IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Integrated Contractors Ltd. v. Leduc Development Ltd.,* 2016 BCSC 1984

Date: 20161028
Docket: S128886
Registry: Vancouver

Between:

Integrated Contractors Ltd.

Plaintiff

And

Leduc Development Ltd.

Defendant

And

L & M Engineering Limited

Defendant by Counterclaim

And

L & M Engineering Limited

Third Party by Counterclaim

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

Counsel for Leduc Development Ltd.: A.J. Winstanley

Counsel for L & M Engineering Limited: T. Goepel, M. Stainsby

Place and Date of Trial: Vancouver, B.C. January 25-29, 2016 February 1-5, 9-12, 15-17, 22-23, 25-26 and February 29, 2016

Place and Date of Judgment: Vancouver, B.C. October 28, 2016

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A. OVERVIEW

[1] This trial was about the failed construction of a subdivision in Fort Nelson, British Columbia. The defendant, Leduc Development Ltd., purchased from the Crown a parcel of undeveloped land of just over 23 acres in April 2004 for $600,000 (the "Property"). The Property was zoned for residential, single-family dwelling and duplex construction. Leduc decided it would subdivide the Property and build residential homes on it in three phases.

[2] L & M Engineering Services Limited was hired to assist with the first phase (the "Subdivision"). In the fall of 2005, Leduc hired the plaintiff, Integrated Contractor Ltd. ("ICL"), as a general contractor.

[3] The Subdivision did not succeed due to a number of factors. ICL was not fully paid so it filed a claim for a builder's lien and breach of contract against Leduc. Leduc responded to that claim and also filed a counterclaim alleging breach of contract and negligence against L & M. Leduc settled its law suit with ICL. The case before me was the trial of Leduc's counterclaim against L & M.

[4] The parties did not agree what this trial was about. Leduc accepts L & M was hired to provide engineering design services, but it alleges L & M also became the Subdivision's project or construction manager. Leduc alleges as project manager, L & M was obliged by its common law and contractual duties to ensure the timely construction and cost effectiveness of the Subdivision. Leduc claims L & M breached those duties, which resulted in delay of construction and financial collapse of the Subdivision. It seeks damages for its lost investment, and damages resulting from loss of opportunity to earn profit on all three phases of land development.

[5] L & M submits Leduc has mischaracterized L & M's role on the Subdivision. L & M's position is that it only provided engineering inspection services and it did so in compliance with both its common law and contractual duties. Its position is that most of the evidence Leduc adduced at trial was irrelevant to the legal issues before me.

[6] Having considered the pleadings in detail and the evidence, I conclude that Leduc's case was entirely dependent upon its assertion that L & M was the project manager. Leduc submitted L & M failed to perform a number of duties Leduc argued are inherently part of project managers' duties, and the evidence it called focussed on those alleged deficiencies.

[7] However, I have concluded that Leduc has failed to prove on a balance of probabilities that L & M was project or construction manager, or that L & M was in any other way responsible for the delay of construction. I have also concluded that Leduc focussed on legal claims that are not in the pleadings, and thus, a lot of the evidence it adduced at trial was irrelevant. But even if that evidence had been relevant, it does not support Leduc's theory of its case.

[8] All claims against L & M are dismissed.

B. WHAT IS AT ISSUE IN THIS CASE?

[9] Leduc applied to amend its pleadings prior to trial but that application was denied (the amendments that were disallowed are contained in Appendix A): *Integrated Contractors Ltd. v. Leduc Development Ltd*. (September 26, 2014), Vancouver Registry No. S128886 (BCSC). L & M successfully argued that Leduc's proposed amendments would fundamentally alter the scope of the trial to L & M's prejudice, and would jeopardize the trial date. Leduc's position was that no new claims were being advanced; it said the amendments were simply a particularization of existing claims.

[10] The Master did not agree with Leduc's position. She characterized the amendments as a "sea change" in the claims. She reasoned that if the amendments were allowed, L & M would have to conduct further investigations including document discovery, witness interviews and examinations for discovery. She also noted the causes of action sought to be added to the claim by Leduc were clearly out of time (para. 12). L & M had pointed out that the counterclaim contained "no actionable allegation against L & M for anything that occurred before August 2005" (paras. 7 and 10) but the proposed amendments implicated events prior to that time.

She found the prejudice to L & M out-weighed the prejudice to Leduc. The application was denied.

[11] The Master did recognize the prejudice to Leduc in not allowing the amendments. She said while triable issues were effectively "taken away" by her ruling, "Leduc can still make its claim and argument for delay on the pleadings that will stand at trial" (para. 17). Leduc submits that sentence renders relevant evidence that falls squarely within the language of the disallowed claims in two ways. First, it says the evidence is background in support of its claim for delay. Secondly, Leduc says the evidence is relevant to the duties L & M took on as "project manager".

[12] Leduc's position is a reiteration of its position before the Master that the proposed amendments did not create new claims, but merely particularized the existing claims against L & M. The Master rejected that submission, as do I. The case Leduc presented in court was not, for the most part, grounded in the pleadings. Instead, Leduc lead a large amount of evidence only relevant to the rejected amendments.

[13] Two examples are illustrative. First, Leduc adduced a large amount of evidence about differences between L & M's preliminary and detailed design engineer's estimates and the estimate prepared by ICL. Leduc submitted L & M knew or should have known that ICL's estimates were too high; or, Leduc alleges that difference proved L & M's estimates were too low and L & M should have updated its estimate. Leduc submits that knowledge ought to have spurred L & M to find another contractor or "force" a lower price on ICL. Leduc argues these failures by L & M were a breach of its contractual and common law duties and that they led directly to delay in construction, causing the project to collapse.

[14] But one of the disallowed amendments specifically alleged that L & M was liable for underestimating the cost of the Subdivision:

> . . . L & M Engineering breached its Retainer Agreement and/or its duty of care to Leduc, in that it negligently; (a) Underestimated to a significant degree the costs of developing the Subdivision Project; . . .

[15] Secondly, Leduc argued that L & M's decision to suspend full time inspection on the site at the end of October 2004 constituted negligence and breach of contract. It is during that time that deficient work was done on the installation of the shallow utilities which resulted in remedial work and construction delays the following spring. Again, this allegation is specifically encompassed in a rejected amendment that stated L & M "failed to inspect the work of subcontractors to ensure that the underground electrical utilities were properly installed" (para. 13(j), Appendix A).

[16] Those claims were explicitly prevented by the Master from proceeding to trial. These are two examples of Leduc focussing on the disallowed claims; many examples exist. The trial was significantly lengthened because of Leduc's failure to confine its evidence to the claims that were before me.

[17] Leduc did not appeal the Master's decision. L & M's position is that most of Leduc's evidence at trial was irrelevant. On that basis, L & M's counsel objected to a large amount of evidence presented by Leduc, but he did so on a categorical basis to avoid constantly interrupting Leduc's evidence and slowing down the trial. This was an appropriate approach in the circumstances.

1. The Pleadings

[18] Because the parties did not agree on what this trial was about, I rely on the pleadings. I have paraphrased from "Part 3: Legal Basis" of Leduc's Further Amended Counterclaim filed August 11, 2015 (starting at p. 27). The claims made against L & M as follows (followed by the paragraph reference from the counterclaim):

a) There was an implied term of the contract between Leduc and L & M that the latter would use reasonable care and skill, diligence and competence in "carrying out the various engineering services" and "the various professional roles" it assumed between April 2004 and March 2007 [para. 1].

b) L & M owed a duty of care to review construction progress, ensure work of subcontractors was carried out expeditiously, interpret contracts and ensure ICL carried out its contractual duties [para. 2].

c) "To the knowledge of … L & M Engineering, the ordinary consequences that should follow in the usual course of things from their breach or breaches of contract or L & M Engineering's breach of duty of care would be" the following "losses" suffered by Leduc:

    i. opportunity to earn profit from the failed contracts for purchase and sale of houses [para. 3(a)];

    ii. ability to participate in and earn profit from the build-out of further phases of the Subdivision, or the Property in general [para. 3(b) and (c)];

    iii. Leduc would suffer economic loss including carrying costs and accrual of interest, downturn in market price of houses [para. 3(d) and (e)]; and

    iv. extra engineering costs and legal expenses [para. 3(f) and (g)].

d) In the alternative, the losses listed above "were the types of losses that would ordinarily have been in the reasonable contemplation of ICL and L & M Engineering at the time" when their agreements and contracts (presumably with Leduc) were made.

e) Leduc suffered and continues to suffer loss and damage.

[19] In support of these claims, Leduc asserts facts at p. 20 of the counterclaim: "Part 1: Statement of Facts". My summary of those assertions (followed by references to the paragraph from the counterclaim) is contained in Appendix "B".

[20] Viewed together with the legal basis asserted in the counterclaim, I find that Leduc's entire case rests on its contention that L & M ceased simply to be the

engineer for the Subdivision and became its project manager (I find the phrases "project manager" and "construction manager" are interchangeable).

