IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *RJG Construction Limited v. Marine Atlantic Inc.*, 2019 NLCA 51
Date: August 12, 2019
Docket Number: 201801H0021

BETWEEN:

RJG CONSTRUCTION LIMITED — APPELLANT

AND:

MARINE ATLANTIC INC. — RESPONDENT

Coram: Welsh, Hoegg and O'Brien JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador (G)
General Division 201401G0057
2018 NLSC 41

Appeal Heard: September 12 and 13, 2018
Judgment Rendered: August 12, 2019

Reasons for Judgment by: O'Brien J.A.
Concurred in by: Welsh and Hoegg JJ.A.

Counsel for the Appellant: Paul Dicks Q.C. and Megan Sheppard
Counsel for the Respondent: Daniel Simmons Q.C. and John O'Dea Q.C.

O'Brien J.A.:

Overview

[1] A construction company entered into a contract with a project owner and performed work pursuant to the contract, but was not paid for the work. The project owner claimed it was entitled to "freeze" all funds owing to the company. In response, the company purported to terminate the contract.

[2] In this circumstance, was the project owner entitled to freeze funds, or did the freezing of funds constitute a repudiation of the contract, thereby entitling the company to terminate the contract and seek damages for breach? This is the essence of the matter under consideration in this appeal.

[3] The project owner in this case, Marine Atlantic Inc., is a federal Crown corporation. It operates ferries between Nova Scotia and Newfoundland and Labrador. Marine Atlantic Inc. entered into a contract dated March 13, 2013 with a construction company, RJG Construction Limited. The contract, valued at approximately $2,858,000, was for the construction of a ferry wharf structure (referred to in the contract as a "Dolphin Replacement") in the town of Argentia, Newfoundland and Labrador (the construction contract).

[4] An engineering company, CBCL Limited, was hired as a consultant on the project and was responsible for the administration of the contract, including dealing with payment of funds during construction. The construction contract provided for periodic payments, known as progress payments, and CBCL was involved in approving, or certifying, these payments.

[5] The construction contract required that RJG obtain a performance bond to secure performance of the contract. A contract was entered into and a performance bond was obtained in the amount of $1,614,770 (the performance bond contract). Western Surety Company was the surety under the performance bond, RJG was the principal and Marine Atlantic was the obligee.

[6] While the construction project was ongoing, Marine Atlantic froze funds and refused to pay RJG for work it had completed. RJG purported to terminate the contract as a result. Subsequently, Marine Atlantic also purported to terminate the contract. Marine Atlantic claimed that RJG had breached the contract by failing to meet the contractual timelines, and by purporting to terminate the contract when it was not entitled to do so.

[7] Both RJG and Marine Atlantic issued notices of default and notices of termination of the contract. RJG's notice of termination was given on January 7, 2014. Marine Atlantic's notice of termination followed three days later, on January 10, 2014.

[8] RJG sued Marine Atlantic in the Supreme Court of Newfoundland and Labrador, General Division, and sought damages for breach of contract arising from Marine Atlantic's failure to pay. RJG's position was that it was entitled to terminate because of Marine Atlantic's freezing of funds. It further argued that when its notice of termination was issued, on January 7, 2014, the contract ended and it was entitled to seek damages.

[9] Marine Atlantic counterclaimed against RJG. It alleged that RJG had breached the contract by not completing the work on time, thereby failing to meet the contractual requirements. Marine Atlantic claimed damages, including the additional costs associated with hiring another contractor to complete the work. It argued that RJG's notice of termination was invalid, and that the contract remained in force until Marine Atlantic's notice of termination brought it to an end, on January 10, 2014.

[10] The trial judge, in his decision (2018 NLSC 41), described the background facts giving rise to the dispute as follows:

> [1] This matter involves a claim and counterclaim for damages arising out of an alleged breach of contract for the design and construction of a wharf structure in Argentia, NL to be used by the Defendant to dock one of its ferries, the *Atlantic Vision* ("*Vision*") travelling between Argentia, NL and North Sydney, NS. Each party alleges the other has breached the contract warranting an award of damages.
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> [2] The Plaintiff, R.J.G. Construction Limited ("R.J.G.") and the Defendant, Marine Atlantic Inc. ("Marine Atlantic") entered into a contract dated 13 March 2013 whereby R.J.G. agreed to construct a wharf structure known as a mooring dolphin ("the dolphin") in the harbor of Argentia, NL. …
>
> [3] Each party gave notice of default under the terms of the contract and purported to terminate the contract. Marine Atlantic gave its notice of default on 24 October 2013 citing failure by R.J.G. to perform its contractual obligations on time. Marine Atlantic allowed R.J.G. to continue work on the project. R.J.G. gave notice of default to Marine Atlantic on 17 December 2013 citing failure by Marine Atlantic to pay amounts allegedly owing to it for work performed and gave its notice of termination based on the notice of default on 7 January 2014. Marine Atlantic issued its notice of termination on 10 January 2014, following the purported termination by R.J.G. Each of the parties has denied the validity of the notice of default and notice of termination of the other.

[11] The judge found that RJG's notice of default was invalid as it did not comply with the contractual requirements. As a result, he determined that RJG's notice of termination was also invalid, because a valid notice of default was required as a condition precedent to issuing the notice of termination.

[12] RJG's main argument is that Marine Atlantic repudiated the contract. It argued at trial that Marine Atlantic's freezing of funds amounted to a repudiation of the contract which permitted RJG to treat the contract as having ended. RJG further submitted that this right to terminate, because of Marine Atlantic's repudiation of the contract, was in addition to and independent of any right to terminate provided for in the contract.

[13] The trial judge rejected RJG's repudiation argument. He held that RJG was not entitled to terminate the contract when it purported to do so. Consequently, the judge concluded that RJG was not entitled to damages.

[14] The judge provided several reasons for concluding that RJG did not have the right to terminate the contract. He held that:

> 1. Marine Atlantic's freezing of funds did not constitute a repudiation of the contract;
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> 2. Marine Atlantic was required to freeze funds in order to comply with its obligations under the performance bond;
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> 3. RJG was estopped from terminating the contract while ongoing remediation discussions took place between the parties; and
>
> 4. RJG was not entitled to terminate as it did not strictly comply with the contractual requirements.

[15] After dismissing RJG's claim, the judge allowed Marine Atlantic's counterclaim. He held that Marine Atlantic was entitled to terminate the contract when it did and that its January 10, 2014 notice of termination was valid. The judge awarded damages to Marine Atlantic for breach of contract in the amount of $1,315,688.56 plus HST, interest and costs.

[16] On appeal, RJG argues that the judge erred as follows: in holding that Marine Atlantic did not repudiate the contract by freezing funds; in finding that Marine Atlantic was justified in freezing funds in order to comply with the performance bond; in deciding that RJG was estopped from terminating the contract; in holding that RJG was not permitted to terminate because it had not

strictly complied with the contract; and in concluding that RJG was not entitled to terminate the contract and seek damages. RJG further argues that the judge erred in finding that Marine Atlantic was entitled to terminate the contract, and in the assessment of damages awarded to Marine Atlantic.

[17] Marine Atlantic argues on appeal that the judge was correct in concluding that it had not repudiated the contract. Further, Marine Atlantic submits that the judge was also correct in finding that the contract was still in force when it issued its notice of termination on January 10, 2014. As such, Marine Atlantic's position is that it was entitled to damages for breach of the contract, and that there was no error made in the assessment of the damages.

Issues

[18] The following issues will be considered on appeal:

Issue 1: Freezing of funds by Marine Atlantic

(a) Did the judge err in concluding that Marine Atlantic did not repudiate the contract by freezing funds?

(b) Did the judge err in concluding that Marine Atlantic was required or entitled to freeze funds in order to comply with its obligations under the performance bond?

Issue 2: Termination of the contract by RJG

(a) Did the judge err in concluding that RJG was estopped from terminating the contract while remediation discussions were ongoing between the parties?

(b) Did the judge err in concluding that RJG could not terminate the contract as it had not strictly complied with the contractual provisions?

Issue 3: Did the judge err in concluding that RJG was not entitled to terminate the contract and seek damages?

Issue 4: Did the judge err in concluding that Marine Atlantic was entitled to terminate the contract?

Issue 5: Did the judge err in the assessment of damages awarded to Marine Atlantic?

Analysis

[19] The issues on appeal require an assessment of whether the parties were entitled to terminate the contract when they purported to do so, and the timing of the purported terminations. Marine Atlantic, in its submissions, characterized the appeal question as follows:

> "There is no doubt that the contract was terminated. This appeal turns on the question of whether RJG was entitled to terminate it on January 7, 2014. If it was, then it is entitled to damages from Marine Atlantic under General Condition 7.2.5. of the contract."

[20] At the appeal hearing, the parties submitted that their positions were mutually exclusive; they agreed that only one of them could prevail and be awarded damages for breach of contract in this circumstance.

