No. 1525/82
Prince George Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

(Heard in the County Court of Cariboo
pursuant to s. 23 of the County Court Act)

BETWEEN: ANTLER CONSTRUCTION LTD. PLAINTIFF AND: SY KOVACHICH and SY KOVACHICH HOLDINGS DEFENDANTS AND: D. C. DENNIS ENGINEERING LTD. and D. C. DENNIS THIRD PARTIES	REASONS FOR JUDGMENT OF THE HONOURABLE JUDGE PERRY
Victor Curtis, Esq;	for the plaintiff
Dick Byl, Esq; and Suzanne Jackson;	for the defendants
Place and dates of trial:	Heard on September 17, 18, 19, 20, and 21, 1984 at Prince George, B. C.

This action was brought by the plaintiff, Antler Construction Ltd., a contractor, ("Antler") against the defendants to recover a balance of $84,092.38 claimed to be due for work done and materials supplied in 1978 in the installation of water and sanitary and storm sewers to service 48 lots for the first phase of a residential subdivision on lands owned by the corporate defendant in the Blackburn road area in the city of Prince George.

At the trial the plaintiff's claim was reduced to

$81,336.88 by deduction from its pleaded claim of one item of $2528 and a second item of $272.50. In particulars which it had supplied to the defendants, Antler alleged that it had been required to replace 10 inch storm sewer pipe by 18 inch pipe by reason of a design change thereby incurring extra costs of $2528 for that item. The plaintiff's principal witness, Mr. John Knuttson, testified to this effect on examination-in-chief. As the result of cross-examination by Mr. Byl, however, it was shown by other evidence that the plaintiff could not have installed the 18 inch pipe as it had alleged, and that the plaintiff's claim for such extra was unfounded. The second item of $272.50 in respect of certain diesel fuel was withdrawn at trial for want of adequate proof.

Notwithstanding the defendants' denial in their statement of defence of any liability to the plaintiff, Mr. Kovachich, on behalf of both defendants, at trial admitted liability in respect of various items of the claim together amounting to $46,142.36, thus leaving in dispute items in the plaintiff's claim which total the sum of $35,194.52.

The defendants admit liability in said sum of $46,142 for the cost of certain materials paid for by the plaintiff and for hauling and handling, and for rental of certain of the plaintiff's equipment used by the defendants after the plaintiff left the job on June 6, 1978, with the concurrence of Mr. Kovachich.

The claims in dispute fall into three broad categories. Firstly, in regard to some items, the defendants' objection is generally to the correctness of the plaintiff's charges.

Secondly, the defendants deny liability for charges totalling $15,869.64, being the total amount charged by the plaintiff for 10 per cent on the cost of materials it ordered, supplied, and hauled to the project, plus 10 per cent for profit. Under this disputed head, the issue is whether, as the plaintiff alleges, and the defendants deny, Mr. Kovachich orally agreed to pay these charges.

Thirdly, there is a disputed claim of $11,125.69 for extras. The plaintiff contractor says that its tender to instal the utilities was based upon plans furnished by Mr. Kovachich. Part way through the project, revisions were made in the design of the underground utilities. The plaintiff alleges that it incurred the extra costs claimed in respect of the sanitary sewer because it had to dig deeper than the original depth zones stipulated on the original plans, and because it had to order larger pipe for the storm sewer. The defendants contend that no extra charges incurred by reason of design changes should be attributed to the defendants. They say that the plaintiff undertook the work on the basis of preliminary plans, when it knew, or should have known that the plans had not been approved for construction by the city of Prince George. The plaintiff's answer to this contention is that Mr. Kovachich invited it to tender when he or his engineer knew that the plans had not been approved and took the risk that design changes might well be made during the course of construction. In my judgment, the plaintiff's contention in this regard must prevail. Indeed, in final argument, defendants' counsel had no submission to make

on this point, and I do not regard it as an issue requiring further comment. The serious points in regard to this claim are that the plaintiff did not bill the defendant for these extra charges until October, 1982, over four years after the plaintiff finished its work on the project, and as to proof of the claim.

From the admitted amount of $46,142.36 the defendants claim a deduction by way of set-off of $29,609.82 for extra gravel allegedly required to be bought and placed by the defendants on the subdivision after the utilities had been installed. The defendants contend that they had to bear this expense because the plaintiff negligently or in breach of contract, failed to instal the sanitary sewer pipes deep enough and thereby failed to provide sufficient protective cover for the utility pipes. The plaintiff denies this allegation. Antler says that it excavated in accordance with the depth requirements of the plans provided to it by the defendants, and further says that it had no responsibility under its contract to supply any gravel.

The final position with respect to these admissions and competing claims therefore is that even if the defendants' demand for a set-off of $29,609.82 should be allowed, and all the items totalling $35,194.52 in dispute be decided in the defendants' favour, the plaintiff contractor would be entitled to judgment for the admitted amount of $16,532.54 at all events.

An application made by the plaintiff during the trial was allowed amending the style of cause to designate the individual defendant by his precisely proper name of Savo Kovachich. He maintains that any liability rests not upon him but solely upon

the corporate defendant. This issue arises in response to the contention raised by the plaintiff at trial that it contracted to do the work with Mr. Kovachich personally. The latter says, in effect, that in the making of the contract, and in the whole course of his dealings with Antler he was at all times acting as an officer or director of the corporate defendant on whose behalf he contracted merely as its agent to the knowledge of the plaintiff.

It appears that Mr. Kovachich was not unfamiliar with the concept of carrying on business and dealing with suppliers on behalf of a corporation. He is 62 years of age. He was born in Yugoslavia but he has lived in Canada since 1948 and is a Canadian citizen. From the year 1966 he was the owner and manager of a large and successful poultry farm in the Prince George area which he conducted as a proprietorship for five years. In 1971 he incorporated his business under the name of Tabor Lake Poultry Farms Ltd. On behalf of that company he dealt with suppliers and negotiated contracts for the sale of eggs. In 1978 he sold the poultry company for $400,000. In 1976 he purchased the lands involved in this litigation. Although another man and an estate which Mr. Kovachich administered, held some undefined interest in the lands, it seems clear on his evidence that he was the dominant owner and treated with it accordingly. He testified that in 1976 he decided to create the subdivision. He caused the corporate defendant, Sy Kovachich Holdings Ltd., to be incorporated as a limited liability company. The precise date of its incorporation was not disclosed in evidence but it

appears to be acknowledged that by the time Antler was first engaged by the defendant in early 1978, the company was in existence and had become the registered owner of the lands comprising the subdivision. There is no evidence of the objects for which the company was formed.

In 1976 he received advice from his then solicitor, and he clearly understood, that he was required by the city of Prince George to first obtain a land-use contract, to be furnished to and approved by the city, and registered in the Land Title Office before he could legally commence construction of his proposed subdivision; and that detailed engineering drawings had to be provided by him or by his engineer on the owner's behalf, and be approved by the city before commencement of the work. He admitted to knowing that it was possible that the city might well require changes and revisions to the initial plans before giving them final approval.

Clearly there was considerable delay in the approval process for the land-use contract which had been submitted by his solicitor. The evidence shows that it was not approved by the city and filed in the Land Title Office until April 20, 1978, and that Mr. Kovachich was so informed by letter from his solicitor dated April 26, 1978 (Ex. 21).

In May, 1977, Mr. Kovachich retained D. C. Dennis Engineering Ltd. to design the civil engineering works for the proposed subdivision and to provide the necessary design drawings for the project. His dealings were with Mr. D. C. Dennis, a professional engineer, who was the principal officer

and director of the consulting engineers firm. The engineers undertook the work. It seems clear that the preparation of the plans was time-consuming.

The set of plans comprise seven sheets of drawings under number D76065, sub-numbers 01 to 08. Sheet 01 is the site plan and it is dated August 6, 1977. The remaining sheets 02 to 08 all bear date of November or December 1977 indicating the completion date of each drawing. The word "Preliminary" is prominently displayed by a rubber stamp in block letters in the lower right hand portion of each sheet. There is evidence to show that this word means that the plans bearing it have not been approved for construction by the city officials of the engineering department.

The land had a natural slope to the south-east, and according to the preliminary plans, the streets and sewers were designed thereon to drain to the south-east corner of the property. Mr. Curtis asked Kovachich on cross-examination whether or not he was aware of the natural south-easterly slope of the land. Mr. Kovachich gave an evasive reply. My conclusion is that he did know of this natural grade; that he determined that it would be less expensive to design the streets and utilities to follow it, and that he instructed Mr. Dennis to prepare the plans accordingly. We do not have the evidence of Mr. Dennis but I think it is a fair assumption that so long as the proposal did not violate good engineering practice, of which there is no evidence, he would conduct himself in harmony with the views of his employer.

The preliminary plans (Ex. 2) and the "as-built" plans (Ex. 3) were admitted into evidence at the outset of the trial on consent of counsels for the plaintiff and the defendants.

The defendants joined D. C. Dennis Engineering Ltd. and D. C. Dennis as third parties. On August 31, 1984, on application by counsel for the third parties, the Honourable Judge Hardinge ordered that the third party proceedings be tried separately from the present action. On the opening of this trial counsel for the plaintiff and defendant accordingly stated that the submissions would be confined to the issues between the plaintiff and the defendants, leaving any contest between the defendants and the third parties to be determined at a later date. This judgment deals only with the issues between the plaintiff and the defendants.

