that this was not a “new” roadway constructed by Barrie, but an enlargement and realignment of an existing roadway with associated culvert and storm sewer installments, together with additional work not relevant to the issues before this court. As such, there was no need for dedication by bylaw; it was and remains a public highway situated on land owned by Barrie.
- [38] The definitions of “improvement”, “premises” and “supply of services” in the *Act* are broad enough to capture the work performed by Atlas. The dewatering services, including installation and removal of the wellpoint dewatering system was by design done on the same premises or in respect of the same premises which was the subject of the Project to overhaul Lakeshore Drive. The very purpose of dewatering is to reduce the groundwater on the land requiring the construction or improvement. Those premises were an existing highway, and the work done by Atlas was integral to its alteration and restoration.
- [39] Section 16(3) of the *Act* applies. It provided:
- (3) Where the Crown is the owner of a premises within the meaning of this Act, or where the premises is,
 - (a) a public street or highway owned by a municipality; or
 - (b) a railway right-of-way,
- The lien does not attach to the premises but constitutes a charge as provided in section 21, and the provisions of this Act shall have effect without requiring the registration of a claim for lien against the premises.

[40] Accordingly, Atlas was not required to register its claim for lien on title. Atlas followed the correct process by serving its claim for lien on the Municipal Clerk as required by s. 34(2) of the *Act*. By so doing, Atlas' preserved its lien.

[41] Harvie's counterclaim for damages must be dismissed accordingly.

CONTRACTUAL TERMS

[42] The two primary issues in dispute are whether the contract terms included:

- (1) A fixed price of \$300,000 or a fixed price of \$300,000 plus additional dewatering and related charges outside the scope of the project documentation; and
- (2) A "pay when paid" agreement for additional work.

Issue 1: Scope of the work covered by the contract

[43] The parties did not sign a quote or otherwise execute a written agreement. All negotiations were carried out between the parties' presidents, D'Urzo for Harvie and Andrew Famiglietti for Atlas.

[44] The parties agree that the base subcontract price was \$300,000 plus HST, and that \$15,505.87 remains owing on the base subcontract.

[45] What must be determined by this court is the scope of the work that was covered by the base contract price of \$300,000, and whether an agreement was reached with respect to additional services not covered by the base contract price.

Position of the Parties

Harvie

[46] Harvie's position is that the parties reached an oral agreement on July 23, 2014. All dewatering work required by the Prime Contract was to be performed by Atlas for the fixed price of \$300,000 plus HST, without extras or any additional unit pricing. The contract price was not based on the length of the system or duration of the pumping set out in the bidding documents. Any additional work was to be authorized only by D'Urzo or Harvie's Project Manager, Ivan Haferer. Harvie would submit a claim for the additional work to Barrie and would support Atlas' additional claim.

[47] Harvie would only pay Atlas for the contract price and any additional work on a "pay when paid" basis. Atlas understood that this meant that Harvie would have no obligation to pay until or unless it received payment from Barrie.

Atlas

- [48] Atlas alleges that the contract was for a lump sum price of \$300,000 for work in accordance with the parameters, terms and conditions of the Project prescribed by the tender documentation made available to Atlas. Any services or equipment exceeding the parameters set out in the Project documentation were in addition to the lump sum.
- [49] Atlas' position is that the agreement reached by the parties is documented in a quote prepared by Atlas following a meeting between the parties on July 23, 2014, and that the terms of that document govern. There was never a discussion of "pay when paid". Harvie raised it for the first time after it was served with Atlas' Statement of Claim.

Law of Oral Contracts

- [50] Harvie's allegation that the parties' contract was completely oral requires consideration through the lens of the law applicable to oral contracts. The principles applicable to the interpretation of contracts in general and to oral contracts particularly was concisely summarized in *S & J Gareri Trucking Ltd. v. Onyx Corp.*, 2016 ONCA 505, at para. 7:

The trial judge applied the correct principles applicable to the interpretation of contracts in general and to oral contracts in particular. He held that when dealing with contracts which are substantially or wholly oral: (i) it is necessary to distill from the words and actions of the parties what they intended: see G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011) at 16; (ii) evidence of the parties' subjective intentions has no independent place in determining the terms of their bargain: *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 (S.C.C.) at para. 54; (iii) the test of what the parties agreed to requires an objective determination; and (iv) the contract must include the requisite elements of offer, acceptance and consideration.

Evidence

- [51] D'Urzo has been involved in different aspects of the civil construction business for approximately 40 years. He incorporated Harvie to be a general contractor in 2010. This was the first contract for dewatering in which D'Urzo had ever been involved. He had no experience with how dewatering work was priced, and did not have the expertise to understand the technical requirements for a dewatering contract.
- [52] Famiglietti took over the operation of Atlas from his father. Although its primary work is dewatering, it also operates a construction business. It has been operating since 1998, providing dewatering services and rental of dewatering and related equipment throughout Ontario and elsewhere in Canada. Famiglietti is not an engineer or engineering technologist.

- [53] It is an agreed fact that Harvie sent an email to Atlas on May 27, 2014, requesting that Atlas quote on the Project. The email included a link to the tender documents and attached a Schedule of Items and Prices.
- [54] The Form of Tender provided by Barrie required every bidder to provide a lump sum for dewatering, with a minimum bid of \$125,000. Paragraph 3.16 of the Schedule A - Special Provisions states that “Payment at the lump sum price bid shall be full compensation for all labour, equipment and materials required to perform all dewatering operations for every facet of this construction project”. This document was available to Atlas from the outset.
- [55] D’Urzo was not certain whether he told Famiglietti how much was allocated for dewatering services in the Prime Contract, but thought it unlikely that he would have shared that with Famiglietti at the time of their negotiations.
- [56] Included in the tender documents was a Permit to Take Water (“PTTW”). The evidence shows that Barrie’s project manager later confirmed that Schedule A of the PTTW was not included in the bidding documents at the time of tender. Schedule A lists, among other documents, an addendum hydrogeological site assessment report prepared by Peto McCallum dated December 14, 2011, which included estimated construction dewatering needs. That report stated that analysis showed that the quality of the ground water underlying the Lakeshore Drive alignment complied with the City of Barrie storm and sanitary sewer use by-law criteria and selected provincial water quality objectives set by the Ministry of the Environment.
- [57] I find that nothing turns on the absence of the PTTW, as Atlas expressly stated in its quotes that they were based in part on Peto McCallum reports of August and December 2011, and accordingly were available to Atlas throughout.
- [58] Further, it is an agreed fact that Atlas has no proof of any communications made from it to Harvie that:
- (a) Information required by Atlas was either missing from or incomplete in the Peto McCallum Report;
 - (b) Information required by Atlas was either missing from or incomplete in the Amended PTTW.
- [59] In section 4.2 of the December Peto McCallum report, it is recommended that the permit holder’s consultant design and implement a ground water quality monitoring program in selected functional monitoring wells and at the dewatering discharge location *or in the decantation tank, if any* prior to and during construction dewatering (emphasis added). Another term for a decantation tank is an “enviro-tank”. Barrie was the permit holder.
- [60] The evidence of both parties established that use of an enviro-tank is required if the groundwater contains too high a value of total suspended solids to be discharged directly into the sewer system. Haferer and D’Urzo agreed that the remarks in the Peto McCallum

reports that dealt with ground water indicated that the sanitary sewer system could be used, and that enviro-tanks may or may not be required.

