COURT OF APPEAL OF YUKON

Citation: *North America Construction (1993) Ltd. v. Yukon Energy Corporation,* 2018 YKCA 6

Date: 20180515
Docket: 16-YU787

Between:

North America Construction (1993) Ltd.

Respondent
(Plaintiff)

And

Yukon Energy Corporation

Appellant
(Defendant)

Before: The Honourable Mr. Justice Frankel
The Honourable Madam Justice MacKenzie
The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of Yukon, dated August 1, 2016 (*North America Construction (1993) Ltd. v. Yukon Energy Corporation*, 2016 YKSC 33, Whitehorse Docket 11-A0114).

Counsel for the Appellant:	P. J. G. Landry and M. L. Burris
Counsel for the Respondent:	H. D. Edinger
Place and Date of Hearing:	Vancouver, British Columbia March 8, 2018
Place and Date of Judgment:	Vancouver, British Columbia May 15, 2018

Written Reasons by:
The Honourable Madam Justice A. MacKenzie

Concurred in by:
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Fisher

Summary:

Yukon Energy Corporation ("YEC") contracted with North America Construction (1993) Ltd. ("NAC") to refurbish a generating station in Yukon. Disputes arose during construction. NAC sued, seeking additional compensation for work it performed under the contract. YEC counterclaimed for the costs of remedying deficiencies. The trial judge granted judgment in NAC's favour and also allowed YEC's counterclaim for the costs of remedying deficiencies, but only at the lower amount estimated by NAC's witness. YEC appealed those three awards on various grounds, including that the judge had incorrectly invoked the rule in Browne v. Dunn to its disadvantage. NAC cross appealed. Held: Appeal allowed; cross appeal allowed in part. The judge erred in invoking the rule in Browne v. Dunn for all three claims. A cross-examiner's failure to confront a witness will not violate the rule in Browne v. Dunn when trial fairness is unaffected by lack of cross-examination. The judge's incorrect application of the rule is material and the error permeated his reasons. The judge also failed to consider YEC's alternative argument on one claim. NAC's cross appeal is allowed in part; the award arising from the deficient electrical cabinets was unsupported by any evidence. NAC's cross appeal on YEC's alleged failure to mitigate is dismissed.

Reasons for Judgment of the Honourable Madam Justice MacKenzie:

> My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.
>
> *Browne v. Dunn* (1893), 6 R. 67 (H.L.) at 70-71.

[1] The principle above, articulated by Lord Herschell L.C., has become known as "the rule in *Browne v. Dunn*" or the "confrontation principle". It regularly gives rise to controversy.

[2] The primary issue on this appeal is whether the trial judge erred in invoking the rule at the trial of the dispute between Yukon Energy Corporation ("YEC") and North America Construction (1993) Ltd. ("NAC").

[3] YEC appeals from the judge's order awarding the respondent NAC approximately $1.6 million for work done in connection with the parties' construction contract to refurbish the Aishihik Generating Station on the Aishihik River 120 km northwest of Whitehorse, Yukon.

[4] This appeal concerns the judge's conclusions on three claims: two of NAC's – the "CRX" claims – which involved change orders to the contract, and the third, YEC's counterclaim for deficiencies.

[5] YEC says the judge erred by:

1. applying the rule in *Browne v. Dunn* when it was not engaged;
2. failing to apply relevant provisions of the contract;
3. misapprehending material parts of the evidence; and
4. failing to address a material part of YEC's defence and counterclaim for deficiencies.

[6] The NAC cross appeals, contending the judge erred by:

1. awarding $100,000 on YEC's counterclaim based on a finding of fact unsupported by evidence; and
2. finding YEC did not fail in its duty to mitigate its damages.

[7] For the reasons that follow, I would allow YEC's appeal on the basis the judge erred in invoking the rule in *Browne v. Dunn* with respect to all three claims on appeal, and as to one claim, also failed to address an alternative argument made by YEC. It is thus unnecessary to address the other grounds of appeal.

[8] I would also accede to the first ground of the cross appeal, but give no effect to the second ground regarding mitigation of damages.

Background

[9] The background relevant to the appeal and cross appeal can be summarized briefly. The judge's reasons, indexed as 2016 YKSC 33, include further detail.

[10] YEC owns and operates the Aishihik Generating Station. In early August 2010, YEC accepted NAC's proposal of $7,136,885 and retained NAC to provide the labour and material, with other work, to install the YEC-supplied third turbine or

"AH3", the new switchgear, the associated equipment, and to complete the installation of additional power cables for the Aishihik Generating Station redundancy project. NAC began work later that month, before the parties had agreed on a final contract. The contract price remained subject to finalization of several matters, including the design, and schedule for completion.

[11] YEC and NAC executed the contract in early December 2010, backdating it to August 6, 2010, and work was substantially complete a year later, in early December 2011. AH3 began generating power on December 6 or 7, 2011.

[12] NAC demobilized its workforce from the Aishihik Generating Station in mid-December 2011. By then, the parties' relationship had deteriorated to the point where YEC refused to allow NAC back on site to remedy deficiencies.

[13] Disputes arose throughout the project, but to their credit, the parties settled many before trial. NAC ultimately sued on a number of changes to the contract it said were the subject of change orders, and YEC counterclaimed for deficiencies. As mentioned, only three claims are at issue on appeal: NAC's claims on CRX 20, CRX 100 and YEC's counterclaim for deficiencies.

[14] In addressing these three claims, the judge applied, or appeared to apply, the rule in *Browne v. Dunn.* I turn to discuss this rule, the standard of review, and the judge's use of the rule respecting each claim.

The Rule in *Browne v. Dunn*

[15] The Supreme Court of Canada summarized the rule in *Browne v. Dunn* in *R. v. Lyttle*, 2004 SCC 5:

> [64] … The rule in *Browne v. Dunn* requires counsel to give notice to those witnesses whom the cross-examiner intends later to impeach. The rationale for the rule was explained by Lord Herschell, at pp. 70-71:
>
> > […] My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with

> witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling.
>
> [65] The rule, although designed to provide fairness to witnesses and the parties, is not fixed. The extent of its application is within the discretion of the trial judge after taking into account all the circumstances of the case. ...

[16] In *R. v. Quansah*, 2015 ONCA 237 at para. 77, Justice Watt neatly summarized the fairness considerations animating the confrontation principle:

> i. Fairness to the witness whose credibility is attacked:
>
> The witness is alerted that the cross-examiner intends to impeach his or her evidence and given a chance to explain why the contradictory evidence, or any inferences to be drawn from it, should not be accepted: *R. v. Dexter*, 2013 ONCA 744, 313 O.A.C. 226, at para. 17; *Browne v. Dunn*, at pp. 70-71.
>
> ii. Fairness to the party whose witness is impeached:
>
> The party calling the witness has notice of the precise aspects of that witness's testimony that are being contested so that the party can decide whether or what confirmatory evidence to call; and
>
> iii. Fairness to the trier of fact:
>
> Without the rule, the trier of fact would be deprived of information that might show the credibility impeachment to be unfounded and thus compromise the accuracy of the verdict.

[17] The purpose of the rule in *Browne v. Dunn* is to protect trial fairness: *R. v. Podolski*, 2018 BCCA 96 at para. 145.

[18] While often referred to as a "rule", its legal application will depend on the circumstances of the case. As the Court in *Quansah* observed at para. 89, "the rule in *Browne v. Dunn* is not some ossified, inflexible rule of universal and unremitting application that condemns a cross-examiner who defaults to an evidentiary abyss".

