

** Unedited **

Indexed as:

Sheds Manor Holdings Ltd. v. Dale Mann Ltd.

Between

Sheds Manor Holdings Ltd., plaintiff, and
Dale Mann Ltd., Dale Mann and Tony Britskey, defendants

[1995] O.J. No. 3465
Court File No. 92-CQ-18094

Ontario Court of Justice (General Division)
Conant J.

Heard: September 6-8, 11-14, 18-19 and 27, 1995.

Judgment: November 16, 1995.

(23 pp.)

Building contracts — Liability of builder — Defective workmanship or design — Duty to owner — General contractor, implied warranty of fitness of subordinate work — Duty to supervise performance by subcontractor.

This was an action for damages arising from a roofing contract. The plaintiff claimed that the roof was faulty because of poor workmanship by a subcontractor. The claims against the subcontractor had been resolved. This was the trial of the claim against the contractor. The plaintiff argued the contractor bore responsibility because no substantial performance certificate was issued and the contract's limitation periods had not begun to run. The contractor relied on the contract's limited warranty provisions.

HELD: The general contractor was liable but its personal principal was not. Damages were assessed at \$125,617.55 covering replacement costs for three of the four buildings in respect of which costs were claimed. The fourth had not yet been repaired. The court found there had been no betterment and made no allowance for it.

Counsel:

M. Boussidan and S. Stoyan, for the plaintiff.

R. Row and M. Goldberg, for the defendants, Dale Mann Ltd. and Dale Mann.

1 **CONANT J.:**— This is a claim of substantial proportions arising from renovations to a set of five adjoining buildings in Toronto made by the defendant Dale Mann Ltd. Of

the almost \$3,000,000 contract, the roofing portion was claimed to be faulty because of poor workmanship by the subcontractor. The roofing subcontractor was Tony Britskey, a defendant initially in this action. However, all claims against Britskey have been resolved and he was not a party in this trial, although he appeared as a witness for the defendants. The plaintiff alleges that re-roofing and necessary repairs to the roof, after its application by Britskey, amounted to about \$200,000 and it claims such amount.

2 Dale Mann Ltd. signed an extensive contract with the plaintiff, which was a standard 1986 edition of the cost plus contract of the Canadian Construction Association, which called for substantial alterations and renovations to buildings on Fraser Avenue and Pardee Avenue, Toronto. The contractor was to subcontract or supply manpower of its own to do the considerable works on this 70-year-old factory building near Dufferin and King Streets in Toronto. The contractor was entitled to charge a 6% fee on all of the works employed, including subcontracts by the contractor, with a ceiling of \$2.6 million dollars of the construction costs. It was not entitled to any further fee on expenditures above that amount.

3 Britskey was contracted to apply a single membrane covering to the roof. All persons involved, including the principals of the plaintiff, Mr. Dale Mann, the President of Dale Mann Ltd., and Britskey himself were fully aware, when considering letting the roofing contract, that the five buildings to be renovated had roofs that leaked. Mr. Mann had experience with Mr. Britskey, who had applied one similar flat roof to a project of Mann's with satisfaction. Mr. Dale Mann and Britskey had access to all the drawings before the roofing began. The first building's roof was applied in January of 1989 and the second roof shortly thereafter.

4 From almost the beginning of the application of roofing there were continued leaks through the membrane and down the parapets, pipes, entrances for air-conditioning and many more areas. There were continual complaints from tenants in the buildings and in due course Savage Sloan Ltd. moved out largely because of these problems. I am satisfied that, over the initial two years, there were at least 50 times that Britskey was asked to attend and repair, which he largely did attempt to do.

5 It may be that, on this type of an underlay of a roof, a single membrane "Brai" roof was inadequate, but all parties were satisfied that if laid and applied properly, a roof of such nature would be satisfactory. The application had the advantage that if a hole appeared in it that the hole could be repaired, similar to fixing an old-fashioned rubber bicycle tube, with an adhesive patch. Throughout the roofs there were a number of protrusions, all of which were in the knowledge of all parties prior to any application. There was no warranty by the manufacturer of "Brai" in this instance, but there was a warranty by Britskey.