[21] Distilling the claim to its essential elements, to succeed Leduc must prove on a balance of probabilities that:

a) L & M agreed to, or in the alternative did, expand its role on the Subdivision beyond providing initial design and engineering inspection services, and became the Subdivision's "project manager".

b) Project managers have a duty of care to ensure, among other things, that construction is proceeding expeditiously, to monitor costs to prevent cost overruns and compel subcontractors to carry out their contractual duties.

c) Together with (a), or in the alternative, once L & M became project manager, its contract with Leduc was broadened to impose on L & M additional duties to monitor construction work to ensure it was proceeding expeditiously, and to monitor costs to prevent cost overruns and compel subcontractors to carry out their contractual duties.

d) L & M failed to ensure construction work was completed expeditiously, failed to prevent cost overruns and failed to compel subcontractors to carry out their contractual duties, thus breaching its duty of care and contractual duties to Leduc.

e) These failures delayed construction.

f) The delay caused the project to collapse, resulting in financial losses for which L & M is responsible.

[22] As I explain in this decision, I find the evidence does not support a finding that L & M was the project manager, or that it took on any duties akin to those of a project manager. I find L & M provided engineering services, including construction inspection services, but it did not manage the construction or purport to direct how

and when work was done. Accordingly, Leduc's claims fail because it has not proven a material fact that is the fulcrum to all of its claims against L & M.

[23] In addition to failing to prove a material fact, Leduc's case has another major evidentiary deficiency. It led no expert evidence about the duty or standard of care for engineers, project managers or construction managers. These are matters beyond the ordinary knowledge possessed by a trial judge. Thus, even if I had made a finding that L & M became the project manager (which I have not), Leduc did not adduce expert evidence to establish what the standard of care was and how it was breached in this case; its claim in negligence would have failed on that ground alone: *International Culinary Institute of Canada Inc. v. Grant Thornton LLP*, 2010 BCSC 541 and *Bergen v. Gerald Guliker*, 2015 BCCA 283 at para. 106.

2. The Legal Principles

[24] Apart from the insufficiency of evidence to support Leduc's factual assertions, I also find Leduc's legal claims are not supported by the evidence.

[25] Leduc's case is that L & M breached its contractual and common law duties as project manager which caused a delay in construction which caused the Subdivision to fail. Leduc focussed on three duties it argued L & M failed to fulfill: ensuring timely completion, preventing cost overruns and compelling subcontractors to complete contracts. Leduc adduced a lot of evidence at trial attempting to prove these three sub-issues, but the evidence did not establish the factual precondition that L & M was project manager. Leduc failed to prove on both an evidentiary and legal basis that those duties were the responsibility of L & M.

[26] In terms of delay, Leduc relies on *Hick v. Raymond & Reid*, [1893] AC 22 (HL) as the authoritative case. Leduc also referred me to two text books that refer to *Hick* in support of its claim. Leduc was not entirely clear about the basis upon which it asserts L & M could be held responsible in damages for construction delay. At times, Leduc advanced delay as an independent tort, and at other times it was presented as an element of L & M's negligence. In any event, Leduc emphasized its reliance on *Hick* as the leading authority in support of its claim.

[27] I do not find *Hick* helpful. The issue in *Hick* was whether timeliness could be implied into the terms of a contract regarding the unloading of a ship's cargo. The co-signee of the ship had a contract requiring that it unload the ship's cargo but, because of a strike by local dock workers, the goods were not unloaded for over a month after docking. The ship owner then sued the co-signee for damages arising from "the unlawful detention of the ship for an unreasonable time" (at 23).

[28] The House of Lords held that, as the contract stipulated no deadline for unloading the ship, the co-signee was required to unload the ship's cargo within a reasonable time. This approach was in conformity with a principle "as old as the law of contract" which states that if the language of a contract does not expressly or by necessary implication fix the time for the performance of a contractual duty, then the law will imply that it should be done within a reasonable time.

[29] The House of Lords found that the co-signee was not liable for any damages, because a "reasonable time" must be calculated not in the abstract, but by taking the specific circumstances of the situation into account. In *Hick*, that meant considering the disruption caused by the dock workers' strike, which lead to a finding that the delay in unloading was not unreasonable.

[30] *Hick* was referred to in the dissenting reasons of Justices Locke and Cartwright in *Patchett & Sons Ltd. v. Pacific Great Eastern Railway Co.*, [1959] S.C.R. 271[1]. That case also considered timely delivery of goods, but the specific legal issue related to the interpretation and application of a statutory provision, and the case is therefore of no application to the facts before me.

[31] *Hick* is not a case about tort law, so the only possible relevance of *Hick* is to Leduc's contractual claims. The parties agree they did not have a written contract. Therefore, Leduc must persuade me on a balance of probabilities both that L & M contracted with Leduc to become project manager and that it is reasonable to

[1] It is also referred to in *Henry Hope & Songs v. Canada Foundry Co*, (1917), 39 D.L.R. 308 (Ont. CA) but the court's reference in that case simply affirms that if a party has no control over the cause of delay it cannot be held liable in contract for that delay.

assume that the unwritten contract Leduc had with L & M explicitly or implicitly included a term regarding timeliness that was broad enough to make L & M liable for construction delays.

[32] The law is clear that courts will not readily imply terms into contracts. Implied terms are not found unless it is so obvious that the parties agreed to those terms without expressing them in the contract, and that they are necessary in a business sense: *Bentsen Consulting Ltd. v. Nicola Native Lodge Society*, 2005 BCSC 1791 at paras. 24 to 26.

[33] It may be that it is necessary from a business sense that a project manager have a contractual duty to perform its duties on a timely basis (but I make no finding on that point), but I was not directed to any case that specifically confirms such a term should be implied if it is not explicitly contained in a project manager's contract. In any event, as I discuss later in these reasons, I do not find the evidence supports a finding that L & M caused any delay in the construction; in my view, its actions were timely.

[34] Also, Leduc cannot succeed in establishing L & M breached implied contractual terms when Leduc cannot stipulate the terms. Leduc did not describe in its pleadings or during final submissions what the implied terms of the contract it submits L & M violated were.

[35] Leduc also submits that explicit and/or implicit terms in its contract with ICL imposed on L & M "project manager" duties. L & M was not a party to that contract. Leduc points to *Homes by Jayman Ltd. v. Kellam Berg Engineering & Surveys Ltd.*, 1995 CanLII 9065 (ABQB); aff'd (on liability issues) 1997 ABCA 308 for support for its position. I note in passing that the Alberta Court of Appeal commented that the liability issues in the case were "made difficult by the very complicated expert evidence" (para. 4); I have already pointed to Leduc's lack of expert evidence to be a major flaw with its case.

[36] In any event, in *Homes*, an engineering company was found to have an implied duty to inspect and perform "some level" of supervision over the actions of a contractor, despite the fact that the engineering company was not a party to the contractor's contract. The trial judge found that considering the contract as a whole, it did "give rise to a reasonable assumption on the part of the Plaintiff that the Engineer would, at the very least, carry out some inspection duties" … and the contractual terms "help[ed] determine the nature of the relationship between the Plaintiff and [the engineering company" (para. 52). But the trial judge also found "[i]t is a little more difficult to conclude that the contract required the Engineer to supervise the work" (para. 54), although ultimately she concluded that the "duty to inspect … implies some level of supervision". She concluded that the engineer had an implied duty to "carry out some inspection of the work … as well as some supervision" but it failed to do so. Interestingly, the only contract clause reproduced in the trial decision that refers to "supervision" places that duty on the contractor (para. 48) whereas all the clauses mentioning the engineer use inspect or inspection.

[37] L & M admits it had a duty to inspect. As discussed below, if supervision means "directing" work, L & M denies it had that duty. Unfortunately, it is not clear exactly what the trial judge in *Homes* meant by "supervise" as differentiated from "inspect", but that was immaterial because she concluded on the facts had the Engineer complied with its duty to inspect, the defects would have been found (para. 52).

[38] In my view, *Homes* does not go as far as Leduc suggested it did with regard to the imposition of duties on a non-party to a contract. At best, there are obiter comments in the decision that an engineer's inspection duties inherently includes some level of supervision, but neither term is defined, so the facts of what the engineers in that case physical did were determinative. What *Homes* does not do is support Leduc's allegation that its ICL contract imposed project management duties on L & M.

[39] Moreover, Dave McWalter prepared the contractual documents for Leduc and he testified that L & M never performed project manager duties, and as he understood it, no terms in ICL's contract with Leduc altered that. Leduc did not call any witnesses from ICL that supported its claim on this point. I draw an adverse inference from the failure to call an ICL witness. Accordingly, I find no reliable evidence support's Leduc's position on this point.

[40] L & M admitted that generally speaking there would be an implied term in its contract that it would carry out its engineering, design and inspection services with reasonable skill, care and diligence. The evidence does support L & M's position and I find that L & M fulfilled its engineering, design and inspection duties responsibly, diligently and in a timely fashion.

[41] Leduc's claim of negligence against L & M as project manager is based on the same factual assertions as its breach of contract claim but, as noted above, there was no expert evidence about the standard of care of a project manager (or engineer) and whether the standard was breached in this case. So, even if a factual foundation existed for the negligence claim (and I find it does not), Leduc failed to adduce the evidence necessary for me to assess the claim.

[42] Leduc has failed to prove a material fact essential to all aspects of its claim. L & M was not project manager and did not purport to undertake project manager duties. Leduc's entire claim fails on that basis alone. I move on to discuss the evidence in the case that leads me to that conclusion.

C. BACKGROUND AND WITNESSES

[43] Leduc is a company owned by Lawrence Fix who lives in Richmond, British Columbia. The company was created for the purpose of developing the Subdivision. Mr. Fix paid about $400,000 of the purchase price for the Property and Ken Wevers, an investor, paid about $200,000.