[21] That is so because, if RJG was entitled to terminate the contract when it purported to do so on January 7, 2014, then the contract would have come to an end on that date. In that case, RJG's claim for breach of contract would succeed and it could seek damages for the breach. Further, in that scenario, the contract would no longer have been in existence on January 10, 2014, when Marine Atlantic purported to terminate it (i.e. the contract would already have been validly terminated by RJG three days earlier). In that case, it could not be found that Marine Atlantic terminated the contract on January 10, 2014, and Marine Atlantic's counterclaim would fail.

[22] Conversely, if RJG was not entitled to terminate the contract when it purported to do so, then the contract would have remained in existence and RJG's claim for breach of contract would fail. In that case, assuming Marine Atlantic's subsequent termination on January 10, 2014 was valid, then Marine Atlantic's counterclaim would succeed and it could seek damages for breach.

[23] Therefore, it is important first to determine whether RJG was entitled to terminate the contract when it purported to do so on January 7, 2014. This requires an examination and assessment of RJG's position that Marine Atlantic repudiated the contract by freezing funds.

Issue 1: Freezing of funds by Marine Atlantic

Issue 1(a):

Did the judge err in concluding that Marine Atlantic did not repudiate the contract by freezing funds?

[24] The first issue to be considered is whether, on the facts of this case, the actions of Marine Atlantic in freezing funds constituted a repudiation of the contract and, if so, whether RJG accepted the repudiation, thereby bringing the contract to an end. The trial judge found that Marine Atlantic did not repudiate the contract by freezing funds.

[25] In *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, [2015] 1 S.C.R. 500, Justice Cromwell considered what is required for repudiation of a contract. Not every minor or trivial breach of a contractual term will constitute a repudiation. Repudiation requires the breach of an important term giving rise to significant consequences.

[26] Justice Cromwell outlined the requirements for repudiation as follows:

> [144] The term repudiation refers to the situation in which a breach of contract by one party gives rise to the right of the other party to terminate the contract and pursue the available remedies for the breach: J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 676-78. This occurs when one party actually breaches the contract in some very important respect and is said to thereby repudiate the contract. If the other party "accepts" the repudiation, the contract is over. If the other party does not accept the repudiation, the contract continues (subject to various other doctrines). In either case, the non-breaching party can pursue the available remedies which may vary depending on whether that party has accepted the repudiation or affirmed the contract.
>
> [145] There is a wealth of learning about the types of breach that constitute repudiation. Without getting into the details, we may say in brief that a breach is a repudiation of the contract if it is a breach of a contractual condition or of some other sufficiently important term of the contract so that there is a substantial failure of performance: S. M. Waddams, *The Law of Contracts* (6th ed. 2010), at ¶590; McCamus, at pp. 676-77.

[27] RJG argued, at trial and on appeal, that Marine Atlantic repudiated the contract when it "froze" funds. The trial judge considered RJG's repudiation argument and rejected it, stating:

> [51] In applying this concept to the facts of this case, by freezing payments to R.J.G., did Marine Atlantic repudiate the contract, thereby giving rise to a right for R.J.G., independent of its terms, to terminate the contract? I find it did not.

Marine Atlantic's decision to freeze "any and all funds with respect to this project"

[28] Some background information is necessary to provide context for the judge's decision that Marine Atlantic did not repudiate the contract, and for the analysis which follows.

[29] While construction was ongoing, Marine Atlantic took the position that RJG had defaulted by failing to meet contractual timelines. Specifically, Marine Atlantic alleged that RJG was in breach of the contract by failing to complete the project by the contractual completion date of June 15, 2013. RJG denied that it was in default. It stated that any failure to complete by that date was attributable to the actions of either Marine Atlantic or CBCL, or was otherwise unavoidable.

[30] Consistent with its position that RJG had defaulted, Marine Atlantic sent a notice of default to RJG on October 24, 2013 alleging that RJG was in breach of the contract for failure to complete it by June 15, 2013. The construction contract provided that a breach was to be remedied within five days of a notice of default, and Marine Atlantic instructed RJG to remedy the default within this five day period. (As an aside, even if RJG had accepted that it was in breach, and even if it had agreed to take remedial action within five days of receiving the October 24, 2013 notice, it would have been impossible for RJG to have "fixed" the breach by completing the project by June 15, 2013, as that date had already passed. This reality was noted by Marine Atlantic when it indicated that "RJG must…provide Marine Atlantic with an acceptable schedule for correction of its default and correct the default in accordance with said schedule").

[31] In reply, RJG advised Marine Atlantic of its position that it was not in default, and it provided particulars to support its position, characterizing Marine Atlantic's action as "totally unwarranted".

[32] Marine Atlantic continued to hold the position that RJG was in default. However, correspondence in the record dated November 4, 2013 indicates that the consultant, CBCL, did not agree that RJG should be held in default, and that its position was that Marine Atlantic "should not proceed with finding [RJG] in default". CBCL observed that "however [Marine Atlantic] is choosing to proceed otherwise. They intend to find RJG in default". The consultant further noted on November 4, 2013: "We gave our opinion and [Marine Atlantic] choose not to proceed in that direction."

[33] The next day, November 5, 2013, Marine Atlantic advised RJG that, "based on the analysis conducted by Marine Atlantic and CBCL" Marine Atlantic took the position that RJG had not remedied its default within the five day period provided by the contract. As such, Marine Atlantic indicated that it intended to "exercise its rights" under the construction contract, including its right to terminate the contract. RJG again replied in writing, provided particulars as to why it was not in default, and indicated that "this action is totally unwarranted and will not go unchallenged".

[34] Significantly, notwithstanding Marine Atlantic's view that RJG was in default, and notwithstanding its position that it was entitled to terminate the contract as a result and sue RJG for damages, Marine Atlantic did not purport to terminate the contract on November 5, 2013 (or at any other time before RJG purported to terminate on January 7, 2014).

[35] Rather the contract continued and RJG continued to perform work under the contract. However, Marine Atlantic did not pay RJG for any work completed after September 29, 2013. RJG maintained a full job crew and equipment on site and continued working on the project on a full-time basis. RJG continued to do work throughout October, November and December, 2013 but it received no payment for work done in this time period.

[36] While construction was ongoing, Marine Atlantic proposed that RJG enter into a new contract, referred to as a Remediation Agreement. There is no mention of a Remediation Agreement in the main construction contract between Marine Atlantic and RJG, and no requirement that the parties enter into any such agreement. Similarly, the performance bond contract does not include any reference to, or any requirement to enter into, a Remediation Agreement.

[37] On December 6, 2013 Marine Atlantic provided RJG with its proposed Remediation Agreement. Counsel for Marine Atlantic in Halifax wrote:

> I have now received instructions from Marine Atlantic that <u>they insist</u> that a formal Remediation Agreement be entered into at this time between Marine Atlantic, RJG Construction and Western Surety.

(Emphasis added.)

[38] RJG refused to sign the proposed Remediation Agreement. (Notably, Western Surety also never signed the Agreement.) RJG took the position that many of the terms were unacceptable. For example, the proposed Remediation Agreement would have required RJG to agree that it was in default and that Marine Atlantic was within its rights to terminate RJG on November 5, 2013. This was contrary to RJG's ongoing position that it was not in default and that Marine Atlantic had no right to terminate. It also provided that the terms of the Remediation Agreement would override the original construction contract, and that RJG could be replaced at Marine Atlantic's discretion. Again, RJG did not agree to this.

[39] The proposed Remediation Agreement required the remaining work under the contract to be completed within 100 days. It also included a clause which RJG

viewed as potentially compromising to worker safety as it fettered RJG's ability to suspend work if weather conditions were felt to be unsafe. Under the proposed provision a consultant would decide whether RJG's determination that working conditions were unsafe was a "reasonable" determination. If the consultant deemed RJG's determination to suspend work for safety reasons to be "unreasonable", any missed day of work would be considered a "default day", and three "default days" would entitle Marine Atlantic to terminate the contract without notice.

[40] In summary Marine Atlantic, through the proposed Remediation Agreement, sought to alter the existing contractual relationship between the parties. RJG was not compelled by the terms of the construction contract or the performance bond contract to enter into a Remediation Agreement and, as it did not agree with the terms of the proposed Agreement, it did not execute it.

[41] RJG's counsel, on December 11, 2013, advised that the proposed Remediation Agreement was unacceptable, and reiterated RJG's position that it denied being in default and denied that Marine Atlantic had any right to terminate the contract. Counsel for RJG provided details to support RJG's position that it was not in default, and to itemize RJG's objection to various provisions of the proposed Remediation Agreement.

[42] RJG continued to work on the project, with a crew fully mobilized on site, and agreed to a key provision of the proposed Remediation Agreement, namely that the project be completed within 100 days, subject to an additional 14 day period to account for damage done to completed work by recent storms.