Mr. Kovachich next hired McWilliam Whyte Goble & Associates, a firm of B. C. land surveyors, to do the surveying and layout work for the proposed subdivision. He contracted with the surveyors at the time of, or shortly after, a meeting held in January, 1978, attended by Mr. Kovachich, Mr. Dennis, and Mr. Victor Bartell, a land surveyor and partner in the surveying firm. The preliminary plans (Ex. 2) were produced to Mr. Bartell by Kovachich or Dennis at that time.

The first phase of the surveyors' function was to survey and produce a plan establishing the lot lines, locate the streets, and lay out the water and sanitary and storm sewer lines, including all connections, and the curbs, and gutters and street lighting. In February, 1978, the surveyors commenced the work by first laying

out the street alignments, which they did in accordance with the plans provided to them.

In April, 1978, Mr. Kovachich instructed the surveyors to carry out the layout for the water and sewer lines. This work involves the surveyor setting out grade stakes in the ground at intervals, offset certain distances from the point where the utility lines are to be installed. The offset stakes indicate thereon the depth to which the contractor is required to excavate.

In the case of the sanitary sewer installations, the depth, as shown on the surveyor's stakes, as taken from the plans (Ex. 2), is obtained by the use of a laser beam whereby the geodetic elevation is scientifically transferred down into the ditch to the invert of the pipe where the laser is set. The grade setting is dialled on the laser and the contractor's man operating the excavating machine follows the laser beam. It is not in dispute that this is an exact method for installing sanitary sewer pipe at the proper depth and to the grade as indicated on the surveyor stakes.

Such was the system followed on this project. The contractor gets his information from the surveyor's stakes which bear the information obtained by the surveyor from the plans. Thus the contractor is required to do its work in accordance with information as to depth and grade conveyed to the contractor by agents of the employer.

The surveyors completed the layout work in February, 1978. In the same month Mr. Kovachich then contracted with

Antler to carry out the first stage of the actual work on the project which was to do the earthworks for the excavation and grading of the streets. He had been referred to Antler by an acquaintance, Mr. Stan Bachinski, a gravel and excavating contractor, who had formerly worked for Antler. Kovachich negotiated for the contract with Mr. Mike Church, an officer and manager of Antler, who examined the plans (Ex. 2) before making a proposal to Kovachich. An agreement was reached whereby Antler would do the earthworks on the basis of an hourly rate for the supply of labour and machines.

Antler commenced work under this earthworks contract on February 20, 1978, and completed it later in the same month. Mr. Kovachich admits that in carrying out the earthworks, Antler had excavated to the depth as shown on the plans (Ex. 2). No claims arising out of this first contract are brought into issue in this case. In due course the plaintiff rendered its first invoice which covers the earthworks carried out by Antler in February. This invoice (Ex. 1 tab 2) is dated April 21, 1978 and is made out to "Mr. Sy Kovachich, Giscome Road, Prince George, B. C.", and is in the amount of $6,416.25. It was paid by means of a cheque bearing the printed name of the corporate defendant, "Sy Kovachich Holdings Ltd." at the top of the cheque and also at the bottom just above a line for the signature of the drawer. The cheque is dated May 8, 1978.

Prior to May 8, 1978, a second contract was entered into with Antler for the installation of the water, storm, and sanitary sewer pipes. It is this second contract which gives

rise to the disputed issues between the parties in this litigation.

In about mid April, 1978, Mr. Kovachich, attended at Antler's office in Prince George for the purpose of asking Antler to quote a price for the excavation and installation beneath the streets of the main trunk lines for water sanitary and storm sewer utilities. He was accompanied by Mr. Bachinski. The evidence shows that he had already contracted separately with Bachinski to do all the work necessary for the installation of the connections of the trunk lines to each individual property line in the subdivision, and to provide the sand bedding for the utility pipes. The making of these arrangements impels the inference that Mr. Kovachich was resolved to negotiate a contract for the main trunk lines without delay, on the basis of the unapproved preliminary plans, and take the risk that approval would soon be forthcoming.

The contract was partly written and partly oral. Save for some inconclusive testimony given by Mr. Bachinski, the evidence of the circumstances surrounding the making of the contract emanates solely from Mr. Kovachich and Mr. John Knuttson. Mr. Knuttson was Antler's project manager and vice-president. He has an impressive background in the construction industry particularly in the installation of utilities mostly for public bodies in many subdivisions throughout B. C. He was well-informed as to pipe requirements generally and in relation to suitability for various soil classifications. He was familiar with the conditions in the Blackburn area having been Antler's

project manager when Antler had earlier installed the water system in that area. The Kovachich subdivision was to connect with the main Blackburn system which was a city controlled utility.

The evidence of Knuttson and Kovachich as to the contract negotiations is conflicting.

Knuttson's evidence is to the following effect. In mid April, 1978, Kovachich came into Antler's office, accompanied by Bachinski. Knuttson had not met Kovachich before this time. Mr. Church came into the office part way through the meeting, but did not become involved in the discussion. Kovachich asked Knuttson if Antler would be interested in doing the water, sanitary, and storm sewer lines. Kovachich said that he would see to getting all the necessary approvals. He had hired Mr. Dennis as his engineer and said that Dennis would be responsible for plans, approvals, and inspections. The McWilliam, Whyte & Goble firm of surveyors would do all the necessary layout work and Kovachich would contact them. Bachinski was to put in the service connections. Kovachich said that he wanted to get started on the project as quickly as possible because he wanted to get the subdivision lots on the market. Knuttson told him that they would have to make an immediate start as Antler had other projects in B. C. to which they were committed as of the beginning of June, by which time or sooner the road restrictions for heavy equipment would be lifted to enable Antler to get their equipment to other jobs. Kovachich was to be the general contractor. He said he would

be on site daily. At this first meeting Kovachich said that he had been checking into the pricing of pipes. He had discovered that there was a price war on at the time among suppliers. He had obtained a number of price quotations. For these reasons Kovachich proposed that he would order and buy all the materials and pay for hauling them to the jobsite. Knuttson concurred, but made it clear that on that arrangement Antler would not involve itself in signing for anything on the owner's behalf. At this time, Kovachich provided Knuttson with the plans (Ex. 2). The latter said that he would examine them and get back to Kovachich with a price quotation. He asked Mr. Kovachich to whom he should give the quotation to which the reply was: "send it to me". Knuttson asked for his address and Kovachich told him it was Giscome Road, Prince George, B. C. The meeting then ended.

Mr. Knuttson then inspected the site and saw that the streets had been excavated to a subgrade and provided drainage to the south-east corner of the property. He then determined the number and kind of pipes and fittings that would be required and got quotes for materials from suppliers. He explained that this was necessary, even though Antler was not buying the materials, because labour costs were related to pipe sizes and types. He then prepared a letter containing a quotation in writing, setting Antler's price at $7 per linear foot for each unit of work.

Mr. Knuttson testified that there was then a second meeting at which time he gave Mr. Kovachich the letter dated April 20, 1978 (Ex. 1 tab 1) which reads, in full, as follows:

ANTLER CONSTRUCTION CO. LTD.

April 20, 1978
File: Sy Kovachich

Mr. Sy Kovachich
Giscome Road
Prince George, B.C.

Attention: Mr. Sy Kovachich

Dear Sir:

Re: Subdivision - 48 Lots - Blackburn Road

Antler Construction Co. Ltd. will perform the following work on the above mentioned subdivision.

(A) Install approximately 2380 linear feet of 8" P.V.C. S.D.R. 35 sanitary sewer pipe complete with tie in and manholes for the unit price of $7.00 per linear foot.

(B) Install approximately 1560 linear feet of 10" P.V.C. S.D.R. 35 storm sewer pipe complete with manholes and excavate approximately 300 linear feet of drainage ditch at the unit price of $7.00 per linear foot.

(C) Install approximately 2200 linear feet of 6" A.C. Class 150 water main complete with hydrants, fittings, and thrust blocks for the unit price of $7.00 per linear foot.

The above mentioned prices are based on the following:

1. All materials required to be to the owners account.

2. All permits, inspections, approvals etc. to the owners account.

3. Materials to be supplied by owner to the jobsite.

4. Payment to be per linear foot measured in the field.

5. Payment to be made upon completion of the above mentioned work.

6. All engineering required to be to the owners account.

7. Drawings - D - 76065 - 02 Revision A
" - 03 Revision A
" - 04
" - 05
" - 06
" - 07
" - 08

Yours truly
ANTLER CONSTRUCTION CO. LTD.

John Knutsson
Project Manager

JK/mh

After reading the letter, Mr. Kovachich told Knuttson to go ahead with the job, thereby accepting Antler's proposal. It was agreed at that time that Antler should start on the job about the beginning of May.

On Knuttson's evidence there was a third meeting which took place a day or two later. There was considerable discussion about pipes. It was apparent that Mr. Kovachich lacked the necessary knowledge to order the materials and asked Knuttson to do so. Knuttson stated that Antler would select, order, haul, and off-load all the materials required for the job on the basis that Antler should be paid 10 per cent of the cost of the materials, for handling and 10 per cent for profit. Knuttson denied Mr. Byl's suggestion put to him during cross-examination that he never said this. Questions 49 to 52 from his examination for discovery were then put to him.

49Q. When was the next meeting between Antler and Mr. Kovachich? A. In early April of 1978. Q. Were you present? A. Yes. Q. And who else was present? A. Mr. Church. Q. Anyone Else? A. No.

Asked to comment on these answers, Knuttson made it perfectly clear that he was there referring to the first meeting. This appears from a reading of the preceding questions. On that basis he added that Bachinski was also present.