- [61] D'Urzo's evidence includes narrative about how Harvie's estimator, Jeff Chen, worked with a quotation submitted by another dewatering contractor just before the tender deadline, Aquatech. Aquatech's quote did not contain a lump sum price but had unit prices based on time and/or materials. D'Urzo's evidence was that Chen converted the unit prices to lump sum through consultation with Aquatech, resulting in the equivalent of a lump sum contract price of \$350,000, and used that amount in its line item for dewatering in the bid that was accepted by Barrie. Chen did not testify.
- [62] The Aquatech quote states that its proposal and pricing was based on a single mobilization to the project site, and continuous workflow. It included a price per meter for the installation of a wellpoint system, a daily wellpoint system rental cost, fees related to enviro-tanks, and contained a list of items that were excluded from the pricing.
- [63] Harvie did not accept Aquatech's bid. Instead, D'Urzo reached out to Famiglietti to ask why Atlas had not submitted a bid. D'Urzo and Famiglietti knew one another socially and D'Urzo testified that he considered them to be friends.
- [64] Atlas responded by preparing a bid dated June 12, 2014 (the "First Quote"). There is lack of consensus about when the First Quote was sent to Harvie. It is probable that it was prepared to meet the bid deadline of June 12, 2014 but there is no documentary evidence proving that it was sent on that date. The evidence establishes that it was likely delivered for the first time on July 15, 2014. Nothing turns on this, however, because Harvie's evidence establishes that it was in Harvie's hands by July 15, prior to a face-to-face meeting between D'Urzo and Famiglietti.
- [65] The First Quote gave a lump sum cost of \$200,000 to "supply, transport on site, install, activate, remove, decommission and transport off site 1,000 metres of Atlas Wellpoint Dewatering System". It provided for a daily pump fee, per pump, of \$200 per day. Another component of the quote was a lump sum cost of \$26,500 for a 75 metres Atlas Eductor Dewatering System, with a daily pump fee of \$285 per day per pump. Other items were noted to be in addition to the lump sum pricing, such as system maintenance, winterization, rental costs related to enviro-tanks, and an engineer stamped dewatering plan. None of these additional items were priced on a lump sum basis. It also stated that the prices in the quote included only the "above mentioned work", and that any additional work required would be subject to an extra charge. It was also subject to Atlas' standard terms and conditions outlined in the attached Schedule A, which listed 20 exclusions and conditions.
- [66] D'Urzo testified that before the meeting between the parties, Chen went through the same exercise with the First Quote to reduce it to a lump sum. I place no reliance on what is contained in the notes said to be made by Chen in relation to the First Quote. They are hearsay and D'Urzo's evidence made clear that he could not explain Chen's notations or calculations.

- [67] Prior to the meeting Harvie also delivered a draft preliminary construction schedule. D'Urzo agreed was available for discussion at the meeting but no one referred to it because Lombardi said that it was illegible.
- [68] The parties agree that their initial meeting occurred on July 23, 2014, at Harvie's offices. Attending from Harvie were D'Urzo, Haferer, and Chris Osborne, who was the original construction superintendent for the Project. The Atlas representatives attending were Famiglietti, Lombardi, and Steve Brett, who was Atlas' Vice President.
- [69] They parties say that an agreement was reached that day but have differing viewpoints about its terms. No one took notes of the meeting.
- [70] Famiglietti's evidence is that he advised D'Urzo during the meeting that if the length of the system exceeded 1,000 metres, or the duration of operation of the system exceeded 160 days, there would be additional charges. Famiglietti was also concerned with the effect that winter weather would have on the progress of construction and D'Urzo expressed that he was sure that Harvie would be able to complete the necessary construction within 160 days.
- [71] Famiglietti also says that he reviewed the requirement for the supply of enviro-tanks with D'Urzo. His evidence-in-chief was that based on his review of the tender documents, he concluded that it did not appear that enviro-tanks would be required. On cross-examination he altered that to say that it was possible that he never read the tender documents, and may have heard from Lombardi that enviro-tanks were not needed. Nonetheless, he advised D'Urzo that they would be supplied to the Project at extra charge if required.
- [72] Famiglietti admits that D'Urzo wanted a lump sum price but does not recall D'Urzo saying that Atlas would not get the contract without that stipulation. Their conversation centered around a time period of 160 days for the dewatering portion of the Project, with D'Urzo remarking that he expected that it would be completed earlier than 160 days.
- [73] Famiglietti says that they ultimately agreed upon a fixed price of \$300,000 plus HST for the provision of a dewatering system of 1,000 metres for a period of 160 days, based on the parameters set out in the Peto McCallum reports. In addition to that fixed price, Atlas was to be paid for all additional work authorized by Harvie. Famiglietti denied that there was any discussion or agreement that they would be paid when Harvie was paid by Barrie.
- [74] D'Urzo's evidence is that his primary objective for his negotiations with Atlas was to obtain a lump sum price for the dewatering subcontract that was less than the \$350,000 in Harvie's bid to Barrie. He was very clear at the meeting that Atlas would not get the work without a lump sum price, and that a contract with unit prices was not possible for Harvie, as it had to be a lump sum to match the requirements of Barrie's Form of Tender. However, on cross-examination this altered when he testified that he wanted, not needed, a lump sum.
- [75] D'Urzo said that Famiglietti finally agreed to a lump sum price by increasing the \$200,000 in the First Quote to \$300,000 to cover all dewatering services that were required. He testified on cross-examination that the lump sum price was dependent on the parameters of the Project specifications, including all the tender documents, and that Harvie's costing to

Barrie of \$350,000 was based on those parameters. If those parameters were exceeded, Harvie would submit a claim to Barrie for additional charges.

- [76] D'Urzo anticipated that the work would not be done in winter and does not recall a discussion at the meeting about additional charges for winterization of the wells. It was only later, because of delays in the Project that were not the fault of Atlas, that Harvie authorized the winterization costs as extra and claimed them against Barrie.
- [77] Finally, D'Urzo said that if there was any extra work that Harvie authorized, Harvie would submit the additional work to Barrie and support the Atlas claim, which included the situation where Atlas' work was delayed by Barrie. He agreed that Famiglietti did talk about concerns relating to delay or if the dewatering portion took longer than expected. In response, D'Urzo told him that there was a provision in the Prime Contract to submit additional costs, which he believed Famiglietti would know from having completed work for Barrie as a general contractor.
- [78] Both parties confirm that at the conclusion of the meeting, D'Urzo agreed that Harvie would provide Atlas with a new preliminary construction schedule. D'Urzo and Famiglietti then shook hands on their "deal".
- [79] D'Urzo was asked whether he requested a revised quote at the end of the meeting. His answer was ambiguous. He stated that he asked Famiglietti to "follow up with what we had agreed to today" but that he did not need a new quote, as the parties already had a deal.
- [80] Haferer was the only other witness who was present at that meeting. He is still employed by Harvie. He recalled the meeting and provided evidence about what was discussed and agreed to during the meeting. He recalled that the two principals discussed the First Quote at the meeting, which he had seen before the meeting. He was aware that it contained conditions, which was typical of all quotes.
- [81] Haferer's evidence was that the agreement reached by the parties was that all dewatering work would be done in accordance with the Project documents. He does not recall a discussion about the length of the system, or a time frame of 160 days for completion. He could not recall D'Urzo saying that the dewatering work would be completed before winter. He recalled that a preliminary construction schedule was to be provided after the meeting.
- [82] Haferer also recalled that once the two principals came to an agreement, D'Urzo asked for revised pricing to be sent to him.
- [83] Following the meeting, Atlas prepared a quote dated July 28, 2014 (the "Second Quote").
- [84] The parties disagree on when the Second Quote was delivered to Harvie; Atlas says on or about July 28, 2014, and Harvie says on August 11, 2014, which was after Atlas started to perform its work. Atlas has no record of having sent the Second Quote to Harvie before August 11, 2014.

- [85] At 3:01 p.m. on August 11, 2014, Harvie sent the preliminary construction schedule as discussed at the meeting. This document was prepared by Harvie. It showed dewatering installation to start in July or August 2014 and for decommissioning to conclude toward the end of October 2014. It also showed short periods of dewatering on Toronto Street and the Bunker's Street culvert extension for a few weeks between June and August 2015.
- [86] At 4:23 p.m. on August 11, 2014, Atlas sent the Second Quote to Harvie. It was sent by Lombardi to Haferer, with the message "As per our meeting in your office please see attached quotation for the job based on the preliminary schedule. Please review and sign back ASAP seeing we have already commenced installation".
- [87] Both parties agree that the Second Quote was never signed. It is an agreed fact that Atlas has no email or other record of making a subsequent request to Harvie to sign and return the Second Quote, nor is there anyone at Atlas who recalls doing so.
- [88] The Second Quote was for a higher lump sum amount than the First Quote. However, it included several items that had been separately priced as additional costs in the First Quote. The Second Quote provided a lump sum cost of \$300,000 to "supply, transport on site, install, activate, remove, decommission and transport off site 1,000 metres of Atlas Wellpoint Dewatering System". This price included system operation "as per the schedule" from August 5, 2014 to October 21, 2014 and July 27, 2015 to October 16, 2015, and noted "160 days". The costs of the stormceptors were now included. It eliminated the daily pump fee, and the costs of a stamped dewatering plan was now included. It also provided for system operation after 160 days at \$500 per day. Costs associated with enviro-tanks, marked as "provisional", were priced out in addition to the lump sum. Winterization was noted to be extra, as was fuel or electricity for the dewatering system, and discharge piping from each dewatering system beyond 40 metres.
- [89] The Second Quote was again subject to further exclusions and conditions set out in Schedule A. Relevant are:
- Any monitoring, mitigation and contingency plans
 - Pump energy (diesel fuel, electricity) including hook up and supply
 - All damage to Atlas' equipment caused by Harvie or its subcontractors to be billed back to Harvie at cost
 - Additional mobilization
 - Winterization of systems
 - Labour for additional work at \$85 per hour
 - All applicable taxes additional