[19] The jurisprudence reflects that where trial fairness is unaffected by lack of cross-examination, a cross-examiner's failure to confront a witness will not violate the rule in *Browne v. Dunn*.

[20] This may be the case where it is clear or apparent, on considering all the circumstances, which may include the pleadings and questions put to the witness in examination for discovery, that the witness or opposite party had clear, ample and effective notice of the cross-examiner's position or theory of the case. Therefore, where the other party, the witness, and the court are not caught by surprise because they are aware of the central issues of the litigation, the rule in *Browne v. Dunn* is not engaged: see *Liedtke-Thompson v. Gignac*, 2014 YKCA 2 at paras. 42-43; *R. v. Drydgen*, 2013 BCCA 253 at para. 18; *Trillium Motor World Ltd. v. Cassels Brock & Blackwell LLP*, 2017 ONCA 544 at para. 317; *R. v. Paris* (2000), 150 C.C.C. (3d) 162 (Ont. C.A.) at para. 23; *R. v. Poole*, 2015 BCCA 464 at para. 39.

[21] Where the rule is engaged, a trial judge enjoys broad discretion in determining the appropriate remedy, and "there 'is no fixed consequence' for an infringement of the rule": *Poole* at paras. 43-44.

[22] In *Quansah* at para. 117*,* the Court listed the following factors that may inform the appropriate remedy:

- the seriousness of the breach;
- the context of the breach;
- the timing of the objection;
- the position of the offending party;
- any request to permit recall of a witness;
- the availability of the impugned witness for recall; and
- the adequacy of an instruction to explain the relevance of failure to cross-examine.

[23] A trial judge may diminish the weight of the contradictory evidence: *Drydgen* at para. 26. Other remedies include recalling the witness and, in the jury context,

giving a specific instruction to the jury about the failure to comply with the rule as a factor to consider in assessing credibility: *Quansah* at para. 119.

[24] However, as discussed below, it may be impossible to disregard a reference to *Browne v. Dunn* when a trial judge has erred in concluding that the rule was engaged and the trial reasons show the judge gave the rule some significance that worked to the appellant's disadvantage: *Drydgen* at para. 27.

Standard of Review

[25] The parties agree that whether or not the rule in *Browne v. Dunn* is engaged is a question of law, reviewable on a standard of correctness: *Drydgen* at para. 22; *R. v. Gill*, 2017 BCCA 67 at para. 22; *Podolski* at para. 148.

The Rule Respecting Each Claim

CRX 20 (Schedule D)

[26] NAC claimed $706,220 for costs allegedly incurred under a price adjustment clause found in CRX 20 or "Schedule D Amendments and Clarifications to the Work", an agreement the parties entered into because the original completion date changed. NAC said the change in schedule necessarily meant its work took longer than planned. NAC's CRX 20 claim turned on a provision of Schedule D entitling it to recover any "actual costs caused by" the new completion date:

> 1. The Price will be adjusted to reflect the Contractor[']s actual costs caused by the new Completion Date of November 30, 2011 under Section 3.3. The Price at Section 8.1 is based upon the original completion date of June 19, 2011 with a six week shut down window commencing May 1, 2011.

[27] YEC denied the scheduling changes had "caused" NAC to spend longer on the project than it had planned. Instead, the extra time NAC spent to complete the project was the result of NAC's inefficient, unsafe, and substandard work practices. The judge accepted NAC's CRX 20 claim, concluding that although NAC's work was

"often sloppy" and "they were not as efficient as they might have been", NAC finished the project within the agreed upon time.

[28] The judge recognized CRX 20 as "one of the most contentious of NAC's claims" and noted it arose "because of 'Shut Downs' which were agreed upon but with respect to which there was no agreement as to the impact upon the project and the additional cost" (at para. 20). The judge found the extra time NAC spent on the project was 102 days, resulting in a cost of $633,510.48, rejecting YEC's position that NAC did not incur any costs from the schedule changes, and the costs it claimed under this CRX were incurred because it took NAC longer than it expected to complete the project.

[29] In regard to the testimony of Mr. Simonson, YEC's on-site contract administrator, the judge said this with respect to the rule in *Browne v. Dunn*:

> [30] There is difficulty with some of Mr. Simonson's evidence with respect to the perceived delays which he observed. That is, that no witness for the Plaintiff, neither the project manager nor Mr. Laith Hamad, who was the electrical coordinator and very much on top of things overall with this project, was cross examined in any manner on any of this evidence.
>
> [31] I spoke with counsel during the trial about my concerns about these and other matters that arose in the Defendant's case and had not been touched upon during the Defendant's cross examination of the Plaintiff's witnesses. I explained my concerns within the parameters of *Browne v Dunn* (1893), 6 R.67 (H.L.). I allowed the evidence to go in, but I advised counsel there would or could be a problem as to the amount of weight attached to such evidence.
>
> [32] Having said this, I must say that little of Mr. Simonson's evidence in particular had any adverse impact upon the Plaintiff's claim under CRX 20. The fact is, and was, that the Plaintiff finished this project on time. The items to which Mr. Simonson referred, even if totally accepted, would be, in my mind, rather small. This is, of course, not something which should be simply rejected, but I do so because overall I was not greatly impressed with his evidence. Many of the matters which he considered to be major appeared to me to be rather minor and with respect to which, hindsight is almost so much better.

[30] NAC refers to para. 32 of the judge's reasons, replicated above, to submit the judge weighed all of Mr. Simonson's evidence without any reference to the rule. NAC in its factum provides some detail about Mr. Simonson's evidence to argue that

"[n]otwithstanding this evidence, there was ample evidence to support the trial judge's conclusion that Mr. Simonson's concerns were minor, in hindsight" and "there was little or no evidence that NAC's delays, if any, related to the issues Mr. Simonson raised, delayed or extended the critical path of the project."

[31] NAC submits: "The trial judge did not rely on *Browne v. Dunn* in respect of Mr. Simonson's evidence. But if he did, to some extent, NAC submits that doing so did not lead him to an error of fact, or one that was palpable and overriding."

[32] In contrast, YEC argues the judge discounted the evidence of its witness, Mr. Simonson, under the rule when it should not have been engaged. NAC contends it is not clear to what extent this error shaped the judge's "overall" impression of Mr. Simonson's evidence.

[33] In its factum, YEC says the judge erred in discounting Mr. Simonson's evidence that but for the inexperience and laziness of NAC's crew, NAC could have finished the project four to five weeks earlier. It says he did so on the basis that YEC violated *Browne v. Dunn* because "no witness for the Plaintiff … was cross-examined in any manner on any of this evidence."

[34] YEC says this error is made clear in light of these facts:

1. YEC's statement of defence set out the particulars of NAC's shortcomings in detail, including unequivocally asserting that it was NAC's acts and omissions that had bloated NAC's construction schedule and caused NAC to be on-site continuously right up to the new completion date;

2. YEC specifically stated in its opening statement that it would take the position at trial that NAC had under-estimated the work, had deployed an inexperienced crew and project manager, and had used poor quality tools and equipment;

3. Mr. Hamad, NAC's electrical coordinator, was cross-examined at length on the cause of NAC's expansion of its work schedule, the difficulties resulting from the remote location, and the safety requirements specific to a power station;

4. Mr. McPherson, NAC's president, was cross-examined on the inexperience of NAC's crew; and

5. Mr. Maloney, NAC's project manager, was cross-examined on the distension of NAC's schedule as a result of various items taking much longer than expected, and YEC's counsel's offer to read in excerpts from his examination for discovery on the effect of the safety and productivity issues on NAC's schedule was refused by the judge.