[43] On December 16, 2013 counsel for Marine Atlantic in Halifax wrote to counsel for RJG in St. John's and advised RJG (and the bondholder, Western Surety) that "any and all funds with respect to this project are being frozen" until a Remediation Agreement is entered into. Further, Marine Atlantic advised that if a Remediation Agreement was not entered into, and if Marine Atlantic terminated RJG, any and all funds would be withheld to cover Marine Atlantic's additional costs.

[44] The December 16, 2013 correspondence from Marine Atlantic, which advised RJG that all funds were being "frozen", read as follows:

> As you know, it is the position of Marine Atlantic that RJG Construction is in default.
>
> In these circumstances, any and all funds with respect to this project are being frozen until this issue has been resolved one way or another. In particular, if a Remediation

> Agreement is entered into, funds can flow in the normal course. However, if no Remediation Agreement can be reached and Marine Atlantic chooses to terminate RJG, then any and all funds will be withheld to cover off any additional costs that Marine Atlantic may incur with respect to completing the work.

[45] The phrase "any and all funds" is broad, and would include payment for all past work completed in October, November and December, 2013. It would also cover payment for future work done beyond December 16, 2013, until such time as a Remediation Agreement was concluded.

[46] RJG replied by providing Marine Atlantic a notice of default on December 17, 2013, and a notice of termination on January 7, 2014. At trial and on appeal, RJG submitted that Marine Atlantic was not entitled to freeze funds and that it did so to obtain leverage, in an effort to pressure RJG into signing the Remediation Agreement. RJG considered the freezing of funds to be a repudiation of the contract.

The trial judge's decision that there was no repudiation

[47] At paragraph 51 of the judgment the trial judge asked, and answered, the key question relating to whether Marine Atlantic had repudiated the contract, when he stated: "… by freezing payments to RJG, did Marine Atlantic repudiate the contract, thereby giving rise to a right for RJG, independent of its terms, to terminate the contract? I find it did not."

[48] In paragraphs 52-56, the judge set out the reasons for this conclusion. The judge cited the actions of RJG, and specifically RJG's failure to meet the contractual timelines, as justification for Marine Atlantic's action in freezing payments. The judge stated that RJG was in "serious default under the contract". On appeal RJG's position was that it had not been in breach of the contract and that it had never admitted to being in default.

[49] The judge pointed directly to RJG's conduct in performing the contract as the justification for Marine Atlantic freezing the funds, stating that "it was the actions (or inaction) of RJG which caused Marine Atlantic to freeze payments in an attempt to get the project to completion. This did not justify RJG in terminating the contract in all the circumstances of this case…" (paragraph 55).

[50] The judge found no fault with Marine Atlantic freezing funds until a Remediation Agreement was in place. He noted that Marine Atlantic "allowed RJG to continue to work under the contract despite the 24 October notice of default"

(paragraph 53). Notably, RJG would not be paid for this work unless and until it entered into a Remediation Agreement, which Marine Atlantic "insisted" be done.

[51] The judge ultimately rejected RJG's submission that the contract had been repudiated and held that RJG had no right to terminate the contract, concluding that "RJG was not deprived of substantially all that it bargained for under the contract" (paragraph 56).

Marine Atlantic's freezing of "any and all funds" did repudiate the contract

[52] With respect, I cannot agree. I would conclude for the reasons that follow that, by freezing "any and all funds related to this project", Marine Atlantic did deprive RJG of substantially all that it had bargained for.

[53] Additionally, I would conclude that Marine Atlantic repudiated the contract by freezing "any and all funds", and by stating that "funds can flow in the normal course" only if RJG entered into a Remediation Agreement. The freezing of "any and all funds" would clearly impact payment for work already performed by RJG as well as any future work, and such action was not authorized by the contractual language or the common law.

[54] The trial judge was required to assess Marine Atlantic's conduct to determine whether it amounted to a repudiation. However, the judge focused on RJG's conduct and on whether RJG was in breach. In this regard, the judge's focus on RJG's conduct was misplaced. The analysis should have been directed at whether Marine Atlantic had repudiated the contract through its actions in freezing funds.

[55] If Marine Atlantic believed that RJG had breached the contract (by failing to comply with contractual timelines), it was open to Marine Atlantic to have terminated the contract before RJG terminated it. However, Marine Atlantic took no such action.

[56] As Justice Cromwell noted in *Potter*, where one party to a contract "breaches the contract in some very important aspect", that party is said to have repudiated the contract (paragraph 144). Repudiation in this context was described as "a breach that is sufficiently serious to give the non-breaching party the right to treat the contract as over" (paragraph 147), and "a breach of a contractual condition or of some other sufficiently important term of the contract so that there is a substantial failure of performance" (paragraph 145).

[57] Freezing of "any and all funds with respect to this project" is not a minor or insignificant breach of the contract. The essence of the agreement for RJG was that it would be paid for its work. Marine Atlantic's contractual obligation to pay was a substantial and important one, and freezing payment amounted to denying RJG of the principal benefit arising from the contract.

[58] Marine Atlantic's freezing of "any and all funds" until a Remediation Agreement was executed clearly evidences Marine Atlantic's intention to disregard its contractual obligation to pay RJG. Marine Atlantic's statement was not equivocal. For example, Marine Atlantic did not say it would freeze funds until such time as it was obliged to pay pursuant to the contract, or that it would freeze funds until such time as the consultant certified that payment was owing. The December 16, 2013 statement that all funds "are being frozen" provides no provision for payment (without a signed Remediation Agreement), even where funds are clearly owing under the contract, and even where amounts have been certified as owing by the consultant.

[59] As well, Marine Atlantic did not state that only certain funds would be frozen. Nor did it suggest that the funds frozen were in any way connected to costs of fixing any contractual deficiencies attributable to RJG. Marine Atlantic essentially stated that it would not pay until RJG signed a Remediation Agreement (having earlier proposed terms which RJG could not accept), even though there is no contractual requirement compelling RJG to enter into such an agreement.

[60] In this respect, Marine Atlantic's submission on appeal that *"Marine Atlantic gave RJG notice that it was freezing, not permanently withholding, payments on December 16, 2013"* is not compelling. The difference between freezing and permanently withholding funds in the present context is a semantic one. Either way the result is the same, as the contract was repudiated.

[61] Further, Marine Atlantic's freezing of funds is not explicitly limited to past or present funds owing as of December 16, 2013 (the date Marine Atlantic advised it was freezing the funds). Freezing "any and all funds related to this project" also signified an intention to freeze funds related to any future work performed by RJG, until an agreement was reached, especially in light of Marine Atlantic's non-payment for past work. As such, Marine Atlantic's statement could also be understood as constituting an anticipatory breach of the contract.

[62] The Supreme Court of Canada discussed the concept of an anticipatory breach of contract in *American National Red Cross v. Geddes Brothers*, [1920] 61 S.C.R. 143, 55 D.L.R. 194 at 147. It was noted that an anticipatory breach may

constitute a “rescission” or “renunciation” of the contract, permitting the other party to treat the contract as at an end:

> The law in cases of this kind is laid down by Lord Esher in giving judgment in the case of *Johnstone v. Milling*, 16 Q.B.D. 460 , at p. 467, 55 L.J.Q.B. 162, as follows:
>
> > …When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not of course amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for damages sustained by him in consequence of such renunciation. … If he adopts the renunciation, the contract is at an end except for the purpose of the action for such wrongful renunciation; …

[63] Similarly, in *Potter*, Cromwell J. discussed the requirements for an anticipatory breach of contract, indicating that such a breach could amount to a repudiation of the contract. Justice Cromwell noted that “when the anticipated future non-observance relates to important terms of the contract or shows an intention not to be bound in the future, the anticipatory breach gives rise to anticipatory repudiation”. He stated at paragraph 149 of *Potter*:

> … An anticipatory breach "occurs when one party manifests, through words or conduct, an intention not to perform or not to be bound by provisions of the agreement that require performance in the future": McCamus, at p. 689; see also A. Swan, with the assistance of J. Adamski, *Canadian Contract Law* (2nd ed. 2009), at § 7.89. When the anticipated future non-observance relates to important terms of the contract or shows an intention not to be bound in the future, the anticipatory breach gives rise to anticipatory repudiation. The focus in such cases is on what the party's words and/or conduct say about future performance of the contract. For example, there will be an anticipatory repudiation if the words and conduct evince an intention to breach a term of the contract which, if actually breached, would constitute repudiation of the contract.

[64] In this circumstance I would conclude that Marine Atlantic’s freezing “any and all funds with respect to this project” constitutes not only a repudiation based on its failure to pay funds for work already performed, as discussed above, but also an anticipatory repudiation.

[65] RJG was faced with the prospect of continuing to work on the project beyond December 16, 2013, knowing that it was Marine Atlantic's stated intention that it would not pay RJG for work done in future without a signed Remediation Agreement. Indeed, without payment, RJG's ongoing ability to cover the salaries of its workers on site and its continuing expenses would be challenged, and the notion of continuing to perform future work without payment would be daunting and impractical. Marine Atlantic's "anticipated future non-observance" related to an important term of the contract (i.e. payment) and showed "an intention not to be bound in future" (*Potter*, paragraph 149). The requirements for an anticipatory breach are met in this circumstance. Rather than continuing to perform future work without the prospect of receiving payment to cover their ongoing associated expenses, RJG ended the contract.