- [90] The Second Quote lists the things on which it is based, including the Peto McCallum reports and “office discussions July 28, 2014”. Atlas says that the Second Quote incorporated the terms and conditions discussed and agreed to during the meeting and reflects the oral agreement reached.
- [91] Harvie says that the Second Quote contained other terms that had not been discussed or agreed upon. It submits that Atlas should have known that Harvie never accepted the “proposal”, as it never signed and returned it. Since Atlas proceeded to perform the contract without it, by its conduct it is deemed to have done so pursuant to the terms of the oral agreement advanced by Harvie.
- [92] Haferer was not aware of any communication from Harvie to Atlas saying that the Second Quote did not reflect their agreement.
- [93] D’Urzo agreed on cross-examination that the reference in the Second Quote to system operation of 160 days reflects the preliminary construction schedule, as do the dates outlined for that system operation.
- [94] Famiglietti’s evidence is that because D’Urzo was his friend whom he believed to be honourable, he was not concerned that the Second Quote had not been signed and instructed his employees to proceed with the work.
- [95] On July 25, 2014, Harvie invited Atlas to observe further test pits being dug at the site to help to understand the soil conditions, and attended.
- [96] It is an undisputed fact that Atlas proceeded to prepare a dewatering plan for the Project. It was delivered to Harvie on August 1, 2014 with a covering email from Lombardi stating “please review and make sure it is correct because once you submit this plan it must be followed”. D’Urzo confirmed that this plan was submitted to Barrie, although had to be revised before its final acceptance. There is no evidence that a separate cost for this dewatering plan was invoiced by Atlas or paid by Harvie.
- [97] Famiglietti’s evidence is that Atlas installed two dewatering systems, the first completed on or about August 8, 2014, and the second one on or about August 12, 2014. The operation of the dewatering system was not immediately started after installation, at Barrie’s request. Haferer testified that Barrie shut down Atlas’ involvement until water samples were taken and enviro-tanks provided.
- [98] Sometime after the delivery of the Second Quote, Famiglietti says that he attended a further meeting with D’Urzo at Harvie’s office. He recalled finding the building more easily on this second occasion but could not recall the purpose of the meeting and does not know when it occurred. At that meeting they reviewed the terms of the Second Quote. He advised D’Urzo that Atlas was unable to provide an unlimited lump sum quote for all dewatering services. D’Urzo advised that he was not concerned about the cost of additional rental equipment, as such costs would be passed on to Barrie if required. D’Urzo agreed that the rental costs set out in the Second Quote would be extra to the lump sum price.

- [99] Famiglietti's evidence is that at the end of the meeting the two men again shook hands and confirmed that the agreement for the supply of dewatering services for the Project would be subject to additional charges relating to the length of the system required, the duration of system operation, winterization and the cost of rental equipment if required.
- [100] D'Urzo agreed that he and Famiglietti had a conversation after receiving the Second Quote. His evidence is that he again told Famiglietti that Harvie would not hire Atlas as its subcontractor except at the agreed upon lump sum price. Famiglietti in return was complaining that Atlas did not want to give a lump sum for an unclear length of time or uncertain distance of piping, but never denied the agreement reached on July 23. It was suggested in closing argument that Famiglietti was having regret over the deal reached at the first meeting.
- [101] D'Urzo agreed that he and Famiglietti met a number of times between August and the end of October, and had a similar conversation. But D'Urzo specifically denies a second meeting at Harvie's office relating to the Second Quote and denies that he and Famiglietti shook hands on a deal at that second meeting.
- [102] At his examination for discovery, D'Urzo was questioned about a second meeting. His evidence was inconsistent with his trial testimony:

Q: I'm talking about the discussions after the meeting of July 23rd, after you received this quote on July 28?

A: I cannot recall exactly what was discussed at any of those meetings from July to August and which meeting we had the discussions.

.....

Q: I'm suggesting to you, Mr. D'Urzo, that there was one particular meeting at your office where this quote was specifically discussed, and at the end of that meeting there was a handshake.

A: Okay.

Q: Do you recall that?

A: Yes.

Q: And I understood in the course of that meeting Andrew indicated in no uncertain terms that he can't give an unlimited lump sum for a dewatering service contract?

A: Okay.

Q: Do you recall that?

A: I actually do.

Q: Yes. And do you recall discussions about rental costs?

A: Yes.

Q: Do you recall saying to Andrew that: I'm not concerned about the rental cost, because that'll be an addition to the contract, so bump the price for the rental costs and I can pass it on to Barrie and eat it on the other end of the quote?

A: If that is indeed an extra, I guess, what was indeed an extra to the lump sum contract.

- [103] When confronted with the inconsistency between his denial of a second meeting and his discovery evidence, D'Urzo's explanation was that he now believes that he understood that they were discussing the July 23 meeting at that point in his discovery, as that was the only time that they shook hands.
- [104] D'Urzo's evidence is that after July 23, 2014, he and Famiglietti had verbal discussions about specific site problems that required a decision without waiting in advance for approval from Barrie, as the delay would hold up the progress of the work. These were informal conversations. He alleges that it was agreed that Atlas would proceed with the work, and Harvie would submit the invoice and any necessary claim for approval to Barrie. Harvie would then pay Atlas when Barrie approved and paid for the work. Finally, if there was additional work that Harvie authorized but Barrie had a proper reason to refuse, then Harvie would pay Atlas for that additional work.
- [105] At trial D'Urzo could not provide examples of instances where Barrie gave pre-approval for additional work and agreed that it might be possible that he did not get pre-approval from Barrie for any of the work in issue.
- [106] Famiglietti's evidence is that he was not concerned about whether Barrie had approved any extra work in advance. His position was simply that Harvie personnel asked Atlas to do the work, and Atlas did it.
- [107] Despite the contrary position taken by Harvie up to the date of trial, D'Urzo agreed during his cross-examination that charges relating to the provision of enviro-tanks is an extra cost that was not included in the base subcontract price. Barrie has taken the position that the provision of enviro-tanks was included in the dewatering allotment in the Prime Contract. Harvie is pursuing payment from Barrie for the enviro-tanks through litigation and submits that it will pay Atlas when and if paid. However, if Barrie wins on that issue, Harvie will not be paying Atlas because it was Barrie who requested the tanks.

- [108] Haferer's evidence is that any work additional to the contract was to be dealt with by D'Urzo. Haferer submitted Atlas' invoices to Barrie for the base subcontract, and anything additional was reviewed by D'Urzo. During Haferer's monthly review, no one at Harvie ever told him that additional work was not being paid because it was unauthorized. Time and material sheets were sometimes included with Atlas' invoices. He passed those on to D'Urzo and was never informed that there was a problem with them.
- [109] D'Urzo testified that he did not pay much attention to the extras, because he had a lump sum contract. Although Harvie is taking the position that it cannot recognize some of the signatures of Harvie employees on the time and material sheets, D'Urzo testified that he made no inquiries with employees to determine if it was their signature, and never questioned the labour or material costs at the time.
- [110] Prior to trial, Harvie admitted that it approved additional work totalling \$230,786.35, which has not been paid because of the damages claimed by Harvie relating to the bond. Both parties used that number in the Scott Schedule for the value of approved additional work.
- [111] However, that number does not accord with the amount that D'Urzo admitted in his affidavit to having authorized. That total is \$233,286.35. At trial the evidence of D'Urzo altered slightly to include the approval of a minor additional amount of \$4,553.05, for a total of \$237,839.40 before HST¹.
- [112] His evidence is that this brings the total owing to Atlas to \$277,119.40 inclusive of HST, taking into account the contract price and amounts paid. It is agreed that included in this sum is work done by Atlas related to bypass pumping and winterization costs, which was additional work approved by D'Urzo before getting pre-approval from Barrie.²
- [113] D'Urzo gave evidence about the authorized extra work as set out at paragraph 72 of his affidavit. I have reviewed his evidence regarding the extra work and charges that were authorized by Harvie and the associated invoices set out in items 3(a) to (k) of the Scott Schedule.
- [114] The work that Harvie authorized and for which it agrees that it owes Atlas payment - subject to the counterclaim - includes: pump rental, maintenance and fuel, cleaning of enviro-tanks, supply of filter bags, thawing out pumps during winter, moving discharge from creek into sanitary sewer and delivery of hose, system modification and cleaning, laying 150 feet of electrical cable, remobilization on Dymment's Creek, dry weather creek dewatering system at \$6,000 per week, installation and removal, rental for pumps for the

¹ Paragraph 72 of the affidavit of Nick D'Urzo contains several mathematical errors. The subtotal is \$533,286.35, not \$602,613.58. The HST figure of \$69,327.23 is accurately calculated on \$533,286.35. The amount that was admitted during the trial to be owed, \$277,119.40 is correct once the additional amount of \$4,553.05 plus HST is included.