[35] YEC also notes NAC's counsel never objected to Mr. Simonson's evidence on the basis of *Browne v. Dunn*.

[36] In addition to the alleged errors discussed above, YEC says the judge did not acknowledge its alternative argument that NAC had failed to prove some or all of the specific costs claimed under CRX 20.

CRX 100 (Extra Cable and Crane Time)

[37] For CRX 100, NAC claimed $119,004 in costs incurred to procure and install electrical cables in addition to those specified in the contract during the start up and commissioning phase of the project. YEC agreed it had made changes to the design that affected how much cable would be required, but primarily took the position that NAC had been compensated for most of this work in other CRXs that included this claim.

[38] The judge awarded NAC half its CRX 100 claim, or $59,500. He stated, after discussing the rule in *Browne v. Dunn*, that "not very much weight may be placed upon the evidence from Mr. Peake [YEC's witness] with respect to just how much cable was required and the resultant crane time" because "nothing was asked of

Mr. Hamad [NAC's witness] with respect to these rather important items" (at para. 71).

[39] The judge's reasoning on this claim included the following:

> [67] It was Mr. Peake who was quite critical of the estimate of 4,000 meters of additional cable which NAC had estimated was required. In his opinion, the appropriate figure would have been closer to 400 meters.
>
> [68] As well, the estimate of the crane time, which NAC had estimated was far more than he would have thought necessary.
>
> [69] Unfortunately, we once again come back to the cross examination of Mr. Hamad and Mr. Maloney, or the lack of cross examination of either of these individuals on these very specific points.
>
> [70] I have referred to my concerns about the failure of the Defendant to adhere to the principles annunciated in *Browne v Dunn* and it is particularly telling here.
>
> [71] The Defendant would have known, during the examination-in-chief and cross examination of the Plaintiff's witnesses, that it was going to be proffering a witness (Mr. Peake) who had estimated that the amount of cable and the amount of crane time would be significantly less than either Mr. Hamad or Mr. Maloney had taken into consideration when preparing the estimates with respect to these particular items. It is, quite frankly, simply an issue, as I remarked to counsel, of fair play. If one knows one is about to put forth evidence that calls into question, for example, cost estimates of time and materials, the witnesses putting forth that evidence should be cross examined on the discrepancy that is intended to [be] put forth by the Defendant. That was not done. In my view, not very much weight may be placed upon the evidence from Mr. Peake with respect to just how much cable was required and the resultant crane time. I do not, as I have said, question Mr. Peake's credibility, what I question is how there can be a legitimate gap in the quantity of cable when nothing was asked of Mr. Hamad with respect to these rather important items. There were questions put to Mr. Hamad about CRX 100, but none that involved the quantity of cable or the crane time.
>
> [72] In the end, I am quite satisfied that as a result of the lack of drawings and detailed connections, due to the evolving design and changes to the previous plans, the Plaintiff was put to a lot of extra time and materials.
>
> [73] I am satisfied that CRX's which were agreed upon, being CRXs 24, 79, 80, 85, and 86 did not include any amount for cable which had yet to be shown to be required.
>
> [74] Both parties were somewhat lax in adhering to a proper extra work charge protocol. It was, as said by Mr. Hamad, a moving target and a reaction to that which had not been envisaged or planned by either party. While both Mr. Hamad and Mr. Peake were good witnesses, and credible witnesses, both cannot be totally right.

> [75] I am not able to come up with any firm costs. I will therefore award one half of CRX 100, which would, by my calculations, be $59,500.00.
>
> [Emphasis added.]

[40] YEC submits the judge's key error with respect to NAC's cable changes claim was his reliance on the rule in *Browne v. Dunn* to resolve the conflict between the evidence of NAC's Mr. Hamad and YEC's Mr. Tilbrook and Mr. Peake. YEC says the rule was not engaged and the judge erred in law in invoking it.

[41] As noted by YEC and as reflected by the judge's reasons at para. 71, replicated above, the judge explicitly discounted Mr. Peake's cable quantity and crane time estimate because YEC did not specifically cross-examine Mr. Hamad on those matters, which the judge characterized as "rather important". NAC says those were narrow issues and relatively insignificant to the overall CRX 100 claim. YEC agrees, but responds that the judge's failure to recognize this underscores the magnitude of his error in assessing the claim.

[42] NAC also notes the judge did not exclude any evidence of Mr. Tilbrook or Mr. Peake in respect of CRX 100 or any other issue at trial, and says it is clear from para. 72 of his reasons that the judge decided the issues between the parties based on the weight of all of the evidence before him, including the validity he saw in the positions of Mr. Hamad and Mr. Peake.

[43] NAC highlights the following factual background which it says informed the judge's decision to favour Mr. Hamad's evidence:

1. While NAC's original list of cables was based on IFC drawings, NAC issued requests for information because it realized after mobilization that the list was missing information;
2. NAC and YEC met with the project engineer and designer, AECOM, in January 2011, to resolve multiple discrepancies and at that meeting they generated a cable list which was greater than the one required by the IFC drawings;

3. the parties negotiated an agreement in relation to the increased cable list as CRX 24, under which YEC agreed to an additional $46,000; and

4. following further meetings in April 2011, YEC provided NAC with a detailed design package including control design/narrative and the I/O schedule.

[44] Much of NAC's submission above invites this Court to attempt to disentangle or identify the basis upon which the judge assessed the evidence and to reweigh that evidence or make findings of fact, which is not the role of an appellate court.

YEC's Counterclaim for Deficiencies

[45] The contract required NAC to perform the work in accordance with all specifications, permits, licences, and regulatory requirements, and it specified NAC had to "perform the Work diligently, in a workmanlike manner, and in accordance with the highest industry practices used in Canada."

[46] YEC's counterclaim for its costs resulting from NAC's deficiencies covered those deficiencies that could be, or had been, repaired, and those incapable of repair, the impact of which allegedly caused YEC ongoing inconvenience. YEC's total special damages claimed for repairable deficiencies was $1,026,327. It also claimed general damages for the irreparable deficiencies in the amount of $153,949 (15%).

[47] YEC's counterclaim for deficiencies included $258,700 for NAC's allegedly deficient installation of cables in the elevator shaft, which the judge dismissed.

[48] The judge recognized YEC's counterclaim for deficiencies as "perhaps the most contentious claim", observing at para. 97 that YEC submitted NAC was "sloppy, unprofessional and unsafe with respect to so much of its work that [YEC] had totally lost confidence in NAC's ability to repair or remedy any of the multitude [of] transgressions" which it alleged had occurred. NAC, on the other hand, maintained the list of deficiencies prepared by YEC was quite exaggerated, as was the cost to remedy them.

[49] In support of its claim, YEC led expert evidence from Mr. Kassam, the general manager of Orbis Engineering, a firm YEC hired to assess the deficiencies. Mr. Kassam estimated the cost of remedying NAC's alleged deficiencies to be $970,961.25.

[50] The judge rejected Mr. Kassam's opinion and accepted the evidence of NAC's expert, Mr. Miller, who assumed all the alleged deficiencies were in fact deficiencies and estimated repair would cost $251,521.52.

[51] The judge thus awarded YEC $251,500.00 for the listed (repairable) deficiencies, but did not address YEC's claim for $153,949 in general damages for the irreparable deficiencies.