[66] Informed by *Potter*, I would conclude that the freezing of any and all funds was a "substantial failure of performance" by Marine Atlantic, which went to the core of the contract and amounted to repudiation (paragraph 145).

[67] When repudiation occurs, and "the other party 'accepts' the repudiation, the contract is over" (*Potter*, paragraph 144). The party accepting the repudiation may then seek to recover damages for the breach. In this case, RJG clearly accepted the repudiation because it terminated the contract on January 7, 2014 as a result. RJG was entitled to consider the contract as at an end, and to seek damages for breach of the contract.

Issue 1 (b):

Did the judge err in concluding that Marine Atlantic was required or entitled to freeze funds in order to comply with its obligations under the performance bond?

[68] As noted above, the construction contract required RJG to obtain a performance bond to secure performance of the contract. A performance bond was obtained pursuant to a contract (the performance bond contract), in the amount of $1,614,770, with Western Surety Company as surety, RJG as principal and Marine Atlantic as obligee.

[69] Marine Atlantic argued that freezing funds in this case was required due to the operation of the performance bond. RJG disagreed and stated that the operation of the performance bond did not require Marine Atlantic to freeze "any and all funds". The judge noted these opposing positions as follows:

> [80] R.J.G. submitted that Marine Atlantic had no right to freeze all payments when it did and in doing so it fundamentally breached the terms of the contract, giving R.J.G. the

> right to cease work and terminate the contract. Marine Atlantic submitted that its decision to freeze (or withhold) further payments under the contract is integrally tied into its obligations under the performance bond provided by R.J.G.

[70] Ultimately, the judge accepted Marine Atlantic's position that it was obliged, pursuant to the performance bond, to freeze funds.

[71] The judge stated his conclusion on this point at paragraph 99 of the judgment, holding that "Marine Atlantic had an obligation to maintain the funds payable under the contract", in order to avoid potential prejudice to itself or the bonding surety, Western Surety. RJG submits that the judge erred in reaching this conclusion. It argues that Marine Atlantic was neither obliged nor entitled to freeze funds in order to avoid prejudice to itself or the surety, and that doing so constituted a repudiation of the contract.

[72] Any purported obligation to freeze funds in this context must be found to exist in the contractual provisions of either the construction contract or the performance bond contract, or in the common law. However, for the reasons that follow, I would conclude that there is nothing in the construction contract, the performance bond contract or the common law that obliged or entitled Marine Atlantic to freeze "any and all funds with respect to this project" to avoid prejudice to itself or the surety.

The construction contract did not oblige or entitle Marine Atlantic to freeze funds

[73] There is no provision in the construction contract between RJG and Marine Atlantic which would authorize or require Marine Atlantic to freeze funds in this circumstance.

[74] There are provisions in the construction contract, namely general conditions 7.1.4.1 and 7.1.5.2, that permit Marine Atlantic to withhold funds in specific circumstances. However, those circumstances do not apply on the facts of this case.

[75] The first provision, general condition 7.1.4.1, provided that, if RJG was in default and failed to correct its default, Marine Atlantic could correct the default itself "and deduct the cost thereof from any payment then or thereafter due" to RJG. This condition allows the owner to recoup expenses actually incurred in fixing the contractor's default, by deducting the cost from the amount otherwise owing to the contractor.

[76] Condition 7.1.4 states:

> 7.1.4 If the Contractor fails to correct the default in the time specified or subsequently agreed upon, without prejudice to any other right or remedy the Owner may have, the Owner may:
>
> .1 correct such default and deduct the cost thereof from any payment then or thereafter due the Contractor provided the Consultant has certified such cost to the Owner and the Contractor, or
>
> .2 terminate the Contractor's right to continue with the Work in whole or in part or terminate the Contract.

(Emphasis added.)

[77] However, Marine Atlantic was not purporting to use condition 7.1.4.1 when it froze "any and all funds with respect to this project". This was not a situation where Marine Atlantic had actually corrected a default and was purporting to "deduct the cost" it incurred. Marine Atlantic, in its December 16, 2013 statement that it was freezing funds, did not indicate that this was being done to cover any costs it had incurred.

[78] Condition 7.1.4.1. does not permit Marine Atlantic to freeze funds and correct a default later. Rather the language provides that it is the actual costs which have been incurred (not hypothetical future costs) in correcting a default that can be deducted. In addition, the condition also requires a consultant to specifically certify the costs that have been incurred in correcting the default, before those costs can be deducted. This did not occur in this case. This condition has no application to the present circumstance, and cannot be relied on by Marine Atlantic to justify freezing funds in this instance.

[79] Second, general condition 7.1.5.2 provided that if Marine Atlantic terminated RJG's right to work, it could "withhold further payment to [RJG] until a final certificate for payment is issued."

[80] Condition 7.1.5. states:

> 7.1.5 If the *Owner* terminates the Contractor's right to continue with the *Work* as provided in paragraphs 7.1.1 and 7.1.4, the *Owner* shall be entitled to:
>
> .1 take possession of the *Work* and *Products* delivered to the *Place of the Work*, subject to the rights of third parties, and finish the *Work* by whatever method the *Owner* may consider expedient, but without undue delay or expense, and

> .2 withhold further payment to the *Contractor* until a final certificate for payment is issued, and
>
> .3 charge the *Contractor* the amount by which the full cost of finishing the *Work* as certified by the *Consultant*, including compensation to the *Consultant* for the *Consultant's* additional services …
>
> (Emphasis added.)

[81] This condition clearly states that Marine Atlantic was required to terminate the contract before it could withhold further payment to RJG. However, in this case Marine Atlantic froze funds without terminating. It does not permit Marine Atlantic to freeze funds while the contract is ongoing.

[82] Marine Atlantic appears to have been aware of the requirement to terminate the contract before being entitled to freeze funds under condition 7.1.5.2. For example on December 17, 2013 counsel for Marine Atlantic wrote to counsel for RJG and Western Surety stating that Marine Atlantic may have to terminate the contract "so it can take advantage of" condition 7.1.5.2. Counsel for Marine Atlantic stated:

> Indeed, if RJG persists in its insistence on being paid forthwith, then Marine Atlantic may have little choice but to terminate RJG's contract so that it can take advantage of [conditions] 7.1.5.2 and .3 which allow Marine Atlantic to hold further payments to RJG…
>
> (Emphasis added.)

[83] On January 10, 2014, Marine Atlantic purported to terminate the contract. Marine Atlantic's counsel wrote to counsel for RJG and Western Surety on that date to advise that, as it had terminated the contract, it "specifically relies on" condition 7.1.5.2., which entitles funds to be withheld following termination:

> Now that Marine Atlantic has in fact terminated RJG, it specifically relies on [conditions] 7.1.5.2 and .3 which allow Marine Atlantic to withhold further payments to RJG…

[84] The trial judge considered the application of conditions 7.1.5.2 and 7.2.4.1 at paragraphs 89-92 of the decision.

[85] First, the trial judge concluded that condition 7.1.5.2 entitled Marine Atlantic to withhold payment to RJG. RJG argued that, under the terms of condition 7.1.5.2, termination of the contract was required as a precondition to withholding funds. The judge rejected this submission and indicated he disagreed

with it, although there were no reasons provided for this conclusion. The judge stated:

> [91] R.J.G.'s position is that pursuant to GC 7.1.5.2, Marine Atlantic was not entitled to withhold payment until after it had terminated the contract. I disagree.

[86] With respect, I would conclude that the clear language of condition 7.1.5.2 provides that the owner's entitlement to "withhold further payment to the contractor" occurs only "if the owner terminates the contractor's right to work", which is not the circumstance here. The condition gives a right to withhold payment only after Marine Atlantic has terminated RJG. It has no application in this circumstance and does not authorize Marine Atlantic's pre-emptory freezing of funds.

[87] With regard to condition 7.1.4.1, the judge found that this condition gave Marine Atlantic the right to "use any payments due to RJG to pay the cost of correcting RJG's default." He stated:

> [92] I find that the provisions of GC 7.1.4.1 give Marine Atlantic the right to use any payments due to R.J.G. to pay the cost of correcting R.J.G's default. If it were to pay R.J.G., then Marine Atlantic would not have this money available for this purpose. …

[88] Again, as noted above, there is nothing to suggest that Marine Atlantic had actually corrected any default by RJG, and was deducting the cost from a payment owing to RJG. Rather Marine Atlantic was freezing any and all payments. The language of condition 7.1.4.1 places it outside the present circumstances.

