

**Cumberland, ss.**

**FRANCIS I. BLAIR**

**Plaintiff**

**v.**

**Docket No. BCD-CV-14-48**

**BERNHARD & PRIESTLEY ARCHITECTURE, INC.,  
RICHARD L. BERNHARD and JOHN W. PRIESTLEY,**

**Defendants**

**DECISION AND JUDGMENT**

This is the story of how a renovation project at a beloved family cottage in a beautiful part of the world went wrong to the point that the owner decided to have the cottage torn down.

The court convened a jury-waived trial February 1-4, 2016 at the Penobscot Judicial Center. All parties appeared with counsel and presented evidence in the form of sworn testimony and exhibits. The trial was recorded, and the record reflects the court’s rulings on disputed exhibits and testimony. After the trial, the parties filed proposed findings of fact and conclusions of law, at which point the court took the case under advisement.

Based on the entire record, the court hereby adopts the following findings of fact and conclusions of law, and renders judgment as set forth below.

1. It was a late 19<sup>th</sup> century shingled seasonal cottage [“the Cottage”] on property located at 66 Manchester Road, Northeast Harbor, Maine. The property consists of acreage with ocean frontage at the head of Somes Sound, Mount Desert Island, and has had outbuildings in addition to the Cottage, which was the principal structure on the property.

2. Plaintiff Francis I. Blair is in his mid-sixties, and is a Navy veteran with subsequent civilian service in several federal government agencies. More recently, he has been active in business and the venture capital arena. His time outside of work is devoted to community activities and also to sailing, sometimes on extended transoceanic voyages. He also has maintained his pilot's license and owns an airplane. However, his prior experience with construction projects was limited to putting up a prefabricated weekend home in Illinois many years ago.

3. Mr. Blair's father acquired the 66 Manchester Road property during the 1960's, and owned it until his death in 2010, at which point it passed by inheritance to Mr. Blair and his elder brother. Mr. Blair has been coming to the 66 Manchester Road property since it came into his family, and over time he developed a strong emotional attachment to the place. Around the time Mr. Blair's father died, Mr. Blair's marriage was ending, and on top of all that, his boat burned. These events deepened his affinity for the Manchester Road property and for the Cottage. He decided to buy out his brother's interest in the property, and did so in 2010-11 for \$2.6 million.

4. The Cottage was built in 1895 and was designed by Fred L. Savage, an architect who designed many of the large homes built during the late 19<sup>th</sup> and early 20<sup>th</sup> centuries along the shores of Mount Desert Island. A wing was added to the Cottage during the 1920's and it again was expanded during the 1950's. As a result, its area amounted to some 8,000 square feet on several floors. It had a total of nine bedrooms.

5. Like many such Fred Savage Cottages, this one was a stick-built edifice built for use during the summer and shoulder seasons. It had plaster walls and many appealing features, including the original windows and extensive fine woodwork throughout. However, the Cottage was drafty and not insulated to any degree, and the heating system was installed only

on the main, downstairs level. Although the cottage was not constructed to modern standards, it had weathered 115 winters by 2010 and had been well cared for throughout its span. A fire in 2006-07 had caused some damage in the area of the kitchen that had not been repaired, at least to Mr. Blair's satisfaction, and he had in mind to fix it properly in the context of a renovation to the Cottage.

6. During 2010-11, Mr. Blair and his life partner, Caroline Alexander, began to explore the idea of making a year-round home together in Maine. The 66 Manchester Road property was certainly a possibility, but they were open to finding a different location. In any case, the home they had in mind needed to be habitable year-round and needed to be configured to meet their needs, tastes and interests. Were 66 Manchester Road the chosen site, it would need significant renovations to be made suitable for year-round use, including a reconfiguration of some of the spaces within, for example, to make the kitchen more functional for their needs, and also to create a space within which Ms. Alexander, an author, could work productively. However, their ideas in 2010-11 were largely inchoate—they knew in general terms what they were looking to accomplish, but they also knew that they would need to rely on others to bring definition to their ideas.

7. They decided to begin by finding an architect, and they came upon an advertisement in a magazine for Bernhard & Priestley Architecture, Inc. [“B&P”]. They followed up with a visit to the firm's website. Liking what he and Ms. Alexander saw, Mr. Blair arranged to meet with the principals of the firm, Richard Bernhard and John Priestley, III, at B&P's office in Rockport.

8. Messrs. Bernhard and Priestley had formed B&P in 1993, initially as a partnership, later converting it into a limited liability company, and then to a subchapter S corporation. Mr. Bernhard has been licensed as an architect in Maine since 1982, and Mr. Priestley has been

licensed in Maine since about 2004, although he practiced in the field for 14 years before that. B&P's focus has consistently been on "high-end" residential projects, most of which have involved waterfront custom homes. The firm had been involved in projects at two other Fred Savage cottages in Islesboro and Camden. The firm was a logical choice for the project Mr. Blair and Ms. Alexander had in mind.

9. In August 2011, Mr. Blair met with Messrs. Bernhard and Priestley at B&P's Rockport office. Mr. Blair brought to the initial meeting what Mr. Priestley termed a "matrix" of the pros and cons of the different properties Mr. Blair and Ms. Alexander had identified as possibilities for their future home together, but, either at that meeting or the next one, which took place at the Blair property, the discussion came to focus on a renovation of the Blair Cottage at 66 Manchester Road.