[44] Mr. Fix is retired and has a background in housebuilding but no experience with building residential subdivisions in northern British Columbia. Mr. Fix is the sole

shareholder of Leduc. Mr. Fix's long-time friend and associate, Ed Renyk, is a director and the financial officer of Leduc. Mr. Renyk has been a chartered accountant for 40 years and also considers himself retired.

[45] L & M is an engineering firm located in Prince George. It was retained by Leduc to assist in designing the development on the Property, and to act as the Subdivision's engineer. David McWalter is the president and a director of L & M. Konrad Dunbar worked for L & M during the relevant times. Mr. McWalter and Mr. Dunbar were the two witnesses called by L & M.

[46] Leduc called 10 witnesses and relied on read-ins from the examination for discovery of David McWalter. In addition to Mr. Fix and Mr. Renyk, Leduc relied upon the testimony of:

1. Bill Myers – Mr. Myers is Mr. Fix's nephew. He worked on the Subdivision until he had a falling out with his uncle. Mr. Myers believes he is owed about $23,000 for work he did on the Subdivision for which he was not paid. He left the site in October 2005 and did not return. He has not spoken to Mr. Fix since 2006.

2. Myrna Blake – she has been a real estate broker since 1991. She co-authored an expert report that Leduc introduced into evidence. She was also hired by Leduc to try to market the Subdivision.

3. Sandra Shofner-McKee – she was the managing broker and realtor of Re/Max in Fort Nelson. She was qualified to give opinion evidence as a professional realtor with a specialization in the residential market in Fort Nelson. She was the other author of the expert report.

4. Ken Wevers – he is a retired contractor with experience in concrete and house construction and he was an investor in the Subdivision.

5. Samuel Moffett – he is a builder who constructed one of the houses on the Subdivision and testified about what he believed the plan was for building the remainder of the houses.

6. Lawrence Sheldon – he is with a small, private lending firm called Medallion which invested in the Subdivision by granting a mortgage to Leduc. Leduc defaulted on that mortgage.

7. Peter Toustousras – he was a technologist with L & M who was the resident inspector on site daily in September and October, 2004.

8. Barclay Pitkethly – he was a senior planner with the City of Fort Nelson from 2001 to 2006.

1. Credibility and Reliability of Witnesses

[47] Mr. Fix is retired as is Mr. Renyk, and both men are in their 70s. They each testified about health issues that have negatively impacted their memory and, to a lesser extent, their concentration. I acknowledge and appreciate their candour about that.

[48] Despite those challenges, both men generally had a fair to good recollection of the major events and the sequence of events pertinent to the case, many of which happened over 10 years before trial. However, at times it was clear to me that Mr. Fix's memory was impaired. Other factors also cause me to question Mr. Fix's reliability and credibility as a witness. Mr. Fix was reluctant to admit to obvious facts that were inconsistent with Leduc's theory of the case, sometimes even when confronted with a document that was consistent with L & M's position. A large amount of his testimony was based on his beliefs, assumptions or thoughts that were contradicted often by other testimony and/or documents. I also find at times he was less than forthright, especially about financial matters. I therefore place reduced weight on his testimony.

[49] The impact health issues had on memory was more evident with Mr. Renyk. He was asked to explain financial documents he prepared at different points in time, and was specifically asked to identify what particular line items on those documents represented. He found this challenging, which is not unreasonable given the volume of documents and time that has passed; but I find the degree and nature of his lack of recollection was not completely accounted for by the passage of time. His explanation about how a particular expense or item was treated in his accounting was often confused or unclear, even when reviewing documents. Thus, reliance on his standard practice did not always clarify his testimony or assist his memory. It was also obvious that Mr. Fix was the controlling mind of the Subdivision and Mr. Renyk's role was secondary. I find those factors do diminish the reliable of Mr. Renyk's evidence. However, I find Mr. Renyk to be genuine and honest in his testimony and he clearly attempted to do his very best to answer any question. I have no concerns about Mr. Renyk's credibility.

[50] Samuel Moffett testified on behalf of Leduc. He had a serious accident in March 2008 and sustained a brain injury impacting his memory and language. Because of that, his evidence is less reliable and I approach it with caution.

2. Leduc's Expert Evidence

[51] Leduc relied on an expert report co-authored by Ms. Blake and Ms. Shofner-McKee. Both were cross-examined on that report. I find the report unreliable and place no weight on it for a number of reasons.

[52] As a starting point Ms. Blake, and to some lesser degree Ms. Shofner-McKee, was retained to market some portion of the Subdivision at different times. It is problematic to rely on experts who were themselves participants in the history of sales, and who gave advice to one of the litigants: *Emil Anderson Construction Co. v. British Columbia Railway*, 1987 CarswellBC 173.

[53] But more importantly, it became clear during their cross-examinations that the report was not truly a joint report, as represented. Counsel's letter of instruction to both women specifically stated that if "a particular section of your joint report is the

work or the opinion of just one of you, please indicate where that is the case and the extent to which that is the case". Ms. Shofner-McKee described in her cross-examination that the report had "her portions" and "Ms. Blake's portions". The report does not reflect that, and that dissonance alone diminishes the weight I place on the opinions expressed in the report.

[54] Ms. Shofner-McKee also agreed in cross-examination that she disagreed with the values in the report placed on executive homes but that she "conceded" the point to Ms. Blake. Ms. Shofner-McKee's view as expressed in correspondence to Leduc and Ms. Blake was that it was very difficult to sell undeveloped lots in Fort Nelson and pre-sales were not common. She agreed in cross-examination that her view on this point has not waivered. That view is contained in the original report, but it was removed from the final copy. Ms. Shofner-McKee seemed surprised by that and could not explain the deletion.

[55] I find Leduc did not prove the assumptions upon which the report was based, and lacked evidence about other critical aspects of the report. Leduc provided no expert evidence as to what it would cost to build a home in Fort Nelson, yet it bases its claim for damages on what it says was its expected return on investment which is dependent upon both sale prices and house construction costs. While Leduc's witnesses testified about their "plan" for building houses in relation to cost or timing, no reliable evidence buttressed their beliefs. Moreover, I found that testimony vague and unsubstantiated.

[56] The report itself has deficiencies. It notes that the type of home built would dictate the price, but the report did not identify what types of houses the authors assumed would have been built or sold. Also, the report is based on having a builder certified by the Home Protection Office ("HPO"), but Leduc led evidence that wanted to hire Mr. Moffett, who was not an HPO builder. Also, the report is based on one of the homes (5618 Birch Dr.) being the reference point for value of proposed lost lots sales, but that sale was not an arm's length transaction. Both experts agreed an arm's length transaction is the best indicator of a property's value.

[57] I also find that the report was prepared to advocate for Leduc's opinion rather than assist the court. While the factors below may not individually reveal a predisposition in the opinion, considered together, especially in light of the experts' testimony, I find Ms. Blake and Ms. Shofner-McKee did not maintain the neutrality expected of an expert witness. A number of factors lead me to that conclusion:

a) Ms. Shofner-McKee wrote to Ms. Blake in a July 2, 2014 email that she assumed that they were "to answer yes to all of the questions asked". Ms. Shofner-McKee did not adequately explain in her testimony why that should not be interpreted as her approaching the opinion with a pre-determined answer.

b) In an email to counsel for ICL on September 10, 2010, Ms. Shofner-McKee comments on the possibility she would be a witness for ICL and stated: "My general thoughts on the Angus subdivision were and continue to be that Leduc was convinced that there was a higher market than there was for executive homes and for land". This appears to contradict the opinion she signed where it states that "at least 16 homes would have sold" in the 12 months starting October 2006, "sales prices of the built-out lots would have been in excess of $400,000", and "demand for 24 build out lots in Phase 2 would have continued at the same rate".

c) Ms. Blake emailed Leduc's counsel on July 7, 2014 and stated: "This is the draft of the opinion … we need to know if this is on the right track insofar as answering what needs to be answered". The next day, counsel confirmed by email that he would provide "his input" later that day.

d) In an email dated July 8, 2014 to Ms. Shofner-McKee, Ms. Blake stated: "It will be really important for our opinion for the reasons that the lots in [other subdivisions] selling today … both developers, I believe, initially insisted that they do the building of the homes (that was a deterrent as people like to have choice) and the personal facts plus choice regarding not doing so much. Otherwise … we will be hit with … well you say they would have

sold but look the [other subdivisions] are sitting here and not selling … we need to explain why not". I find this reflects a pre-disposition about the opinion before it has been prepared.

e) Ms. Shofner-McKee responds to that email by expressing her view that it was "very difficult" to sell bare lots in Fort Nelson. This view was eventually removed from the joint opinion.

f) On September 15, 2015, Ms. Blake emails Ms. Shofner-McKee and states: "Apparently [Leduc's counsel] made an error in the question re; the opinion … we need to revise as per the attached." She asks Mr. Shofner-McKee to initial the removal of the following sentence from the opinion: "At this rate the full 24 homes of Phase 1 would have been sold out by June 1, 2008". Neither witness could clearly explain what error was in the question Mr. Winstanley posed, or why that error required the removal of a sentence in the report. In fact, their testimony on these points was inconsistent; neither had a good recollection. What is clear is that the opinion was changed based on information provided by counsel which neither expert could clearly explain or describe.

g) The report refers to one of the homes being purchased for $435,000 and Ms. Blake opined prices probably would have steadily increased by about 10% each year. Ms. Shofner-McKee's response to an email from Ms. Blake was: "[G]ood … we actually have the data to support" [my emphasis]. However, that home was listed for sale at trial for less than what it was purchased for ($423,000).