[89] In summary, I would conclude there is nothing in the terms of the construction contract that would entitle or oblige Marine Atlantic to withhold funds from RJG in this circumstance and that the judge erred in finding otherwise. The language in conditions 7.1.4.1 and 7.1.5.2. is clear and unambiguous, and I would conclude that the judge's interpretation is inconsistent with the contractual language used in these conditions.

<u>Neither the performance bond contract nor the common law obliged or entitled Marine Atlantic to freeze funds</u>

[90] There is no provision in the performance bond contract that authorized or required Marine Atlantic to freeze funds in this circumstance.

[91] However the trial judge interpreted the performance bond contract to find that Marine Atlantic had an obligation at common law to freeze funds because, in

the judge's view, to do otherwise might impact the operation of the performance bond.

[92] The judge noted Marine Atlantic's position that it was entitled to freeze funds because "it was bound to preserve payments under the contract to protect itself under the performance bond" (paragraph 53). The judge ultimately agreed with Marine Atlantic's position in this regard. With respect, and for the reasons that follow, I would conclude that the judge erred in so doing.

[93] Marine Atlantic notified the bonding company, Western Surety, of its October 24, 2013 notice of default at the same time it gave notice to RJG. Once notified, Western Surety had four options under the bond: it could remedy the default; it could complete the contract; it could obtain a bid from other contractors to complete the work; or it could pay Marine Atlantic the amount of the bond (or Marine Atlantic's proposed cost of completion) less the balance of the purchase price.

[94] Western Surety did not advise Marine Atlantic which option it was selecting. In the judge's assessment, this obliged Marine Atlantic to avoid doing anything which might be seen as interfering with the bondholder's rights to exercise any of its options, including the option to complete the contract with the remaining funds.

[95] The judge concluded that Marine Atlantic's action in freezing any and all funds was required in order to avoid any potential prejudice to Western Surety or Marine Atlantic, as any payment to RJG could potentially void the bond. The judge stated in this respect:

> [99] Marine Atlantic was thus in the position of not knowing how the bonding company would respond. Until it was advised, I find Marine Atlantic had an obligation to maintain the funds payable under the contract in order to avoid any prejudice to Western Surety who might be entitled to the funds to complete the contract or to Marine Atlantic which might have its security thereunder voided. …

[96] The judge concluded at paragraph 87 that "the balance of the contract price must be maintained, less the amount properly paid to the contractor, so the bonding company can complete the contract if that is the option chosen."

[97] However, in this case the judge allowed Marine Atlantic to maintain "any and all funds with respect to this project". This goes well beyond Marine Atlantic maintaining "the balance of the contract price … less the amount properly paid to the contractor". It also ignores the fact that the amount to be maintained by Marine Atlantic, to protect itself and Western Surety, would not include funds payable to

RJG for work already performed under the contract, and for which RJG had not been paid.

[98] The fact that Western Surety had various options under the performance bond contract, and the fact that Marine Atlantic was waiting for Western Surety to select an option, did not entitle Marine Atlantic to freeze "any and all funds" until an option had been chosen and acted upon by the surety. The language of the performance bond contract simply does not support such an interpretation.

[99] The judge referred to the decision of the British Columbia Court of Appeal in *Fraser Gate Apartments Ltd. v. Western Surety Co*. (1998), 54 B.C.L.R. (3d) 1, 160 D.L.R. (4th) 577 (B.C.C.A.), to support the proposition that Marine Atlantic was authorized in freezing "any and all funds". However, with respect, I would conclude that the decision in *Fraser Gate* does not support this conclusion.

[100] The issue in *Fraser Gate* involved a dispute regarding the construction of an apartment building. The owner identified certain deficiencies in construction and, as in the present case, the owner provided the contractor with a notice of default, and required the default to be corrected within five days, as required by the contract. The surety was also put on notice of the default.

[101] The surety agreed there was a default and authorized a different contractor to complete the work, with the owner paying the balance of the contract price to the surety. The owner responded that, instead, it would use the existing tradespersons to complete the work. The surety indicated that this was not an option under the bond, and that by pursuing it the owner had rendered the bond null and void.

[102] The British Columbia Court of Appeal Court stated at paragraph 67 that "… the surety was entitled to have the obligee retain all weapons, so to speak, the obligee had to obtain performance from the principal, so that, if necessary, the surety could step into the obligee's shoes and do all that could possibly be done to reduce the surety's liability on the bond."

[103] In the present case, the judge referred to *Fraser Gate* as authority for the proposition that Marine Atlantic was entitled to freeze funds. The judge stated:

> [88] In *Fraser Gate Apartments Ltd. v. Western Surety Co*., (BC CA), [1999] 3 W.W.R. 213, 109 B.C.A.C. 260 at paragraph 67, it was held that a surety is entitled to have the obligee (in the case at bar, Marine Atlantic) retain all the "weapons" the obligee has to obtain performance from the contractor so the surety can step into the shoes of the owner to do all it can to reduce any amount it may become obligated to pay under the bond. This includes retaining any remaining amount of the contract price to use in any

> way it sees fit to reduce its obligation under the bond (paragraph 73). To do otherwise, would run the risk of having the owner's rights to collect under the bond voided.

(Emphasis added.)

[104] However, the decision in *Fraser Gate* does not support the conclusion that Marine Atlantic could freeze "any and all funds" in this circumstance. Marine Atlantic would be entitled to retain "any remaining amount of the contract price", in order to ensure that it did not void the performance bond. But "retaining any remaining amount of the contract price" would not entitle Marine Atlantic to withhold funds that had been earned under the contract, for work already completed by RJG. Rather, the right to retain "any remaining amount of the contract price" would be limited to the unearned and uncompleted portion of the contract price, if any, which remained at the time the bond is called and the surety becomes involved.

[105] The "remaining amount of the contract price" in this case means any remaining portion of the $2,858,000 contract between RJG and Marine Atlantic which had not yet been earned by RJG. For example, and hypothetically, if RJG had completed work valued and certified in the amount of $1 million, Marine Atlantic would be obliged to pay RJG that amount. Marine Atlantic in that instance would be justified in "retaining any remaining amount of the contract price", not yet earned by RJG, which, in the above example, would be $1.858 million dollars (i.e. the $2.858 million contract price minus $1 million due to RJG for work completed under the contract).

[106] If RJG had completed work valued at $1 million dollars, but Marine Atlantic had paid only $750,000, then $250,000 would be owing to RJG. This $250,000 would not be required to be retained by Marine Atlantic in order to protect either Marine Atlantic's rights or the surety's rights. *Fraser Gate* does not stand for the proposition that a project owner may withhold amounts which have been earned by a contractor.

[107] The 1983 decision in *Newfoundland (Attorney General) v. Insurance Corp. of Newfoundland*, 1983 CarswellNfld. 46, 23 A.C.W.S. (2D) 18, 2 C.C.L.I. 298 is instructive in this regard.

[108] The *Insurance Corp. of Newfoundland* case also dealt with a construction project secured by a performance bond. The Insurance Corp. of Newfoundland (ICON) was the surety under the performance bond. The project owner (and obligee under the bond) was the Province of Newfoundland. The contractor (a

company referred to as "Newtown") defaulted and ICON was obliged, as surety, to find a new contractor to complete the work and to pay the cost of completion "up to the amount of the bond *less the balance of the contract price*" (paragraph 17, emphasis in original).

[109] The Court noted that the "balance of the contract price", as defined in the contract, did not distinguish between amounts earned and amounts unearned by the defaulting contractor. As such, the Court was asked to determine the amount to which the surety (ICON) was entitled.

[110] Justice Noel Goodridge, at paragraph 26, found that the surety was entitled only to the unearned funds, stating:

> When a surety such as ICON guarantees the performance by a builder such as Newtown to an owner such as the Province and is called upon to discharge that undertaking, then the surety is at some point subrogated to the position of the owner and acquires the right to receive the unearned contract funds in the hands of the owner…
>
> (Emphasis added.)

[111] Further, at paragraph 34, the Court again stated:

> … the surety is entitled to receive from the owner the unearned funds under the contract". Equity would not permit less.
>
> (Emphasis added.)

[112] The Court was also clear that the surety could not be put in a better position than the owner. That is, the surety (or the owner) would not be entitled to retain funds for work which had been performed by the contractor (i.e. funds which had been 'earned', but not yet paid).

[113] Justice Goodridge considered the relevant case authorities and concluded that "the cases recognized that the surety could not be in a better position than the owner in relation to the builder and those claiming through or under him" (paragraph 29). This conclusion was reiterated at paragraph 43, where the Court noted that "nothing can happen to place the surety in a better position than the owner itself would be."

[114] Similarly, the Court stated at paragraph 42 that the contractor cannot be placed in a worse position simply because a surety is present. The Court held:

> The reason that the defences of a contractor against an owner are preserved against a surety are that the contractor cannot be placed in a worse position against the surety than he would be against the owner.