10. When Mr. Blair's budget for the project came up during the initial meeting, he gave a number, as to which the memories of the three participants in the meeting differ somewhat. He recalled mentioning \$750,000, but Messrs. Bernhard and Priestley recall different numbers. However, all agree that the number mentioned was between \$500,000 and \$1 million. Because the project was then at a largely undefined conceptual stage, Mr. Blair's number was not intended to be a firm price, but meant to give the architects a sense of what he expected to spend.

11. The initial meeting was followed up with a meeting at 66 Manchester Road, at which Messrs. Bernhard and Priestley viewed the Cottage and Mr. Blair and Ms. Alexander outlined their goals and ideas. Messrs. Bernhard and Priestley responded by saying that the concepts Mr. Blair and Ms. Alexander had outlined seemed feasible.

12. In concept, as of August and September 2011, the project entailed a moderate renovation of the Cottage that included upgrades to the existing kitchen, master suite, the

addition of some new interior walls, and repairs to the foundation. Mr. Blair and Mr. Alexander also envisioned a new separate structure to serve as a conservatory. The budget he expressed initially included the cost of building the conservatory, along with the cost of the limited renovation.

13. From the beginning of his dealings with B&P, Mr. Blair emphasized his long attachment to the Cottage and his desire to preserve it and the features within, such as the original windows, the plaster walls and the fine woodwork throughout, to the extent possible.

14. Mr. Blair decided to retain B&P in connection with the Cottage renovation and conservatory project. In the course of discussing the terms of its engagement, B&P told Mr. Blair that his cost for their services would be lower if the firm's charges at each phase of the project were based on a percentage of the construction cost rather than on hourly rates. However, until the project had been sufficiently defined to enable a construction cost to be determined, the firm proposed to charge by the hour on the understanding that Mr. Blair would be credited against the percentage-based fee for whatever amounts he paid based on hourly rates.

15. The initial terms of B&P's engagement are set forth in a letter agreement dated September 8, 2011 and signed by both parties. On its face, the letter agreement was intended to be supplanted, "as soon as the requirements and scope of the project are determined," by a standard form contract developed by the American Institute of Architects—the Abbreviated Standard Form of Agreement Between Owner and Architect, B151-1997 ["the AIA Contract"].

16. The letter agreement called for B&P's services to be billed monthly to Mr. Blair at specified hourly rates while the letter agreement remained in force. Consistent with the parties' discussions, the letter agreement indicated that Mr. Blair would be credited for all payments made pursuant to the letter agreement against the percentage-based fee due under the AIA

Contract. Around the time he executed the letter agreement, Mr. Blair paid an initial deposit of \$3,000.00.

17. Once the letter agreement was in place, B&P began work on what in architectural parlance is called the schematic design phase. The AIA Contract defines a construction project in terms of five phases, in the following sequence:

- the schematic design phase
- the design development phase
- the construction documents phase
- the bidding or negotiation phase
- the construction phase

18. As was noted by B&P during the trial, these phases do not occur in neatly defined segments during a single project, because a project involves many components, and different components may be at different stages at the same time. Thus, some aspects of the Blair renovation were in the construction phase while others—newly developed ideas or revisions—might be at the initial schematic design phase.

19. Through the autumn of 2011, Mr. Blair and Ms. Alexander worked with B&P on refining the concepts embraced in the renovation. One new project element soon emerged—a separate structure for Ms. Alexander’s research and writing. Her primary writing project at the time involved a new—and since-published—translation of *The Iliad*, Homer’s epic tale of the Trojan War, so the edifice she and Mr. Blair envisioned came to be called the Homer Tower. Another change in the project came in the form of Mr. Blair’s decision to remove the two wings connected to the central part of the Cottage. It was also decided to remove the southeast turret on the structure and to renovate the master bedroom area.

20. According to its own records, B&P spent hundreds of hours during the schematic design phase, which ran through the fall toward the end of the year. That level of effort was not unusual for projects involving sizeable structures, especially when the owner is actively involved, as Mr. Blair and Ms. Alexander were. A number of designs of different elements went through multiple drafts, as a result of the ongoing dialogue between architect and owner.

21. Another development in the fall of 2011 is that B&P sent Mr. Blair an updated cost estimate of between \$1,887,725 and \$1,972,250 for the cottage project as it was envisioned at that time. Ex. 16s (e-mail message from Richard Bernhard to Frank Blair Oct. 21, 2011). Although the figure is described as a “replacement cost,” in context it appears to be B&P’s estimate of likely cost. The cost of the conservatory and the tower were separate, and brought the total cost to about \$2.6 million. This was much higher than Mr. Blair’s initial figure of what he wanted to spend, but he did not tell B&P to reconfigure the project to reduce the project cost.

22. Early in 2012, B&P sent Mr. Blair the AIA Contract that would supplant the letter agreement, for him to review and sign. The AIA Contract is dated January 9, 2012, which is when B&P signed it and sent it to Mr. Blair. He did not see it until weeks later, perhaps because he was away on a sailing trip. In any event, he did eventually sign it.

23. The scope of Bernhard & Priestley Architecture, Inc.’s duties to Mr. Blair after January 9 of 2012 are enumerated in Articles 2, 3, and 12 of the AIA Contract. (AIA Contract at 1.1).