[52] During Mr. Kassam's examination-in-chief by YEC's counsel, the following exchange occurred in which the judge raised the rule in *Browne v. Dunn*. He admonished counsel for YEC for failing to follow it, and counsel for NAC for not being "on his toes" about the rule:

> THE COURT: Let me deal with something that's bothered me over the lunch hour, because I had to go back and reread the cross on Mr. Miller. I didn't recall this morning and I didn't see it in my notes that you had put any of Mr. Kassam's report to Mr. Miller. Are my notes accurate?
> MS. BURRIS: I don't recall putting his report to Mr. Miller, but Mr. Miller's report in my understanding is based on Mr. Kassam's report.
> THE COURT: Well —
> MS. BURRIS: Well, it's a response to Mr. Kassam's report in that the — Mr. Miller's report contains the hours estimated by — in the table.
> THE COURT: Let me go through the report, then.
> (PAUSE)
> I'm concerned particularly because there's such a huge discrepancy between the hours to complete various items.
> MS. BURRIS: Yes —
> THE COURT: The labelling hours, the code items, and so on. I don't recall that you put — that you put Mr. Kassam's estimates to Mr. Miller and asked him if he had any comment on them.
> MS. BURRIS: I don't believe I did, My Lord.
> THE COURT: Okay. Are you aware of the rule in *Brooks v. Dunn — Browne v. Dunn*?
> MS. BURRIS: Yes, My Lord.
> THE COURT: Well, that's a breach. Right?
> MS. BURRIS: My Lord, my — my reason for not doing it is because my read of Mr. Miller's report is that he reviewed the estimates generated by Orbis and they —

> THE COURT: But if you're going to — the rule is simple. If you're going to go after a witness' credibility through a witness you intend to bring up, you had to put that witness' evidence to him. I mean, that's the rule as I recall it; isn't it?
> MS. BURRIS: Yes, My Lord. And all I can say in response is that Mr. Miller's report, his estimates are right next — he's formatted his report in response to it, so I — I — I did not — I did not put it to him, but they were — they were in the — because they were in the contents of the report, and so I didn't think it was necessary to point it out since he'd pointed —
> THE COURT: Well, okay, I'm just —
> MS. BURRIS: — out the discrepancies himself in his report.
> THE COURT: You're going to have to be careful of that because that's not the only witness you did that with, all right, and I've let it go.
>
> You weren't on your toes, Mr. Edinger.
>
> And so — so it's in but there's now an issue of how much weight do I put on it. Do you appreciate that?
> MS. BURRIS: Yes, My Lord, I hear —
> THE COURT: Okay.
> MS. BURRIS: — what you're saying.
> THE COURT: Carry on with Mr. Kassam.

[53] One of the reasons the judge awarded only a fraction of the repairable deficiencies claimed appears again to be his application of the rule in *Browne v. Dunn.* The judge had this to say about how much NAC should have to pay for deficiencies, which included his concern that YEC had violated the rule by not putting Mr. Kassam's estimates to Mr. Miller in cross-examination:

> [129] The question then becomes should NAC have to pay anything since the deficiencies did not amount to a fundamental breach of the contract. In my view, they do, because they did not complete the job as they were required to do under the contract.
>
> [130] … Mr. Kassam had estimated the cost of remedying the deficiencies would be $970,961.25.
>
> * * *
>
> [137] Mr. Miller's estimate of the cost to repair was $251,521.52.
>
> [138] Mr. Kassam was of the view that all of Mr. Miller's estimates of time required were far too low. Where Mr. Miller had estimated some 65 hours to complete "the labelling", Mr. Kassam estimated 482 hours. Where Mr. Miller estimated some 40 hours to prepare as built to drawings, Mr. Kassam estimated some 653 hours. Where Mr. Miller estimated some 4 hours to complete what were described as "code items", Mr. Kassam estimated that this should take some 1,116 hours.
>
> [139] These are rather stunning contrasts, none of which were put to Mr. Miller. Mr. Miller did, however, have access to and read the reports, so

> would have been aware of them. No cross examination was put to him, however, in that regard.
>
> * * *
>
> [142] I was not particularly impressed by Mr. Kassam's evidence. Mr. Mortimer was not called and therefore not questioned with respect to his estimate. Mr. Miller's report was, in my view, fair and reasonable. I award YEC the sum of $251,500.00 with respect to the deficiencies as prepared by YEC.

[54] NAC submits that independently of any application of *Browne v. Dunn*, the judge had other reasons for preferring Mr. Miller's testimony. In particular, NAC points to the judge's statements that Mr. Kassam's "bias came through quite clearly", that he "appeared to suffer from a loss of memory" on a number of occasions, and was needlessly "argumentative" (at paras. 131, 132).

[55] NAC, in its factum, again delves into the detail of the evidence in an attempt to demonstrate that the weight of the evidence, or a reasonable assessment of the evidence, shows that even if the judge applied *Browne v. Dunn* with respect to Mr. Kassam's evidence, it had no effect on his ultimate judgment on this issue. NAC submits the judge properly weighed the relevant evidence before deciding to accept the full value of Mr. Miller's evidence.

[56] YEC contends the judge erred in relying on *Browne v. Dunn* as a basis for preferring Mr. Miller's report to Mr. Kassam's, as reflected in para. 139 above, even though he acknowledged that Mr. Miller had in fact read Mr. Kassam's report. It was therefore obvious that Mr. Miller had "ample and effective notice" (per *Liedtke-Thompson* at para. 43) of YEC's case, and *Browne v. Dunn* was not engaged. YEC relies on *Drydgen*, saying, as in that case, the judge's reference to *Browne v. Dunn* was material as it is impossible to tell from the judge's reasons to what extent this error coloured his assessment of Mr. Miller's evidence.

Breach of the Rule in Browne v. Dunn

[57] I conclude the judge erred by invoking the rule in *Browne v. Dunn* when it was not engaged. In my view, this error of law tainted his reasoning on all three of the claims appealed.

[58] As NAC observed in oral argument, *Browne v. Dunn* is infrequently raised in civil cases where the factual and legal issues in dispute have been well canvassed by the parties in advance of trial.

[59] I note at the outset that counsel for NAC made no complaint about any breach of the rule with respect to any of the claims when YEC witnesses testified, nor did he argue in closing submissions that the rule applied. Instead, the judge raised the rule on his own.

[60] Furthermore, with respect to CRX 20 (Schedule D), when counsel for YEC offered to read in relevant portions of Mr. Maloney's discovery evidence at trial to address the judge's concern, the judge refused. Yet, the discovery evidence in question reflected that counsel for YEC had examined Mr. Maloney on the safety and productivity issues and the effect they had on NAC's schedule:

> MS. BURRIS: The second issue that I think this addresses is your concern regarding the evidence that — in our case regarding NAC's lack of productivity and safety records and the impact that had on the project schedule.
>
> As noted in the trial decision that was upheld in this *Liedtke-Thompson* case, where it has been — I think this falls into the same category where the — our defence to the Schedule U claim was clearly set out in our pleadings, in our statement of defence.
>
> Where it also falls into that — this point in — in the same facts is that it was also put to Pat —Mr. Maloney on discovery. I have — and so that leads me to the second part to address. I have read-ins from the transcripts of the examination for discovery of Mr. Maloney and Mr. Hamad to hand up.
>
> The selections don't include the sections in which we put the issues of productivity and — and safety record to Mr. Maloney, but I can read them to you now, if you would like to hear that.
>
> THE COURT: I expressed my — let me deal firstly with the — your argument on *Browne v. Dunn.*
>
> I've got this. I will take into consideration what you've said. I wasn't — I should probably refrain from trying to train lawyers, but my— the point I was trying to make to you, Ms. Burris, is (a) be aware of these matters, be aware of the various rules of evidence that could impact you, and take care not to repeat mistakes like that in the future.
>
> The evidence is in. I will consider it that — that — and that wasn't the only part with the experts. The trial process is about being fair on both sides and on my side. That's all.
>
> So, my caution to you is if you're going to take exception to something that's before you right now through your opponent's

> evidence, you've got to highlight it. You can't just stand back and come up with something to counter it if you haven't dealt with it in some manner. All right?
>
> That's — the rules of evidence are simply about fairness. Okay?
>
> MS. BURRIS: Yes, My Lord.