[115] The Court clearly distinguished the surety's right to receive funds relating to uncompleted, as opposed to completed, work. Justice Goodridge made this distinction at paragraphs 53 and 54, stating that a surety was entitled to receive contract funds relating to uncompleted work, and not funds relating to work which had been completed (even where those funds had not been disbursed). He stated:

> [53] ICON for a fee has delivered a performance bond to the Province in respect of uncompleted work under the contract. It is as noted a matter of law and equity that ICON should be entitled to receive the contract funds relating to that uncompleted work.
>
> [54] On the other hand the …suppliers of work and materials…have made possible the performance of the completed work under the contract. It is logical that any funds undisbursed in respect of this work should be made available to the contractor…
>
> (Emphasis added.)

[116] Notably, the specific dispute in *Insurance Corp. of Newfoundland* is somewhat different than in the present case in that the *Insurance Corp. of Newfoundland* case involved competing claims to funds between a surety and creditors of a contractor (as opposed to the contractor itself). However, the analysis and reasoning in the *Insurance Corp. of Newfoundland* decision, in delineating that a surety is entitled to receive unearned funds for uncompleted work (but not earned funds for work which has been completed) is wholly applicable to the present case.

[117] In the present case as funds have been earned by, but not yet paid to, the contractor (RJG), they cannot be retained for the benefit of the obligee (Marine Atlantic) or the surety (Western Surety). To do so would in fact bestow a windfall on Marine Atlantic and Western Surety, as they would be enriched by RJG's unpaid work under the contract.

[118] Finally, the trial judge also referred in his decision (paragraph 95) to correspondence from Marine Atlantic's Halifax Counsel to RJG and Western Surety by which "counsel also drew attention to his interpretation of the bond which he indicated obliged Marine Atlantic to retain all funds under the contract." However, the fact that counsel held or offered such an interpretation does not mean it is supported by the contract or the common law.

[119] Significantly, there is nothing in the record to indicate that the bondholder, Western Surety, agreed with the position taken by Marine Atlantic's counsel.

There is no evidence that Western Surety suggested or directed that Marine Atlantic freeze these funds. At no time did Western Surety indicate that payment of these funds to RJG could contravene Marine Atlantic's obligations to Western Surety or cause prejudice which might void the performance bond.

[120] In fact, Western Surety wrote Marine Atlantic on January 31, 2014, and requested that Marine Atlantic advise of the specific provision of the contract which permitted Marine Atlantic to withhold payment to RJG, as follows:

> On January 11, Western Surety requested a response from [Marine Atlantic] to RJG's letter of December 11, 2013 disputing the allegations of default advanced by [Marine Atlantic]. Western Surety also requested confirmation of the provision of the contract which permitted [Marine Atlantic] to withhold payment from RJG under the Contract.
>
> On January 24, 2014 [Marine Atlantic] provided a response to the December 11, 2013 of RJG, disputing RJGs version of the facts. However you did not respond to the request for the contractual basis for withholding of payments to RJG, other than to direct us to the Statement of Defence and Counterclaim filed by [Marine Atlantic] which does not respond to the question.

[121] As the above correspondence suggests, Western Surety's view was that Marine Atlantic ultimately did not identify any contractual provision authorizing the freezing of funds.

[122] To conclude on this point, and informed by the case authorities, Marine Atlantic was neither entitled, nor obliged, by the performance bond contract or the common law to withhold "any and all funds with respect to this project" in this circumstance. I would respectfully conclude that the trial judge erred in concluding otherwise.

Issue 2: Termination of the contract by RJG

[123] The trial judge also found that there were two additional reasons why RJG could not terminate the contract. Specifically, the judge held that RJG was estopped from terminating the contract while remediation discussions were ongoing with Marine Atlantic, and that RJG could not terminate the contract as it had not strictly complied with the contractual requirements. These two findings will be considered next.

Issue 2 (a):

Did the judge err in concluding that RJG was estopped from terminating the contract while remediation discussions were ongoing between the parties?

[124] Marine Atlantic submitted at trial that RJG was estopped from taking action to terminate the construction contract while discussions were ongoing relating to the proposed Remediation Agreement. The trial judge agreed and held that RJG was estopped from terminating the contract when it purported to do so on January 7, 2014. The judge stated:

> [100] Marine Atlantic also advanced a third argument as to why R.J.G.'s notice of default was invalid based on estoppel. Marine Atlantic submitted that in light of the negotiations between the parties through their respective solicitors, the extension of the deadline for a response from the bonding company and the apparent agreement between counsel to postpone their ongoing discussions relating to a remediation agreement until after the Christmas break, Marine Atlantic was entitled to some kind of notice from R.J.G. before it took the unilateral decision on 7 January to terminate the contract. I agree. R.J.G. was estopped in the circumstances from taking the unilateral action to terminate the contract without first giving Marine Atlantic notice of its intention to cease further negotiations and to rely strictly on its purported rights under the contract.

[125] Issues relating to the Remediation Agreement were addressed earlier. As noted above, the agreement proposed by Marine Atlantic, which was not accepted by RJG, would have extensively altered the existing contractual relationship between the parties.

[126] Significantly, and as noted by the judge, Marine Atlantic froze "all payments owing to RJG under the contract" while negotiations were ongoing relating to the Remediation Agreement. This constituted a repudiation of the contract, but the judge makes no comment regarding whether Marine Atlantic was, itself, in any way estopped from taking such action while discussions were ongoing:

> [13] Through their respective solicitors, the parties and Western Surety exchanged various drafts of a proposed remediation agreement but no agreement was reached. On 16 December 2013 Marine Atlantic's solicitors wrote the solicitors for R.J.G. and Western Surety advising that it was "freezing" all payments to R.J.G. under the contract pending finalization of an acceptable remediation agreement or, failing that, in the event of termination of the contract by Marine Atlantic, so the payments could be applied to any additional costs that may be sustained by Marine Atlantic to complete the project.

[127] Even after Marine Atlantic's notification on December 16, 2013 that funds were being frozen, and even after RJG provided its notice of default as a result on December 17, 2013, the judge noted that the parties were still discussing a possible remediation agreement. He stated that "discussions continued on a remediation agreement without success" (paragraph 14).

[128] The judge also noted, at paragraph 14, that during these discussions: "RJG continued to seek payment of its progress claim and, in particular, an invoice for $255,000 since it had not been paid since 29 September 2013. No payments were forthcoming."

[129] The judge's reference to ongoing discussions includes an email exchange between counsel for Marine Atlantic and RJG on December 19 and 20, 2013.

[130] On December 19, 2013 Marine Atlantic's counsel indicated that it had not received a response from Western Surety regarding what option they were choosing under the bond. Marine Atlantic proposed to give Western Surety an extension on the deadline to respond. This extension to Western Surety was proposed with two conditions, namely that:

> (a) "all parties agree that Marine Atlantic is entitled to withhold any potential payments to RJG in the interim; and
>
> (b) RJG takes no further action to attempt to enforce payment before the aforementioned deadline".

[131] RJG's counsel rejected this proposal in a reply dated December 20, 2013 and made a counter-proposal which was ultimately not accepted.

[132] Counsel for RJG wrote to advise that RJG had not been paid for work performed after September 29, 2013. He further advised that RJG had submitted an invoice for $255,000 which was payable in November, 2013 (and remained unpaid) and another invoice for $240,000 which would be payable on December 31, 2013.

[133] RJG's counsel rejected Marine Atlantic's condition (a), set out above, and stated that "if Marine Atlantic agrees to pay the $255,000 within 7 days" RJG would agree to condition (b), and would take no further action to enforce payment. However, there was no agreement in this respect, and no amount was paid by Marine Atlantic.

[134] Payment was still being withheld by Marine Atlantic on January 7, 2014, when RJG terminated the contract. This was three weeks after RJG's notice of default had been provided on December 17, 2013. The record demonstrates further good faith efforts by RJG to resolve the matter, and seek payment, before deciding to terminate the contract when payment was not forthcoming. For example, RJG prepared its own draft agreement, proposing terms on which the project could continue. This was circulated but was not accepted or executed.

[135] As discussed previously, RJG was not required by the terms of the construction contract or the performance bond contract to enter into the Remediation Agreement, and, as it did not agree with the terms proposed by Marine Atlantic, it did not execute it.

[136] It would be wholly inconsistent to allow Marine Atlantic to repudiate the contract (by freezing funds) during Remediation Agreement discussions but conclude that the same discussions prohibited RJG from terminating. Notably, RJG was not being paid for its work while these discussions were occurring.

[137] The Supreme Court of Canada discussed the requirements for promissory estoppel in *Maracle v. Travelers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50, 80 D.L.R. (4th) 652 at 57. The party asserting estoppel must show that the other party promised or represented that it would not enforce its rights under the contract, and that this promise or representation was relied upon:

> The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position. In *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607, 68 D.L.R. (2d) 354 , Ritchie J. stated [at p. 615, S.C.R]:
>
> > It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.
>
> This passage was cited with approval by McIntyre J. in *Engineered Homes Ltd. v. Mason*, [1983] 1 S.C.R. 641, 51 B.C.L.R. 273, 49 C.B.R. (N.S.) 257, 47 N.R. 379, 146 D.L.R. (3d) 577, at p. 647 [S.C.R.]. McIntyre J. stated that the promise must be unambiguous but could be inferred from circumstances.