Cross-examined as to his recollection of these meetings, Mr. Knuttson agreed that was a long time ago, and that he could not remember every word said. He then stated that when he had spoken of the 10 plus 10 condition to Mr. Kovachich he did not actually reply that he would pay 10 plus 10. Then Mr. Byl put to Knuttson his answers to his discovery questions 253 and 254 as follows to show that at trial he gave different testimony on this important point. "Q. So by "ten and ten" you mean ten per cent overhead, ten per cent for profit? A. That is right. Q. And what did Mr. Kovachich say to that? A. He said that is fine, it would still be cheaper than if we hired D.C. Dennis to do the work." This clarified Knuttson's recollection of what Kovachich had said, and I think it must be treated as evidence put in through defendant's counsel which binds the defendant. The inconsistency goes only to credibility. I bear it in mind on that basis but I point out that during argument Mr. Byl took the position that Mr. Knuttson was a credible witness.

Knuttson further testified that: (1) in regard to payment of all the work, Kovachich said "send the bills to me"; (2) Kovachich did not tell him that the corporate defendant was developing the land; (3) did not tell him that the plans had not yet been approved by the city. The version given in evidence by Mr. Kovachich of these matters is much different.

According to him, there was only one meeting at which materials were discussed. It was held in early April prior to April 20, 1978.

He and Knuttson and Bachinski were present. He had not met Knuttson before this time. Church showed up during the meeting. Kovachich produced the plans to Knuttson. He looked at them and within two hours told Kovachich that the price would be $7 per foot. He thinks that Knuttson said they had no jobs at present and wanted to keep their men busy. He told Knuttson there was a price war on for pipes. He had phoned a supplier the day before. Knuttson said "you're giving us this job and we will purchase the material cheaper than you can buy it". To this Kovachich replied to Knuttson: "If you can buy the pipe cheaper than me I'll appreciate it." He thinks Knuttson said OK or something to that effect. On direct evidence he said to Knuttson that he knew nothing about material, plans, or surveying and would be glad to have people like them to help him. He testifies that he told Knuttson that the city had not yet approved the plans as far as he knew, and that it would be up to Knuttson and Dennis to decide when they would start on the subdivision. He testifies that Knuttson said that he would phone Dennis and that they would work together. He admits that he told Knuttson that he wanted the job to start as soon as possible. He says that the subject of the ordering of the materials was discussed because Knuttson has said that he could get them at a cheaper price. His understandi of the matter was that he realized he would have to pay for the hauling of the materials to the job site. He denies (1) that

there was any discussion about different kinds of pipe; (2) that he told Knuttson that he had no knowledge of pipe and materials; (3) that there was any discussion whatever about Antler charging 10 plus 10 per cent for ordering, paying for, and hauling of the materials. Knuttson said nothing to him about overhead or profit, and he had no knowledge of any such trade practice in the constuction industry. He says that his company name was not discussed but that he did tell Knuttson that the company was the owner of the land. He said that he did not receive the "quote" letter of April 20, 1978 (Ex. 1 tab 1) until about ten days after the meeting; that he received it through the mail and that no copy of it was handed to him personally at any time by Knuttson. At one stage during his direct examination, Mr. Kovachich said that at the February meeting (i.e. when the first contract with Antler for the earthworks was negotiated) Knuttson told him that Antler could instal the water, sanitary, and sewer systems for $7 per foot for each unit. He further testified that at the February meeting he said that he wanted this work done as soon as possible and that Antler was also anxious to make an early start.

Cross examined, he was confronted with the letter (Ex. 1 tab 1). He said he read it, but interpreted the provision in regard to materials to mean that he was to be responsible for paying only the hauling charges. He said that the first materials arrived on the site on April 24, 1978, and he knew that they had been hauled there by Antler. He acknowledged that he knew that Antler had been ordering and hauling all materials that arrived at the job site from April 24, through August, 1978. In his

evidence he expressed the opinion that this did not really involve much work on Antler's part. He said: "all you have to do is tell the supplier what you want. It's the same thing as picking up the phone and ordering a load of chicken feed". He admitted that he said to Knuttson, in reference to Antler's invoices for all their charges "Send the bills to me and I'll pay for them."

I will now deal with the first issue. The question is whether the defendant Savo Kovachich in negotiating the agreement with the plaintiff was merely acting as agent for the defendant Sy Kovachich Holdings Ltd. and if so, whether the plaintiff knew he was so acting.

The duty on the defendant in cases of this description is to give notice to the plaintiff in clear terms that it was dealing with a limited company. Mr. Kovachich seeks to discharge that duty firstly by reliance on evidence that payment made to Antler of two invoices by means of two separate corporate cheques issued May 8, 1978 for $6,416.25 and the second for $76.257.61 issued June 15, 1978, by Sy Kovachich Holdings Ltd. in the form I have earlier described. Secondly, he submits that since Mr. Knuttson carefully examined the plans bearing the corporate name it ought to have been apparent to him that the corporate entity was the owner of the lands and that Antler was contracting with and extending credit to that corporate entity.

In that regard Knuttson's evidence is to the effect that he did not pay close attention to that particular part of the plans, and really gave no thought to the matter of the precise identity of the owner of the land. I do not accept the evidence

of Mr. Kovachich that he told Knuttson the Kovachich Holdings Ltd. was the owner of the land.

At the time of the negotiations involving the first contract for the earthworks in February, 1978, Mr. Kovachich dealt with Mr. Church. I find that Mr. Kovachich was mistaken when he said, in one part of his evidence, that he had a discussion with Mr. Knuttson in February. Be that as it may, there is no evidence that Kovachich gave any notice, clear or otherwise, to Church of the existence of Sy Kovachich Holdings Ltd.. Kovachich said that the plans were on the wall in his house when he was negotiating the matter with Mr. Church. There is no evidence that the corporate name came to Church's notice or that it was drawn to his attention.

After Antler had performed the earthworks contract in February at the request of Mr. Kovachich it submitted its invoice (Ex. 1 tab 2) dated April 21, 1978, for $6,416.25, addressed to Mr. Kovachich personally. On Mr. Knuttson's evidence that he met with Mr. Kovachich at least three times on and after April 20, 1978, the fair inference is that Mr. Kovachich was in receipt of that invoice during the time that he was negotiating the second contract for the installation of the utilities with Knuttson. Antler's written tender (Ex. 1 tab 1) is dated April 20, 1978 and is addressed to Sy Kovachich. In other words the contractor made an offer to him personally to carry out the utility installatior works on the terms therein stipulated. Mr. Kovachich personally accepted that offer without saying that he did so on behalf of his company. Mr. Kovachich testifies that he did not receive

that tender, or a copy thereof, by personal delivery from Mr. Knuttson, but got it in the mail about ten days later. I prefer and accept the evidence of Mr. Knuttson on this point. The inference I draw is that Kovachich had the written offer addressed to him at the time of his acceptance.

Antler commenced to work installing the utilities on April 27, 1978. I find that prior to that time Mr. Kovachich, as he admits, told Knuttson to have Antler send all their bills to him personally and that he would pay for them. Antler's second invoice for $5,962.06 for materials dated May 31, 1978 and its third invoice dated June 1, 1978 for $76,257.61 (which includes the May 31st invoice) were both addressed and sent to Mr. Sy Kovachich, Giscome Road, Prince George, B.C. These latter two invoices were paid by a Sy Kovachich Holdings Ltd. cheque dated June 15, 1978 for $76,257.61.

There is evidence to show that Antler thought it was dealing with Mr. Kovachich, not with his corporate entity. The contractor invoiced him upon completion of the first contract in February showing that the name of the account in their records was that of Mr. Kovachich. He paid it with a company cheque. Mr. Byl does not argue that the cheque provided notice to Antler that it had been extending credit to a limited liability company. Even if that could be said, the fact is that when Antler entered into the second contract, Knuttson made a specific point of asking Mr. Kovachich who was to pay the bills under that contract. The latter admits that he told Knuttson to send the bills to him and that he would pay them. At that time, and earlier, when he accepted

Antler's offer without qualification, he should have taken the opportunity to make it clear that his undertaking to pay the bills, and his acceptance of the offer, were not intended to bind him personally.

The invoices thereafter were all sent and continued to be sent to Mr. Kovachich despite the fact that each payment was made by a corporate cheque. In these circumstances the inference must be that Mr. Kovachich knew that the plaintiff did not have notice by means of the cheques that it was extending credit to the corporate defendant.

Payment on account by means of cheques from Sy Kovachich Holdings Ltd. is not, of itself, sufficient notice to the plaintiff that it was dealing with a limited company: see Gelhorn Motors Ltd. v. Yee and Wilcox (1970) 71 W.W.R. 526. As Sydney Smith, J. A. said in Holland v. Saltair Beach Resorts Ltd. (1951) 1 W.W.R. (N.S.) 816 at p. 818: "The cheques did not necessarily mean much. If Holland had been paid with bank drafts, he need not conclude that the bank was his employer."

It is certainly not unusual for corporate officers to arrange to have their personal debts paid by means of corporate cheques.

The additional fact that the company name was on the plans does not in my judgment afford much assistance to Mr. Kovachich. The duty of the alleged agent is to communicate and that duty is not discharged by leaving it to the other contracting party to guess as to the identity of the party to whom he is asked to extend credit. It does not necessarily follow from the bare fact that the company's

name appears on the plans even when combined with the issuance of company cheques, that Antler knew or should have known that it was being employed by the company through an agent. Knuttson testifies that he paid scant attention to the name. I accept this. If he carefully examined that part of the plans bearing the company name he would also have noticed that those plans bear dates of August through December, 1977. Even if Knuttson had given any close thought to the fact that the plans he handled in April, 1978, had the name Sy Kovachich Holdings Ltd. on them, it would not necessarily follow that such corporation was then the owner of the lands, or even if it were, that it, and not Mr. Kovachich, was developing the land.