24. Section 1.2 of the AIA Contract mandates that:

The Architect’s services shall be performed as expeditiously as is consistent with professional skill and care and the orderly progress of the Project. The Architect shall submit for the Owner’s approval a schedule for the performance of the Architect’s services which may be adjusted as the Project proceeds. This schedule shall include

allowances for periods of time required for the Owner's review and for approval of the submissions by authorities having jurisdiction over the Project. Time limits established by this schedule approved by the Owner shall not, except for reasonable cause, be exceeded by the Architect or Owner.

25. The scope of Bernhard & Priestley Architecture, Inc.'s Basic Services is defined in section 2.1 of the AIA Contract as follows: "The Architect's Basic Services consist of those described in Paragraphs 2.2 through 2.6 and any other services identified in Article 12 as part of Basic Services, and include normal structural, mechanical, and electrical engineering services."

26. Article 2, Section 2.2 of the AIA Contract defines the Bernhard & Priestley Architecture, Inc.'s obligations during the "Schematic Design" phase of the project.

Specifically, Bernhard & Priestley Architecture, Inc.'s responsibilities were as follows:

2.2.1 The Architect shall review the program furnished by the Owner to ascertain the requirements of the Project and shall arrive at a mutual understanding of such requirements with the Owner.

2.2.2 The Architect shall provide a preliminary evaluation of the Owner's program, schedule, and construction budget requirements, each in terms of the other, subject to the limitations set forth in Subparagraph 5.2.1.

2.2.3 The Architect shall review with the Owner alternative approaches to design and construction of the Project.

2.2.4 Based on the mutually agreed-upon program, schedule and construction budget requirements, the Architect shall prepare, for approval by the Owner, Schematic Design Documents consisting of drawings and other document illustrating the scale and relationship of project components.

2.2.5 The Architect shall submit to the Owner a preliminary estimate of the Construction Cost based on current area, volume or similar estimating techniques.



27. By email of October 21, 2011, Priestley provided a replacement cost of between \$1,887,725 and \$1,972,250 for the existing Blair property. (Exhibit 16s).

28. Article 2, Section 2.3 of the AIA Contract defines B&P's obligations during the "Design Development" phase of the project as follows:

2.3.1. Based on the approved Schematic Design Documents and any adjustments authorized by the Owner in the program, schedule or construction budge, the Architect shall prepare for approval by the Owner, Design Development Documents consisting of drawings and other documents to fix and describe the size and character of the project as to architectural, structural, mechanical and electrical systems, materials and such other elements as may be appropriate.

2.3.2 The Architect shall advise the Owner of any adjustments to the preliminary estimate of Construction Cost.

29. Article 2, Section 2.4 of the AIA Contract defines B&P's obligations during the "Construction Documents" phase of the project as follows:

2.4.1. Based on the approved Design Development Documents and any further adjustments in the scope or quality of the project or in the construction budget authorized by the Owner, the Architect shall prepare, for approval by the Owner, Construction Documents consisting of Drawings and Specifications setting forth in detail the requirements for the construction of the Project.

...

2.4.3 The Architect shall advise the Owner of any adjustments to previous preliminary estimates of Construction Cost indicated by changes in requirements or general market conditions.

30. Article 2, Section 2.6 of the AIA Contract defines B&P's obligations during the "Construction Phase- Administration of the Construction Contract" phase of the project, as follows:

...

2.6.4 The Architect shall be a representative of and shall advise and consult with the Owner during the administration of the Contract for Construction. The Architect shall have authority to act on behalf of the Owner only to the extent provided in this Agreement unless otherwise modified by written amendment.

2.6.5 The Architect, as a representative of the Owner, shall visit the site at intervals appropriate to the stage of the Contractor's operations, or as otherwise agreed by the Owner and the Architect in Article 12, (1) to become familiar with and to keep the Owner informed about the progress and quality of the portion of Work completed...

...

2.6.13 The Architect shall prepare Change Orders and Construction Change Directives, with supporting documentation and data if deemed necessary by the Architect as provided in Subparagraphs 3.3.1 and 3.3.3, for the Owner's approval and execution in accordance with the Contract Documents, and may authorize minor changes in the Work not involving an adjustment in the Contract Sum or an extension of the Contract Time which are consistent with the intent of the Contract Documents.

31. Article 8 of the AIA Contract controls the manner in which the AIA Contract may be terminated. Specifically, the relevant termination provisions are as follows:

8.4 This Agreement may be terminated by either party upon not less than seven days' written notice should the other party fail substantially to perform in accordance with the terms of this Agreement of the party initiating the termination.

32. The AIA Contract called for B&P's fee for Basic Services (according to paragraph 3.2) to be determined on a percentage of Construction Cost Basis. AIA Contract at Article 11.

33. During the fall of 2011, Mr. Blair hired Steve Mohr as the landscape architect. Mr. Mohr's responsibilities included securing permits from the Town of Mt. Desert and the Department of Environmental Protection. Mr. Mohr prepared some early schematic designs for the project.

34. By December 2011, B&P had retained Albert Putnam, P.E., a structural engineer with whom B&P had worked on other projects, to advise B&P on the structural and load-bearing capacity of the existing structure and on structural aspects of the renovation project.

35. During the December 2011—February 2012 period, Mr. Putnam reviewed B&P's plans for the renovation, visited the Blair cottage and evaluated its structural integrity and load-bearing capacity. He made a site visit on January 6, 2012, and found the cottage "untouched"—construction had not begun.

36. His impression was that the Blair cottage was a typical specimen of its type—more lightly framed than modern techniques would call for, so that floors bounced somewhat and the house shook when the wind would blow. As a result of this shifting and settling, cracks would appear in the plaster wall finishes occasionally, although they could readily be repaired.