[138] In this circumstance, RJG would not be estopped from asserting its contractual rights absent some clear indication and agreement that its contractual rights would not be enforced while discussions were ongoing. There is no evidence of any such agreement in this case. There is nothing to indicate that the requirements for promissory estoppel were satisfied in this instance.

[139] There was no contractual or common law basis on which to conclude that RJG was estopped from exercising its right to terminate the contract in the face of

Marine Atlantic's repudiation. I would conclude that the judge erred in finding otherwise.

Issue 2(b):

Did the judge err in concluding that RJG was not entitled to terminate the contract because it had not strictly complied with the contractual requirements?

The trial judge stated that RJG was required to have been in strict compliance with the terms of the contract before it could issue a notice of default and a notice of termination.

[140] He considered the contractual provisions to determine whether or not RJG was in compliance under the contract, and concluded that it was not. As a result, the judge determined that RJG's notice of default was invalid and, consequently, that its notice of termination was also invalid.

[141] In my view, the judge erred in concluding that RJG's failure to strictly comply with the contractual provisions disqualified it from terminating the contract.

[142] There are two points to be considered in this respect. First, I would conclude that Marine Atlantic's repudiation of the contract, in and of itself, entitled RJG to terminate the contract without reference to strict compliance with the contractual terms. That is, the right to terminate the contract follows directly from RJG's "acceptance" of Marine Atlantic's contractual repudiation.

[143] The second point relates to whether the judge properly considered the totality of the evidence, and properly considered the actions of Marine Atlantic and the consultant, CBCL, in reaching the conclusion that RJG was not in compliance with the contract.

<u>Marine Atlantic's repudiation of the contract entitled RJG to terminate the contract without reference to the contractual provisions</u>

[144] First, with respect to the impact of repudiation on the need for strict compliance before terminating a contract, the Ontario Court of Appeal's decision in *Barclays Bank PLC v. Devonshire Trust*, 2013 ONCA 494 (application for leave to appeal dismissed at *Barclays Bank PLC v. Metcalfe & Mansfield Alternative Investments VII Corp (2014)*, [2013] S.C.C.A. No. 374, CanLII 1205 (SCC), is relevant.

[145] In *Barclays*, the issue was whether a notice of early termination was validly provided pursuant to the terms of a contract. The argument was that, as the notice of early termination was not in accordance with the contractual requirements, it was invalid.

[146] The trial judge concluded that, as there was a repudiation of the contract, even if the party in question was unable to deliver a notice of termination under the contract, "the doctrine of repudiation brought the contract to an end on that day" (paragraph 199).

[147] On appeal, it was argued that the trial judge had erred in concluding that repudiation displaced the need to comply with the contractual requirements regarding a notice of early termination. It was also argued that the judge had erred in failing to find that the terms of the contract served to "exclude the common law doctrine of repudiation" (paragraph 200).

[148] The Ontario Court of Appeal held that "the trial judge was correct that, even if [the party purporting to terminate] was not able to deliver a valid notice of early termination, the common law principle of repudiation resulted in the termination of the contract…" (paragraph 206).

[149] The Court of Appeal further held that the contract did not oust the common law doctrine of repudiation, as "plain language would be required to do so" and the contract was "devoid of any such language" (paragraph 205). As a result, the contract could be terminated notwithstanding the absence of strict compliance with the contractual provisions relating to termination.

[150] In my view, the analysis and conclusion in *Barclays* is applicable to the present case. That is, even if it is found that RJG had not strictly complied with the contractual provisions relating to termination, it was entitled to terminate the contract due to Marine Atlantic's repudiation and its acceptance of that repudiation.

[151] As in *Barclays*, there is no evidence that the parties in the present case intended to contractually displace the right to rely on the common law doctrine of repudiation. In fact, clause 1.3.1 of the construction contract states that, absent express language, common law rights and remedies are preserved, in addition to those provided by the contract. Clause 1.3.1 reads:

> "Except as expressly provided in the Contract Documents, the duties and obligations imposed by the Contract Documents and the rights and remedies available thereunder

> shall be in addition to and not a limitation of any duties, obligations, rights, and remedies otherwise imposed or available by law."

[152] Therefore, as the contract does not include any language ousting the common law doctrine of repudiation, the law of repudiation would continue to apply and be available to RJG.

[153] In my view this wholly disposes of this issue. I would conclude that the trial judge erred (by not considering Marine Atlantic's repudiation of the contract) when he concluded that RJG was not entitled to terminate the contract because it had not strictly complied with the contractual provisions.

[154] Finally Marine Atlantic, on appeal, also submitted that RJG had repudiated the contract when it gave its notice of termination and withdrew from the worksite on January 7, 2014. Marine Atlantic argued that it accepted this purported repudiation on January 10, 2014, and terminated the contract.

[155] Marine Atlantic further argued that, as there was a repudiation of the contract by RJG, Marine Atlantic was not required to comply with the notice provisions under the contract. Specifically, it submitted it was not required to provide RJG with a notice of default or give RJG five days to cure the default before terminating. In Marine Atlantic's submissions, when a party to a contract relies on the common law of repudiation to terminate, the contractual notice requirements do not apply and need not be met.

[156] While I do not agree with Marine Atlantic's submission that RJG repudiated the contract (and in fact hold that Marine Atlantic repudiated it), I would agree with Marine Atlantic's underlying proposition that the party "accepting" the other party's repudiation of the contract need not adhere to the contractual notice requirements when terminating. In this case, the party accepting the repudiation was RJG.

<u>Was there proper consideration of the totality of the evidence relating to the actions of Marine Atlantic and the consultant, CBCL, in determining whether RJG was in strict compliance with the contract?</u>

[157] The second point relates to whether the judge properly considered the totality of the evidence, and considered the actions of Marine Atlantic and the consultant, CBCL, when he held that RJG was not in strict compliance with the contract, and therefore not entitled to terminate. In light of the conclusion on the first point, above, while it may not be necessary to decide this point, it will be discussed briefly.

[158] The judge focused on RJG's lack of strict compliance with various contractual requirements relating to requesting and receiving payment from Marine Atlantic. However, he gave no consideration to Marine Atlantic's actions, which demonstrated Marine Atlantic's intention to withhold payment regardless of whether RGJ strictly complied with the contractual provisions.

[159] For example, RJG provided its notice of default on December 17, 2013, a day after Marine Atlantic advised that it was freezing "any and all funds". The judge focused on the timeline of a progress payment (referred to as progress payment #5) which, according to the judge's calculations, meant that RJG would not have been entitled to payment until December 24, 2013.

[160] The judge concluded that RJG's notice of default on December 17, 2013 was therefore premature, and determined that RJG would have been required under the contract to issue a new notice of default after December 24th:

> [74] … Therefore, Marine Atlantic would have been obliged under the contract to pay Progress Claim No. 5 no later than 24 December 2013. R.J.G. issued its notice of default on 17 December. The notice of default issued by R.J.G. was therefore not in compliance with the contract. Marine Atlantic was under no obligation to pay R.J.G. on that date and the notice is therefore a nullity. In order to be in compliance with the contract, R.J.G. would have had to issue a new notice of default at some point after 24 December 2013 which it did not do.

[161] However, this analysis ignored the fact that Marine Atlantic had already notified RJG, on December 16, 2013, that it was freezing any and all funds. Presumably this freeze would apply regardless of whether RJG was or was not in compliance with the contract. There was no indication that funds would flow if RJG was in strict compliance with the contractual notice requirements.

[162] The trial judge placed great emphasis on RJG's failure to provide a new notice of default after December 24, 2013 in order to strictly comply with the contract and be entitled to terminate.

[163] However, Marine Atlantic submitted on appeal that, because it believed it was obliged to freeze funds due to the performance bond, even if a later (presumably compliant) notice of default had been given by RJG, Marine Atlantic would still have refused to pay. Marine Atlantic submitted the following in this regard:

> RJG did not deliver a new notice of default. Furthermore, even if it had done so, Marine Atlantic would have been entitled to withhold payment following its notification to

> Western Surety and while it was waiting on Western Surety to exercise its right of election under the terms of the bond, as discussed below.

[164] The judge's analysis also ignored evidence in the record that indicated Marine Atlantic would not pay even where amounts owing to RJG had been certified by the consultant.

[165] For example, on December 16, 2013, the consultant CBCL notified Marine Atlantic (in an email to Mr. Dan Herder of Marine Atlantic) that the consultant had certified a progress payment in the amount of $255,000 (progress payment #5), which was to be paid to RJG.