The invoices of September 12 and October 31, 1978 were not paid, and Antler made efforts to collect them. Knuttson telephoned to Kovachich. Then Antler wrote a letter to him dated November 30, 1978, signed by Mr. Knuttson (Ex. 1 tab 8a) as follows:

November 30, 1978
File: Kovachich

"Mr. Sy Kovachich
R.R. #1 Giscome Road
Prince George, B. C.

Attention: Mr. Sy Kovachich

Dear Sy:

Re: Your Subdivision Blackburn Road

Is there a reason you have not paid Antler Construction for the materials and work performed as invoiced to you in connection with the above mentioned project.

We show invoices totalling $70,438.69 as being due.

Would you please let me know if there is a problem in this regard.

Yours truly,

ANTLER CONSTRUCTION LTD.
John Knuttson
Project Manager"

Mr. Kovachich received that letter. His evidence in this connection was unsatisfactory. On direct examination he said he did not discuss the accounts with Knuttson because Antler failed to test the sanitary sewer. There is no evidence that he gave that explanation at the time. Nor is there any evidence that Antler did fail to carry out the test. Cross-examined, he changed this evidence, stating that he believes he did discuss the accounts with Knuttson, but does not now know if he told Knuttson he would not pay them. I find that he made no protest about the accounts in response to Antler's collection efforts, or as to the fact that the letter was addressed to him personally and that the project was therein described as "your subdivision".

During the winter of 1978-79, probably in early February, 1979, Knuttson and Church went to the home of Kovachich to confront him personally about the ignored unpaid accounts. It happened that Bachinski was with Kovachich at the time. It appears that they had been drinking. I do not think this is significant. At times the discussion became somewhat heated, but it was quite detailed, and it is not suggested that the faculties of Mr. Kovachich were impaired or affected.

For the purposes of the issue of the identity of the party with whom Antler had entered into the contract, it is only necessary to refer to this meeting to point out that Mr. Kovachich did not, at any time during the meeting, take the position that the bills and collection letter should not have been sent to him personally. In my judgment, he could hardly have failed to know, in light of the foregoing evidence, that Antler regarded him, and

not the company, as the person with whom Antler had contracted. In fact, there is no evidence that Kovachich disavowed personal responsibility at any time prior to the filing of the defence in this litigation.

Mr. Savo Kovachich has not discharged the burden of proof on him to show that he was acting as an agent of the corporate defendant. He did not designate himself as entering into the contract with Antler on behalf of the comapny or as an officer or manager representing the company. There is no evidence that at any time the plaintiff elected to treat the company as principal. The fact that the payments which were made were by means of company cheques, and that the company's name was on the plans, falls short of adequate and clear communication by Kovachich to Antler that the company was the contracting party. On all the evidence on this issue it must be inferred, and I do infer, that Mr. Savo Kovachich was contracting in his personal capacity. I hold that the liability to the plaintiff, Antler, is his personal liability and not that of the corporate defendant.

I turn now to the issue created by Antler's charges totalling $15,896.64 for 10 plus 10 per cent on the materials.

Mr. Kovachich testifies that materials were discussed at the first meeting in April, 1978, but nowhere in his evidence does he refer to any subsequent meeting. I prefer the evidence of Mr. Knuttson as to this, and find that the negotiations leading to the final contract were carried on over three separate meetings in Antler's office.

The conclusion I reach on the evidence is that by the date

of the initial meeting on or about April 20, 1978, Mr. Kovachich was acting as his own general contractor. He had made a separate contract with Bachinski for the service connections. He had been making his own inquiries about the price of pipes. It seems clear that he intended to select, and order the materials himself, perhaps with the aid of his engineer. He had prepared a list of materials.

At the first meeting Kovachich proposed or stated to Knuttso that he would himself take charge of ordering the materials. At that stage he felt himself to be competent to do this. According to his own evidence it appears that he held the opinion that the ordering of materials did not amount to much and required no special expertise. Anyone could do it. As he put it, it really amounted to no more than picking up the telephone and ordering a load of chicken feed. On this basis, the inference is that he had decided to undertake this task, not only because he thought he could quite easily manage it, but also because he felt he could save money by doing so. He would not have to pay Antler to do it. Knuttson apparently was prepared to go along with this, but likely with some unexpressed reservations.

The first meeting concluded. Knuttson examined the plans and depths and other specifications shown thereon. He then prepared the quote (Ex. 1) on the faith of those preliminary plans, and on the footing that Kovachich would select and order and pay for the materials and do all ancillary things in connection therewith. It is not in dispute that both parties attached the same meaning to conditions 1 and 3 of the document, namely, that it was the owner's responsbility to buy the materials and to cause them to be

delivered to the job site. The contractor's obligations under exhibit 1 were confined to excavating, and to installing the pipes complete with manholes for the sewers and fittings for the water main.

Kovachich accepted the offer and it remained only for the job to start under that arrangement. The parties were in agreement that it should start as soon as possible. This meant that the materials should be ordered and brought on site without delay.

What next happened can only be explained on the basis that Mr. Kovachich commenced to harbour some misgivings about his ability to undertake the task of taking charge of all matters regarding the materials. At some stage he produced his list of pipes and prices to Knuttson. The latter's evidence is to the effect that the list was incomplete and of no real value. He and Kovachich discussed the matter of pipes and I think that it was at this time that it dawned on Mr. Kovachich that he had undertaken to tackle a job that was beyond him, and it was then that he said that he really knew nothing about materials, plans, or surveying, and would be glad of Antler's help, notwithstanding that during cross-examination he denied saying this.

There can be no doubt that either by words or conduct Kovachich agreed to an addition of the written document whereby Antler would order, pay for, haul and unload the material, and this is in accord with what actually happened with the knowledge and express or implied consent of Kovachich. I accept Knuttson's evidence that all of this required the kind of knowledge and

experience possessed by Knuttson and a considerable expenditure of his time, much of it at night.

Although the evidence of Mr. Kovachich on this matter is inconsistent within itself, it does appear that he concedes that the written document (Ex. 1 tab 1) does not contain all the terms to which the parties agreed. He testifies that he understood that he would have to pay for the hauling of the materials to the job site and he admits liability for reimbursement to Antler for the purchase price of materials. He must have orally agreed to these terms during his discussions with Knuttson, yet he does not, in his evidence, refer to any meeting at which these terms were agreed upon. As opposed to this, he further states that he expected Antler to do all things in connection with the materials for nothing.

Mr. Kovachich asserts more than once that at the first meeting there was no discussion about 10 plus 10 per cent for materials. In this, he is correct. Knuttson does not say that the discussion on this topic took place at the first meeting. At that meeting the arrangement was that Mr. Kovachich would select, order, and buy all the materials. But Mr. Kovachich refrains from referring to any subsequent meetings, and I suspect this is a deliberate omission. It fits in with his evidence that he did not receive or see the bid letter of April 20, 1978 (Ex. 1 tab 1) until ten days or so after he first met with Knuttson. This enables him to take the point that if there had been an agreement for 10 plus 10, as alleged by Knuttson, it ought to appear in writing in the letter.

Mr. Byl acknowledges that it is probably standard practice in the construction industry for a contractor to charge 10 per cent for handling and 10 per cent for profit. Kovachich denies paying Bachinski a handling charge but the evidence shows that such a charge is added to the invoices received by him from Bachinski.

In deciding between witnesses the court should take into account the probabilities material to an estimate of the evidence. In my view the probability is that Knuttson orally agreed to take care of all matters relating to the materials only on the condition that it would receive a standard 10 per cent plus 10 per cent in accordance with the acknowledged custom in the industry. It is not likely that he would commit Antler to do all this for nothing.

Mr. Byl submits that Knuttson's evidence is a reconstruction of what he thinks took place about seven years ago rather than the product of a true recollection. I do not agree. Firstly, there is a written record of the matter. The invoice of September 12, 1978 (Ex. 6a item 9) includes a charge of $14,500 for handling and profit for materials. The invoice of October 31, 1978 (Ex.1 tab 7) includes a charge of $717.18 for 10 per cent on materials and 10 per cent for profit. Mr. Kovachich did not protest these charges either when he received the accounts or the collection letter. Secondly, Mr. Kovachich testifies that at the meeting in his home in February, 1979, the issue of 10 plus 10 was discussed. He objected to it on that occasion for the first time.

Mr. Byl further submits that on this question an adverse inference should be drawn against the plaintiff for its failure to call Mr. Church as a witness, presumably on the basis that he would not have helped the plaintiff's case if he gave evidence.

Mr. Church was not present at the trial. No person was asked to explain his absence. The matter was not raised until argument. It is argued for the defendant that his absence is to be accounted for by the fact that his evidence would not support the plaintiff's case. Depending upon the circumstances it is open to the trier of fact to draw an inference. On this issue the case for the plaintiff is that the parties orally agreed to the markup of 10 plus 10 percent in the course of discussion at Antler's office. Kovachich denies that any such agreement was made. In my view this adverse inference doctrine should not be invoked in this instance. A proper foundation for its application is lacking. There is no affirmative evidence to show that Mr. Church took any part in the negotiations, important or otherwise, in the discussion and negotiations leading up to the alleged oral agreement and Knuttson was not cross-examined on the point. Finally, no reason is shown why the defendant could not have called Church had he deemend it desirable to do so.

It was not argued by defendant's counsel that all terms were settled by the written document. It is conceded that the written document does not embody all the terms of the agreement.