37. Although Mr. Putnam was not able to observe most of the structural members of the cottage directly because they were concealed behind plaster walls or woodwork, he looked carefully for signs of overloading or fatigue. He noted what he referred to in a later report as "minor evidence of distressed finishes due to settled framing." He also saw that the attic rafters were overstressed—not an uncommon phenomenon in cottages of that vintage in Northeast Harbor—and would need reinforcement. All in all, however, he determined the Blair cottage to be reasonably sound for a structure of its nature and vintage. Although not constructed according to modern standards, the Blair cottage had withstood the rigors of winter in Maine for well over a century.

38. Based on what he observed, Mr. Putnam concluded that, with limited structural modifications, including selective sistering of beams and posts, and the placement of concrete footings in the basement to provide further support for the floors, the existing cottage could support the renovations depicted in B&P's plans and specifications, which were in various

stages of development. He reported his conclusions to B&P, and the design process proceeded to the point of construction drawings for much of the components of the project by early 2012.

39. Meanwhile, in late 2011, Mr. Blair had selected a contractor for the renovation project. B&P had recommended four builders with relevant skills and experience. At the end of November 2011, Mr. Blair interviewed one of the four, a contractor who had worked on the cottage while Mr. Blair's father was alive, and also interviewed a contractor B&P had not recommended, Nelson F. Goodwin Co., Inc., of Seal Harbor [“the Goodwin Company”]. The Goodwin Company had experience working with Frederick Savage cottages on Mount Desert Island, and was qualified to handle the project. However, B&P had vetted the Goodwin Company, and based on what was elicited, Mr. Bernhard warned Mr. Blair that the Goodwin Company would “rob him blind.” Mr. Blair, on the other hand, believed that the other contractor—the one B&P had recommended—had overcharged his father for work on the cottage.

40. As was his prerogative, Mr. Blair retained the Goodwin Company to perform the renovation work. The contract between Mr. Blair and the Goodwin Company called for payment on a time and materials basis, rather than a fixed price basis. The Goodwin Company was to bill Mr. Blair monthly, with materials billed at cost. The company's profit would be derived from the rates charged per hour for labor.

41. Nelson Goodwin, Jr., son of the founder of the Goodwin Company, was in charge of the work on behalf of the Goodwin Company, and served as project supervisor/foreman throughout the Goodwin Company's work. Mr. Goodwin, Jr.'s understanding of the project, based on initial discussions with Richard Bernhard, was that it involved a “minor renovation,” focused on an upgrade of the kitchen and a bathroom; demolition of the two wings, and repairs to the foundation.

42. Thus, the project bypassed the bid phase and went directly to construction in early 2012.

43. In January, Mr. Putnam and B&P collaborated on producing structural drawings for the projects—depictions of the structural aspect of the renovation project, showing what was to be removed (or demolished, to use the trade term); what was to remain and what was to be installed, to enable the contractor to understand the scope of work and to develop a price for the owner.

44. Demolition work—removal of materials that were to be discarded as part of the renovation—began in January or February.

45. On March 15, 2012, Mr. Putnam made a second visit to the Blair cottage and noted that demolition work was underway, mainly in the kitchen, where a substantial portion of the renovation was to occur. Elsewhere, finish woodwork that needed to be removed for renovations was in the process of being taken down. He noted that some second floor joists were damaged, likely in the course of a previous renovation, but damage was confined to a limited area. However, the walls and most of the finish woodwork around the cottage remained intact. His assessment of the structural integrity of the cottage did not change.

46. Sometime in the early months of 2012, the great mystery of this case began to unfold. Instead what the original plan had called for—preserving most of the existing walls, woodwork, chimneys and windows of the cottage—it was evidently decided that the cottage was to be nearly gutted, in the sense that all of the interior finishes—plaster and woodwork—would be removed and the windows would be taken. Everything would be taken down to the wall studs and ceiling joists. It was not literally a gutting of the structure in the sense that all interior walls and floors were demolished, leaving only exterior walls and roof, but it was not

very far from that. Only the skeleton—the structural components of the cottage—would remain.

47. Between February and April 2012, the Goodwin Company proceeded to tear down and remove the interior finishes—all of the plaster and most of the woodwork—and to remove all of the windows and chimneys.

48. Around the same time, Mr. Goodwin, Jr., as well as his father, Nelson Goodwin, Sr., came to believe that it would be more cost-effective to tear down the cottage than to proceed with the renovations. It is not clear whether they developed this point of view before or after the interior finishes, windows and chimneys had been removed. However, the stripping of the cottage interior finishes and removal of windows and chimneys exposed what Mr. Goodwin took to be major structural problems with the cottage that confirmed his strong view that it made more sense for Mr. Blair to tear down the structure and rebuild than to proceed with the renovations.

49. The mystery has to do with who authorized such a drastic change in the plan. The Goodwin Company as general contractor plainly could not—or at least should not—have gone forward with the complete stripping of the interior without a very clear directive to do so, but Nelson Goodwin, Jr. was not asked how or from whom he obtained his understanding that the plan had changed from preserving interior finishes and windows, to the extent possible, to removing them. Mr. Blair likewise was not asked either whether he gave advance authorization for the wholesale disassembly of interior finishes and the removal of windows, or whether he even knew that the Goodwin Company was doing these things.