[61] In its factum, NAC makes this general argument, which is applicable to the judge's raising *Browne v. Dunn* as to all three claims:

> 50. The trial judge did not rely on *Browne v Dunn* to exclude any evidence. He admitted all of the evidence of Mr. Simonson in respect of CRX 20, Mr. Tilbrook and Mr. Peake in respect of CRX 100 and Mr. Kassam in respect of YEC's deficiency claims.
>
> 51. Each of the issues raised in YEC's appeal required the trial judge to weigh all of the evidence before him: CRX 20 concerned contractual interpretation and YEC's factual arguments about why NAC had remained on site; CRX 100 required understanding the evolving cabling design of the project and NAC's role in the installation of that cable; YEC's deficiency claim involved weighing the estimates of Mr. Miller and Mr. Kassam of the costs of fixing all the alleged deficiencies. YEC's appeal can therefore only be that the trial judge gave insufficient weight to the evidence of the YEC witnesses based on the application of *Browne v Dunn.*
>
> 52. Having said that, NAC submits there is no evidence [in] the trial judge's reasons or in the transcripts that he improperly applied *Browne v Dunn* to his fact finding exercise. This was the best possible result for YEC in the circumstances. The weight the trial judge gave to the evidence of the YEC witnesses was clearly based on what he saw as the value of that evidence and without any application of *Browne v Dunn*. The trial judge's references to *Browne v Dunn* are, therefore, in the words of this Court in [*R. v. Roberts*, 2016 YKCA 3], regrettable but harmless.

[62] It is important at the outset to observe that the rule in *Browne v. Dunn* is not a rule of evidence as NAC's position seems to assume in suggesting it could be used to exclude evidence. Such a remedy does not fall into the broad range of appropriate remedies available to a trial judge in the exercise of his or her discretion. To the extent the judge thought that it did, he was mistaken. Rather, the rule relates to the evaluation of the reliability and credibility of the evidence. It is a rule designed to promote and achieve fairness. As noted above, a trial judge enjoys a broad discretion in determining the appropriate remedy. Potential remedies in the judge

alone context include diminishing the weight of the contradictory evidence, and recalling a witness.

[63] The concern on this appeal is the extent to which the judge's perception that YEC had breached the rule compromised the value or weight the judge gave to YEC's evidence.

[64] At the hearing of this appeal, counsel for NAC candidly acknowledged that the rule in *Browne v. Dunn* was not engaged in this trial and the judge erred in invoking it. However, as reflected in its submission above, NAC said this Court should not disturb the judge's conclusions on any of the claims in question because there is evidence it says could have supported the judge's conclusions, regardless of his references to or application of *Browne v. Dunn.* I have already said that submission invites us to improperly weigh and evaluate much conflicting evidence on our own. This is not the role of this Court. We are simply not equipped to retry this lengthy and complex case.

[65] I agree with YEC's submissions. As noted in *Drydgen*, when the rule is improperly invoked, it is difficult to assess the extent to which it affected the trial judge's evaluation of the evidence. This case involved much conflicting evidence. This Court owes no deference to an assessment of evidence that is tainted by legal error, and it is an error of law to invoke the rule where it was not engaged. It is not possible to determine from his reasons how the *Browne v. Dunn* error affected the weight the judge gave the evidence in question.

[66] As YEC points out, the judge's repeated application of the rule was not only unjustified in all the circumstances of the extensive pre-trial disclosure in this complex construction lawsuit, but it was initiated solely by him and applied solely against YEC, not NAC. Neither party invoked the rule at trial, and as stated, neither relied on it or referred to it in closing argument.

[67] YEC is correct, in my opinion, that although the judge did not expressly state he relied on *Browne v. Dunn* in deciding the Schedule D claim or the deficiencies

counterclaim, his repeated reference to the applicability of the rule to YEC's evidence on those claims, and indeed his explicit statement that he placed less weight on Mr. Peake's evidence in regard to the CRX 100 claim, make it difficult to conclude it was not a factor in his assessment of the evidence. The *Browne v. Dunn* error was not harmless.

[68] In my view, NAC made a fair and appropriate concession at the hearing of this appeal that the rule in *Browne v. Dunn* was not engaged in this trial. As in *Liedtke-Thompson*, YEC's theory or responses to NAC's claims were set out in its statement of defence and counterclaim, in its expert reports, and in its opening statement at trial. There had been examinations for discovery, discussions of the issues and exchanges of correspondence. NAC had ample and effective notice of YEC's defence and its case on the counterclaim.

[69] NAC relies on *R. v. Roberts,* 2016 YKCA 3, where this Court concluded that an erroneous application of the rule in *Browne v. Dunn* was not determinative of the appeal as the trial judge's reference to the rule, while regrettable, was "harmless". However, in *Roberts* the Court allowed the appeal on another ground, that the trial judge had misconstrued Mr. Roberts' testimony and incorrectly concluded that he had no defence known to law. This context is important because, as Justice Donald noted at para. 18, since the trial judge "found that the appellant offered no defence known to law, there would be no reason for her to test his narrative against the rule."

[70] In reaching that conclusion, Donald J.A. urged a restrained approach to applying the rule in *Browne v. Dunn*, saying at para. 15, "I think the rule is often invoked inappropriately."

[71] In the present case, I am unable to accept NAC's submission that the references to the rule in the judge's reasons were merely "regrettable but harmless". Instead, I find references to the rule in *Browne v. Dunn* permeated the judge's reasons. It is not possible to regard the references as mere surplusage. In my view, the errors were material and justify appellate intervention.

Failure to Address YEC's Alternative Argument

[72] YEC's alternative argument challenged the legitimacy of specific items included in NAC's Schedule D claim. YEC disputed the amount of specific costs claimed, saying NAC had failed to prove a number of its claimed costs, especially, for example, overhead costs. NAC's claim for overhead costs alone was $168,463.68, which YEC submitted was based only on "estimated" rather than "actual" cost and that any award under Schedule D should be reduced by $197,824.49 for overhead, and by a minimum of $235,887 for total disputed costs.

[73] While a judge is not required to provide a word-by-word, line-by-line, or even page-by-page explanation for his or her decision, a failure to address a relevant matter may constitute a material error justifying appellate intervention if the omission gives rise to the reasoned belief that the judge forgot, ignored, or misconceived the evidence in a manner that affected his or her conclusion: *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at paras. 125-126; *Housen v. Nikolaisen*, 2002 SCC 33 at para. 39. Similarly, a failure to address competing positions raised by the parties may constitute a reversible error: *British Columbia (Minister of Technology Innovation and Citizens' Services) v. Columbus Real Estate Inc*., 2016 BCCA 283 at para. 36.

[74] In my view, the judge erred in failing to address or even acknowledge YEC's alternative argument on Schedule D (CRX 20).