The problem has of course arisen for want of some

subsequent writing, however simple, evidencing the oral addition to the written document. By one part of the oral arrangements the defendant's position was enhanced by being relieved of the obligation to order and pay for the materials. By the other part, the plaintiff would receive compensation for its time and trouble. Neither counsel advanced argument seeking to place responsibility on either party for failing to commit the oral part of the contract to writing.

Having given the matter the most anxious consideration, I find myself reasonably satisfied on the totality of the evidence, and on the probabilities material to an assessment of the conflicting evidence, that the plaintiff has proved to the degree required that the contract between the parties did contain a term providing for a handling charge of 10 per cent and 10 per cent profit for materials to be paid by the defendant Kovachich to the plaintiff, and I so find. As shown by the evidence above related, Mr. Knuttson entered into considerable detail of the meetings at which the issue was discussed and recited words used by both parties. There is an air of reality to his narration. On the other hand, Mr. Kovachich is far less exact. His evidence is of a less convincing quality. He simply denies that the matter of 10 plus 10 was ever mentioned or discussed. In the totality of the circumstances I feel satisfied that this is inherently unlikely.

Antler commenced work under the contract on April 27, 1978. By that date, the defendant's surveyors had laid out the lines for the water mains. Mr. Knuttson says that he had been able to purchase the pipes at prices earlier quoted to him, despite escalating prices at the time he ordered them for the Kovachich

subdivision. Some were ordered locally and some from Vancouver suppliers.

Although Knuttson had got the project under way by ordering materials, he was not personally in charge of Antler's work at the site itself, although he did visit the site periodically. The superintendent was Mr. Ron Jobson. Mr. Orville McKee was the on-site foreman who was responsible for supervision of the work. Both Mr. Jobson and Mr. McKee were deceased at the time this litigation began.

It appears that Mr. Knuttson was on site to observe that the surveyors had set their stakes for the water line. His unchallenged evidence is that city regulations at the time in question called for water lines to be buried underground to a depth of three metres to provide that depth of protective cover plus sand bedding, after being covered with backfill, gravel and street pavement, following their placement in the underground trench. Therefore Antler did not, and was not, required to excavate to the "regulation" depth, but only to the depth shown on the surveyor's stakes. This method applied for each of the three utilities with some qualification in respect of the water mains. In the case of the sanitary sewer, as above mentioned, the dug depth is that which is transferred down to the laser beam.

The unrefuted evidence of Knuttson is that in each instance Antler excavated according to the information shown on the surveyor stakes in accordance with the procedure sanctioned by the defendant's surveyor and engineer.

The plans provided to the surveyors and to Antler required

3 metres depth for the water lines and 2 metres for the sanitary and storm sewers respectively.

While work on the water line was in progress, an inspector from the city's engineering department, Mr. Dale McTaggart, made inspections at the site. There is no evidence of any complaint from him as to Antler's work or that they were in breach of any instructions from the city or of specifications shown on the plans. The city's concern was that the work had been started before the preliminary plans had been approved for construction by the city.

Mr. Victor Bartell is a partner in the land surveyors firm engaged by Mr. Kovachich to do the layout work. Called as a witness by the plaintiff, he said that he knew that the preliminary plans were not approved for construction and that it is not unusual for land developers to start on a project prior to the plans being officially approved. In explaining the proceedure he followed on the Kovachich project, he stated that the surveyors set out stakes every 15 metres and mark them to indicate to the contractor the depth that the contractor is required to dig. In the case of the sanitary sewer the grade is set out only for the first pipe and thereafter the operator of the machine uses the laser beam.

In testifying as to the procedure followed on the project Mr. Knuttson said, when he was referring to the surveyor's stakes for the water-main, that "we were given a dug depth, not a finished depth". I infer from his evidence, combined with the evidence of Mr. Bartell, that the surveyor stake which was set out for the first sanitary sewer pipe also gave á "dug depth", not a finished depth.

The water line was finished on May 15, 1978 and about half

of the service connections had also been installed by Bachinski.

It appears that while work on the water-main installation was in progress discussions were being held between the city engineer with his officials and Mr. Dennis and Mr. Kovachich as to a proposed change in design.

Mr. Dale McTaggart, an inspector from the city's engineering department, testified that he made periodic inspections at the site. The city's concern was that the work had been started before the preliminary plans had been approved for construction, in breach of the city by-law. Mr. McTaggart, called by the plaintiff, testified that on May 3, 1978, the city had sent the plans back for correction and resubmission.

The evidence shows that a plan revision was ordered by the city which required that the plan covering the sanitary sewer should be redesigned so that it would drain out at the north side of the property instead of the south side. I do not know whether this was the reason that the city returned the plans for correction. There was some suggestion in the evidence, but no proof, that the reason for the plan change involved the existence of an easement between lots 16 and 17. The point is not material in the present case. I mention it because Mr. Kovachich stated during the trial that he wanted this court to decide which of Antler or the third parties were responsible for what he called "mistakes" in the plans. As Antler had nothing to do with the preparation of the plans, this court is not called upon to decide that question. It is a matter between him and the third parties. In regard to this topic, however, I would observe that so far as Mr. Kovachich contends

that Antler was at fault for allegedly failing to consult with Dennis before proceeding with its work, I find no merit in this contention. It was not a condition of his contract with Antler that the latter must consult with Dennis Engineering before commencing to work under the contract.

Neither the city nor Mr. Kovachich nor Dennis Engineering ordered Antler to stop work on the installation of the water line. In due course the water line as installed by Antler received approval and Antler's work remained intact without changes, and was a satisfactory job.

I find on McTaggart's evidence that on May 15, 1978, Antler's men were setting out the sanitary sewer pipe.

On Knuttson's evidence I find that on May 16 at the site, Mr. Kovachich informed Knuttson that a revised design would be forthcoming whereby the sanitary sewer would now drain out the north side, and for this reason Antler would have to wait for the revised drawings to be made available so that the surveyor could layout the line. No significant changes were being made to the water-line.

There is no evidence that Knuttson made any reply to Kovachich on receiving this information. On his evidence I infer that he already knew, or at least, was reasonably certain, that the pending change would involve relocation of the sanitary sewer line. My impression was that the information did not cause him much suprise. It evoked no verbal or other reaction from him. In my view this would have been an opportune and appropriate time for him to discuss with Kovachich a change in the contract price for installing the sanitary sewer line.

According to McTaggart's evidence, Antler moved a backhoe down to the north-east corner on May 17. It appears that by this time Antler had received the surveyor's grade sheets, thereby apprising Knuttson of what the redesign would involve.

At the time when Antler was ready to start installing the sanitary sewer, the existing situation was that the road grades had been made according to profile plan 07 of the original plans (Ex. 2). The streets had been excavated to follow the natural grade of the land sloping south-east. The water line had been installed according to that plan.

The revision involved a change of route for the sanitary and storm sewers. Sheet 08 of revision D on Ex. 6 shows the east and west road surfaces sloping generally from south to north.

This relocation meant that Antler would start the sanitary sewer installation from a different location than was originally prescribed. Instead of starting from the south end Antler would start from the north end. I find no evidence that Antler had got started at the south end. The evidence indicates that by itself this aspect of the matter did not constitute a change of much significance. Antler simply had to start clearing land for a right-of-way at the north end by way of preparatory work to enable the surveyors to lay out the line. Some bush had to be cleared and the ground levelled. I would have considered that this part of the work should be classed as necessarily ancillary work to the job that Antler, on April 20, 1978, had contracted to perform, but the point was not argued.

Because the direction of the gravity flow of the sewer

line was reversed, it was necessary for Antler to correct the road alignment and regrade the streets. This, in turn, changed the depth of the sanitary sewer, according to the revised plan (Ex. 6), at various points along the line.

A brief discussion took place one day between Mr. Kovachich and Mr. Knuttson at the site of the new starting point when the Antler crew was clearing bush. Knuttson now testifies that it must have been obvious to Kovachich that the roads were being realigned. It appears that Kovachich made some inquiry about the necessity for Antler's big 235 backhoe for what appeared to him to be bush clearing. Nothing was said by either man on the question whether this or any later work would result in extra charges to Kovachich. I am not prepared to draw an inference from this incident that Kovachich must have realised that a change in contract price was intended.

Under the revision no variation of any kind was ordered to change the size of pipe for the sanitary sewer. Thus the revision did not entail any expenditure of Mr. Knuttson's time on that account.

Changes in the sizes of the storm sewer pipes did, however, involve him in spending time to reorder such pipe to comply with these changes. The orders came from Mr. Kovachich or his agents with a frequency which was no doubt exasperating. Eight inch pipe was first ordered, then some 10 inch, then 15, then 12, and finally some 18 inch pipe. I find that Knuttson did order these various sizes as each change was made, but the only pipe which actually arrived on site was the 10 inch pipe and the

final order of 18 inch pipe. The latter had been ordered by Knuttson but it did not actually arrive on site until August or September, about two months after Antler had left the job. It was installed by Bachinski for the owner.

The grades for the storm sewer system had not been changed. Mr. Knuttson testifies that the new depth specifications for the sanitary sewer required Antler to put its larger backhoe (a 235) into service. Also the manholes would be deeper and two or three drop manholes had to be acquired. They had to be benched out in steps in order to meet Workers' Compensation Board requirements.