[58] For all these reasons, I place no weight on the expert opinion.

D. ISSUES

[59] The following issues arise:

a) Was L & M the project manager for the Subdivision?

b) What caused the delay?

c) Did Leduc suffer a loss because of L & M's actions?

1. Was L & M Project Manager?

[60] The nature of L & M's role is central to Leduc's case. Leduc alleges that L & M was carrying on business as professional engineers who were providing engineering services, and at some later point, "project management services" for the Subdivision.

[61] L & M's position is that at no point did it agree to perform, nor did it perform, any type of "management services". In its response to the counterclaim L & M says in April 2004 it was retained to provide only the following professional engineering services:

> (a) L & M would revise Leduc's conceptual layout of the proposed Subdivision in order to increase density.
>
> (b) Once the layout was revised, L & M would submit an early application for subdivision approval on behalf of Leduc to the town of Fort Nelson.
>
> (c) L & M would seek the approval of the responsible Ministry to commence clearing of the Property on behalf of Leduc, and L & M would assist in securing a survey and geotechnical report, which were required for construction.
>
> (d) L & M would provide a preliminary construction cost estimate to Leduc and the latter would use that to market the Subdivision and secure financing.

[62] These conditions are explicitly set out in an April 8, 2004 letter Mr. McWalter wrote to Leduc in which Mr. McWalter said he was confirming the agreement that arose from their recent meeting. No mention is made of other professional services, or anything akin to management services.

[63] Leduc agrees L & M was retained for those services listed above, but submits L & M took on a greater role as construction proceeded. Many documents and L & M's witnesses' testimony contradict Leduc's position.

[64] Leduc did not lead evidence that there had been an explicit discussion or communication between the principals of the parties (Mr. Fix and Mr. McWalter) about L & M becoming project manager or significantly expanding its role. I acknowledge that Leduc's two main witnesses (Mr. Fix and Mr. Renyk) believed that L & M had taken on this role, but I find those beliefs have not been proven on a balance of probabilities.

[65] The best evidence from Mr. Fix is that he "assumed" L & M was responsible for a number of things he associated with project management, or he thought L & M should have been responsible for those same things. I find his beliefs were either based on unproven assumptions or contradicted by other more reliable evidence. In my view, the evidence adduced at trial overwhelming supports L & M's position. In particular, I find Mr. McWalter's and Mr. Dunbar's testimony was persuasive. They were credible and reliable; their evidence was consistent between each other and consistent with the documents. Both were clear and firm that L & M's role on this project was as engineers performing inspection functions.

a. Examination for Discovery Read-ins

[66] Leduc led evidence that directly contradicts its claim and supports L & M's case. The following exchanges from the examination for discovery of Mr. McWalter were read into the record by Leduc:

> 94 Q And you say that position [held by Mr. Greer] was one of site supervisor?
>
> A I would say a better definition of Mr. Greer's responsibilities were construction manager.
>
> . . .
>
> 99 Q And who supervised the work of those subcontractors?
>
> A Mr. Greer supervised the work of those subcontractors.

100 Q And who inspected the work of those subcontractors?

A L & M Engineering inspected the work to ensure that the requirements of the subdivision bylaw of the Town of Fort Nelson were adhered to.

101 Q Okay. So am I correct in saying that at all times L & M Engineering performed an inspection function?

A That is correct.

. . .

334 Q In the amended response to counterclaim, in paragraph 8, you describe the role of the site supervisor and the role of the project monitor. I accept that you don't like the term "project monitor," but the definition of "site supervisor" includes the hiring and managing of all trades that participated in the subdivision's construction. You see that?

A Again, that's a horrible definition.

335 Q Site supervisor is a horrible definition?

A M'mm-hmm, yeah.

336 Q Well, what would you call it?

A That would be the construction manager, or the contractor in a normal circumstance.

. . .

837 Q Tab 5. Again, these are invoices from Allan Greer and Triple 8 Services that you were forwarding -- that you've received and you're forwarding on to Leduc?

A Correct. We're forwarding them this minimal comment.

838 Q With a comment at the bottom of the first page:

"The contractual arrangement for the provision of Construction Management services by Triple 8 Services Ltd. was made directly with Leduc Developments Ltd. Accordingly, we cannot comment upon the all-inclusive hourly rate of $90/hour, nor can we comment upon the total hours charged by Mr. Allan Greer."

A That is correct. We had no information with respect to the contractual arrangements between Greer and Leduc.

839 Q But you do see the total of current invoices is $40,397.85?

A Yes, I do.

840 Q And that's in excess of the budget, is it not?

A I wouldn't know that. I never did see a budget between Leduc and Greer.

. . .

1627 Q How do you understand the difference between an engineer providing monitoring services and an engineer providing supervision services?

A Monitoring services are to ensure that the intent of the subdivision servicing bylaw from the municipality [is] respected so that at the end of the project we can assure the municipality that all works were constructed in accordance with their standards.

…

1642 Q So was Konrad Dunbar in the case of this roadway subgrade preparation, was he acting – was he providing supervision services or was he providing monitoring services?

A He was ensuring that the work was done as per the geotechnical recommendations. Whichever label you wish to attach to that activity please do so.

1643 Q Well, I would like to attach to that activity inspection and supervision services.

A He was certainly inspecting. Was he supervising? No. Supervising implies directing the works. Konrad Dunbar was not directing the works. In other words, telling the contractor where to fix, when to fix, what equipment to use. That was not his role or responsibility.

1644 Q Well, I'm suggesting to you, sir, that inspection and supervision services were exactly his responsibility.

A No, they were not.

1645 Q All Right

A The role of an onsite engineer is to monitor the works by the contractor, to inspect the works by the contractor, but we certainly do not direct the works that are done by the contractor.

[67] Mr. McWalter's testimony at trial was consistent with this evidence and both directly contradict Leduc's position.

b. Allan Greer's Role

[68] Allan Greer was a surveyor from Australia, but he was not certified as such in British Columbia. He was associated first with Liard Project Services Ltd. ("LPS") and then with Triple 8 Project and Construction Management Services ("Triple 8"). He worked on the Subdivision for just over a year, finally leaving in late spring or

early summer of 2005. Mr. Greer did not testify because apparently he could not be located.

[69] Mr. Fix agreed that he viewed Mr. Greer as the construction manager when Mr. Fix first hired him in 2004. Mr. Fix also agreed that in the beginning, L & M's primary role was to be on site to inspect work to ensure that it met the City of Fort Nelson's standards but Leduc's position is that L & M "took over" Mr. Greer's role at some point. Mr. Fix emphasized that Mr. Greer was hired based on L & M's strong recommendation. He goes so far as to say L & M and Leduc "mutually agreed" to hire Mr. Greer and LPS.

[70] L & M does not dispute it recommended Mr. Greer to Leduc to clear the Property, but it denies any participation in hiring him, and any knowledge of the contractual terms between Mr. Greer and Leduc. Mr. McWalter testified that he offered to prepare contract documents for the arrangement between Mr. Greer and Leduc, but Leduc declined. This was consistent with Mr. Fix's evidence; he testified that he preferred to do business without written contracts.

[71] It is not clear to me why Leduc's contention that Mr. Greer was jointly hired by it and L & M would support the theory that L & M was the project manager, but I do not need to consider that issue. The evidence clearly shows that Mr. Greer was hired by Leduc exclusive of any participation of L & M.

[72] Mr. McWalter testified L & M being unaware of the contractual terms between Leduc and Mr. Greer made it difficult, if not impossible, for L & M to verify the cost of work incurred on the Subdivision. It also meant that L & M did not always know when or what work Mr. Greer was doing. Mr. McWalter said he could not even determine if Mr. Greer was invoicing Leduc directly and how that was being tracked. The documentary evidence consistent with L & M's position, includes:

a) July 13, 2004 - an email from Mr. McWalter to Mr. Fix and Mr. Greer which stated: "I would like confirmation from Leduc that the project will be

constructed by Allan Greer with Liard Project Services acting as a construction manager";

b) August 11, 2004 - an email from David McWalter to LPS (copied to Mr. Dunbar, Mr. Fix and Mr. Toustousras) in which he wrote: “As previously discussed L & M will provide construction layout services in addition to construction inspections, provide daily site reports, and take responsibility for the preparation of ‘as built’ drawings and the finalization of the subdivision completion and registration process with the Town of Fort Nelson Staff. In addition to Liard Project Services (LPS) providing construction services for Leduc, LPS will also provide materials testing services….The construction services being provided by . . . LPS have been negotiated directly between Leduc and LPS. Without knowledge of your contractual relationship, we are unclear whether or not we are to quantify or measure the work performed by LPS”.

c) August 20, 2004 - an email from Mr. Greer to Mr. McWalter in which Mr. Greer described his finalization of the construction schedule and coordination of work regarding the gas service main.

d) August 21, 2004 - an email from Mr. Greer to Mr. Fix which contained a lengthy progress report. It described the work Mr. Greer had done and in my view, makes it clear he was “managing” the construction.