[166] Mr. Herder sent an email to Marine Atlantic's counsel in Halifax on the same day, December 16, 2013, seeking direction on how to deal with this progress payment, which had by that time been certified by the consultant. Mr. Herder noted that the normal course of action would be to pay the amount owing. He wrote:

> Here's the most recent progress claim for work performed by RJG up to and including October 31st at a value of $255,000. The claim has been verified by CBCL and would normally upon receipt by [Marine Atlantic] be processed for payment…
>
> At the beginning of the process when we first started discussing the issues with RJG, you indicated that [Marine Atlantic] should not pay any monies to RJG, and that maybe payment would be better made to the bonding company.
>
> We didn't land on any particular decision as I recall at that time, and we just said we'd wait till we had a claim and then decide.
>
> In light of the circumstances we find ourselves in today, should we pay this amount?...
>
> Once approved by CBCL, we have no grounds to hold up payment other than legal grounds you might identify. …

[167] The message in reply from Marine Atlantic's counsel in Halifax was that no payment was to be made to RJG. He wrote:

> No payments should be released at this time. I will write counsel for both RJG and Western Surety and advise them accordingly.

[168] As a result, Mr. Herder notified the consultant that Marine Atlantic "would not process payments to RJG". On the same day, December 16, 2013, Marine Atlantic wrote RJG to advise that "any and all funds with respect to this project are being frozen."

[169] It is clear from the record that Marine Atlantic's decision to freeze any and all funds was made subsequent to the consultant certifying payment to RJG of $255,000, and subsequent to Marine Atlantic being advised by the consultant that this amount had been certified.

[170] A further progress payment for approximately $240,000 (referred to as progress payment #6) was certified for payment by the consultant on December 19, 2013, at which time the consultant advised Marine Atlantic that this payment had been certified.

[171] The next day, December 20, 2013, there was an email exchange between Mr. Herder of Marine Atlantic and Mr. Calvin Hollett of the consultant, CBCL, whereby Mr. Herder asked whether there was anything in the contract which would permit Marine Atlantic not to pay RJG, notwithstanding the consultant's certification. Mr. Herder inquired as follows:

> Thanks Calvin, I think, as I already know this.
>
> I'll ask the same question in a different way. Is there anything in the contract, in the consultant's opinion, that would permit the owner not to pay/give the owner discretion not to pay because of a subsequent event?

[172] It is unclear whether the "subsequent event" referred to in Mr. Herder's message was Marine Atlantic's freezing of funds on December 16th, RJG's notice of default on December 17th, or some other event.

[173] Mr. Hollett of CBCL wrote to advise that Marine Atlantic was responsible for paying RJG, as payment had been certified:

> The Owner [Marine Atlantic] is responsible for paying the contractor [RJG]. We as the consultant stated the facts, decisions on final payment and the final amounts are ultimately the Owner's decision.
>
> Similar to [progress] claim #5 we as the consultant certified the claim for payment. [Marine Atlantic] at its own discretion chooses to withhold payment.

[174] Marine Atlantic also argued that RJG's December 17, 2013 notice of default for non-payment was premature as the respective time periods relating to the payment of progress payments (including the time for the consultant to certify payment and the owner to pay) had not elapsed, and therefore there was no default.

[175] However, there was evidence that RJG had originally made a claim for payment in early November, 2013 and that the consultant did not certify any

amount for payment at that time. At trial, however, the consultant's witness, Mr. Hollett, testified that an amount of $157,500 should have been certified in November, 2013. That amount still remained unpaid when RJG issued its notice of default on December 17, 2013.

[176] The trial judge referred to the consultant's evidence in the judgment, at paragraph 64:

> [64] … [RJG] submitted that CBCL had all the information it required for payment of the lump sum amount of $157,500 for installation of the template which was also included in that claim. R.J.G. submitted that GC 5.6.1 required the consultant to certify the amount applied for or in such amount as the consultant determined to be properly due. When pressed on cross-examination, Calvin Hollett for CBCL agreed with counsel for R.J.G. that he had had sufficient information to certify the $157,500 and should have done so by 15 November, ten days after receipt of the claim pursuant to the contract. However, the consultant pointed out that R.J.G. had not made a specific request for payment of the $157,500 as that wasn't what was being discussed.

[177] While Mr. Hollett's evidence was that CBCL should have certified at least $157,500 in November, 2013, the judge concluded that the consultant's evidence was "not a correct interpretation of the contract":

> [76] Mr. Hollett for CBCL, while being pressed on cross-examination, conceded that he thought he should have certified at least the $157,500, but that was not his view in November/December 2013 and it is not a correct interpretation of the contract.

[178] If CBCL had certified the $157,500 as owing to RJG in November, 2013 (as the consultant's witness, Mr. Hollett, testified should have occurred) then Marine Atlantic would have been required to pay this amount in November, 2013. There would then have been no issue with RJG's strict compliance with the contract, and no issue that RJG's notice of default was premature, as this amount still remained unpaid at the date of RJG's notice of default on December 17, 2013.

[179] In this respect, it is unclear whether the judge appropriately considered the impact of the consultant's failure to certify the payment to RJG, which should have been a critical factor in the judge's consideration as to whether RJG's notice of default was premature.

[180] It is also not clear whether the judge considered the totality of the evidence, including the evidence relating to Marine Atlantic's actions and position that no payment would be made even if RJG was in compliance and payments had been certified, when the judge concluded that RJG could not terminate the contract.

[181] In summary, I would conclude that the trial judge erred (by failing to consider that Marine Atlantic had repudiated the contract) when he concluded that RJG was not entitled to terminate due to its lack of strict compliance with the contractual provisions.

[182] Given that this wholly disposes of this issue, it is not necessary to determine whether the judge properly considered the totality of the evidence, and whether he properly considered the actions of Marine Atlantic and the consultant, CBCL, in reaching the conclusion that RJG was not in strict compliance with the contract.

Issue 3: Did the judge err in concluding that RJG was not entitled to terminate the contract and seek damages?

[183] For the reasons provided, I would conclude that RJG was entitled (because of Marine Atlantic's repudiation and RJG's acceptance thereof) to terminate the contract on January 7, 2014, that RJG was entitled to seek damages for breach of contract as a result, and that the trial judge erred in concluding otherwise.

Issue 4: Did the judge err in concluding that Marine Atlantic was entitled to terminate the contract on January 10, 2014?

[184] The trial judge's conclusion that Marine Atlantic was entitled to terminate the contract on January 10, 2014 was premised on the notion that RJG had not already validly terminated it on January 7, 2014.

[185] As noted above, the parties conceded that their positions were mutually exclusive, and that if RJG was entitled to terminate the contract on January 7, 2014, it could not be found that Marine Atlantic also terminated the contract on January 10, 2014.

[186] The judge found that RJG's notice of termination was invalid and that RJG was not entitled to terminate the contract on January 7, 2014. He further found that the contract continued until validly terminated by Marine Atlantic on January 10, 2014. The judge stated:

> [101] As already noted, on 7 January 2014 R.J.G. purported to terminate the contract and ceased work on the project. This constituted repudiation of the contract by R.J.G and entitled Marine Atlantic to issue its notice of termination on 10 January on this basis or on the basis of the uncorrected default by R.J.G.

[187] For the reasons provided above I respectfully disagree, and conclude that RJG validly terminated the contract on January 7, 2014, by accepting Marine

Atlantic's repudiation. As a result, the contract was no longer in existence on January 10, 2014, when Marine Atlantic purported to terminate it. Consequently, I would conclude that the judge erred in finding that the contract was terminated by Marine Atlantic on January 10, 2014.

Issue 5: Did the judge err in the assessment of damages awarded to Marine Atlantic?

In light of the findings above, it is unnecessary to consider the assessment of damages awarded to Marine Atlantic.

Conclusion

[188] Marine Atlantic's action in freezing "any and all funds with respect to this project" constituted a repudiation of the contract. RJG accepted the repudiation and terminated the contract on January 7, 2014.

[189] There was no contractual or common law justification for Marine Atlantic's action in freezing funds. Specifically, Marine Atlantic was not entitled to freeze "any and all funds with respect to this project" to comply with the performance bond.

[190] Further, there was nothing to disentitle RJG from terminating the contract when it did. RJG was not estopped from accepting Marine Atlantic's repudiation and terminating the contract while remediation discussions were ongoing. Finally, Marine Atlantic's repudiation of the contract entitled RJG to terminate the contract without reference to the contractual provisions.

Disposition

[191] In the result, I would set aside the decision in the Court appealed from and allow the appeal.

[192] In light of the trial judge's dismissal of RJG's claim at the trial, there was no assessment of RJG's damages. Consequently, I would remit this matter to the Supreme Court, General Division, to consider and determine the issues relating to damages and the assessment of damages.

[193] I would further order that RJG is entitled to its costs in this Court under column 3 of the scale of costs of the *Court of Appeal Rules* as well as costs in the Court appealed from, also under column 3.

_____

F. P. O'Brien J.A.

I concur: _____

B. G. Welsh J.A.

I concur: _____

L. R. Hoegg J.A.