Work on the sanitary sewer started on May 17. Antler has no record of when it was finished but I find on other evidence that it was fully installed on May 31, 1978. Antler then began work on the storm sewer at a point between manholes 15 and 16. They did only a small segment and then left the job. The work which Antler did carry out at that trench appears to have been done in less than a day, as the evidence indicates that Antler started on the storm sewer on June 5, 1978, and left the job the same day, and did not return. I assume that between May 31 and June 5 there was some delay awaiting pipe but the evidence on this point is not clear. Mr. Knuttson testified that the sanitary sewer was finished by mid June, 1978, but this appears to be out of harmony with other acceptable evidence that Antler left the job on June 5, 1978. The storm sewer specifications called for 18 inch pipe. As earlier stated, Mr. Knuttson testified that Antler had installed 18 inch pipe. This was shown to be incorrect.

Antler put in 10 inch pipe. As Mr. Byl concedes, there was no intention on Mr. Knuttson's part to mislead the court. I think he unintentionally fell into this error because Antler had no record or documentation of what had actually occurred during this time. On cross-examination, he stated that the surveyor had told him to put in 10 inch pipe. He further testified that Mr. McTaggart, the city inspector, told Antler to take out the 10 inch pipe. But Antler either neglected or declined to do so.

Mr. Kovachich testifies that he examined this particular storm sewer ditch between manholes 15 and 16. He had watched it being dug by Antler before its crew left. He said it took them only four hours to do the job. He estimated that it was no more than two feet into the ground, and as he was concerned about frost, he called Mr. Dennis about his concern. He further testifies that after Antler had left the job on June 5, 1978, the 10 inch pipe in that trench was replaced by Bachinski with an 18 inch pipe in what he believes was a different ditch in August or September. In giving this evidence Mr. Kovachich's memory was aided by reference to entries he had made in his diary at the time. While in the witness box without his records, Mr. Bachinski could not recall whether he had to redig that particular trench.

I accept this evidence and find as a fact that the said trench was excavated to no more than 2 feet.

After digging this short segment of storm sewer trench Antler, as stated, did no more work under its contract. Mr. Knuttson testifies that there had been so many delays that Antler had to quit to go to other jobs. Mr. Kovachich testifies that he did not

approve of this decision but he understood that Antler needed its key personnel on other jobs, and assented.

An allegation in the statement of defence that Antler had abandoned the project was withdrawn by the plaintiff. My finding therefore is that the contract was terminated by mutual agreement of the parties before it was substantially completed. The job was taken over for Kovachich by Mr. Bachinski, carrying on business as B & M Holdings. He installed the storm sewer and completed the job about the end of August, 1978. When he took it over he did not have some of the necessary men or equipment to do the work, and I expect that it was necessary for him to take some time in preparing for the job. Antler "rented out" to Kovachich their man-hole specialist, Mr. Unterhoffer, with his truck and the backhoe operator, Mr. Nyberg, and the laser.

On September 1, 1978, the defendant first arranged for gravel to be placed on top of the utilities.

On the evidence I am unable to conclude that the design change was the cause of any serious delay to the plaintiff. Antler was anxious to leave for other jobs. Viewed in this light perhaps any delay would be regarded as a matter of concern to this contractor but which would not normally be regarded as serious delay. In my view there was no such delay on the part of the defendant sufficient to constitute a breach of contract on the defendant's part. The contract did not specify a date for completion. It was a contract to instal all the utilities for the subdivision for a readily ascertainable sum. Clause 6 provided for payment to be made upon completion of the work. In my judgment it was

an entire contract and carried an implied undertaking by the contractor to complete the whole of the project. A utility project for a subdivision left without a storm sewer would be useless. In this case, but for the good grace of Mr. Kovachich, Antler might well have faced a claim for failure to complete. Because of his assent, however, the matter does not arise.

On the evidence I am led to the view that the depth specification change for the sanitary sewer was in reality not of great concern to Antler at the time. No point whatever was made of it at the time. I find that Mr. Knuttson would have been content with whatever extra remuneration would be forthcoming under the contract for the additional amount of linear footage the rerouting would involve.

The time was fast approaching for Antler to send its key men to other jobs. It was hiring from the union hall. It did not want to lose its men. I infer, without, I hope, extending the evidence beyond its natural significance, that such delay as did arise out of the changed orders for the size of the storm sewer pipes, was really the catalyst that brought about Antler's decision to leave the job at that stage in its unfinished state.

Although the plaintiff at trial placed emphasis on its view of delay, there is no claim by Antler for additional money on account of delay.

The extra digging allegedly done by Antler for the sanitary sewer under the revised specifications allegedly involved additional costs to the plaintiff. It is those claimed costs which are the subject-matter of Antler's claim for $13,653.69 for extras.

This claim is evidenced by an undated invoice (Ex. 1 tab 8). It is not in dispute that no prior claim was made by the plaintiff upon Mr. Kovachich for payment of this claim, and that it was made and sent to him in October, 1982; almost 4 1/2 years after these costs are alleged to have been incurred.

It is clear on the evidence of Mr. Knuttson that Antler had no intention to make such a claim. He frankly states that the claim was made only because the invoices of September 12, 1978 (Ex. 1 tab 6a) for $60,046.19 and October 31, 1978 (Ex. 1 tab 7 for $10,392.50) had not been paid. A number of items on these accounts are in dispute in the present case.

The said invoice of October, 1982 (Ex. 1 tab 8) reads as follows:

"Antler Construction Co. Ltd.
P. O. Box 1629
Prince George, B. C.

Manager:
Mike Church

Date 19

TO Sy Kovachich

I N V O I C E

Extra costs incurred to Antler Construction Co. Ltd. due to revisions made in design of underground utilites as listed below:

2200' of 6" water main c/w hydrants, fittings and thrust blocks as per drawings:
3 hydrant assemblies
2 main line tees
5 main line gate valves
2 - 90° bends
1 - cap
2200' of 6"@$7.00 per foot = $15,500.00

continued page 2

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Sanitary Sewer Mains (Original depth zones)

Exist. to M.H. 2.5 - 3.0	- 68 meters deep
9 - 8 2.5 - 3.0	- 15 meters deep
8 - 7 2.5 - 3.0	- 85 meters deep
7 - 6 2.5 - 3.0	- 97.5 meters deep
6 - 5 2.0 - 2.5	- 61 meters deep
8 - 4 2.0 - 2.5	- 92 meters deep
4 - 3 2.0 - 2.5	- 88.5 meters deep
3 - 2 2.0 - 2.5	- 84 meters deep
2 - 1 - 2.0 - 2.5	- 86 meters deep

No drop manholes

As Constructed Sanitary Sewers

84 to 9 = 50 meters @ 6.5 to 7.0 meters deep
9 - 4 = 78 meters @ 4.0 - 4.5 meters deep
4 - 3 = 91 meters @ 2.5 - 3.0 meters deep
3 - 2 = 83 meters @ 2.5 - 3.0 meters deep
2 - 1 = 86 meters @ 2.5 - 3.0 meters deep
4 - 5 = 92 meters @ 4.0 - 4.5 meters deep
5 - 6 = 84 meters @ 2.0 - 2.5 meters deep
6 - 7 = 99 meters @ 2.5 - 3.0 meters deep
7 - 8 = 57.5 meters @ 3.0 - 3.5 meters deep

As our quotation was based on isntalling (sic) the sanitary was to a maximum depth of 2.5 meters we are requesting payment for depth zones over 2.5 meters as follows:

2.0 - 2.5 = 84 m (275.60 feet)	@ $7.00 per foot	=	$ 1,929.20
2.5 - 3.0 = 359 m (1177.87 feet.)	@ $8.50 per foot	=	10,011.89
3.0 - 3.5 = 57.5 m (188.65 feet)	@ $10.00 per foot	=	1,886.50
3.5 - 4.0 = -----	@ $13.00 per foot	=	--------
4.0 - 4.5 = 170 m (557.77 feet)	@ $16.00 per foot	=	8,924.32
4.5 - 5.0 = -----	@ $19.00 per foot	=	--------
5.0 - 5.5 = -----	@ $21.00 per foot	=	--------
5.5 - 6.0 = -----	@ $24.00 per foot	=	--------
6.0 - 6.5 = -----	@ $27.00 per foot	=	--------
6.5 - 7.0 = 50 m (164.05 feet)	@ $30.00 per foot	=	4,921.50
Total = 720.5 m (2363.96 feet)		=	$27,673.41

Sanitary sewer original contract = 2,363.96 x $7.00 = $16,547.72

Sanitary sewer changed contract = (See above) = 27,673.41

Increase due to changes in sanitary sewer = $11,125.69

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continued page 2 ....

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The storm sewer system had so many changes made to it that we onlu (sic) installed the storm sewer between manhole 15 to 16 and this was changed from 10" pipe at 2 meters deep to 18" pipe at 3.5 meters deep.

Antler has invoiced for 158' @ 7.00 per foot	=$1,106.00
Due to the greater depth and larger diameter Antler now wants 158' @ $16.00 per foot	= 2,528.00
Total due on storm sewer installed	=$2,528.00

INVOICE TOTAL ..... $13,653.69"

This claim is advanced on the basis of a quantum meruit. Mr. Curtis, in argument on behalf of the plaintiff said: "The claim by its very nature has to be a claim somewhat in the nature of a quantum meruit claim because it is an extra request that was not put in the original quotation.:

Mr. Byl, on behalf of the defendant, objects to the claim being advanced on this basis, on the ground that quantum meruit was not pleaded. Counsel is correct. It is framed in the form of a claim for money due from the defendant to the plaintiff for work done and materials provided by the plaintiff for the defendant at his request. It is a simple claim for debt. Though a civil debt is founded on some contract between parties, this pleading but imperfectly reflects the real nature of this dispute. The word "contract" nowhere appears, and there is no mention of a claim for extras. The statement of claim was filed on December 14, 1982 in close proximity to the date of the invoice, (Ex. 1 tab 8).