6 Britskey attempted to place responsibility for the roof leaks onto the owner by reason of air-conditioning units being lowered, tools or building materials being left on the membrane and extra work done on the parapets. I am satisfied, on the balance of probabilities, that a roof or series of roofs requiring 50 repairs, with leaks appearing continually even after all of those repairs had been attempted, was the result of poor workmanship, planning, supervision and repair, by Britskey. After coming back many

times for repairs, Britskey gave up attempting to satisfy the owners or the contractor. I am not persuaded that a 2-ply or 4-ply roof would have made any appreciable difference if applied and supervised in the same manner that Britskey applied the single membrane under his subcontract. I am satisfied also that part of the leaking problem was caused by the lack of shielding protection applied to the inside and over the top of the parapets by Britskey. This application is recommended by the Canadian Roofing Contractors Association. I therefore find that the leaks and damages arising therefrom as described later herein, are a result of the poor application, supervision and repairs of Britskey.

7 In my conclusion, above, I am mindful of the report of an expert, Mr. Paul Whaley of Trow Consulting Engineers Ltd., who examined the roof and stated in April 1991:

It is our opinion that the roof system currently in place is of poor workmanship and design.

and,

It is our recommendation that a complete re-roofing project be conducted.

8 Also Mr. Jerry Saunders, a roofing expert, who inspected the roof in July 1991, stated:

... the membrane is not at fault and the above listed items are application deviations.

And, after more leakage complaints, another roof consultant inspected. Mr. Albert Duwyn of IRC Group in April 1992 summarized:

Although the roof system was installed per verbal manufacturers instructions and the installation of the membrane on the flat areas is adequate as a waterproofing material, the necessary special attention to details was not given.

Critical areas such as vertical surfaces, corners, drains, vents and skylights were not installed to industry standards.

Liability of Dale Mann Ltd. Under the Contract

9 Having decided that the problems with the roof were the fault of the roofing subcontractor, Britskey, I now turn to the question of the liability for such damage on the part of the general contractor, Dale Mann Ltd.

10 I will say at the outset that, having listened to the testimony of the witnesses and the argument of counsel and reviewed the documentary evidence, it is my belief that both parties took a rather casual approach to the contract. This is despite the fact that both Sheds Manor and Dale Mann Ltd. obtained legal advice before signing it. Once the contract was signed, however, if one party did not follow its terms strictly, the other party appeared to have acquiesced in such conduct. This approach changed significantly when the parties reached court. They now ask the court to enforce different provisions against the opposing party that they themselves did not enforce while the project was proceeding.

11 The plaintiff contends that, under General Condition ("GC") 10.1(b), the general contractor is liable for the poor performance of its subcontractors. There are a number of provisions in the contract that address the contractor's liability, which I set out below:

GC 10.1 The Contractor agrees to preserve and protect the rights of the parties under the Contract with respect to work to be performed under subcontract and to: ...
(b) be as fully responsible to the Owner for acts and omissions of his Subcontractors and of persons directly or indirectly employed by them as for acts and omissions of persons directly employed by him.

GC 21.1 The Contractor shall protect the Work and the Owner's property and property adjacent to the Place of the Work from damage and shall be responsible for damage which may arise as the result of his operations under the Contract except damage which occurs as the result of:
(a) errors in the Contract Documents;
(b) acts or omissions by the Owner, the Consultant, Other Contractors, their agents and employees.

GC 22.1 If either party to this Contract should suffer damage in any manner because of any wrongful act or neglect of the other party or of anyone for whom he is responsible in law, then he shall be reimbursed by the other party for such damage. The party reimbursing the other party shall be subrogated to the rights of the other party in respect of such wrongful act or neglect if it be that of a third party.

Besides the duties created by the contract, the plaintiff suggests that there is a common law implied warranty that the work and materials must be reasonably fit for the purpose for which they are intended. Common law rights are preserved and, according to the plaintiff, enhanced by Art. A.5(a), which states:

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.

12 In response, the defendant asserts that the plaintiff is out of time to bring these claims because they were not brought within the time period stipulated in the contract in the following provisions:

14.12 As of the date of Total Performance of the Work, as set out in the certificate of Total Performance of the Work, the Owner expressly waives and releases the Contractor from all claims against the Contractor including without limitation those that might arise from the negligence or breach of contract by the Contractor except one or more of the following:

(a) those made in writing prior to the date of Total Performance of the Work and still unsettled;

(b) those arising from the provisions of GC 19 -INDEMNIFICATION or GC 24 - WARRANTY.

[I note that 14.12(c), which would extend the Contractor's liability to cover claims made in writing within six years of Substantial Performance, was struck out and initialled by the parties.]