50. Given Mr. Blair's profound affection for the cottage, it seems unlikely that he would have authorized the complete stripping of the interior finishes and removal of the original windows of the cottage, especially given Mr. Putnam's assessment that, with some

additional support, the cottage had sufficient structural capacity to support the renovations as contemplated. Thus, the possibility that the stripping of the interior occurred without Mr. Blair's authorization, as a means of advancing, both physically and logically, the Goodwins' advocacy of a teardown, cannot be ruled out. However, it is just a possibility, so the genesis of the decision remains a mystery, at least to the court.

51. The mysterious decision by persons unknown to strip the interior of the cottage and remove the windows came as a complete surprise—a “shock” to quote Mr. Bernhard—to B&P and Albert Putnam when they returned to the cottage for another site visit on April 26, 2012.

52. So drastic was the effect of the removal of interior walls and windows that Mr. Putnam felt it necessary to document the shift in a May 1, 2012 field report on the April 26 site visit. His report is a model of circumspection, not to mention circumlocution. It begins with a recitation of his understanding of the limited scope of the renovation as he had understood it to be before arriving at the site April 26, 2012, and seeing bare studs and vacant window openings. He summarized the original plan for the project in saying, “In short, we planned to surgically renovate the house in accordance with applicable building codes, but in my opinion we had not crossed the threshold which required a whole-house lateral load resisting upgrade.”

53. His May 1 field report made it clear that the unexpected stripping of the interior finishes and removal of windows meant that the threshold in question had been irreversibly crossed. His report also pointed out that installing new windows in inadequately framed window openings would likely void the window warranties.

54. His report finessed any attribution of the decision by describing it in the passive voice: “As selective demolition progressed, the decision was made to expand Phase 1 scope:

replace all chimneys, windows and interior finishes . . .,” At trial, Mr. Putnam said he had to word his report in that manner because he had no idea who had made the decision.

55. Two critical points emerge from Mr. Putnam’s May 1, 2012 report—and were confirmed in his trial testimony. First, the renovations as originally contemplated could have been completed without the wholesale removal of finishes, chimneys and windows. Second, the removal of finishes and windows not only exposed the cottage’s structural weaknesses but also markedly increased them. The windows, in particular, had contributed to the structural integrity of the cottage while they were in place, and the wall finishes served a similar though less significant role in making the cottage structurally sufficient for purposes of the original renovation. As Mr. Putnam phrased it in his trial testimony, the windows and interior wall finishes served to “stiffen” the structure and thus to compensate for the light framing. With the windows and walls removed, the building became more susceptible to the lateral movement commonly called “racking,” and the modest structural remedial work originally contemplated would no longer suffice.

56. Another site meeting was scheduled for May 8, 2012, of the owner, architects, engineer and contractor. This was a pivotal meeting, because its primary purposes were to update Mr. Blair on the newly revealed structural deficiencies and the resulting expansion of the renovation, and to obtain his decision on whether to continue with the renovation project or to abandon it in favor of the teardown that the Goodwins favored.

57. Before the meeting, Mr. Goodwin, Jr. had urged Mr. Bernhard to try to talk Mr. Blair into tearing down the structure, and thought he had Mr. Bernhard’s commitment to do so. Mr. Putnam likewise had concluded that, from a cost benefit standpoint, it likely made more sense to tear down the cottage and rebuild than to continue with what was now a major structural renovation.



58. Mr. Putnam in his trial testimony recalled opening the cost-benefit discussion with a comment that it might be cheaper to tear down the cottage. Mr. Goodwin testified that he spoke in favor of a teardown, and expected Mr. Bernhard to endorse the idea. But Mr. Blair rejected the teardown idea. Memories differ as to his phrasing. Mr. Goodwin, Jr. recalled Mr. Blair saying, “Part of me doesn’t want to tear my father’s house down.” Mr. Putnam testified to recalling Mr. Blair’s rejoinder being more emphatic: “Guys, I am not tearing my dad’s house down.”

59. However Mr. Blair had phrased his rejection of the teardown option, Mr. Bernhard affirmed it by saying, “And there’s no reason why you should . . .” To Mr. Goodwin, Jr., this was a betrayal of Mr. Bernhard’s previous expression of support for the teardown option. As Mr. Goodwin, Jr. expressed it during his trial testimony, he felt Mr. Bernhard had thrown him under the metaphorical bus. In any event, Mr. Blair’s opposition to the teardown option ended all discussion of it, for the time being.

60. Another development in the early months of 2012 is that the foundation proved to need far more extensive work than anticipated. There were voids in the stonework caused by decades of exposure to water in its various forms, and some of the original mortar had turned to sand, thereby losing whatever binding effect it may originally have had. Eventually nearly all of the original foundation had to be removed and replaced. Initially, the removal and replacement was accomplished by placing jacks under the sill plates of the cottage structure. There is no indication in the evidence that the entire foundation could not have been repaired or replaced in this manner, meaning that the extensive foundation work did not preclude the surgical renovation, to paraphrase Mr. Putnam’s field report, originally contemplated.

61. What therefore seems equally clear is that the original renovation plan, with its limited structural repairs and reinforcement within the cottage, had been feasible, and that it

became impossible only because of the fateful decision by persons unknown to go much further in demolition and removal than the original plan had contemplated. What also seems clear, at least with the benefit of hindsight, is that the decision to remove all windows, chimneys and interior wall finishes was a mistake, because it turned what had been a modest renovation into a much more extensive; expensive and lengthy one. It also is clear that this mistake was not the fault of B&P or Albert Putnam. The only other possibilities are that it was the fault of the Goodwin Company, or the fault of Mr. Blair, or the fault of both.