It must first be pointed out that the claim appearing in the invoice for $15,500 for alleged extra costs in regard to the water main was not claimed by the plaintiff. This part of the invoice

constituted a form of demand for $15,500 when it was received by the defendant in October, 1982. Mr. Knuttson's evidence as to this large portion of the invoice is that Antler made no charge because, in fact, there was not much change in the water system. Kovachich had already paid Antler $15,120 for 2160 ft. at $7 per foot per an invoice of June 1, 1978 (Ex. 4).

No objection was taken until final argument to the plaintiff's failure to plead quantum meruit. No authority was cited on the question whether or not a claim for work and labour may be sufficient to cover a claim for remuneration on that basis. It must have become apparent to Mr. Kovachich in October 1982 (but no sooner) that the plaintiff's claim was for extra costs. The first two lines of the invoice (Ex. 1 tab 8) reads: "Extra costs incurred to Antler Construction Co. Ltd. due to revisions made in design of underground utilities listed below:"

Mr. Byl did not suggest that the plaintiff's failure specifically to plead for its alleged additional costs on a quantum meruit basis resulted in prejudice or embarrassment in the conduct of the defendant's case. I must decline to give effect to the objection.

No objection was taken to the claim being advanced on a quantum meruit basis for only one portion of the work covered by the contract. There was no submission that the alleged deeper digging was merely an extension of work that the contractor was obliged to do under the contract. I will accordingly treat with the matter to accord with the manner in which the case was conducted.

Although not so stated in argument it seems evident

that the plaintiff relies upon the fouth rule suggested by Egbert, J in Re Chittick and Taylor (1954) 12 W.W.R. 653 (S.C. Alta.) to determine what are "extras" within the meaning of a building contract, as follows:

> "(4) If the contractor did work or supplied materials not called for by the contract on the instructions, express or implied of the owner, he is entitled to charge for such additional work or materials as an 'extra'. What amounted to instructions from the defendant is dependent on the circumstances relating to each item..."

I think it is there made clear by Egbert, J. that this rule in regard to instructions is to be applied in relation to the surrounding circumstances of the particular case.

I did not have the benefit of any citation of authorities by either counsel. Mr. Byl submits that in the circumstances of the present case it would work a serious injustice to the defendant to entertain this claim. I agree. A decision rejecting the claim, however, must depend upon the application of legal principles to the facts. There was no close argument on the matter.

In commenting upon the case of Re Chittick and Taylor, the learned author of Hudson's Engineering and Building Contracts, 10th ed. makes the following observation at p. 507:

> "... the authorisation or promise to pay can be inferred from mere knowledge of any acquiesence in the proposed variation, provided it is realised or ought to be realised that a change of price is intended or probable as a consequence of the variation". (my emphasis)

and at p. 545:

> "It is submitted that where work is undertaken by a contractor at a given price the employer will not, by assenting to or even requesting an alteration from the original plan, render himself liable to pay extra for it, unless he is either expressly informed or must necessarily from the nature of the work be aware that the alteration will increase the expense, and even then the employer will not be liable to pay extra

Antler kept no records or documents of its "extra" charges and presented none in attempting to prove its pecuniary claim. In all the circumstances I am loath to infer that Mr. Kovachich must have been necessarily aware that the changes would increase the expense to him, and there is no evidence from his engineer. His surveyor was not questioned about the matter during cross-examination. There were no surveyors field notes put in evidence.

Antler's invoice of June 1, 1978, (Ex. 1 tab 4) reads:

"Work performed to May 31, 1978

1.	Water system - 2160' @ $7.00 per foot ------	$15,120.00
2.	Sanitary sewers - 2372' @ $7.00 per foot ----	$16,604.00
3.	Materials supplied as per attached list -----	$44,533.61
	Total ----------	$76,257.61

The defendant paid this account. Mr. Knuttson made some attempt to show that in charging the contract price for the sanitary sewer by that invoice Antler was reserving its right to charge extra for that work, and was still reserving it when Antler accepted payment of $16,604 as part of the above total. He said, in effect, that he was waiting for the as-built plans so that he could ascertain what extra work Antler actually had done. Antler did not know. It had no records of any extra wages for its workmen or for machine costs attributable to the alleged extra digging. In my view Antler should be presumed to have waived a claim for extra charges at the time of its invoice of June 1, 1978.

The conduct of the plaintiff from that time forward for 4 1/2 years shows that there is a missing element. There was no intent, real or implied, that any work done by way of deeper digging

should give rise to an enforceable right to additional payment. The conduct of the plaintiff clearly shows that from the time it received the information showing the variations, it carried out the work without objection. Not before October, 1982, after 4 1/2 years, did the plaintiff affect to regard the alleged extra digging as extra work outside and over and above the contract. Mr. Knuttson admits that Antler's bill for extras was rendered, in October, 1982, for the sole purpose of giving Antler additional bargaining power in the matter of the defendant's unpaid account. There was no suggestion that Antler demanded compensation for extras pursuant to any agreement, express or implied, which it thought had been created in any way between it and the defendant. It's conduct was an in terrorem act having nothing to do with an agreement, express or implied.

When the defendant told the contractor there would be a change in plans and when the contractor thereafter worked under the changed plans nobody took a position. The contractor acted in a manner inconsistent with the concept of an express or implied agreement for extras. In Peter Kiewit Sons' Company of Canada Ltd. [1960] S.C.R. 361, 22 D.L.R. (2d) 465, (S.C.Can.) Judson, J. speaking for the majority, refers at p. 482 (D.L.R.) to a passage from Winfield on the Law of Quasi Contracts, 1952, p. 52, wherein it is stated that the obligation sued upon under a quantum meruit is genuinely contractual, not quasi-contractual. The present case is one in which the contractor, although not bound to do so, did accede to a request to do the work called for by the design change. In the normal course this would entitle the contractor

to be paid for such additional work but in the present case the evidence shows that the contractor voluntarily waived such entitlement.

The plaintiff's claim for additional work is advanced on the basis of quantum meruit. It is well-settled law that such a claim must depend upon a new contract, express or implied, for that work. In every contract there must be agreement, express or implied. Mere agreement, without any intent, real or implied, to be bound at law, does not give rise to an enforceable right.

There was no express request by Kovachich or his agents for extra work. The claim for extras is made on the basis of implied contract inferred from the conduct or presumed intention of the parties. This presumed intention or acceptance of work raises a presumption that a contract was made, but in either case, like any other presumption, it may be rebutted and displaced by the particular circumstances of the case: 8 Hals. 3d ed. p. 225 para. 389.

Even if a contract can be implied in this case, the contractor must prove its additional cost by fixing the price of work not provided for in the plans and specifications. This price represents the actual cost of work in addition to that provided for in the plans and specifications: See Corpex (1977) Inc. v. (my emphasis) The Queen in Right of Canada, (1984) 6 C.L.R. 221 at p. 246, per Beetz, J. (S.C. Can.).

The extra digging allegedly done by the plaintiff does not become translated into an extra because the defendant was withholding payment of a disputed invoice. The defendant felt justified in assuming that when he paid for the sanitary sewer

work shown on the invoice of June 1, 1978, at the contract price, he had no further obligation to pay any more for the installation of the sanitary sewer.

By its invoice of October, 1982, the plaintiff purports to charge the difference between the contract price of $7 per lineal foot and a series of rates ranging from that very contract price through to $8.50 excalating to $30 per foot.

These figures do not come from any records or ledger made up by Antler at the time, but purport to be based upon Antler's customary charges. The evidence in support of this was lamentably sparse. It consisted solely of the following undocumented bare assertions by Mr. Knuttson. He said this: "The rates range from $8.50 per foot to $30 per foot for varying depths and all these rates are lower than what we charge the City of Prince George". And this: "$23 a foot is what we charged on Hart Highway work for similar work". Absent any evidence of such so-called similar work. The court cannot accept this as proof of a reasonable price.

The next problem concerns the disputed issue of the proof offered by Antler of the depths it allegedly excavated as shown in its invoice (Ex. 1 tab 8). This is a claim for alleged actual digging. The plaintiff maintains that at the time of construction it actually excavated to the deeper depth zones for the sanitary sewer it now claims. The defendant disputes the plaintiff's figures. The evidence as to procedure followed the plaintiff in its attempt to prove its claim and by the defendat in attempting to prove its counterclaim occupied a good portion of the time on this trial. I intend to deal with it as breefly

as possible.

Exhibit 3 are the as-built plans. Exhibit 2 are the original plans upon which Antler based its bid. Both of those exhibits were entered on consent of counsel at the outset of the trial. For that reason I think it is too late for Mr. Byl to object to the use of these plans. Exhibit 6 are the revised plans. The were not entered on consent. Whatever may be said as to the weight to be given to evidence based on Exs. 2 and 3 that calculations made from all the plans are of little value, I think Mr. Byl's objection is a valid one in regard to Ex. 6. There was no evidence to show that those plans were reasonably accurate as to any part of them. They all show thereon that they were drawn by one "J.P.", and certified by Mr. Dennis, who is not a party to these proceedings.

The plaintiff made no attempt to prove his claim for extras until long after the pipes were laid and the project was completed and the streets were paved.

Telescoping this evidence into manageable proportions, the process followed by Mr. Knuttson and the plaintiff's expert witness, Mr. McTaggart was along these lines. The object was to try to calculate the depth of each manhole at the time of construction. They used the as-built plans, the preliminary plans, and the revision plans (Ex. 6) and made elaborate calculations therefrom. After comparing Ex. 3 with Ex. 2, the as-built plans, Ex. 3, were then compared with the unverified revision plan (Ex. 6). The conclusion was that while this will disclose the final depth of the manholes now it cannot give better than an estimate of the depth dug by the contractor at the time the contractor excavated.