e) September 21, 2004 - an email from Mr. McWalter to Mr. Renyk in which Mr. McWalter warned Leduc that the project was being constructed on a cost plus basis, and therefore it would not have the normal price controls of a construction contract. He also noted that preliminary pricing from Mr. Greer was much higher than the engineer's estimate that L & M had provided.

f) September 22, 2004 – letter from Dave McWalter to Larry Fix providing an update and rationalization of projects costs up to August 31, 2004. He

wrote that "[t]he subdivision construction works are being managed on a 'construction management' basis by Allan Greer of Triple 8 Services Ltd" and that the cost estimate included with the letter was made using the preliminary pricing "provided by Allan Greer, your construction manager…".

g) October 27, 2004 - a letter from Mr. McWalter to Mr. Fix and Mr. Renyk to which was attached Triple 8 invoices. Mr. McWalter noted he was in no position to comment on Mr. Greer's rate of $90 an hour or the total hours because Leduc's contractual arrangements with Mr. Greer were unknown to L & M.

h) May 4, 2005 - an email from David McWalter to Mr. Greer responding to Mr. Greer's request for payment. Mr. McWalter wrote it was difficult to process those invoices because L & M "does not have any presence in the Fort Nelson area" and had received no progress reports, inspection reports or contractor's invoices for work done in late 2004 and early 2005. He also wrote that "we do not know what kind of work (if any) is happening at the construction site".

i) May 5, 2005 – an email from Allan Greer to Larry Fix complaining about Mr. McWalter's email because in Mr. Greer's view "our instructions were issued directly from Leduc".

j) May 20, 2005 - an email from Mr. Dunbar to David McWalter in which Mr. Dunbar reported about a meeting held at BC Hydro to discuss the underground utilities. He stated that Mr. Fix had decided to let Mr. Greer "continue working as before".

k) Various dates - a large number of letters from L & M to Leduc enclosing invoices from LPS in which Mr. Greer's services were described as "construction management and survey services". The same description is

used in the large number of letters sent to Leduc to which L & M attached Triple 8 invoices.

l) Various dates, approximately monthly - L & M issued invoices to Leduc accompanied by a letter describing the services it provided. In most of those letters, it described the provision of engineering services, professional engineering services and/or construction inspection services. In two invoices different wording was used and I discuss those invoices below.

[73] In a letter dated July 6, 2005, L & M was described as providing "construction inspection and construction management services". Mr. McWalter testified that "management" is a typographical error and it should have read "supervision". He was firm that L & M did not provide Leduc with construction management services at any time. He explained L & M was providing construction management services on an industrial subdivision being built in Fort Nelson during the same time period, which might explain the error. I accept his testimony on this point and find the reference to construction management was an error.

[74] The phrase "construction supervision … services" was used in L & M's December 1, 2005 letter to Leduc accompanying its invoice which stated services were provided for the months of August, September and October, 2005. Mr. Dunbar and Mr. McWalter both testified that the "supervision" provided was not the same as project management; Mr. Dunbar did not direct where, when and how work would be done. Mr. Dunbar explained he may have done some extra work by dealing directly with contractors, but that was in furtherance of his role as engineer and was in relation to the remediation work. He also testified that L & M were basically "stepping up" to assist Leduc, failing which the project may have immediately failed.

[75] Once Mr. Fix told Bill Myers to stop working, there was no project supervisor on site. This is consistent with the evidence Leduc read in from Mr. McWalter's examination for discovery. During this time (and others) the testimony, supported by

many documents, proves L & M was continuing to try and persuade Leduc to hire a general contractor, as it had been doing for quite some time.

[76] Taking into account all the testimony about what L & M did during this time period, I find on a balance of probabilities that Mr. Dunbar did not perform construction management or project management duties. Any “supervision” he provided was consistent with his role as an engineer to ensure the work done met the necessary engineering specifications and bylaw requirements.

[77] Mr. Fix agreed in his testimony that Allan Greer was responsible for coordinating workers for construction and that Mr. Greer was directly emailing Mr. Renyk and Mr. Fix about the project. Mr. Fix’s response during cross-examination to the wording L & M used in some of the documents to describe its and Mr. Greer’s roles was that he “assumed L & M would do the construction management" as a team with Mr. Greer, or that L & M “should have” known the contractual arrangements between Leduc and Mr. Greer. I do not accept Mr. Fix’s testimony on these points because there is insufficient reliable evidence consistent with his belief, and a large amount of reliable evidence contradicting his belief.

[78] Finally, Leduc’s conduct was inconsistent with its position. At some point Mr. Greer stopped working for LPS, but then conducted his work under Triple 8. Its letterhead is consistent with L & M’s position about Mr. Greer’s role: “Tripe 8 Project and Construction Management Services”. Most significantly is the fact that Triple 8 was a company owned solely by Mr. Fix that he gave to Mr. Greer. In other words, Mr. Fix arranged to have a company he owned to be paid by Leduc for work done on the Subdivision. Neither Mr. Dunbar nor Mr. McWalter was aware of this association at the time. Mr. Fix’s explanation for giving the company to Mr. Greer was so he could keep his “eye on finances”.

[79] I have no doubt that Allan Greer was, to Leduc’s knowledge and with its consent, the Subdivision’s project manager. I am not persuaded that Mr. Fix was unaware or did not understand that to be the case at the time.

c. Bill Myers' Role

[80] Mr. Fix's testimony was that his nephew was Mr. Fix's representative on the site. Mr. Myers had no experience or training in engineering, road construction, installation of underground utilities or house construction. Mr. Fix's and Mr. Myers' idea was that Mr. Myer's would learn those things from Mr. Fix while working on the Subdivision.

[81] Mr. Myers said he was the "Regional Manager" for Leduc. He testified that once Mr. Greer left, L & M was "continuing" Mr. Greer's role as project manager. He testified he was to assist Mr. Dunbar in that role. Yet, he contradicted himself in cross-examination because he agreed throughout 2005 Mr. Dunbar was on site as the "engineer". Mr. Myers also agreed that on a day-to-day basis, he directed workers as to what should be done, and when it should be done. He agreed Mr. Dunbar's role was to check the work to make sure it had been done right.

[82] I find that Mr. Myers was Leduc's project manager after Allan Greer left the site. Regardless of the labels he used, he confirmed that in terms of directing crews on a daily basis and deciding when things were done, that was his responsibility, while Mr. Dunbar's role was to ensure things were being done correctly. I also find that Mr. Fix was aware that Mr. Myers was managing the construction on site.

d. Letter of Agency

[83] Leduc asserts that L & M was its agent for all purposes, which it says is consistent with its position that L & M took on the role of project manager. It is not clear to me that is a logical progression but in any event, I find the evidence does not support this submission.

[84] Leduc relies on a letter it wrote to the town of Fort Nelson dated April 21, 2004. In it Leduc advised the town that "[i]n all matters pertaining to the planning and subdivision of the proposed Angus Subdivision ... L & M ... is empowered to act as the agent for Leduc Development Ltd". Leduc also relies on Mr. Fix's interpretation

of that letter, which was unsupported by any other evidence. As noted above, I approach Mr. Fix's testimony with caution.

[85] L & M's position (supported by Mr. McWalter's testimony) is that the letter is a standard form required by the City of Fort Nelson whenever a developer who lives out of town is submitting a subdivision application. In that light, the phrase "pertaining to the planning and subdivision" specifically refers to the process of obtaining from Fort Nelson the necessary approvals to build a subdivision.

[86] Leduc interprets the phrase "all matters pertaining to the planning and construction …" to be a reference not only to the municipal process, but to all elements of its land development project. That interpretation is not reasonable on its face nor is it supported by any other evidence. Even if the meaning of the letter was ambiguous (which I find it is not), Leduc did not provide any reason as to how or why L & M could be bound by a representation Leduc made to the city.

[87] I reject Leduc's argument on this point.

e. Royal Bank Financing

[88] Leduc sought financing from the Royal Bank of Canada (RBC) in July 2004. RBC granted Leduc a letter of credit on terms. L & M was not a party to the letter of credit.

[89] Leduc submits that the letter of credit itself broadened L & M's role, and thus its liability.[2] While it may be possible for a contract to impose legal duties on a non-party, I find that is not the case with regard to the letter of credit. In my view, the letter of credit identifies L & M as a "monitor", but that imposes no additional duties on L & M than it had as project engineer. Moreover, even if the letter of credit created "new" duties, those duties would possibly be owed by L & M to RBC and not to Leduc.

[2] Leduc also claims L & M should be liable for what it says is the difference between that estimate and the amount of money it spent on the Subdivision but, as noted above, that claim was one of the amendments disallowed by Master Bouck and ought not to have been pursued at trial.

[90] In any event, I find the evidence does not support Leduc's contention. Leduc used L & M's cost estimate dated July 19, 2004 to obtain RBC financing, despite the fact that Mr. Greer had sent Leduc information subsequent to that estimate showing that actual construction costs would be much higher. This is confirmed by, among other things, Mr. McWalter's email to Mr. Renyk on September 21, 2004 in which he stated: "[e]ssentially, the project is being constructed on a 'cost-plus' basis without the normal controls of a construction contract".

[91] On October 13, 2004, Ed Renyk sent an email to David McWalter stating that RBC wanted to know the progress of the development to compare to the total project costs given to the bank by Leduc during the loan approval process. He attached a worksheet "based on the information and figures attached to your 19 July 2004 letter…which [RBC] are using as the baseline of progress".