62. At some point around this same time—the early spring of 2012—the Goodwin Company generated a cost estimate for completing the cottage renovation. *See* Ex 17, sec. 8, p. 43. The initial estimate is dated March 31, 2012, for a total of \$1,868,055.00. What is clear about the estimate is that covered only the work within the cottage itself and not the conservatory or the Homer tower. Those elements of the project brought the cost to about \$2.6 million. What is unclear about the \$1,868,055 estimate for the cottage renovation is whether it was intended to reflect the cost of the originally planned renovation, with the limited structural work it entailed, or whether it was intended to be an estimate of the cost of the more extensive renovation made necessary by the removal of all interior finishes and of the chimneys and windows. Neither side asked Nelson Goodwin, Jr. to clarify this significant ambiguity.

63. The March 31, 2012 date places the estimate well before the April 26, 2012 site visit. This means that the estimate could not possibly have encompassed the cost of the extensive additional structural work that Albert Putnam determined would be necessary as a result of the removal of interior finishes, chimneys and windows. That, in turn, compels the conclusion that the estimate must have been for the original renovation only, and did not address the cost of the changes that Mr. Putnam first observed April 26, 2012. Another point

that supports this conclusion is that the estimate of \$1,868,055 is just below the lower end of the range of replacement cost estimates (between \$1,887,725 and \$1,972,250) that B&P had generated months earlier.

64. On the other hand, the \$1,868,055 estimate includes a budget of \$139,930.00 for windows and another \$141,070.00 for masonry, both of which amounts point the other way—that the estimate reflects the fact that all windows and chimneys were being removed and replaced. The other fact that points in the same direction is that no other estimate of the cost of renovation ever appears to have been developed by the Goodwin Company, despite the equally incontrovertible fact that the scope, and thus the cost, of the renovation project had substantially increased as a result of the removal of all windows, finishes and chimneys. Mr. Putnam's structural drawings of the extensive additional structural work made necessary by the removal of interior walls and windows were in the hands of the Goodwin Company by the end of June 2012 at the latest, but no revision of the March 31 estimate ever ensued.

65. A third possibility is that the \$1,868,055 estimate is in effect a hybrid of pre- and post- expanded renovation costs—that it includes some but by no means all of the costs of the expansion in the scope of the renovation necessitated by removal of windows and interior finishes.

66. In any case, the evidence clearly shows that Mr. Blair was made aware of the \$1,868,055 estimate and that, even after he had been made aware of it, he did not waver, at least for the time being, from his desire to preserve what remained of the original cottage. Mr. Blair testified at trial that during at least one conversation with B&P, which may have been by telephone, he protested the estimate as being too high, but if he did so, he evidently relented, and at least implicitly, agreed to the total \$2.6 million cost estimate, because work continued on the renovation and on plans for the conservatory and the tower.

67. In keeping with his understanding of his client's preference to preserve what remained of the cottage, during May 2012 and through the summer, Mr. Bernhard promoted the view that the renovation should proceed, albeit on an expanded basis, and in fact tried to dissuade others from even mentioning the possibility of a tear-down.

68. As work on the renovation continued through the summer of 2012, Mr. Blair became increasingly concerned about the cost and timetable for the renovation. He knew the cost of the project had increased significantly, but he did not have any updated figures or estimates for the cost. The AIA requires B&P to generate change orders, and the drastic expansion of the project to due to removal of windows, chimneys and interior finishes clearly called for a change order to be issued to the Goodwin Company, which in turn would presumably trigger an updated cost estimate from the contractor.

69. It is for the contractor, not the architect, to generate actual construction cost estimates, but section 2.6.13 of the AIA Contract plainly calls for the architect to trigger the contractor's responsibility to update construction cost estimates by issuing change orders and what the contract calls Construction Change Directives.

70. Although the scope of the project changed markedly since the Goodwin Company's March 31 estimate, it does not appear that B&P took the steps called for by the AIA Contract in terms of change orders, to trigger an obligation on the part of the Goodwin Company to update its March 31, 2012 estimate. No change orders issued by B&P appear anywhere in the extensive exhibits. The Goodwin Company's applications for payment that do appear in the exhibits contain fields identifying change orders and the increase or reduction in costs associated with change orders, but no change orders or cost changes resulting from change orders are listed. *See* Ex. 17, tab 8. For example, Goodwin Company application number 6,

dated July 31, 2012, lists no change orders and indicates that change order cost changes are \$0.00, plainly indicating no change in the original estimate.

71. Had B&P issued change orders to reflect the expanded scope of renovation and the additional structural work that resulted from the decision to remove all windows, chimneys and interior finishes, the Goodwin Company would have been required to calculate the increase or decrease in project cost associated with the change order, and adjust the \$1,868,055 figure for cottage renovations accordingly. It is impossible to calculate what a revised estimate of the cottage renovation cost would have amounted to, and therein lies the problem. Mr. Bernhard testified that the project could have been done for the same cost, but that seems very improbable and, in any event, his guesstimate does not substitute for the contractually required procedure. Change orders should have been issued, and if in fact, no change in cost resulted, the \$1,868,055 estimate would not have changed, but the plain fact—emphatically established in Mr. Putnam’s May 1, 2012 field report—is that the level of structural work associated with the cottage renovation had increased significantly, and there is no reason to think the Goodwin Company was prepared to do the extra work for nothing.