The reason, as I attempted to follow it, was that on the preliminary plan some contour grade elevations are indeed shown but only at about five feet intervals, according to the figures thereon. In that case, one would need to make a number of assumptions as to what the contours are in between.

There is no evidence that the contours on those plans are those drawn by a land surveyor. They were evidently prepared by the engineer. This casts doubt on their accuracy. In order to obtain the actual depth of excavation at the time of construction one would need to know what the contours above the pipes were originally at that time. One would need verified surveyor's information as to the grade at the time of construction for the calculations to be considered to be accurate.

There was no provision for calculation by this method. In my view the plaintiff ought to have informed the defendant of its intention to prove his claim in this manner. Mr. Kovachich would then have had an opportunity to involve his own expert in the process. In view of the foregoing the plaintiffs demand for extras as claimed in Ex. 1 tab 8 is disallowed in full.

As it was, when Mr. Kovachich received this invoice 4 1/2 years after the event he made an effort on his own to refute these figures. He fixed a tape measure to calculate the depth of each manhole, taking into account the pavement, crush and gravel on top. His object was to show that Antler's figures were wrong. According to his calculations they were wrong, and it was on his figures that he entered his counterclaim for the cost of the gravel he had caused to be put over top of the utilities.

There is no evidence from any city official to show that the gravel he bought was made necessary due to the failure of Antler to adhere to the plans. He was unable to say that Antler breached the contract in that respect. He was not able to say what gravel was extra gravel as opposed to gravel he had undertaken to put over the project at the start.

It may be that he was called upon to get more gravel than he anticipated because the native material excavated out of the trenches may not have been approved for his roads. So far as appears on the evidence it may be that he had to import new material. He did not cover this point in evidence.

The only way that the defendant can show that Antler was negligent or in breach of contract would be to provide proof that Antler failed to follow the information on the stakes or on the plans as this he failed to do.

The defendant's counterclaim must therefore fail, with one qualification. I am convinced that from testimony adduced by Mr. Kovachich on cross-examination that the plaintiff virtually admits that he bought, hauled and paid for 4000 yards of extra gravel for which the defendant is entitled to be compensated. The evidence shows that the price of gravel was 50 cents per yard for a total under that head of $2000. But Mr. Kovachich gave evidence that the job also requires hauling, loading, delivering, and spreading the gravel. The only evidence before me of a reasonable amount for this extra outlay is found in defendant's exhibit 7 tab 11 which shows a trucking charge of $35 per load. For 400 loads this would amount to $16,000. In addition there are the

spreading and other forms of expense above mentioned. It is difficult to determine the proportion of the total should be paid by the plaintiff. I will, somewhat arbitrarily, allow to the defendant on his counterclaim hereunder an additional $2,500 for a total of $4,500.

I must now deal with the remaining disputed claims (Ex. 1 tab 6a,b).

I now turn to the items listed on Antler's first unpaid invoice dated September 12, 1978, totalling $60,046.19 (Ex. 1 tabs a and b), made up of nine items for which the plaintiff claims payment.

Item 1: Clearing right-of-way and correcting road - $716.74. The particulars given on page 2 of Ex. 1 tab 6b are:

> Clearing right of way for storm sewer and sanitary sewer at east end of subdivision and correcting road location on easterly road.
>
> | | |
> |---|---|
> | D-6 dozer 5 hrs. @ $50 | - $200.00 |
> | 235 backhoe 4 hrs. @ $80 | - $320.00 |
> | Hiab 2 hrs @ $45 | - $90.00 |
> | Lowbed 2 hrs @ $35 | - $70.00 |
> | Labourer 2 hrs @ $18.37 | - $36.74 |
> | | $716.74 |

The objection to this claim is as to the amount and to the use of a large 235 backhoe and DC6 Cat. Mr. Kovachich testified that he had observed Mr. Bachinski do similar work in the same sort of terrain in the subdivision with a smaller 450 machine in half the time. Thus the lowbed, etc were unnecessary. Mr. Knuttson said the 4 hours labourer cost at $50 per hour and 4 hours at $80 per hour did not necessarily represent the actual working time. He said that if a union man is called out to work at all he is guaranteed 4 hours work, no matter how long he works. Mr. Bachinski

was not able to say whether or not his 450 John Deere could have done the job. There is evidence earlier mentioned that Kovachich protested the use of this large machinery at the time and at the February, 1979 meeting. There is no evidence of what work Antler would have done, if any, clearing the south-east corner of the property under its contract. I have some disquiet about this claim. But I heard no argument as to the matter of the union rates charged to the defendant and Bachinski's evidence did not confirm the plaintiff's evidence. With some reluctance I will allow this claim.

Item 2: Rental of 235 backhoe for deep services - $1,200.

The claim here is by the plaintiff for the rental to Bachinski of the large 235 backhoe to put service connections at $80 per hour. The defendant contends that this is a duplication of a bill dated August 10, 1978 (Ex. 7 tab 9) from Antler to Bachinski for overtime rental of the backhoe totalling $537.68. Bachinski was employed by Kovachich as an independent contractor. Kovachich paid the $537.68 bill to Bachinski. The bill of August 10 states that it was for rental on May 30, 31, and June 1st, 1978. I am not satisfied with the explanation for the confusion regarding this item and it is disallowed.

Item 3: Hauling and unloading of materials - $7,476.20

This item is admitted by the defendant. Allowed.

Item 4: Digging the storm sewer manhole 15 to 16 - $1106.

On earlier evidence as to this item and in view of the erroneous charge the plaintiff made in this regard, I conclude it will be appropriate to disallow this item. Disallowed.

Item 5: Rental of 225 hoe for storm sewers - $7,690.83

After Antler left the job it rented out equipment for use by Bachinski to finish the job but on the basis the charges would be paid by the defendant. The dispute on this item involves all but $7000. It is said that $690.83 thereof was paid to Bachinski and that there is an overlapping. I must reject this. Bachinski was left in charge of the job during the summer of 1978 and the defendant maintains that there was an agreement between him and Knuttson that no charges would be accepted by him unless they carried Bachinski's signature. Bachinski was not able to confirm this. In effect, he did not recall the matter. I find that the condition asserted by the defendant has not been proved. This claim is allowed.

Item 6: Supply manhole man and truck - $2,209.60

It was agreed the defendant would pay Antler for the services of Unterhoffer, the manhole expert, to assist the defendant to finish the project. The objection here is that his work slips were not signed by Bachinski. For the reasons given above I allow this claim.

Item 7: Rental of laser beam - $630

This item is admitted and is allowed.

Item 8: Materials supplied to project - $24,516.34

This is admitted and is allowed.

Item 9: Handling and profit of materials - $14,500.48

For reasons earlier set out this claim is allowed.

To summarize the above findings and the results thereof, the plaintiff sued the defendants for a total of $84,092.38.

I have found that liability rests upon the personal defendant, Savo Kovachich. This claim of $84,092.83 was made up as follows. Under the September 12, 1978 invoice (Ex. 1 tab 6a) the plaintiff claimed $60,046.19. I have disallowed item 2 of $1200 and item 4 of $1100 for a total deduction under that head of $2306. On this invoice the plaintiff succeeds in the net amount of $57,740.19.

Under the invoice of October 31, 1978 (Ex. 1 tab 7) the plaintiff sued for $10,392.50. The claim of $227.50 therein for diesel fuel was rejected as abandoned. Under this head the plaintiff therefore recovers the net sum of $10,165.

Under the invoice of October, 1982 (Ex. 1 tab 8) the plaintiff sued for extras of $13,653.69 all of which I have disallowed.

The net result of the above calculations is an award of $67,905.19.

The defendant counterclaimed under its extra gravel claim for $29,609.82 of which I have herewith awarded him $4,500. This court accordingly gives judgment to the defendant Savo Kovachich against the plaintiff in the amount of $4,500 together with costs to be taxed.

The court hereby awards judgment to the plaintiff against the defendant Savo Kovachich in the amount of $67,905.19 and costs to be taxed.

The said amount of $4500 together with costs shall be set-off against the plaintiff's judgment and taxed costs.

In regard to costs, and for the assistance of the taxing officer I am of the opinion and hold that there should be no

costs to either party for costs in regard to that portion of the trial taken up with the allied questions of proof by the plaintiff of its costs for extras and the defendant's proof of its counter-claim for extra gravel. It is clear that the plaintiff made this claim only because the defendant had not paid its previous accounts, much of which he disputed. On the other hand, the defendant made no protest or demand for the extra gravel claim until he was sued in October, 1982 for extras. It was a tit for tat situation. All costs will be taxed on a party and party scale.

The claim against the corporate defendant, Sy Kovachich Holdings Ltd. is dismissed with costs. Under Rule 57(11) it will be appropriate to order that the costs of the unsuccessful defendant, Savo Kovachich, shall pay the costs of the successful defendant. This accords with the submissions of counsel on this point.

The question of court order interest has caused me considerable concern. No action was taken by the plaintiff until 4 1/2 years after the cause of action arose. However, I have reached the conclusion that the applicable rates should be in accordance with the registrar's rates prevailing from time to time to the date of judgment.

On the first portion of the claim above noted the date will run from October 31, 1978. On the second portion of the claim it will run from December 1, 1978, and on the counterclaim from November 30, 1982. Counsel are at liberty to speak to me, however, as to this portion of this judgment.

Judgment accordingly

F.S. Perry, L.J.S.C.