[92] David McWalter's reply email on October 25, 2004 pointed out that Mr. Greer had provided much higher construction costs estimates. Again on October 27, 2004 David McWalter wrote to Ed Renyk stating "actual construction costs will be much closer to the Greer cost estimate because of inefficiencies resulting from fall weather and from the lack of a fixed price construction contract". This was consistent with many other documents and Mr. McWalter's testimony.

[93] In response to Ed Renyk's follow up email asking for a report, David McWalter wrote the following in an email dated November 3, 2004:

> With all due respect I was not aware that you (or the Bank) was requiring additional information from me at this time. Without the benefit of a fixed or unit priced contract, it is impossible for me to complete the spreadsheet that has been previously submitted to the bank. It is impossible to break down the total project costs into the categories for watermain, sanitary sewermain, storm sewermain, roadworks etc. I have no way of knowing if I have received copies of every single invoice for my review and approval. Likewise, I have no way of knowing what invoices have been paid to date at this time. The bank probably require[s] more than I can provide at this time, but without any kind of construction contract, I cannot provide the detailed breakdown as per your spreadsheet.

[94] All Mr. Fix could say when confronted with this document was that he was aware L & M had "concerns". I find that Mr. Fix and Mr. Renyk had been adequately,

and repeatedly, advised by L & M that costs on the Subdivision were increasing because of the arrangements Leduc had with Mr. Greer (not having a fixed construction contract in place).

[95] In addition to its contractual claim, Leduc submits that L & M's July 19, 2004 cost estimate was a "fixed" quote or guarantee by L & M of what it would cost to construct the Subdivision. From that proposition, Leduc tried to argue that the certification and approvals L & M gave, which resulted in ICL being paid progress draws from the letter of credit, were inaccurate and/or negligently provided.

[96] As noted above, Leduc failed in its attempt to amend its pleading to add these specific claims; they are also beyond the applicable time limitation. I find nothing in Leduc's argument that takes it outside of those disallowed claims.

[97] But even if there was a legal basis in this case for Leduc to advance that argument, the evidence defeats its position. The evidence was clear that L & M's estimate was just that. There is nothing in the documents that suggests L & M was guaranteeing, or warranting the estimate amounted to a "quote". Leduc chose to hire Mr. Greer on its own terms and it did not involve L & M in that process; I have found Leduc knew Mr. Greer was its project manager. More importantly, as confirmed in the documents supported by Mr. McWalter's testimony, L & M repeatedly warned Leduc that its arrangement with Allan Greer appeared to make the construction proceed on a "unit price" basis that would be more expensive, and less efficient.

[98] Leduc tries to point to Mr. Renyk's forwarding of the proposed real estate terms and conditions to David McWalter on July 16, 2004 as support for its position that the letter of credit created additional duties for L & M upon which Leduc can sue. Mr. Renyk referred to "covenant 1" of the terms and conditions which opens with the following: "Without affecting or limiting the right of the Bank at any time to demand payment or cancel any undrawn portion of any demand loan in this Agreement, the Borrower covenants and agrees with the Bank as follows …".

Mr. McWalter testified that he understood those terms to be consistent with L & M's role to "monitor" the project for the bank, a role no different than being construction inspector. I agree his characterization is correct.

[99] I find Leduc submitted to RBC L & M's preliminary design estimate despite knowing at that time that its actual construction costs would be much higher. It, and it alone, bears responsibility for the discrepancy between the engineer's cost estimate and the actual cost of construction, and whether that cost eventually exceeded the letter of credit (I make no finding on the latter point).

[100] Mr. Fix and many witnesses that testified on behalf of Leduc had a somewhat casual approach to business and contracts. They preferred to rely on trust and people's word. Mr. Fix, Mr. Moffett and Mr. Sheldon all testified that they preferred not to put things on paper. Mr. Fix was adamant that he preferred not to put anything in writing; he would not sign contracts unless absolutely necessary.

[101] I make no comment on the wisdom, from a business point of view, of such an approach as it appears Mr. Fix had been successful in business. But he had no experience in the construction of residential subdivisions in the far north. I find that inexperience, combined with Leduc's preferred approach to business, were major contributors to its legal difficulties with ICL and the many subcontractors who placed liens on the Property. All of these factors were instrumental in construction delay and they are not attributable to L & M's actions or inactions.

f. Hiring ICL

[102] L & M's position, supported by numerous documents, is that it had been urging Leduc for some time to hire a general contractor. Leduc finally accepted that recommendation. This recommendation is relied upon by Leduc as proving L & M were project managers. Alternately, Leduc seems to argue that L & M is responsible for deficiencies in ICL's performance of its contractual duties because of that recommendation. Neither proposition is supported by the evidence. Moreover, a general contractor is the rough equivalent to a project manager so Leduc's argument fails at a common sense and logical level.

[103] L & M recommended Leduc hire ICL because it was a company that was already working in Fort Nelson, meaning there would be cost savings because any expenses for travel time potentially could be split. L & M also knew ICL to have a good reputation. Leduc relied on the following evidence from Mr. McWalter's examination for discovery which explained why L & M recommended ICL:

> 891 Q Why was the request to quote limited to ICL?
>
> A They were doing work in the area on several other projects that we were aware of, some of, some of which were being administered by L & M. In my opinion, they were a good contractor, they are a good contractor, and it seemed like a reasonable fit to get the works completed
>
> . . .
>
> 894 Q How experienced was ICL by May 31, 2005?
>
> A I am not sure if I am fully aware of their corporate history, but they had a very, very good track record with experience principles. They are still as I mentioned before, they are still in business now as IDL.
>
> 895 Q But I am just asking about their experience as of May 31, 2005.
>
> A In my opinion, it was good.
>
> 896 Q What is good experience?
>
> A They were a good, reliable contractor.

[104] This evidence does not support Leduc's claim because it illustrates L & M's recommendation was reasonable and sound. This is supported by other evidence.

[105] Mr. Dunbar testified about the difficulty of obtaining crews and equipment to work in Fort Nelson. Because of its location and weather, the construction season in Fort Nelson is generally from May or early June until it freezes again in October or November. Because of its remote location, it is expensive to bring in crews and equipment and this is made more difficult when a development is on a small scale, as was this Subdivision. The next nearest community of any size is a three and a half hour drive away. Also, Fort Nelson has a population of only about 5,000 people and none were equipped to perform the work needed on the Subdivision because, among other things, specialized heavy equipment was necessary and there were no local businesses that could supply that. Mr. McWalter testified that finding

contractors even in Prince George can be a challenge for many of the same reasons. Mr. Myer's testimony supported Mr. Dunbar's with regard to the impact these factors had on construction. I did not understand Leduc to contest these statements; certainly it presented no evidence to undermine them.

[106] I conclude L & M cannot be faulted for recommending ICL to work on the Subdivision.

Conclusion

[107] I find the evidence does not support Leduc's position that L & M agreed to or did take on any professional duties beyond being the engineer for the Subdivision. L & M provided engineering design and inspection services and did not undertake any management responsibilities.

2. What Caused the Delay?

[108] As noted above, it was not entirely clear to me whether Leduc argued delay as an independent tort or simply one element of its assertion that L & M was negligent in its project manager duties. Leduc's delay argument rested heavily on *Hick* which I have found to be of little assistance. Because I have also found that L & M was not the project manager for the Subdivision, it is not necessary for me to address the submissions about delay; Leduc has failed to persuade me on the evidence and the law that it has a valid claim for delay against L & M. However, in the event I am wrong about any of those conclusions, I address the causes of construction delay.

a. Bad Weather

[109] There was abundant evidence that Fort Nelson experienced unusually large amounts of rain in both July and August 2005. Mr. Myers testified about heavy rain that shut down construction for about 13 days. During his testimony he described photographs that depicted the impact the rain had on the ongoing road construction. Notes made by Mr. Myers are consistent with this evidence as he recorded that torrential rain stopped construction from July 17 to July 29, 2005, and required water

to be pumped until August 3, 2005. Mr. Dunbar testified that 2005 was the worst summer he experienced in Fort Nelson in terms of the rain. There is no doubt that the amount of rain was a major cause of the delay in construction.

b. Leduc's Reliance on Allan Greer and Bill Myer

[110] BC Hydro convened a meeting in early May 2005 because it was concerned about deficiencies in the installation of shallow utilities. Both Mr. Dunbar and Mr. McWalter testified that they were aware BC Hydro is very particular with respect to installation of its services and that it provides its own inspectors for that scope of work.

[111] Mr. Greer completed that work after L & M had left the site for the winter in 2004. That timing meant no one was on site to verify whether the work was done in compliance with BC Hydro's specifications. In addition, Mr. Greer had used frozen soils to backfill the trenches. Both circumstances required remediation work that delayed construction. Leduc alleges L & M "should have" been on site to review Mr. Greer's work in late 2004. This is a claim that cannot be brought because it concerns events before August 2005. In any event, I find the evidence does not support Leduc's position.

[112] As discussed earlier in this decision, I have found that Mr. Greer was project manager and that his contractual arrangements were, to Leduc's knowledge, unknown to L & M. In a May 4, 2005 email to Mr. Greer, Mr. McWalter wrote that L & M had received no progress reports or inspection reports and was unaware of what was happening on the site. Combined with the rest of the reliable testimony and documents, I find that Mr. Greer's installation of shallow utilities and backfilling of the trench in late 2004 was work that was done without engineer oversight, but that Leduc and Mr. Greer bear the sole responsibility for that.