² Also, paragraph 72 of D'Urzo's affidavit, as well as Exhibit 32 of his affidavit, are misleading in that they do not list all of the invoices associated with these costs. For that, reference must be made to items 3 (a) to (k) on the Scott Schedule.

Bunker's Creek bypass between November 13, 2015 and December 8, 2015, and winterization.

- [115] Focusing further on this group of approved extras, Harvie agrees that part of the \$277,119.40 is comprised of additional authorized work for the cost of a sanitary discharge pipe in the amount of \$8,040 contained in invoice no. J003727³. Included in the supporting documents delivered with this invoice is an email from Phil McIntyre of Atlas to Sal Rustico of Harvie dated August 25, 2015, in which he provided a quote of \$35 per linear meter for discharge piping. Included in his email is the following statement: "Keep in mind that 40 meters of discharge pipe is included in our quote for the WellPoint system I'm onsite now so if you need an exact measurement I can work that out with Glen...Please let me know if the above is acceptable and I will coordinate the work and Atlas will bill accordingly". The response sent by Rustico by email on September 2, 2015 did not question or take issue with McIntyre's comments about the quote, instead indicating that the cost per meter was approved.
- [116] Rustico was employed by Harvie during the Project and worked as the Co-Project Manager with Haferer. While he was not hired by Harvie until 2015, his evidence was that based on what D'Urzo and Haferer told him, Harvie had been given a lump sum price for dewatering from Atlas, and that D'Urzo had to authorize any additional dewatering work. This makes it all the more significant that there was no objection from anyone at Harvie to Atlas' suggestion that "40 meters of discharge pipe is included in our quote".
- [117] One of the approved additional costs was final cleaning of the enviro-tanks, charged at \$2,500 per tank. This is the same price set out in the Second Quote for this service.
- [118] It is an agreed fact that Harvie provided no written communication to Atlas to indicate that it took issue with Atlas' invoices for extra charges. Famiglietti's evidence is that during his numerous discussions with D'Urzo over payment, D'Urzo never raised any issue with respect to any one of the charges contained in the invoices delivered to Atlas.
- [119] Famiglietti also recalled having a conversation with D'Urzo during the Project in which D'Urzo requested a reduction in the cost of providing by-pass pumps, and Famiglietti agreed to reduce the charges as requested. Further, during the Project D'Urzo called him and asked for a discount on the charges for rental of enviro-tanks when he advised that he was having problems with Barrie, and Famiglietti agreed to discount the price from \$2,500 per month as priced in the Second Quote to \$1,900 per month. D'Urzo could not recall this discussion but did not deny that it occurred. In June 2015, as will be discussed later, Harvie requested that Barrie pay additional costs for provision of enviro-tanks which was based on a price of \$1,900 per month.

³ Incorrectly identified as invoice no. J003949 in paragraph 72 of D'Urzo's affidavit.

- [120] Famiglietti acknowledged that he was not involved on site. It was McIntyre, who was Atlas' Operations Manager, or Ian Hoard, another Atlas employee, who had contact with Harvie and involvement with the Project on site.
- [121] Mr. Rotenberg made detailed submissions about the absence of evidence from Lombardi, asking this court to draw the adverse inference that he would not support Atlas' position with respect to the terms of the contract and what occurred during the meeting of July 23. Lombardi no longer works for Atlas, but Famiglietti knew where he was employed at the time of trial. Mr. Rotenberg argued that it was only Lombardi who could provide testimony about what he reviewed to create the First Quote, and who could interpret the Peto McCallum reports, corroborate what occurred in the July 23 meeting, explain the content of the Second Quote, and confirm when the dewatering plan was approved by Barrie. The reason for Lombardi's absence, it was argued, was that Famiglietti wanted to control the narrative.
- [122] I disagree with these submissions. The relevance of the First Quote is only as a comparator to the Second Quote, to show how it was altered following the parties' negotiations. The comments in the Peto McCallum report regarding water quality and the potential need for enviro-tanks does not require the expertise of an engineer to interpret. Corroboration of what occurred in the July 23 meeting is not required; it is the persuasive force of the evidence, not the number of witnesses who testify for each side, that is important. Famiglietti was the person who negotiated the deal, and his evidence explained why the Second Quote was structured as it was. The date that the dewatering plan was approved was not a factual issue that needs to be resolved to determine the terms of the contract. I make no adverse inference from the absence of Lombardi.

Analysis

- [123] Considering all of the preceding evidence and the arguments advanced by counsel, I find that the agreement struck by Harvie and Atlas and by which they governed their dealings is reflected by the Second Quote (the "Contract"). The Contract price of \$300,000 included dewatering work including a daily pump fee for a maximum of 160 days, with longer duration of pumping at an additional cost of \$500 per day. It included a system length of only 1,000 metres. It included the costs of the dewatering plan. Any additional rental or services that Harvie required to fulfil its Prime Contract were in addition to the lump sum, such as services related to enviro-tanks, winterization, fuel or electricity, and discharge piping from each dewatering system beyond 40 metres. It was subject to the terms and conditions set out in the Notes, and the exclusions listed Schedule A.
- [124] I reach this conclusion for the following reasons, and make the following findings of fact:
- (1) The Second Quote was prepared following the meeting and was not sent until the preliminary construction schedule had been received.
 - (2) The Second Quote was delivered on August 11, 2014 for the first time, on the same day and shortly after the preliminary construction schedule was delivered.

- (3) As indicated in the quote itself, it was prepared in part based on the meeting of July 23, 2014.
- (4) The dates set out in the preliminary schedule were reflected in the Second Quote, totalling 160 days.
- (5) The Second Quote was never signed. Neither D'Urzo nor Famiglietti was concerned about the lack of a signed quote because they were on friendly terms and trusted one another.
- (6) Both were satisfied that the negotiations on July 23 had resulted in consensus, as Atlas was asked to proceed with the installation. I find that it went ahead on Harvie's instruction.
- (7) Haferer was an honest witness who did not appear to be well versed in the issues in dispute in this litigation, as he gave answers that did not always support Harvie's position. I accept his evidence that most quotes contain conditions and that D'Urzo asked for revised pricing at the end of the July 23 meeting.
- (8) There was a second meeting between Famiglietti and D'Urzo after delivery of the Second Quote, convened specifically to discuss it. D'Urzo was satisfied with the content of the Second Quote, as he allowed Atlas' work to continue to the Project's completion.
- (9) Famiglietti and D'Urzo shook hands at that second meeting on the deal that is reflected in the Second Quote.
- (10) Harvie was required to submit a lump sum bid to Barrie for dewatering, but it was not required to accept only a lump sum quote from a subcontractor. As D'Urzo testified, he wanted that, but did not need it.
- (11) One of the reasons that D'Urzo was content with the Second Quote was that he believed that there was scope within the Prime Contract to claim against Barrie for additional dewatering services and equipment rental if the scope of the dewatering exceeded the parameters in the tender documents, or if Barrie asked for the work to be done.
- (12) The fact that additional services were included in the Second Quote explains the increase from \$200,000 to \$300,000, and this increase was not the result of Atlas capitulating to perform all dewatering work for \$300,000.
- (13) Winterization costs are extra, as Harvie has acknowledged, which is reflected in the Second Quote.
- (14) Harvie was not charged for the dewatering plan, which is reflected in the Second Quote.