GC 24.2 Subject to paragraph 24.1, and in conformity with Article A-9 COST OF THE WORK, the Contractor shall promptly correct defects or deficiencies in the Work which appear prior to and during the period of one year from the date of Substantial Performance of the Work, as set out in the certificate of Substantial Performance of the Work, or such longer periods as may be specified for certain products or work.

33.1 Defective work, whether the result of poor workmanship, use of defective products, or damage through carelessness or other act or omission of the Contractor and whether incorporated in the Work or not, which has been rejected by the Consultant as failing to conform to the Contract Documents shall be removed promptly from the Place of the Work by the Contractor and replaced or re-executed promptly in accordance with the Contract Documents at the Contractor's expense, where such defective work:

(a) was performed prior to Substantial Performance of the Work and has been rejected by the Consultant on or before the ninetieth (90th) day following Substantial Performance of the Work; or

(b) was performed after Substantial Performance of the Work and has been rejected by the Consultant on or before a date of one year following Substantial Performance of the Work or on or before Total Performance of the Work, whichever is the shorter period.

As well, the defendant states that the plaintiff did not comply with the requirements for dealing with disputes as set out in GC 7 and Appendix 7.

13 The limitation periods in both GC 14.12 and 33.1 start to run from a date to be determined under the certification process. GC 14.12 appears to be quite clear in releasing the contractor from all claims from the date stated. Under GC 14.14, this provision prevails, in the event of a conflict, over other provisions including GC 22 and Art. A.5(a). In my view, however, a certificate of total performance, which establishes the date of total performance, is central to this general condition. Similarly, the certificate of substantial performance is crucial to the interpretation of GC 33.1. No certificate was issued on this project with respect to substantial or total completion. This, in my view, was a condition precedent to both GC 14.12 and GC 33.1 and, without a concrete date for substantial or total performance, the contractor cannot be released from claims.

14 Dale Mann Ltd. argues that it would be unfair to allow the contractor's liability to proceed indefinitely simply because a certificate was not issued. It cites Art. A.5(b) which states that no act or omission of a party shall constitute a waiver of any right or duty of that party under the contract. In my view, Art. A.5(b) does not permit a party to acquiesce in the non-observance of contractual conditions, thereby lulling the opposite party into a mistaken belief that they will not be enforced, only to seek to uphold them when a dispute comes to court. A party must be vigilant in protecting its rights. A case cited by the defendant, *Corpex (1977) Inc. v. Canada* (1982), 6 C.L.R. 221 (S.C.C.), stands for this proposition.

15 In *Corpex*, a contractor incurred expense because he relied on specs regarding soil conditions provided by the defendant. These specs turned out to be wrong. There was a clause in the contract that limited the liability for payment by the defendant. For example, a misunderstanding on the part of the contractor, even if caused by the defendant, was not covered. Substantial differences in the soil conditions were also explicitly excluded unless the contractor gave written notice of the claim to the Engineer within thirty days of discovery. The contractor did not file such a claim and, as a result, the court would not permit him to recover his loss. The court stated at p. 243:

However, the contractor may not take advantage of the compensation machinery established by cl. 12 when he has not himself observed it.

While the defendant cites *Corpex* in regards to the plaintiff's failure to launch a proper claim under its contract, the case is equally applicable to the defendant's conduct in not ensuring that a certificate was issued. It was clearly in Dale Mann Ltd.'s interest that a certificate be issued so that it could be released from all claims under GC 14.12. The contract provided a mechanism for the contractor to require a certificate be issued in GC 6.3:

The Contractor may notify the Owner in writing, with a copy to the Consultant, that the Owner is in default of his contractual obligations if:

- (a) the Consultant fails to issue a certificate in accordance with the provisions of GC 14-CERTIFICATES AND PAYMENTS ...

The Contractor's written notice to the Owner shall advise that if the default is not corrected in the five (5) working days immediately following the receipt of the written notice the Contractor may, without prejudice to any other right or remedy he may have, stop the Work or terminate the Contract.

The fact that subsection (c) of GC 14.12, which would have extended Dale Mann Ltd.'s liability to six years after substantial completion of the project was struck out indicates to me that this issue was important to the parties, making it even more significant that the defendant was not vigilant in protecting the rights that it had negotiated.