72. Mr. Priestley in his trial testimony said that B&P had made repeated efforts to get an updated estimate out of the Goodwin Company, but the evidentiary record does not support that contention. Instead, the record tends to validate Mr. Blair’s mounting dissatisfaction, during the summer of 2012, about how the project seemed to be drifting on without an end in sight in terms of either the work or the cost of the work. Mr. Blair had good reason for deciding that B&P was not fulfilling its responsibility under section 2.6.5 of the AIA Contract “to keep the Owner informed about the progress and quality of the portion of Work completed...”

73. By September, he had paid the Goodwin Company about \$545,000 on the project, and he felt he had little more than “a hole in the ground,” to quote from his trial testimony, to show for the investment. That assessment is unduly gloomy, because it ignores the fact that much of the foundation had been either repaired or replaced, and interior work on the cottage was underway.

74. Both of the Nelson Goodwins, along with the cottage caretaker, remained convinced that it made much more sense to tear down the cottage than to continue with the renovation. It can readily be inferred that, despite Mr. Bernhard’s efforts to foreclose any discussion of a teardown, one or both of the Goodwins pressed their case with Mr. Blair during the summer of 2012.

75. In September 2012, Mr. Blair decided to change course. His decision appears to have been relatively sudden. As he described it, he and Ms. Alexander had flown in his airplane to southern Maine, to visit Wasco and Little Harbor, manufacturers of windows and skylights, to view samples of the products for possible purchase for the cottage, the conservatory and the tower. Mr. Bernhard met them at the airport and drove them to the Wasco and Little Harbor facilities. During the visit to Wasco, Mr. Blair listened to Mr. Bernhard’s remarks to the Wasco representatives and thought that they displayed an inadequate understanding of the renovation project—Mr. Bernhard spoke of Wasco supplying a type of window that had once been under consideration but had been changed as a result of decisions months before. On the drive back to the airport, Mr. Blair told Mr. Bernhard he was not happy with Mr. Bernhard’s presentation and, more broadly, with B&P’s handling of the project. To this criticism Mr. Bernhard replied with words to the effect of “If that is how you feel, then you should fire us.”

76. Mr. Bernhard’s words resonated in Mr. Blair’s mind over the next few days, and he came to realize that he had lost confidence in B&P. The renovation project seemed to be

dragging on, and the expense was mounting with no real end in sight. He had no sense of what the cost of the renovation project was going to be, and was not even sure how it would be accomplished. He had counted on B&P to guide and advise him on what to do, but they did not appear to have a clear idea of where the project was headed, or a clear sense of how, and for how much, it could be completed. He decided that Mr. Bernhard was right—based on his lack of confidence in B&P, he would terminate the firm’s services.

77. Mr. Blair handled the termination in a forthright manner. He contacted B&P and arranged a meeting with Messrs. Bernhard and Priestley for September 18, 2012 at B&P’s office in Rockport. Mr. Blair had just mailed B&P a check in payment of its most recent invoice, for recently about \$45,000. He decided to stop payment on the check, because he considered that he had already paid B&P more than enough for its services.

78. At the September 18 meeting, Mr. Blair told Messrs. Bernhard and Priestley that he had decided to terminate the firm’s services and to tear down the cottage. He did not go into specifics about his reasons, but made it clear that the termination was based on general differences of opinion about the project.

79. B&P learned of the stop payment order on the check a day or so after the meeting.

80. By the end of September 2012, the 117-year-old Blair cottage had been torn down.

81. The replacement structure, which will cost around \$4 million, was nearing completion as of the time of trial. The \$4 million price tag for the new building is relevant, because it, along with his acquiescence to the \$1,868,055 estimate, tends to show that Mr. Blair’s price range was in fact well above the \$750,000 figure he had given to B&P in August 2011.

82. Also relevant is the fact that the new structure bears a resemblance—in B&P’s view a suspiciously strong resemblance—to its predecessor, a point that has triggered B&P to assert

in its counterclaim that Mr. Blair is liable for conversion and unjust enrichment by keeping and using and benefiting from work that he has not entirely paid for. This contention is discussed further below.

83. Mr. Blair has proved by a preponderance of the evidence that he had cause to terminate his contract with B&P. Specifically, B&P's failure to issue change orders or Construction Change Directives, to quote the AIA Contract phrase, to reflect the changes in the cottage renovation project after the date of the March 31, 2012 estimate—primarily the changes described in Mr. Putnam's May 1 field report—meant that Mr. Blair was not being kept informed of the progress and cost of the work. As noted above, to what extent a new estimate and a new schedule would have varied from the previous ones is uncertain but that is beside the point.

84. The point is rather that, because there were no change orders, there was no revision of the original estimate, so the cost impacts of the changes were therefore unknown to Mr. Blair. It was not B&P's job to develop the new construction cost estimate, but it was B&P's job to issue the change orders that would have required the contractor to generate a new estimate. B&P's failure to do this part of its job was a breach of the contract.