- (15) Costs associated with enviro-tanks are extra, some of which Harvie has acknowledged, which is reflected in the Second Quote.
- (16) The amount charged by Atlas for enviro-tanks changed to \$1,900 from \$2,500 found in the Second Quote.
- (17) Harvie made a claim to Barrie for increased dewatering duration due to delays with the helical piles. It states that the sum of \$214,000 is claimed for 428 increased days, at a costs per day of \$500. This is the daily rate reflected in the Second Quote.
- (18) Harvie has agreed that it approved additional costs of \$277,119.40, and so the agreement was not for \$300,000 plus HST for all dewatering services.
- (19) One of the additional costs approved by Harvie was remobilization, which is listed as no. 13 in Schedule A to the Second Quote.
- (20) Harvie approved final enviro-tank cleaning at a price set out in the Second Quote.
- (21) Harvie has never objected to any of the extra charges in the invoices delivered to it until after this litigation began, either verbally or in writing.
- (22) It defies logic that Famiglietti, with his significant experience in dewatering, would agree to a fixed price contract for all dewatering services and supplies, regardless of the true length of the Project and without making allowance for contingencies and extra services and equipment.
- (23) Where the evidence of D'Urzo conflicts with that of Famiglietti, I prefer Famiglietti's version of events. Famiglietti's version of what occurred at the two meetings at Harvie's offices, and the terms of the agreement reached is corroborated by the subsequent conduct of the parties. D'Urzo's evidence is problematic. He was inconsistent about whether a second meeting had occurred, and his explanation that he believed that he was being questioned about the first meeting on July 23 is difficult to reconcile with the specific questions asked on discovery.
- (24) D'Urzo's evidence has also been inconsistent about additional costs involving enviro-tanks – first such costs were included in the base subcontract price but at trial, for the first time, he admitted they were extra. Yet those costs will only be paid if Barrie pays them. His evidence did not attempt to explain why he authorized some costs associated with enviro-tanks, such as final cleaning, but not others such as rental.
- (25) As explained below, D'Urzo's assertion that the negotiations resulted in a "pay when paid" term is not supported by the evidence, and D'Urzo's evidence on this issue is similarly problematic.

Pay When Paid Allegation

- [125] Harvie's Statement of Defence alleges that the parties orally agreed that Atlas would only be paid by Harvie for the Contract price and any additional work on a "pay when paid" basis, meaning that Harvie had no obligation to pay Atlas until or unless it received payment from Barrie. The onus is on Harvie to prove that this term forms part of the Contract.
- [126] It is admitted that Harvie is currently involved in litigation with Barrie related to payment under the Prime Contract. The amount claimed by Harvie includes some of the work that Harvie authorized Atlas to do, for which Harvie submitted a claim to Barrie. Eight years after Atlas completed its part of the Project, it has still not been paid for the amounts requested by Harvie.
- [127] If this court accepts that the parties agreed to such a term, the Contract will only become enforceable against Harvie once Harvie receives payment from Barrie: *Timbro Developments Ltd. v. Grimsby Diesel Motors Inc.* (1988), 32 C.L.R. 32 (Ont. C.A.)
- [128] Harvie must also show that it has made every reasonable effort to collect the money from Barrie or obtain a reasonable settlement: *6157734 Canada Inc. v. Bluetime Enterprises Inc.*, 2016 ONSC 1794 (Div. Ct.) at paras. 36-38.
- [129] Both parties agree that the determination of this issue will turn on a question of credibility between D'Urzo and Famiglietti: *Quadform Ltd. v. Rock Con Forming Ltd.*, 2020 ONSC 7903 at para. 58, *1473662 Ontario Ltd v. Avgrouop Consulting Services Ltd.*, 2011 ONSC 2900 at paras. 43-47, *Dirm 2010 Inc. v. Abraam Construction Inc.*, 2021 ONSC 2510 at paras. 22 and 31-36.
- [130] As earlier indicated, D'Urzo's evidence is that one of the terms discussed and agreed upon at the meeting of July 23 was the timing of Harvie's payment to Atlas. He alleges that Famiglietti agreed that Atlas' progress payments and additional payments would be made after Harvie received payment from Barrie for Atlas' work, based on the amount that Harvie was paid for Atlas' work. It is his assertion that "pay when paid" is a fact of life in the construction industry.
- [131] Famiglietti denies that a "pay when paid" arrangement was ever discussed at the meeting of July 23. His evidence is that nothing was discussed about payment at the July 23 meeting, although agreed that payment terms are an essential term of a contract.
- [132] He also testified that he had subsequent meetings with D'Urzo over the course of the Project, at least one of which involved addressing payment of Atlas' outstanding accounts. He also had lunch with D'Urzo several times after the Project ended, where he pressed D'Urzo for payment. Famiglietti asserts that D'Urzo never once mentioned during those discussions that Atlas would only be paid when he received payment from Barrie. Also, Famiglietti recalls D'Urzo advising him in the fall of 2014 that he was in a "big fight" with Barrie and requested Atlas' indulgence to wait a little longer for payment. Famiglietti agreed to wait but advised D'Urzo that the matter of payment had to be resolved.

[133] D'Urzo testified that he had several conversations with Famiglietti about payment over the course of the Project, and acknowledged that at least once he told Famiglietti that he was fighting with Barrie and asked to be given more time. This stands in contrast to paragraph 52 of his affidavit, in which he denied that he and Famiglietti ever had a conversation about Harvie's payments to Atlas, and that Harvie's issues with Barrie in 2014 were work issues unrelated to dewatering or payment.

[134] D'Urzo also conceded that during those discussions he never reminded Famiglietti that Atlas would be paid when and if Harvie was paid.

[135] D'Urzo's evidence also conflicts with the evidence given at his examination for discovery. When asked what was discussed at the meeting of July 23, 2014, he did not mention timing of payment or a "pay when paid" arrangement. After a lengthy exchange about the negotiations at that meeting, Mr. D'Urzo was asked:

Q: I understand. What else was discussed?

A: That's pretty well it.

Q: That's it?

A: Yes.

Q: I understand after the meeting – so there's nothing else of consequence that you can recall, other than it had to be a lump sum and everything was included?

A: Correct.

[136] This testimony has never been corrected or altered pursuant to Rule 31.09(1).

[137] Again, the only other individual who was present at the July 23 meeting and a witness at this trial was Haferer. When asked whether anyone said that the deal included a "pay when paid" provision, his response was that he did not recall that topic. In his affidavit, Haferer did not include that term as being part of the agreement reached that day even though he outlined what he believed to be the main points of the agreement.

[138] There is no correspondence between the parties during the period of the Project that references a "pay when paid" arrangement, nor any until this litigation began.

[139] Another significant inconsistency in D'Urzo's evidence is that he testified, unequivocally, that the \$271,974.76 (increased to \$277,119.40 at trial) owing to Atlas for approved additional work is owed to Atlas regardless of the outcome of the litigation with Barrie. This is entirely at odds with a "pay when paid" arrangement. Yet despite his evidence on cross-examination, at para. 76 of his initial affidavit he deposed that "Harvie maintains that it will pay Atlas for the authorized additional work when Harvie is paid by Barrie". These statements are not reconcilable.