[75] In summary, I would allow the appeal on all three claims: CRX 20, CRX 100 and the deficiencies.

The Cross Appeal

[76] NAC cross appeals on the two bases referred to above: that the judge erred in awarding YEC $100,000 on the counterclaim for the deficiency regarding CRX 111 (the electrical cabinets), and in not finding that YEC had failed to mitigate its damages by refusing to permit NAC to return to the site to remedy deficiencies.

CRX 111 (Electrical Cabinets)

[77] NAC supplied electrical cabinets with welded backs instead of cabinets with removable backs as specified by the contract. YEC claimed $206,971 to compensate YEC for the work that would be required to procure, install and commission replacement cabinets. In closing submissions, YEC raised the alternative argument that it was entitled to $100,000 in damages as the amount necessary to modify the existing cabinets.

[78] In closing argument, NAC admitted liability, agreeing the cabinets had not been delivered as ordered, but disputed the quantum of damages. Thus, the sole question for the trial judge was the amount of the award.

[79] The two main witnesses at trial were Mr. Maloney, NAC's senior project manager, and Mr. Peake, YEC's electrical projects coordinator.

[80] The repair estimates provided by the two witnesses differed substantially. Mr. Maloney testified the cost to repair the cabinets was "in the $20,000 to $30,000 range". In contrast, when asked for his estimate, Mr. Peake replied, "I would say I'd want probably 100 grand".

[81] The judge's reasons for awarding $100,000 to YEC were brief:

> [93] … the cabinets which were supplied had welded backs. Modifications had to be made to them by making holes in the sides and in the backs so that they could be used. They are still being used, but are not what was requested or required by YEC.
>
> [94] YEC is seeking to replace the cabinets totally at a cost of some $206,000.00. Mr. Maloney estimated that it would cost $20,000.00 to $30,000.00 to cut the panels out. Mr. Peake thought they could be "fixed" for $100,000.00.
>
> [95] I am satisfied that the cabinets should have been delivered with either removable backs or open backs.
>
> [96] They should be repaired. I accept Mr. Peake's evidence and allow this claim in the amount of $100,000.00.

[82] NAC asks this Court to set aside the award, or in the alternative, to reduce it to $20,000 (the low end of Mr. Maloney's estimate).

[83] NAC says this in Part 3 of its factum on cross appeal:

> Did the trial judge err in finding that it would cost $100,000 to repair the Cabinets (CRX 111)?
>
> 1. A finding of fact unsupported by evidence is characterized as an error in law or an error in principle. The standard of correctness applies.
> 2. NAC submits that the trial judge made a manifest error in determining that the cost to repair the Cabinets would be $100,000 in the absence of any evidence. The trial judge accepted Mr. Peake's off the cuff estimate of $100,000 for the cost of repairs. YEC presented no objective evidence of the actual cost for repairs and how this figure was derived.
> 3. The trial judge rejected Mr. Maloney's evidence that the repair of the Cabinets would cost between $20,000 to $30,000 and provided no explanation before doing so. Mr. Maloney was the Project Manager and gave evidence on what would be required to fix the Cabinets. Mr. Peake had not investigated whether the panels could be cut out but believed others had.
>
> [Emphasis added.]

[84] In the portion underlined above, NAC at least implicitly raises the question of whether the judge's reasons were adequate.

[85] YEC's response focuses on the issue of sufficiency of the evidence; specifically, whether there was no evidence, or whether the judge erred in his assessment of the evidence. YEC notes there is a distinction between a complete absence of evidence and the sufficiency of evidence, and says it is "patently false to allege an absence of *any* evidence supporting the $100,000 award" because Mr. Peake testified that it would cost an estimated $100,000 to fix the cabinets.

[86] YEC further submits that NAC's real concern is that the judge preferred Mr. Peake's estimate over Mr. Maloney's. YEC relies on *Woelk v. Halvorson*, [1980] 2 S.C.R. 430 at 435-36, to say the judge's damage assessment was not wholly erroneous so as to warrant appellate interference. The judge was entitled to weigh the cost estimates provided by the two witnesses. Based on their different levels of experience and backgrounds, and the fact Mr. Peake provided details about the work required to fix the deficiency, whereas "Mr. Maloney only proposed a vague

plan to come up with a plan for the rework", there is no basis to conclude the judge erred.

[87] As stated by the Supreme Court of Canada in *Housen*:

> [1] A proposition that should be unnecessary to state is that a court of appeal should not interfere with a trial judge's reasons unless there is a palpable and overriding error. The same proposition is sometimes stated as prohibiting an appellate court from reviewing a trial judge's decision if there was some evidence upon which he or she could have relied to reach that conclusion.

[See also paras. 5, 6 and 10.]

[88] Examples of "palpable" factual error include findings made in the complete absence of evidence and findings of fact drawn from primary facts that are the result of speculation rather than inference: *R. v. Stewart*, 2018 BCCA 76 at para. 82.

[89] Where it has been shown there was no evidence on which the trial judge could have reached his or her conclusion, an appellate court is obliged to interfere: *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58 at para. 80; *Woelk* at 435-36.

[90] The parties directed this Court to the following extracts from the transcript, which provided the basis for the judge's award of $100,000.

[91] Mr. Maloney, on direct examination by Mr. Edinger, said this:

> Q And in terms of what might be needed to be done in order to get them to the state that YEC, you believe, needs, what do you think that would take?
> A We've reviewed this, and we feel that a person could talk to Rev [NAC's supplier] and come up with a plan to modify them in the field, obviously working closely with YEC so we don't interrupt their operations. But essentially, they're eight foot tall by two feet wide by 18 inch deep steel panel that's 12 gauge steel that could be reworked in the field to essentially remove the back out of them and make good with some provisions that —
> THE COURT: Cut it up?
> THE WITNESS: Yeah, and do it properly so it doesn't look like a —
> THE COURT: Sort of like cutting pieces off the pipe, flanges?

THE WITNESS: Yeah. I mean, you would have to be careful, we admit that, that, you know, it's a control panel, but we don't — we feel it could be done quite easily.
THE COURT: And?
THE WITNESS: Our estimate to do the work is in the $20,000 to $30,000 range.

[92] In contrast, in examination-in-chief by Ms. Burris, Mr. Peake said this:

Q Can the backs on the existing cabinets be removed?
A They would have to be cut off.
Q And is that possible to do that?
A Yes. Yeah.
Q With these cabinets?
A I'd want to look at them more closely, but I'm suspecting that the back plane [*sic*] could be temporarily moved out of the way. You could cut the panel out.

Where the issue is going to be is trying to relocate the equipment that's on that back panel. Anything that's there will get disconnected, and if the wires are long enough, they'll get moved to either the sides or the front if there's space available.

If the wires aren't, then you would — we would require a new cable to be run from wherever that source or the marshalling rack or wherever it came from to this new thing.

So — and then additionally, anything you've disconnected we're going to need to recommission, and that's probably the most timely of the process.

Q Have you investigated whether this is possible?
THE COURT: I'm sorry. Whether what?
MS. BURRIS: Have you — whether it's possible to make these modifications to allow the back panel to be cut off — or back cover to be cut off.
THE WITNESS:
A No, I have not. I personally have not.
Q What would be required to do that?
A I believe that others had investigated and looked into it and had looked at the options. One of the options was having a contractor come in and do it. I don't have the workforce to look into it, so it's not something that I can entertain. I would be getting a contractor to do it.
Q Do you have an idea of what kind of a budget you'd require to bring in a contractor to do that work?
THE COURT: I don't know that he would set that. That would be up to the contractor, I suspect.
THE WITNESS:
A Well, yes. I was hoping that — I think there was a number that was identified as being able to do the work already, so I would hope that I would get whatever that deficiency value was and be able to strike a PID and actually have that work to be done.
Q You said "strike a PID". Can you explain what you mean by that?