[113] It was not long after this discovery that Mr. Greer stopped working for Leduc and Leduc finally agreed with L & M's repeated recommendation that Leduc hire a general contractor. L & M sent out a request for quotation to ICL at the end of May 2005. The evidence also shows that Mr. Knapp from ICL visited the site around

June 9 and June 12, 2005 to review the work at L & M's request, so L & M responded promptly to Leduc's request.

[114] Before ICL provided its quote, additional problems caused by the faulty work in late 2004 were discovered that required repair and remediation (in addition to the BC Hydro-related repairs). Although Leduc disagrees with the characterization of L & M's role, I have found Mr. Myers was project manager.

[115] I find that L & M performed its engineering and inspection roles promptly during this time period by ensuring inspectors were on site to confirm the compaction of the shallow utilities trench met required standards, including Harder and Associates (a geotechnical firm) which did an investigation and completed a report. Mr. Dunbar's daily inspection reports are consistent with that timing. Mr. Myers also agreed that Harder and Associates asked for changes to his work in order to comply with the standards and this also contributed to delay in construction. Mr. Myers admitted that his inexperience was a significant factor in how long it took for the road to be readied for gravel.

[116] As construction was delayed and ICL was not showing up on the site, Mr. Meyers testified that he, Mr. Fix and Mr. Dunbar agreed that Mr. Myers would do a portion of the work ICL was bidding on (finishing the subgrade of the roadworks). ICL facilitated this by delivering material (soils) to the site free of charge and lending equipment to Mr. Myers for this purpose. But Mr. Myers was working alone (or with only one other person), so that work took longer than it should have.

[117] Mr. Dunbar testified the decision to let Mr. Myers do some of the roadwork was Leduc's alone but Mr. Fix claimed he had no knowledge of this arrangement. I prefer Mr. Dunbar's evidence on this point because it is more consistent with the documents and the rest of both his and Mr. Myer's testimony, and I have concerns about the reliability of Mr. Fix's testimony as discussed earlier in this decision.

[118] However, it is unclear to me if Mr. Myers' work on the subgrade was an independent contributor to construction delay. The evidence suggested the

possibility that ICL was not showing up at the Subdivision because it was delayed at another site. Whatever was the cause, I do find that none of that delay can be attributed to L & M. Leduc tried to argue that L & M should be held liable for not "forcing" ICL to show up earlier, but the contract between Leduc and ICL was not finalized until October 4, 2005. Withholding payment under the contract would have been the only mechanism L & M had for persuading ICL to work on time, but that was obviously unavailable before the contract was in place.

c. Builders' Liens

[119] Builders' Liens were registered against the Property and were not removed until June 28, 2005. Common sense dictates that in a community the size of Fort Nelson, word would easily spread that Leduc was not paying its bills. This is confirmed by other evidence. Mr. Myers agreed in cross-examination that one of the reasons that ICL was reluctant to come on site without an assurance of payment was because by that time Leduc had a bad reputation in the community. He also agreed it became difficult to get people to work on site because Leduc had not paid many contractors and those contractors had been forced to file builders' liens. Mr. Dunbar also confirmed that was his impression and it made it more difficult to get people to work on the site; this contributed to delay. There are numerous documents consistent with this evidence.

[120] Overall, I conclude that L & M did not contribute to construction delay, which I find on a balance of probabilities was caused by bad weather, Leduc's decision to rely on Allan Greer and Bill Myers as project managers and Leduc's diminished reputation in the community.

d. Miscellaneous Submissions

[121] I have concluded that delay in construction was not caused by any action or inaction by L & M and that is sufficient to dismiss all claims by Leduc related to delay. However, for the sake of completeness, I address briefly other submissions raised by Leduc that fall outside of the factors I have found above that caused the

delay. As with the main claims, I find the evidence does not prove that L & M is responsible for any of these circumstances.

i. Delay in ICL Signing Contract

[122] Leduc blames L & M for not "forcing" ICL to agree to a contract earlier than it did. L & M sent ICL a request for quotation on May 31, 2005 but ICL's response was not received until August 2005. I agree with L & M's position that until the full extent of the repair work needed was known, it would have been imprudent for Leduc to bind itself to a contract with ICL in case Leduc could not deliver the site on time. No one knew how long remediation would take until all investigations were done and I am satisfied L & M acted expeditiously to have investigations done as quickly as possible. Also, Leduc did not explain how L & M could have forced ICL to provide its estimate or sign the contract earlier.

ii. Failure to Pursue other Contractors

[123] Leduc submitted that L & M should have found someone else to do the work once it was clear ICL was not showing up on site when Leduc wanted it to. L & M's evidence and position was that given the remote location, short time remaining in the 2005 construction season and Leduc's diminished reputation in the community, no other company was available or willing to complete the work.

[124] Leduc asserts that Peak Concrete Ltd. ("Peak"), a company owned by Ken Wevers, an associate of Mr. Fix's, could have done the work, and done it for a lesser amount than Leduc paid to ICL, but that L & M prevented this. No document to substantiate this claim was produced at trial. Mr. Fix could not remember what price Peak had offered to complete the job, which makes his assertion that Peak could do it for a lesser amount. In fact, there was no document because there was no estimate or quote provided by Peak. Mr. Wevers confirmed this during his testimony. He never provided Leduc or L & M an estimate or quote to do the work. Nothing went beyond general conversations Mr. Wevers had with Mr. Fix.

[125] That evidence is further confirmed by evidence Leduc led by reading in portions of Mr. McWalter's examination for discovery [Q: 1721]. Mr. McWalter deposed that he had never heard of Peak and he was completely unaware of it being considered to do any work on the Subdivision. Mr. Fix confirmed he did not pass along information about Peak to L & M. L & M cannot be responsible for failing to investigate or engage a company which it did not know existed.

[126] Moreover, Mr. Wevers said he considered doing only the curb, gutter work and sidewalks to assist Leduc to get the project done on time. This is consistent with the fact that Peak is a company specializing in concrete and not roadworks, or construction generally. Mr. Fix's claim that Peak could have done all the work ICL was bidding on has no credibility.

[127] I find there is no validity to the assertion that any other contractor would have been available to do the work that ICL did.

iii. Enforcing ICL's Contract

[128] Leduc submits that L & M should be liable for duties Leduc says L & M failed to perform which arose from the contract Leduc had with ICL. L & M is not a party to that contract. I have already discussed earlier in this decision that the legal support put forward by Leduc for this claim does not go as far as Leduc submitted. In addition, Leduc led evidence from Mr. McWalter that to the extent "supervision" meant directing work on site, that was never part of L & M's responsibility. That is consistent with clause GC-3 of the contract between Leduc and ICL, which states, in part, that "[t]he Contractor shall have complete control over its own organization, and the carrying out of the Work, and the method of Carrying out the Work."

[129] Apart from the clarity of that contractual term, Mr. Dunbar explained that it would be unethical for the engineer to direct how work is done since the engineer's duties are to inspect the work to ensure it meets required municipal standards. To expect the engineer to do that would amount to it "inspecting" its own work.

[130] Leduc argues the ethical concern is invalid because Mr. McWalter admitted L & M were performing construction management services for a different development. However, that was not a residential development and most importantly, I do not know if L & M was simultaneously providing engineering services at that site, which is where the ethical issue might arise.

[131] Leduc tried to argue that L & M "delayed" issuing the certificate of substantial completion in violation of its contractual duties, but the evidence clearly showed that that certificate was issued promptly when it was requested. Leduc tried to link the refusal to issue the certificate promptly with its damages claim; Leduc took the position that it needed that certificate in order to get building permits and failure to do so meant lots could not be sold.

[132] That position was contradicted by Mr. Pitkethley, Leduc's own witness. Consistent with documentary evidence, he testified that all that was needed by the town to issue building permits was the following: all legal surveys were completed and properties staked; all roads named or numbered with Town Council's approval, and preliminary subdivision approval was issued by the approving officer. All conditions were in place at the latest by July 19, 2006.

Conclusion

[133] In summary, I find the evidence proves that L & M performed all of its common law and contractual duties in an expeditious manner and did not cause and cannot be held responsible for any delay in construction. I conclude the evidence proves on a balance of probabilities the delay was caused by bad weather, Leduc's decision to rely on Allan Greer and then Bill Myers as its project managers and Leduc not paying its subcontractors on time.

3. Did Leduc suffer a loss?

[134] Given my conclusion that Leduc has failed to prove that L & M breached its contractual or common law duties, it is unnecessary for me to address this issue.

E. CONCLUSIONS AND COSTS

[135] I dismiss all claims against L & M.

[136] If the parties cannot agree on costs, they can apply through Trial Scheduling for a brief hearing before me so long as they do so no later than 30 days after the date of this decision.

"Sharma J."