16 The defendant suggests that the date of substantial performance can be determined from the evidence. It sets the date of total performance in February 1990; the date of substantial performance can be figured out by working backwards. This issue also arose in *Corpex*. Under the Quebec Civil Code, there is an absolute prescription against the

type of claim made after five years. The site log for the project indicated that the contract terminated in September, 1969 and the action was started in December 1974. The contractor pointed out that the provisional completion certificate, stating that the work was almost complete, was issued in December 1969. Further, the trial judge noted that one year after the certificate, the work had still not been formally approved. The Supreme Court held that it was not possible, on the basis of the evidence before it, to fix the completion of the work at a specific date. The same can be said for the case before me now; I do not find that the evidence clearly establishes a precise date for either substantial or total performance.

17 Dale Mann Ltd. relies on the limited warranty contained in GC 24.2, which provides that the contractor shall remedy defects appearing one year after substantial performance. This type of clause has been interpreted by the Supreme Court of Canada in *Sault St. Marie (City) v. Proctor & Redfern Ltd.* (1986), 22 C.L.R. 73 (S.C.C.), to mean only that the contractor must guarantee the work for the stipulated period. The court held that the clause did not establish a limitation period because it was not sufficiently explicit to over-ride the Limitations Act.

18 Dale Mann Ltd. also raises the issue of the role of the Consultant under the contract. The Consultant plays an extensive role in the day to day running of the project, as set out in GC 3 and GC 7. Appendix 7 to the contract provides that any duties carried on by the Consultant are to be conducted by the project monitor. This appendix further provides that the Consultant/project monitor shall be the arbitrator of first recourse.

19 Dale Mann Ltd.'s first argument with respect to the Consultant is that the plaintiff should have used the dispute mechanism in the contract, which includes making an initial claim to the Consultant. Because the plaintiff did not follow this procedure, the defendant contends, it is precluded from proceeding with a civil action now. The plaintiff asserts that Appendix 7 shows that the parties agreed on a reduced role for the Consultant on the project. I do not interpret Appendix 7 as explicitly limiting the scope of the Consultant's duties; they are simply to be carried out by the project monitor. I do not doubt, however, that the parties conducted themselves as if the Consultant's role had in fact been reduced and that nobody complained about it at the time.

20 Based on the evidence, there was no dispute between Sheds Manor and Dale Mann Ltd. until at least 1991, after the Trow Report was made. Up until that time, the plaintiff believed that Dale Mann Ltd. was working with the plaintiff to achieve a solution to the roofing problems. When Dale Mann took Tony Britskey and JT Donald Consulting onto the roof without the plaintiff's knowledge, it became clear that the plaintiff and Dale Mann Ltd. were no longer working together.

21 The defendant argues that it was not given proper notice of the plaintiff's claim. The purpose of notice is to provide information to the other party so they are not taken by surprise by the commencement of a claim and can govern themselves accordingly. Dale Mann Limited knew about the leaks in the roofs and knew that the plaintiff wanted the problems solved. Indeed, in his letter to Tony Britskey on March 4, 1991, Dale Mann indicated that if the problems were not solved, another roofer would be retained and Britskey Roofing would have to pay for the repairs. Finally, Dale Mann Ltd. knew of its liability under GC 10.3 for the performance of the subcontractor.

22 Dale Mann Ltd.'s second point regarding consultants is that it had advised the plaintiff that a roofing consultant should be retained because of its inexperience in dealing with these kinds of roofs. The plaintiff did not follow its advice and therefore Dale Mann Ltd. is absolved of responsibility. However, this argument is contrary to the testimony of Dale Mann himself. Mr. Mann stated that breaking out the roof specs was an easy job that did not require an expert. As a result, he gave them to his own employee, Mark Scoffield, to do. I note, as an aside, that the manner in which Dale Mann Ltd. broke out the roofing specs encouraged contractors to depart from the recommendations provided in the specs. The defendant also subsequently disputed the findings of the expert it later recommended, Trow. It obviously felt that it had enough expertise to criticize a recognized roofing expert.

23 The defendant raised the issue of interference by the principals of Sheds Manor in the project. It is asserted that, amongst other things, Mr. Frieburg and Mr. Saltsman negotiated with subcontractors without the involvement of Dale Mann to get them to reduce their price. It is not clear to me what impact the defendant believes a finding that this occurred should have on its liability under the contract. However, my decision on this issue is based on GC 10.2, which gives the plaintiff the right of approval over subcontractors. I find that, to the extent that the plaintiff negotiated with the subcontractors, it was in the context of consultation before approval under GC 10.2.