- [140] This all leads to the conclusion that D’Urzo’s evidence on this issue is not reliable. It is both internally inconsistent, not corroborated by either of the other two witnesses who attended the meeting, and lacking any written corroboration once payment became an issue between the parties. It is certainly problematic that D’Urzo left out this essential term of the agreement on discovery when he was directly asked about the discussions and agreement reached at the meeting, even though given three opportunities to recollect it. However, the insurmountable difficulty in accepting that this was a term of the agreement is his unexplained mid-trial concession that Harvie will pay Atlas \$277,119.40 even if it does not recover these additional costs from Barrie, subject to anything that may have been awarded for the counterclaim.
- [141] I prefer Famiglietti’s evidence. He was adamant that Atlas has never once in its decades-long history walked away from a job because it was not getting paid; it was clearly a point of pride for him. I find that the fact that Atlas remained on site and completed its contract does not support the possibility that Atlas had agreed to wait for Barrie to pay. Famiglietti’s evidence that D’Urzo asked him to give him more time for payment because he was in a dispute with Barrie over payment was confirmed by D’Urzo and is consistent with the fact that Harvie eventually resorted to litigation against Barrie. That Harvie has pursued Barrie for these payments is not enough to overcome the shortcomings in D’Urzo’s evidence.
- [142] I find that the subcontract did not include a “pay when paid” provision.
- [143] Harvie submits that if this court finds that there was no such term, then the payment terms for this subcontract remain uncertain, as Atlas has led no evidence of payment terms and such a term cannot be implied.
- [144] The issue to be decided by this court is whether payment terms can be implied.
- [145] This issue was raised and discussed in *Marden Mechanical Ltd. v. West-Con Developments Inc.*, 2007 CarswellOnt 1629, at paras. 36-42, where Corbett J. found that there was an implied term that interim payments would be made. The court found that although the contract was silent as to payment terms, it contemplated progress draws because it would have been unreasonable to expect the contractor to perform three quarters of the contract work by building a warehouse and then wait months for payment while another building was being constructed before it could complete the contract work and get paid. He also referenced a decision of Master Sandler, *RSG Heating & Air Conditioning Ltd. v. Maxximum Design & Construction Inc.*, [2002] O.J. No. 3844 (Ont. Master), in which he held that even though there are no payment terms in a quotation, and no formal contract superseding the quotation and acceptance, the usual practice is for interim billing when a job is to take more than one month.
- [146] Neither of the two quotes created by Atlas contained a payment provision. Atlas delivered 10 invoices to Harvie, on which was listed the value of the subcontract work claimed to be completed, as well as its claims for additional work, plus another 8 invoices for even more additional work.

- [147] The evidence is clear that requests for progress payments under Atlas' base subcontract were made by Harvie to Barrie on a regular basis during the Project, and paid to Atlas.
- [148] Atlas has been in business since 1998 and Harvie has been in existence since 2010. These are companies with principals who have a great deal of experience in the construction industry. Both know that progress payments are a standard feature of construction contracting. Neither would reasonably expect to have to wait years to be paid
- [149] I find that this level of sophistication of both parties, along with the billing of monthly progress draws, allows the court to infer that interim billing and payment was an expected part of the Contract for the parties.

AMOUNT OWED TO ATLAS

- [150] The evidence filed in this case was voluminous. It required countless hours of reading and cross-referencing and additional written submissions. While not all of it is referred in these reasons, it has been considered in the determinations reached.
- [151] Determining the amount, if any, owed to Atlas under the Contract requires consideration of the following issues raised by counsel:
- (1) Whether Harvie is estopped from asserting that it is not liable for payment of the additional charges.
 - (2) Whether all additional work claimed by Atlas was authorized by Harvie.
 - (3) Whether Atlas has proven the value of the disputed work.
 - (4) If necessary, whether unjust enrichment is available.
- [152] However, none of these issues will affect a preliminary calculation of the amount owed by Harvie to Atlas, as Harvie's admissions allow for some initial determinations.
- [153] First, Harvie admits that it owes Atlas \$277,119.40, which it has not paid due to the counterclaim. Having dismissed the counterclaim and having found that there was not a pay when paid arrangement, I find that this sum, which is inclusive of HST, is currently due and owing.
- [154] Second, in addition the above amount, Harvie has made formal, written claims to Barrie for what it considers to be additional work performed by Atlas. D'Urzo referred to these claims in para. 76 of his affidavit, stating that Harvie maintains that it will pay Atlas for this authorized additional work when it is paid by Barrie. However, during his cross-examination he changed his evidence to say that paragraph 76 is not entirely correct, and that Harvie is not required to pay if it does not recover payment from Barrie.

- [155] I find that this category of claims made to Barrie requires no further analysis, as the fact that Harvie made the claim shows that it does not dispute that it authorized the work, nor its value or that it was completed.
- [156] The first amount is a claim made to Barrie by correspondence dated June 11, 2015 for \$23,220 plus HST for Atlas' supply, installation and use of enviro-tanks at Bunker's Creek. The supporting documentation indicates that it includes rental of two tanks over various periods in 2014 and 2015, mobilization and demobilization of both tanks and final cleaning of the tanks, the latter of which Atlas charged Harvie at only 50% of the cost. The rental cost is shown at \$1,900 per month. The associated cost is found at disputed items 1, 2, 4, 5, 13, 14, 15, 19, 20, 34, 35, 36 in Appendix A to the Scott Schedule. These amounts total \$23,219.99. However, Atlas' claim in relation to these rental costs and services is \$2,500 greater than Harvie's. Harvie claims that Atlas double charged for the cleaning costs, as invoice J003186 provided for only 1 unit of cleaning at \$2,500.
- [157] I disagree with this position. The supporting invoices show that there were two enviro-tanks for which rental costs were charged. It is improbable that Atlas intended to charge for the final cleaning of only one of them. The sum of \$2,500 will be added to the amount owed to Atlas, for a total of \$25,720.
- [158] The second amount is a claim made by Harvie to Barrie by correspondence dated June 11, 2015 for additional dewatering performed by Atlas at Bunker's Creek. The total cost of the additional work claimed by Barrie is \$61,254.66 plus HST. According to the description of the work, this cost was comprised of installation and maintenance of additional wells and a 6" pump. These are items 6, 8 and 10 in Appendix A to the Scott Schedule.
- [159] The third amount relates to a claim made by Harvie to Barrie by correspondence dated January 27, 2016, for increased bypass pumping requirements at Bunker's Creek. It particularized its claim in a summary attached to the letter, which included the sum of \$199,783.25 beside the description "Atlas – Pump Equipment Rental". D'Urzo's evidence is that he authorized the supply of pumps from Atlas. Having reviewed the evidence pertaining to Exhibit 42 to D'Urzo's affidavit, I find that the equipment rental was what Atlas provided, as per invoices J003916 (\$82,505) and J003760 (\$40,000). However, Harvie disputes an additional sum of \$3,100 (no. 62a and 62b on Schedule A), which is included in the amount claimed by Harvie from Barrie. In summary, there is a lack of evidence to support that the full \$199,783.25 is owed to Atlas for equipment rental. I find that only \$125,605 is owed. The amount of \$122,505 (\$82,505 and \$40,000) is already included in the \$277,119.40, leaving \$3,100 to be added to the amount owing to Atlas.
- [160] The fourth amount relates to a claim made by Harvie to Barrie by correspondence dated February 3, 2016 for costs related to helical piles. Part of the claim is the amount of \$32,860 paid to Atlas for winterizing the dewatering system and thawing out the pumps. This sum is included in the \$277,119.40. However, there is a further claim for increased dewatering duration due to delays with the helical piles. It states that the sum of \$214,000 is claimed for 428 increased days, at a costs per day of \$500. The description reads "Atlas – Sewer System, Bunkers and Dyments".

- [161] There is a dispute in the evidence about whether all of this additional time can be attributed to Atlas, yet neither D'Urzo nor Rustico could say how much of the cost could be attributed to Atlas, or to another subcontractor or to Harvie itself. Rustico, who authored the letter, stated that subcontractor's costs other than Atlas' were included in the amount of \$214,000, but could provide no supporting documentation for that contention.
- [162] Many of the disputed items in Schedule A are for additional pumping costs and daily systems operation in excess of 160 days. These are items number 16, 39, 47, 54, 58, 63, and 68. The associated amounts total \$191,500. These figures are close enough to satisfy me that Harvie is claiming from Barrie the amounts on Atlas' associated invoices for pumping and system operation over 160 days. The amount of \$191,500 shall be added to the amount owed to Atlas.
- [163] Rustico gave evidence about more of Atlas' costs that Harvie sought from Barrie.
- [164] On August 21, 2015, Harvie delivered correspondence to Barrie seeking, in part, \$9,690 for the cleaning of the tanks and lines due to iron build up and dewatering shut down. He agreed that this was an approved extra, but his evidence was not clear whether this was an extra to the Prime contract or Atlas' subcontract. However, no evidence was provided to connect this to an invoice or invoices or any of the items in the Scott Schedule or its Schedule A. I am not satisfied that this amount is not already included in the sum owing.
- [165] On January 18, 2016, Harvie delivered correspondence to Barrie seeking \$35,090.06 for extra dewatering discharge, explained to be the result of having to extend a discharge watering pipe to the nearest sanitary manhole. It is accompanied by an email from Harvie to Barrie which indicates that Atlas' charge will be \$8,050. However, no evidence was provided to connect this to an invoice or invoices or any of the items in the Scott Schedule or its Schedule A. I am not satisfied that this amount is not already included in the sum owing.
- [166] These additional amounts which have been proven as owing to Atlas total \$281,574.66.
- [167] It is now necessary to examine whether the other disputed charges are additional to the Contract.