Appendix "A"

DISALLOWED AMENDMENTS

13. Prior to the Agreements or Contracts with the plaintiff, L & M Engineering breached its Retainer Agreement and/or its duty of care to Leduc, in that it negligently:

(a) underestimated to a significant degree the costs of developing the Subdivision Project;

(b) failed, subsequent to the clearing & grubbing subcontract, to properly organize and tender the subdivision construction works;

(c) failed, subsequent to the clearing & grubbing subcontract, to negotiate fixed price contracts with the subsequent suppliers or subcontractors;

(d) failed to put its own professional services on a fixed price contract;

(e) failed to audit the costs of suppliers of materials, services, and the work of subcontractors to ensure that those costs remained within budget allowance;

(f) generally failed to audit the use of the money loaned to Leduc by the Royal Bank;

(g) failed to certify, in a timely and/or an adequate fashion, the construction costs of the Project Subdivision before each draw was advanced to Leduc;

(h) failed to audit the invoices and expenses related to the construction of the Subdivision Project to ensure that the work met industry standards, and a reasonable price was charged for the work;

(i) failed to inspect the work of subcontractors to ensure that the watermain was properly installed, pressure tested, and/or maintained;

(j) failed to inspect the work of subcontractors to ensure that the underground electrical utilities were properly installed;

(k) failed to determine and remediate, in a timely fashion or at all, the cause or causes of the subgrade and subbase failures;

(l) generally failed to review the construction of the subdivision to ensure that it was being constructed to industry standards and complied with all building, municipal, geotechnical, and environmental standards; and

(m) generally failed to review construction progress, and to ensure that the works required to complete the Subdivision Project were carried out expeditiously.

14. As a consequence of these breaches of contractual duty or breaches of duty of care by L & M Engineering, or any of them,

> (a) the Subdivision Project experienced delay that prevented its completion during 2004, by August 2005, and now threatened to also delay its completion during 2005;
>
> (b) the Subdivision Project began to experience cost overruns to budget that forced Leduc to seek out other private sources of funding when requested progress draws on the line of credit were delayed by L & M, or the amount requested by L & M was out of line with the percentage completion of the Contract Works; and
>
> (c) when Leduc experienced difficulties finding these additional funds, suppliers and subcontractors began to file liens against title to the Property, thereby causing Leduc to acquire the reputation as a developer who did not pay its suppliers and subcontractors.
>
> . . .

20. L & M Engineering breached its Retainer Agreement with the defendant, and/or the aforesaid knowledge gave rise to a duty of care to Leduc that L & M Engineering breached when it negligently:

> . . .
>
> (b) seriously underestimated the costs of completing the Subdivision Project;
>
> (c) certified to the Royal Bank of Canada and the City of Fort Nelson that the line of credit for $315,981 was sufficient to construct the works necessary to complete the Subdivision Project to full municipal standards;
>
> (d) failed to audit the costs of suppliers of materials, services and the work of the plaintiff to ensure that those costs remained within budget allowances;
>
> (e) failed to determine and remediate, in a timely fashion or at all, the cause or causes of the subgrade and subbase failures;
>
> (f) failed to obtain a subcontract for the supply and installation of streetlighting for the Project;
>
> (g) failed to make any or any sufficient allowance for the approaching onset of winter conditions so as to leave ICL's curb & gutter and paving subcontractors sufficient time to complete the Concrete Works and Asphalt paving called for by the Contract; and
>
> (h) failed to hold ICL to its August 16, 2005 Agreement to commence the Work forthwith and to fully complete it within the construction schedule mentioned in the Tender Form of August 24, 2005.

Appendix "B"

SUMMARY OF FACTS ASSERTED IN COUNTERCLAIM

a) L& M was at all times "carrying on business as professional engineers, providing engineering and project management services" [paras. 3 and 5].

b) L & M agreed to act as Leduc's agent in all matters pertaining to the planning and subdivision of the Property, and Leduc agreed to pay for those services on an hourly rate [para. 4].

c) In May 2004, L & M recommended to Leduc that Allan Greer and his company Liard Project Services be hired to do "supervision/inspection" of the clearing and grubbing work [para. 6].

d) By June 2004, "L & M and Leduc mutually agreed" to hire Allan Greer to search for a subcontractor to provide installation services for deep utilities and road grade, but the "responsibility for onsite supervision/inspection" always "remained with" L & M [para. 7].

e) Allan Greer and L & M jointly reviewed and recommended subcontractors. [para. 8].

f) In June 2005, Allan Greer withdrew, "leaving L & M Engineering to continue" and "[t]hereafter, up and until the month of August 2006, L & M Engineering provided project supervision and coordination, layout and inspection services" which included among other things, a requirement to have an engineer onsite in order "to ensure that all construction work was performed using good engineering practices" [para. 9].

g) In July 2004, Leduc sought financing from the Royal Bank of Canada ("RBC"). It obtained a letter of credit. The conditions to advance funds on that letter of credit included L & M having to perform certain specified things with regard to the construction [para. 10]. Because L & M knew the principals of Leduc lived in Richmond BC, L & M assumed a duty of care with regard to the RBC conditions, and it knew Leduc relied upon L & M for a number of specific conditions [para. 11].

h) The letter of credit broadened the engineering services and project management roles L & M had to perform to include an "acceptance and certification role", and "various roles" [para. 14 and 15].

i) ICL breached its contract and duty of care to Leduc by failing to complete construction on time, abandoning the contract, submitting invoices when no payment was due, charging for extra work, filing a lien, and proceeding to enforce the lien [para. 16].

j) ICL and L & M had express or implied knowledge of the circumstances Leduc lists as follows [para. 17]:

   i. "Leduc… being based in Richmond, [was] relying upon L & M to be accurate in their estimates of costs", and take care to ensure that the

project's remaining budget was sufficient to complete construction [17(a)].

ii. Leduc was party to contracts for purchase and sale of individuals lots, and was required to "provide the purchaser a registered subdivision plan" by October 28, 2005 (for the first contract for purchase), and March 1, 2006 (for the second contract for purchase) [17(b)].

iii. "The Agreements of August 16/05, September 12/05 and June 2006", were completed. The nature of their contents was also completed [17(c)].

iv. "ICL's breach of the September 12/05 Agreement had left… [Leduc] in a position where… it faced the significant risk that… [Leduc] would not be able to meet the October 28th completion date" under the first contract for purchase or the March 1, 2006 completion date under the second contract for purchase [17(d)].

v. ICL failed to meet three completion dates: October 15, 2005; October 28, 2005; and March 1, 2006 [17(e)].

vi. "The subsequent onset of winter weather conditions had caused the suspension of the Contract Works in whole or in part until June 2006" [17(f)].

vii. Due to this delay, by October 15, 2005, Leduc "was fully extended on the financing for this subdivision development, with no or insufficient ability to earn income by selling or building on the lots" [17(g)].

viii. "In the negotiations of May-June 2006, ICL was unlawfully taking the positions that the so-called Contract of October 4, 2005 was still in place", saying this prevented Leduc from bringing in another contractor. ICL claimed a right to payment of "its December 31, 2005 invoice, failing which it could refuse to complete the Contract Works" [17(h)].

ix. During the May-June 2006 negotiations, Leduc had to accept ICL's position because the "funding for the project's completion was still controlled by L & M Engineering, the Royal Bank of Canada and the Town of Fort Nelson" due to the RBC line of credit. ICL's refusal to relinquish the October 4, 2005 Contract would cause serious delays as Leduc attempted to hire another contractor "that was acceptable to these three interests, thereby resulting in serious financial consequences" for Leduc [17(h)].

x. Leduc was party to the August 21, 2006 contract for purchase, which required it to provide a "registered subdivision plan and 23 lots in a

stage of completion whereby construction of houses could be commenced immediately" by October 20, 2006 or sooner [17(i)].

xi. "ICL had filed a lien on August 11, 2006, based on L & M Engineer's acceptance and certification that the "ICL Contract" had been completed and $275,544.19 was rightfully then due and owing" [17(j)].

k) L & M breached its agreement and was negligent. At paragraph 18 of its counterclaim, Leduc lists 35 subparagraphs outlining the alleged breaches which I have grouped and summarized as follows (including identifying the subparagraphs to which I refer). Leduc claims that L & M:

i. Recommended ICL to work for Leduc, and then failed to ensure ICL lived up to its contractual duties [18(a), (b), (c), (e), (h), (p), (r), (s) and (aa)];

ii. Failed to ensure ICL provided all labour, materials, fuel machinery, and tools to do the work [18(c)];

iii. Failed to prepare a "lump sum" contract for Leduc and ICL, allowing that contract to "remain unexecuted by ICL" until September 29, 2005 and not ensuring the work was done for that lump sum [18(d) and (s)];

iv. Failed to advise Leduc of a right to terminate the contract, supporting ICL's actions which Leduc alleges breached ICL's duties [18(g), (l), (j), (k),(l),(m) and (jj)];

v. Failed to adequately supervise ICL in the performance of its contract to ensure it was done in an expeditious, competent or professional manner [paras. 18(x), (m), (aa), (m) and (ff)], including keeping daily records, and maintaining adequate protection of work from damage (18(x), (bb), (cc)];

vi. Failed to visit the site prior to construction [18(y)];

vii. "[A]allowed ICL to erect full payment" on a progress draw before completing work, and approving work and invoices inappropriately [paras.18(n), (t), (u), (v), (w)];

viii. Approved work that did not meet contractual requirements [18(ee)];

ix. Failed to ensure that the subdivision project was complete to full municipal standard in timely fashion or at all [18(hh)]; and,

x. Failed to ensure that ICL obtained adequate insurance [18(ii)].

l) These failures resulted in delay that prevented completion of project, cost overruns, and Leduc being sued with builder's liens.