24 As a result, I find that Dale Mann Ltd., as general contractor on the project, is liable to the plaintiff under the contract for the problems with the roof.

Personal Liability of Dale Mann

25 The plaintiff initially asserted that Dale Mann was personally liable for his representations regarding Britskey's qualifications. During trial, it became clear that any such representations would have come from Mark Scoffield, not Dale Mann. As a result, the only ground on which Mr. Mann is alleged to be personally liable for the plaintiff's damages is that he failed to verify Mr. Britskey's qualifications with the Canadian Roofing Contractors Association ("CRCA"). Dale Mann asserts that he is merely an employee of Dale Mann Ltd., who was the party actually retained by the plaintiff. He therefore owed no personal duty to the plaintiff. I am not convinced that Mr. Mann was a mere employee of the general contractor. Dale Mann Ltd. was chosen as the general contractor in part because of the rapport between Mr. Frieburg, Mr. Saltsman and Mr. Mann. Having said this, the evidence does not, in my opinion, establish the personal liability of Dale Mann. I am not convinced that he had a duty to verify Tony Britskey's membership in the CRCA. Further, if Dale Mann had done so, this information would not have changed the parties' conduct.

Damages

26 As described earlier, considerable leaking occurred on many areas of all five roofs after the application by Britskey, and regardless of many attempts by that roofer, leaks continued. A number of experts were employed by all parties to assess the roof and to make their recommendation. Mr. Whaley of Trow, recommended "that a complete re-roofing project be conducted" and Mr. Duwyn of I.R.C. stated, "all areas with this condition be removed and replaced." These inspections and recommendations were made

in 1991 after Britskey ceased to respond to requests for repairs. The roofer employed his own consultant, Mr. Carter of J.T. Donald Consultants Ltd., who recommended "continuing repair to the membrane until all damage is repaired, and careful monitoring of the roof to prevent future damage."

27 I was quite impressed and accept the evidence of Mr. Whaley and Mr. Duwyn as they were experienced in roof assessment and consulting. Mr. Carter's evidence was not as convincing as his examination was made almost surreptitiously -- without the attendance or permission of the owners of the building. In any event, Mr. Carter's opinion was not all that divergent from the former two mentioned. Mr. Carter recommended continuing repairs for some unknown period of time while the others recommended re-roofing. I am not persuaded that continuing repairs and monitoring would be that much less costly or that effective over a reasonable length of time as would be proper re-roofing.

28 I am satisfied from the great amount of evidence presented to this Court that the repairs and replacements as made by the plaintiff for buildings 33-and-35 Fraser and, 2-and-4 Pardee were necessary applications, the success of which is manifested by the lack of leaking and complaints since their applications. No. 2 Pardee was re-roofed in the fall of 1992 and No. 4 Pardee and 33-35 Fraser was re-roofed in the fall of 1994. I find that the repairs, as made, were necessary for the preservation of those buildings and the expenditures made by the plaintiff were justified and appropriate. I therefore find damages as follows:

4 Pardee:

The paid invoice of Peerless Enterprises
for re-roofing and sheet metal is allowed: \$19,936.00

33-35 Fraser:

Peerless Enterprises modified bitumen base and
capsheet, initial quotation of \$60,000, with
extras and tax allowed: \$67,400.00

Exact Air Conditioning for removal and replacement of air-conditioning units while re-roofing underway: \$ 6,607.25

Rudco Insulation for replacement of insulation: \$988.68

TOTAL \$74,995.93

2 Pardee:

Solab - replace roof - 10-year warranty - 2-ply: \$22,470.00

Exact Air Control lift air-conditioning
units & replace \$ 3,263.50

Speedy Electrical disconnect AC units and reconnect: \$552.12

TOTAL: \$27,285.62

Labour

29 Time-sheets for workmen of the plaintiff, namely, Lipa, Czyszczonek, Belland and Parker were presented for work by them on the buildings in 1992 and 1994. The total time-sheets added up to over \$10,000 for an assortment of work on the five buildings by these employees. Counsel for the plaintiff suggested an examination of the time-sheets would indicate that \$3,400 could be minimally accountable to these five buildings regarding their roofs. I accept the evidence and the assessment of about one-third of the time in the sheets as being referable to the roofs and therefore allow \$3,400.00.