Invoices for Enviro-Tank Rental

- [168] Enviro-tank rental is a provisional cost in the Contract. Atlas billed at the agreed rate of \$1,900 per month. Harvie has never explained why it would try to collect for some of the enviro-tank rental from Barrie at a cost of \$1,900 per month and then deny that other tank charges were authorized. There was no reason for these tanks to be rented by Atlas unless they were required to perform the requested work. The evidence satisfies me that Harvie initiated the provision of the tanks – whether that was at the request of Barrie is for another court to decide. I find that those tank rental costs which have not already been considered in these reasons were extra to the contract. These additional amounts are items 40, 41, 48, 55, 59, 60, 65 and 69 in Schedule A of the Scott Schedule, totalling \$17,199.95

Enviro-Tank mobilization and demobilization

[169] Likewise, costs of mobilization and demobilization of the tanks is a provisional cost in the Contract, at a cost of \$1,250 per tank each way. For the same reasons, I find that those costs that have not already been considered in these reasons were extra to the contract. These additional amounts are items 42, 43, 49, 61, 66 and 70 in Schedule A, totalling \$7,100.

Final Enviro-Tank cleaning charges

[170] This service is a provisional cost in the Contract at a cost of \$2,500 per tank. Harvie conceded responsibility for payment of \$2,500 and I have previously explained why that should be \$5,000. Later, in December 2015, there were two further cleaning costs of \$2,500 each. For the same reasons, I find that those costs that have not already been considered in these reasons were extra to the contract. These additional amounts are items 67 and 71 in Schedule A, totalling \$5,000.

Additional Well Charges

[171] These charges have already been considered and taken into account in these reasons.

Moving Equipment Charges

[172] The Contract allows for one mobilization only; additional mobilizations are excluded in Schedule A. Labour for additional work was agreed to be charged at \$85.00 per hour. There is a time and material report for each of these charges, charged at that hourly rate. These are items 3, 7, 9, 21, 25, 26 and 27 in Schedule A, totalling \$9,336. I find that these services and costs are additional to the Contract.

Pump Installation Charges

[173] One of these charges has already been accounted for in these reasons; the other is item 29 in Schedule A. There is a time and material sheet for this charge of \$3,970.73, which indicates that Harvie wanted a pump installed in the excavation. As I have already concluded, by virtue of the fact that Harvie made a claim to Barrie that included a pump installation cost, Harvie has acknowledged that additional pump installation is outside of the contract.

Standby Drilling Charges

[174] This item is documented as a delay on January 14, 2015 because the job site was not prepared by Vivid and drilling could not start, for which Harvie was charged. There is no time and material sheet for this charge and I am not persuaded that delay caused by other subcontractors is addressed by the Contract as an additional cost.

Vivid Additional Charges

- [175] This charge is said to be incurred due to wells having to be reinstalled due to the original ones being damaged by Vivid. The work is documented as being completed on January 15 and 16, 2015. However, no time and material sheets have been produced for these dates.

Costs for Assisting Harvie and Vivid

- [176] These costs of \$4,356.00 are recorded as being incurred on January 21, 2015. A time and material sheet records the labour costs at \$85.00 per hour, plus material including a generator, submersible pump, discharge hose and suction hose. I find that this cost was extra to the Contract.

Pumping Costs

- [177] These costs have already been considered in these reasons and found to be additional to the Contract.

Fuel Costs

- [178] Energy costs, whether diesel fuel or electricity are covered in item 8 of Schedule A, and are excluded from the Contract price. Also, Note 1 to the Contract states: "Fees exclude fuel or electrical energy for the dewatering system...". The fuel charges are items 17 and 64 in Schedule A, totalling \$16,332.39. I find that these are additional to the Contract.

Extra Piping Charges

- [179] These charges are addressed in the Contract. Note 5 provides that each dewatering system allows for 40 m of discharge piping, and that any additional piping will be extra. I find that extra piping charges are additional to the Contract and were incurred in relation to the work that Harvie asked to be done at Dymont's Creek.
- [180] These charges were set out in an email to Rustico from McIntyre at \$35 per linear meter of discharge and a charge of \$400 for the extra piping. Rustico responded on September 2, 2015 that the cost per meter was approved. These are items 46, 52, 53, 56 and 62 totalling \$93,255.00 and are extra to the Contract.

Winter Condition Costs

- [181] These costs have been admitted by Harvie to be additional to the Contract and have been accounted for already in these reasons.

Standby Charges

- [182] While there are references to delay documented by Atlas, such as in an email dated February 15, 2015 to Harvie, I am not persuaded that the Contract addresses charges associated with delays caused by either Harvie or its subcontractors.

Standby Pump Charges

[183] The same applies to these charges.

Daily Systems Operation Charges

[184] These charges have already been dealt with in these reasons and accepted as additional to the Contract.

Vac and Water Truck Charges

[185] The evidence shows that Harvie was aware of and approved the charges for one instance of the water truck supply costing \$4,752.37 and a time and material report was submitted to Harvie along with an invoice from a third-party supplier. This cost is extra to the Contract.

[186] However, it has not been adequately explained by Atlas why the balance of the charges were incurred, and specifically, why the charge is additional to the supply of a “water truck for jetting” which is included in the lump sum price.

Rental Costs for 35 kw Genset

[187] Again, item 8 of Schedule A excludes pump energy, and these costs were incurred after the first 160 days of the contract. The weekly rental cost is included in time and material reports. I find that this cost totalling \$5,015 is additional to the contract. It is associated with item 31 on Schedule A.

Discharge Pipe over 40 metres

[188] This charge of \$11,080 concerns additional pipe other than at Dymment’s Creek. It is excluded by Note 5 of Schedule A.

[189] This charge is said to be incurred on April 30, 2015, after the cost of extra piping had been approved by Harvie. In this case, Atlas undercharged at \$20 per metre.

[190] I find that this was an additional amount to the Contract.

Miscellaneous Charges

[191] The first of these are extra time charges due to a damaged swing arm, part of Atlas’ equipment. While there is a time and material report that documents the resulting labour, there is no evidence about who is responsible for the damage.

[192] The next is a cost of \$600 to move a enviro-tank to Dymment’s Creek. The Contract provides for mobilization and demobilization per tank of \$1,250 each way; Atlas provided a discount. I find that this charge is additional to the Contract.

- [193] Next are the charges associated with the 35kw Genset. Although these costs as said to have been charged in invoice J003305, no such charges can be found on that invoice and there is no associated time and material report.
- [194] The next miscellaneous charges listed as items 62(a) and (b) on Schedule A have already been accounted for in these reasons.
- [195] Next is a cost of \$2,613.60 to pump water out of a tank and to relocate and reconnect the pump and tank. There is a time and material report for this work. It was work done on October 19, 2015, beyond the 160 days provided in the Contract. I find that it is additional to the Contract.
- [196] Last is a cost of \$595.00 for placing a ramp on October 21, 2015, for which there is a time and material report for labour charged at \$85/hr. I find that this is additional to dewatering services provided by the Contract.
- [197] The total of these disputed charges found to be in addition to the Contract price is \$181,856.04.

Summary of charges additional to the Contract price

- [198] The total of all of the charges which are disputed by Harvie in Appendix A to the Scott Schedule but found by this court to be additional to the Contract price is \$463,430.70 (\$281,574.66 + \$181,856.04) before HST.
- [199] To follow the headings in the Scott Schedule for ease of reference, the calculation is as follows:

Contract work	\$300,000.00
Authorized Additional Work	\$237,839.40
Disputed Additional Work	\$463,430.70
Subtotal	\$1,001,270.10
Amount Paid	(\$292,600.99)
Subtotal owed to Atlas	\$708,669.11
HST	<u>\$ 92,126.98</u>
Total Owed to Atlas	\$800,796.09 plus interest

- [200] It remains, however, for the court to determine whether the value of the charges have been proven by Atlas and whether they were authorized by Harvie.