> A Well, I've got a — I've got an operating budget for O&M. Anything outside of my O&M would be capital, so there has to be capital monies to —
> THE COURT: Hold on. I don't care. If we have a figure, let's have the figure. Tell us how you came to it. I don't care where it comes from, which pocket, okay.
> MS. BURRIS: Okay.
> THE WITNESS:
> A Yeah, I would — if I was to estimate how much it would be, I would say I'd want probably 100 grand.
>
> [Emphasis added.]

[93] Mr. Peake may have been unprepared for this issue only raised near the end of trial as an alternative argument because, as NAC points out, YEC originally claimed for replacement costs of the cabinets, not the repair costs.

[94] The judge himself recognized the need for evidence on the repair costs, as is apparent from his attempt, underscored above, to elicit such evidence.

[95] In answer to the first part of the judge's question, "If we have a figure, let's have the figure", Mr. Peake replied, "if I was to estimate how much it would be, I would say I'd want probably 100 grand." But the second part of the judge's question, "Tell us how you came to it", remained unanswered. The matter was not pursued and Mr. Peake provided no information about how the $100,000 figure was derived.

[96] YEC submits that Mr. Peake, as its electrical projects coordinator, was both well placed to be knowledgeable about the cabinets and able to provide details about how the repairs could be completed. It says Mr. Maloney had a civil, rather than an electrical, engineering background, was inexperienced with electrical cabinets, and was not directly involved with the installation process.

[97] However, in my view, Mr. Peake's "off the cuff" estimate was merely speculation. The judge did not review the witnesses' expertise or familiarity with the project. It was not a matter of the judge preferring the testimony of one witness over the other. The testimony did not reach that stage. It cannot be said there was "some evidence" upon which the trial judge could have relied to make a damages award of $100,000 with respect to CRX 111.

[98] Therefore, I agree with NAC that the judge's award of $100,000 was based on mere speculation unsupported by evidence and amounts to reversible error.

[99] In any event, even if it could be said that Mr. Peake's estimate provided some support for the judge's award, the judge failed to provide adequate reasons as to why he preferred Mr. Peake's evidence to that of Mr. Maloney.

[100] The entirety of the judge's analysis was, "I accept Mr. Peake's evidence and allow this claim in the amount of $100,000.00" (at para. 96).

[101] These circumstances are reminiscent of *Phillips v. Keefe*, 2009 BCCA 523. *Phillips* concerned a dispute as to whether a fence, which previously separated the parties' two backyards, accurately marked a boundary line between their properties. The issue at trial was the true location of the boundary line. The conflicting reports of two B.C. Land Surveyors were adduced in evidence and both surveyors testified. In dismissing the action, the trial judge said that after considering the evidence from both experts, he preferred the defendants' expert.

[102] One of the plaintiffs' grounds of appeal was that the reasons for judgment were inadequate. The Court, in *Phillips*, allowed the appeal and ordered a new trial on that basis, saying this:

> [7] In my respectful view, the judge's reasons are insufficient to meet the standard set out in the authorities. The judge says the defendants' expert was "the more persuasive witness by a substantial margin". He says that he was "doubtful of the plaintiffs' expert evidence" while he was hearing it. However, the reasons do not explain why he was led to either of those conclusions. The trial judge's reasons do not need to set out what the judge thought in a "watch me think" fashion: *R. v. M (R.C.)*, [2008] 3 S.C.R. 3, but they do need to set out "what he or she has decided and why he or she made that decision": *R. v. Morrissey* (1995), 22 O.R. (3d) 514.
>
> [8] In *Gibson v. Insurance Corporation of British Columbia*, 2008 BCCA 217, this Court stated:
>
> > [25] We have the benefit of the trial judge's conclusory findings on each of these issues, but we do not enjoy an indication of the reasoning process, the evidentiary analysis, or a discussion of the acceptance and rejection of the evidence of the numerous experts, in which the trial judge had to engage in arriving at these conclusions.

> [9] Such statements are apposite here. The trial judge has provided his conclusory findings but he has not provided any indication of his reasoning process, the evidentiary analysis or a discussion of the acceptance and rejection of the evidence of the experts except to say that he found one expert "more persuasive by a substantial margin than the other." Further, there are no reasons setting out the basis for this special costs award.
>
> [10] The reasons leave the plaintiffs unable to identify or challenge any errors the judge may have made in reaching his conclusion. Nothing of his reasoning process is disclosed. As this Court said in *Gibson* at para. 34:
>
> > The gravamen in the reasons debate is their adequacy to permit proper appellate review.

[103] As noted above, "conclusory findings" or "bald conclusions on issues of fact", to use the language from *Gibson v. Insurance Corporation of British Columbia*, 2008 BCCA 217 at para. 21, do not permit proper appellate review.

[104] In *Ecobase Enterprises Inc. v. Mass Enterprise Inc.*, 2017 BCCA 29 at para. 9, the Court said a decision should not be set aside if the record permits meaningful appellate review. However, this is not such a case. Based on the discussion above, it cannot be said the record allows for meaningful appellate review.

[105] I would allow the first ground of the cross appeal and order a new trial with respect to the issue of CRX 111.

Failure to Mitigate

[106] As noted above, the judge awarded $251,500 to YEC to account for deficiencies.

[107] On this ground of the cross appeal, NAC seeks an order reducing the award because of YEC's alleged failure to mitigate by not providing NAC with an opportunity to return to the site to correct the deficiencies.

[108] At trial, NAC said YEC was obligated to mitigate its damages by allowing NAC back on site to remedy the deficiencies. In turn, YEC said the party contracting for the work is not obligated to allow a contractor to repair damage or deficiencies where there has been a loss of confidence between the parties. In closing

submissions, YEC pointed out that Messrs. Peake, Tilbrook and Simonson had all testified they had little or no confidence in NAC.

[109] The judge accepted YEC's argument. His reasoning included the following:

> [107] The Plaintiff urges the Court to reject all of the Defendant's deficiencies list because the project was substantially completed and the deficiencies were not serious ones. That being the case, the Plaintiff argues, there was no fundamental breach of the terms of the contract. That, in turn, required the Defendant to mitigate its damages. The best way to mitigate its damages was to allow the Plaintiff to carry out the necessary remedial work.
>
> [108] I agree with the Plaintiff that that the deficiencies were not so serious as to amount to a fundamental breach of the contract having been committed by the Plaintiff.
>
> [109] I also agree with the Plaintiff that an owner is required to mitigate its damages. However, with the greatest respect to the learned trial judge in *Beta Construction Inc. v Chiu*, 2015 ONSC 5288, at para 86, I do not agree that the owner must allow the contractor an opportunity to repair the deficiencies.
>
> [110] In my respectful view, to compel an owner to allow a contractor with whom it has no confidence simply makes no sense.
>
> * * *
>
> [127] It was Mr. Peake who quite honestly said that while conducting the walkthrough with Mr. Hamad and others from NAC toward the end of the project, that he and the other YEC people who were attending with him had already determined that they were not going to have NAC come back to do any of the deficiencies. They did not like NEC's [*sic*] work and refused to allow them to carry any further work out.
>
> [128] YEC was entitled to come to that conclusion and was entitled to make such a decision.