6 Pardee

30 This is the fifth building at the northeast corner of the overall structure for which there has been, as yet, no re-application of roofing. There is an estimate by Peerless Enterprises, of December 1994, of \$31,861.00, plus GST. From the evidence before the Court I am not persuaded that the leaks in this roof have caused that much concern to require a full new roof or major application, as suggested. I am not satisfied that there are tenants in this very old building that have been or will be unduly inconvenienced. I also note from the reports of the experts that although 20% and 50% moisture penetration of the underlay was the situation in the other four units, the moisture penetration in this building was 17%. This, now being over six years since the initial application was made by Britskey and work having not been important enough to be proceeded with by this time, I therefore do not allow the claim for damages for replacement of the roof of this building. Thus, the quantitative damages are as follows:

2 Pardee (October 1992)	\$ 27,285.62
4 Pardee (December 1994)	\$ 19,936.00
33-35 Fraser (November 1994)	\$ 74,995.93
Labour (one-half 1992 -- one-half 1994)	\$3,400.00
Total:	\$125,617.55

Overall Betterment

31 It was urged by counsel for the defence that the roofing replacements constituted a betterment to the owner in that 2-ply modified bituminous roofing was applied. I am of the view that from the beginning of the project, all parties were quite satisfied with the one-ply application and there seems to be inefficient evidence before the Court that, if properly applied, the application would not have been successful. The only real difference, in my view, with these new' applications is that there were and are manufacturers' warranties for five or ten years, which was not the case with the Britskey application. There, of course, always was a 10-year warranty by Britskey.

32 This manufacturer's warranty may be of benefit but I weigh and balance the great amount of aggravation concerned and probably, temporarily at least, a diminution in the value of the premises for over four years before the roofs became water-tight.

If betterment were allowed, I accept the suggestion of the plaintiff's counsel that the damage award be reduced by 13.5%. However, under all the circumstances I find that, because of the age of the building, the length of time between initial application and the repairs and the lack of end result difference between the 2-ply and the single membrane, there is no betterment and I therefore do not reduce the award.

Counterclaim

33 The initial claim in this action was dated April 1st, 1992, and a defence was filed and dated on behalf of Dale Mann Ltd. and Dale Mann on June 22nd, 1992. There was no counterclaim included in the filing by the defendants of June 1992. Shortly before the case was called in this Court of August 18th, 1995, as noted, an Amended Statement of Defence and a counterclaim was filed. A total of the four items listed in the counterclaim was \$12,061.91.

34 The first item was progress draw No. 19 of December 3rd, 1990 in the amount of \$6,366.10. There was denial by the plaintiff in the action that this amount was still owing and no copy of any unpaid invoice was produced to the Court. Mr. Dale Mann said that he had rendered an account in 1992 but had not followed it up. The Court is not persuaded that this amount remains unpaid, there being, no documentation to support same and little more than a recollection by Mr. Dale Mann.

35 Invoice #91230, July 3, 1990 for \$567.10: there was no reference to this invoice before the Court and, this portion of the claim is also denied.

36 Invoice #91247 (no date) for \$383.42: similarly, there is no documentation or even recollection by the parties of this invoice and therefore it is also denied.

37 Claim for \$5,034.29 for use of tools: there is allowance under Article A-9(g) for a claim for the use of tools. However, again, no invoice was produced to support this claim. Mr. Dale Mann said that he had sent an invoice at one time for this amount but that he had no proof of the amount as requested. Claim denied.

38 During the trial there was reference to a claim of the defendant herein for invoices or payments made to Trow Consulting and I.R.C., which Article A-9(j) is the responsibility of the owner. Mr. Whaley gave evidence that he had received, on behalf of Trow, his account of an unspecified amount and he presumed it had been paid by Dale Mann Ltd. There is no reference by Mr. Duwyn or any other verbal or documentary proof that the account of I.R.C. had been paid by Dale Mann. In any event, on both of these accounts there was no claim made in the counterclaim of August of this year and no specific amounts were asked for in argument, thus, these accounts are totally unproven and, in fact, not claimed initially.

39 As above, due to total lack of documentary Support and very limited reference and oral proof by Mr. Dale Mann all items of the counterclaim are dismissed.

40 Judgment to go to the plaintiff against Dale Mann Ltd. in the amount of \$125,617.55.

41 I may be spoken to as to interest and costs.

CONANT J.

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