Estoppel and Waiver

- [201] Atlas argues that estoppel and/or waiver acts to bar Harvie from disputing that it authorized the additional charges, or that Atlas has not proven the work and its value. The basis for its submission is that there is no evidence that Harvie advanced either of these arguments until after this litigation had begun.
- [202] I find that this is the state of the evidence in this case; at no time during their dealings did Harvie object to an invoice on the grounds that the work or service was not authorized or provided.
- [203] Estoppel is an equitable defence. The test for promissory estoppel is:
1. that the party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on; and
 2. that party so relying must establish that in reliance on the representation, they acted on it or in some way changed their position.
- [204] This defence requires evidence that one of the parties entered into a course of negotiation which led the other to suppose that the strict rights under the contract would not be enforced: *Maracle v. Travelers Indemnity Company of Canada*, 1991 CarswellOnt 450 (SCC) at para. 13, citing *John Burrows Ltd. v Subsurface Surveys Ltd.*, [1968] S.C.R. 607, at p. 615.
- [205] The promise can be inferred from the circumstances but must be unambiguous: *Engineered Homes Ltd. v. Mason*, [1983] 1 S.C.R. 641, at p. 647.
- [206] To accept the submissions of Mr. Greenberg, I would have to agree that silence alone is conduct that can be intended to affect the legal relations between a contractor and subcontractor. This is difficult to accept. Further, there is no evidence of how Atlas changed its position in response. The test for estoppel is not met.
- [207] Waiver requires full knowledge of one's rights, and an unequivocal and conscious attempt to abandon them: *Trial Lawyers Association of British Columbia v. Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47, at para. 75, citing *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490, at p. 500. Similarly, there are no unequivocal words or conduct on the part of Harvie that would allow this principle to apply.

Whether Atlas has Proven the Value of the Disputed Work and Whether Authorized

- [208] Harvie submits that Atlas has not met its burden because it has not met the test for admission of business records, and no evidentiary foundation has been provided that the work was authorized and carried out.

[209] As the lien claimant and plaintiff, Atlas bears the evidentiary burden of proving the value of services and materials that it supplied.

[210] It is agreed that Atlas served a notice under s. 35 of the Ontario *Evidence Act*, R.S.O. 1990, c. E. 23 for the business records on which it relies. Subsection 35(2) of the, provides:

Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.

[211] The Ontario *Evidence Act* specifically permits the admissibility of a record based upon information given to the individual who records it, in other words, hearsay. Section 35(4) provides that “lack of personal knowledge by the maker, may be shown to affect its weight, but such circumstances do not affect its admissibility”.

[212] In *R. v. Felderhof*, 2005 ONCJ 406 (CanLII), the court set out eight requirements for admissibility under s. 35:

- a. a record made on some regular basis, routinely, systematically;
- b. of an act, transaction, occurrence or event;
- c. and not of opinion, diagnosis, impression, history, summary or recommendation;
- d. made in the usual and ordinary course of business;
- e. it was in the usual and ordinary course of such business to make such record;
- f. pursuant to a business duty;
- g. at the time of such act or within a reasonable time; and
- h. where the record contains hearsay both the maker and informant must be acting in the usual and ordinary course of business.

[213] The principles animating the admissibility of documents under the business records exception were summarized succinctly by McDonald J. in *Robb Estate v. St. Joseph's Health Care Centre*, 1999 CarswellOnt 500, at para. 13, citing *Setak Computer Services Corp. v. Burroughs Business Machines Ltd.* (1977), 15 O.R. (2d) 750 (Ont. H.C.):

In *Setak Computer Services Corp.*, Griffiths J. canvassed the policy considerations that give use to s. 36 (now s. 35) of the *Evidence Act*. I set out some principles which emerge from *Setak Computer Services Corp.* which, I hope, will guide counsel in this case. First, the record or writings must be made in the usual and ordinary course of business as opposed to some purely private or personal activity; second, the record or writing must have been made at the time of the event or within a reasonable time of the event; third, the circumstances surrounding the making of the document affects weight rather than admissibility; fourth, the documents, if created pursuant to a regular business duty, are presumed to be reliable; fifth, the policy consideration behind s. 35 are obvious but, for emphasis, I repeat them. It is to assist in the proof of an event on the assumption that the document which records or refers to the event is trustworthy and, depending on the circumstances surrounding the creation of the document, *prima facie* proof of the facts recorded therein; sixth, the mere fact that a document is in the possession of a party (and, as such, may appear in the affidavit of documents) does not cloak the document with proof of the truth of its contents.

- [214] Except where I have previously found them to be missing, all of the charges are supported by time and material reports that have been completed on the day that the labour or material was provided. Most contain a description of why the work was necessitated, and sometimes indicate that someone at Harvie directed the work to be performed. Based on the language in the description and the similar handwriting, they appear to have been prepared by the person who was actually on site to perform the work or observe the work, and signed by a representative of Atlas. There is no reason that arises from the evidence for those record keepers to be motivated to fabricate the work done or time spent. Where applicable, source document were provided along with the time and material sheets to Harvie at the time that the invoices were submitted.
- [215] The number and consistency of the time and material reports shows that they were prepared routinely, and that it was in the ordinary and usual course of business to make such a record. These were then used to prepare the formal invoices and are reflected in an ongoing, more detailed chronology of the work that was added to by Atlas over time.
- [216] All of this leads to the conclusion that the records are accurate and trustworthy. I find that the time and material sheets and the corresponding invoices were all prepared by Atlas in the usual and ordinary course of business, at or within a reasonable time from when the work was performed.
- [217] The large evidentiary record is sufficiently clear and convincing to allow this court to find that Atlas saw the Project through to completion even as it was presented with many challenges: delays caused by directions from Barrie, delay caused by other subcontractors, winter weather, and increased labour and material costs.

- [218] The evidence supports the finding that Atlas delivered the supporting documentation as referenced above with respect to its claim with each of its invoices. Roberto Santarelli was Atlas' estimator/project manager with responsibility for internal review and supervision of the Project. As has been noted several times, it was only after this proceeding was begun that Harvie raised the objection that the work was not authorized. Santarelli's evidence is that there are no corporate records or other documentation in which Harvie raised any issue or dispute about Atlas' entitlement to payment of the extras outlined in the invoices. While Santarelli did not create the business records at issue, he familiarized himself with the documents relating to the Project and the invoicing done up to the time that he joined Atlas in February 2015 when the Project was ongoing, and was responsible for it thereafter.
- [219] I find that Harvie has taken an arbitrary approach to what it has decided was authorized by it or not, and whether Atlas has performed the work reflected in the invoices. There has been no rationale basis advanced for the position taken. Harvie's approach has simply been "prove it", although it has not been able to present any documentation to show that it made an objection to the content of the invoices, or the supporting documentation.
- [220] This is a situation where there is more than just silence on the part of Harvie. The ongoing reporting by Atlas through its invoices without any written or verbal objection, and the fact that Harvie's personnel were on site and aware of Atlas' work, often with documentation showing that it was requested by Harvie, supports the conclusion that Harvie was aware of and approved all additional work. The fact that it approved some of Atlas' work, and claimed it from Barrie, shows that Harvie was keeping oversight during the Project. The fact that Harvie was content with Atlas' performance is inconsistent with a finding that Atlas was charging for work either not done or not requested to be done. I find that D'Urzo was initially not particularly concerned with the additional costs charged by Atlas during the Project, as he thought that there was room within the Prime Contract to recoup those costs from Barrie. That has proven to be harder than he may have thought, but that is no reason for Atlas not to be paid for the work done in good faith and for Harvie not to be held to the Contract.

ORDER

- [221] This court orders and adjudges:
- (a) Atlas shall have judgment against Harvie in the amount of \$800,796.09 inclusive of HST.
 - (b) The defendant shall pay prejudgment interest on this sum from March 4, 2016 pursuant to s. 128 of the *Courts of Justice Act*.
 - (c) As requested by counsel for both parties, they may have an opportunity to make brief written submissions on the rate of prejudgment interest. The submissions shall be no longer than 3 pages and are due by April 22, 2024. Counsel are to work out their own timetable for this exchange, if necessary.

- (d) Submissions on costs will be requested after a decision is made on the prejudgment interest rate, if costs have not already been agreed to by the parties by then.

Madam Justice S.E. Healey

Released: March 25, 2024