[110] NAC submits the judge erred in concluding that reasonable mitigation did not require giving NAC an opportunity to remedy the deficiencies. NAC says in the absence of a fundamental breach of contract, an owner *must* provide the contractor an opportunity to rectify deficient work before the owner is entitled to damages for the cost of having the deficiencies repaired by a third party.

[111] YEC says that since whether a plaintiff has mitigated its damages is a question of fact, NAC must demonstrate the judge made a palpable and overriding error in concluding YEC acted reasonably. YEC submits the judge made no such error because his finding was well supported by the evidence.

[112] YEC notes that in November 2011, the parties began a series of discussions about the deficiencies, and held many meetings and conference calls to resolve the disagreement. Both parties point to detailed evidence regarding the process by which a formal deficiency list was created, then revised, then further revised. NAC disagrees with YEC's interpretation of the record, the order in which certain events occurred during the period when the parties confirmed their differing positions as to the deficiencies, and the point at which YEC decided it would not allow NAC back on site. I note all of this evidence was before the judge, who was in the best position to assess it.

[113] In my view, NAC has failed to identify an error of law or fact in the judge's reasoning.

[114] The test for mitigation asks whether a plaintiff took all reasonable steps to mitigate its loss: *McGregor on Damages*, 19th ed. (London, UK: Sweet & Maxwell, 2014) at 9-004 and 9-016; *Webb v. Attewell* (1993), 88 B.C.L.R. (2d) 1 (C.A.) at para. 34.

[115] The parties referred to *Delco Automation Inc. v. Carlo's Electric Limited*, 2016 ONCA 591, which concerned two separate actions regarding work completed on two correctional centre projects in Ontario by Carlo's Electric Limited ("CEL"), an electrical engineering company. In the Brampton claim, a dispute arose as to the scope of the work in the contract. Delco, the contractor, claimed CEL, the subcontractor, was required to supply and install wiring both inside and outside the perimeter of the buildings. CEL disagreed, saying the contract did not require it to perform the latter work. The parties met to see if the dispute could be resolved. At that meeting, CEL offered to quote on the work it claimed was not within the scope of the contract. Delco rejected CEL's offer and notified CEL that it would hire third parties to complete the work if CEL did not agree to do it. CEL did not perform the work, but stayed on site and continued to complete other work it agreed was within the scope of the contract. Delco sued CEL, seeking its costs of having the work completed by third parties.

[116] At trial, CEL said Delco failed to reasonably mitigate its losses because CEL would have charged less than the other companies that performed the disputed work. Delco argued it had acted reasonably in the circumstances, which included that if CEL had been genuinely interested in performing the work, it could have done the work under protest, that Delco had reasonably lost confidence and trust in CEL, that the relationship between the parties was frequently acrimonious, and there was no evidence CEL would have charged less than the third parties. The trial judge agreed, concluding Delco had acted reasonably in the circumstances.

[117] CEL appealed on a number of grounds, including that the judge erred in finding Delco had reasonably mitigated its damages. The Ontario Court of Appeal dismissed CEL's appeal, saying this about mitigation of damages:

> [25] Although a plaintiff is entitled to recover damages for the losses it suffers from the defendant's breach of contract, the extent of those losses may depend upon whether it has taken reasonable steps to avoid their accumulation: *Michaels v. Red Deer College* (1975), 57 D.L.R. (3d) 386 (S.C.C.), at p. 390. Where, after the breach of a commercial contract, a defendant makes an offer to the plaintiff that would reduce the losses incurred, the plaintiff is generally required to accept a reasonable offer by way of mitigating its damages. However, it is always a question of fact whether it is reasonable for the plaintiff not to accept the breaching defendant's offer: *Payzu Ltd. v. Saunders*, [1919] 2 K.B. 581 (C.A.), at p. 589; *Nashville Contractors Ltd. v. Middleton*, [1984] O.J. No. 99 (C.A.).
>
> [Emphasis added.]

The court went on to conclude there was no basis to interfere with the trial judge's conclusion that the contractor had reasonably mitigated its damages, noting Delco's loss of confidence in CEL as one of the reasons why the record supported the trial judge's determination.

[118] NAC argues *Delco* can be distinguished on the basis that it involved an "offer to quote" not an offer to return to the site to fix deficiencies. I do not accept that argument. The underlying premise of *Delco* is that mitigation is a question of fact. I agree with the Ontario Court of Appeal that "it is always a question of fact whether it is reasonable for the plaintiff not to accept the breaching defendant's offer".

[119] This conclusion is consistent with the established jurisprudence and *McGregor on Damages*, c. 9 “Mitigation of Damage” at 9-016:

> **(b) A question of fact or a question of law.** In *Payzu v. Saunders* [[1919] 2 K.B. 581 CA] both Bankes and Scrutton L.JJ. said that the question of mitigation of damage is a question of fact; in *The Solholt* [[1983] 1 Lloyd’s Rep. 605 CA] Sir John Donaldson M.R. said that “whether a loss is avoidable by reasonable action on the part of the claimant is a question of fact not law” and that “this was decided in *Payzu v. Saunders*”. It has never been doubted since; today it tends to be regarded as trite law. One result of this is that, once a court of first instance has decided that there has been, or has not been, a failure to mitigate, it is difficult to persuade an appellate court to come to a different view. Mitigation being a question of fact, “it is therefore rarely appropriate”, said Potter L.J. in *Standard Chartered Bank v Pakistan National Shipping Corporation* [[2001 1 All E.R. Comm. 822 CA], “to interfere with the conclusions of the trial judge based as they are on the evidence (or lack of satisfactory evidence) before him”....
>
> [Footnotes omitted.]

[120] At trial, NAC relied on *Beta Construction Inc. v. Chiu*, 2015 ONSC 5288 at para. 86, to say an owner *must* provide the contractor an opportunity to rectify deficient work before the owner is entitled to damages for the cost of having the deficiencies repaired. The judge, at para. 109, declined to follow *Beta*. NAC has referred this Court to other Ontario trial decisions with statements to similar effect. Neither party has referred this Court to any binding authority for the proposition that absent a fundamental breach of contract, the party contracting to have the work completed must, in all circumstances, provide the contractor an opportunity to rectify deficient work.

[121] In my view, what constitutes reasonable mitigation will depend on the circumstances of the case at hand. It is a factual inquiry entitled to deference on appeal. I agree with the Ontario Court of Appeal that an innocent party might generally be expected to accept a reasonable offer by the breaching party to remedy deficient work. After all, the breaching party may be able to correct the deficiencies in the most economical and timely manner due to its familiarity with the project. But to say the innocent party is always obligated to allow the other party, whose work was deficient, back on site even where there has been an established loss of

confidence, is not sensible. The better approach is that advanced by YEC that reasonable mitigation should be determined on a case-by-case basis.

[122] The judge followed that approach, and based on the evidence before him, concluded that YEC had reasonably lost confidence in NAC. NAC has failed to identify a material error in the judge's assessment.

[123] I would dismiss the cross appeal relating to the ground that YEC failed to mitigate its damages.

Disposition

[124] In the result, I would allow the appeal to the extent of setting aside the order as it relates to CRX 20, CRX 100 and the counterclaim for deficiencies. I would allow the cross appeal as it relates to CRX 111. I would order a new trial as to those four claims.

_____
The Honourable Madam Justice A. MacKenzie

I agree:

_____
The Honourable Mr. Justice Frankel

I agree:

_____
The Honourable Madam Justice Fisher