85. Mr. Blair has made a number of other allegations of breach, but these were not proved. For example, B&P met its obligation to explore alternative approaches to the project in the course of the design development phase. Soon after Mr. Blair and B&P entered into the letter agreement, Mr. Blair decided to focus on a renovation of the cottage. Given that focus, B&P was not under any obligation to talk him into a different project. Moreover, the renovation was entirely feasible as originally planned, without the wholesale removal of windows and interior finishes, so B&P had no obligation to advocate for a teardown or other approach. B&P's time spent during the schematic design and design development phases may



have been excessive to some extent, as Mr. Trodella's testimony suggests, but the basis for B&P's compensation changed as a result of the AIA Contract from an hourly rate basis to a percentage completion basis.

86. The rulings on Mr. Blair's Amended Complaint against B&P and Messrs. Bernhard and Priestley are as follows:

- Count I (breach of contract): Mr. Blair has proved a breach of contract, in that B&P failed to keep him informed of the cost of the project during the summer of 2012. Specifically, Plaintiff proved that Defendant B&P breached the part of its contract that requires it to keep the owner informed of cost and to issue change orders under paragraph 2.6.13 of the AIA Contract. Mr. Blair alleges multiple other breaches, but has not proved them.
- Count II (misrepresentation): This count alleges that Defendants "intentionally, negligently or recklessly" made misrepresentations for which they are liable to Mr. Blair. Mr. Blair has not proved, either by a preponderance of the evidence or by clear and convincing evidence for purposes of any fraud claim, that any of the Defendants made misrepresentations on which he reasonably relied. Judgment will enter for Defendants on Count II.
- Count III (negligence): Mr. Blair has not proved that any of the three Defendants was negligent. He did call Victor Trodella as an expert witness, but Mr. Trodella's testimony focused mainly on the reasonableness of B&P's billing, and that testimony is discussed below in the context of count IV and also B&P's counterclaim. His testimony did not define a standard of care for issuing change orders or "Construction Change Directives," which is the only area in which Mr. Blair proved B&P's performance was deficient. Accordingly, judgment will enter for Defendants on Count III.

- Count IV (unjust enrichment): Victor Trodella's testimony did suggest that B&P logged a very high number of hours in delivering its services, especially during the schematic design phase but also in other phases. On the other hand, Mr. Blair paid all but the last of B&P's bills. Even more to the point is that, because the AIA Contract calls for B&P's compensation to be based on specified percentages of construction cost as opposed to hours spent, the time B&P spent on particular aspects of the project is much less relevant than it was under the original letter agreement, which was subsumed into the AIA Contract, with credit given for amounts paid. The construction cost on which the AIA Contract compensation percentages are based was low, if anything, because it did not reflect the full cost of the additional work involved as a result of the expanded demolition and removal of windows, chimneys and finishes. Thus, there is no evidence that B&P or the individual Defendants have been unjustly enriched as to the fees that Mr. Blair voluntarily paid them. As indicated below, the court concludes that B&P has not entitled to recover its counterclaim for fees under the AIA contract, and that result eliminates any possibility of unjust enrichment. Judgment is entered for Defendants on Count IV.
- Count V (fraudulent misrepresentation): As noted above with respect to Count II, Mr. Blair has failed to prove, by clear and convincing evidence, any fraud on the part of any of the Defendants. Judgment on Count V will be entered for the Defendants.
- Count VI (Unfair Trade Practice): This case does appear to involve a transaction within the scope of the Maine Unfair Trade Practices Act (UTPA), 5 M.R.S. § 205-A *et seq.*, and the UTPA does afford a private right of action to persons who have suffered a loss in a covered transaction as a result of an unfair, deceptive or otherwise unlawful trade practice. *Id.* § 213; . What is missing in this case is proof by Mr. Blair that any of

the three Defendants engaged in an unfair, deceptive or otherwise unlawful act or omission, even bearing in mind that proof of bad faith or intent to deceive is not required to prove liability for a UTPA violation. *See State v. Weinschenk*, 2005 ME 28, ¶¶ 16-17, 868 A.2d 200, 206 (“An act or practice may be deceptive, within the meaning of Maine's UTPA, regardless of a defendant's good faith or lack of intent to deceive”). Here, the omissions that Mr. Blair proved were matters of contractual obligation and do not rise to a UTPA violation. Judgment will be entered for Defendants on Count VI.

- Count VII (punitive damages): In order for the Defendants to be held liable for punitive damages, Plaintiff has to prove underlying tortious conduct as well as actual or implied malice by clear and convincing evidence. Mr. Blair has not proved that any of the Defendants are liable to him in tort, much less actual or implied malice, so there is no basis for a punitive damages award. Judgment on Count VII will be awarded to Defendants.

87. Thus, the only claim Mr. Blair has proved is his breach of contract claim against B&P.

88. The analysis turns to what damages he has proved. Mr. Blair clearly believes he most if not all of what he had paid for the renovation work went to waste. However, if those sums were entirely wasted, it was only because he decided to tear down the house rather than proceed with the renovation. He could instead have retained a different architect and continued with the cottage renovation, which was shown to have been feasible despite the increased need for structural work, albeit likely at a somewhat higher cost than is projected in the Goodwin Company's March 31, 2012 estimate.

89. Had he done so, his expenditure on the renovation would not have been “wasted.” Although he was entitled to tear down the cottage, he is not entitled to shift onto B&P

whatever loss resulted from his decision to tear down the cottage, as opposed to from any defect in B&P's work. Thus, whatever loss he may have incurred by tearing the house down was not caused by B&P's breach of contract, but by his own decision. Furthermore, much of what he expended on construction was to repair and replace the foundation, which he would have had to do regardless, and which therefore was not wasted.

90. As to his claim for reimbursement of B&P's fees, the court declines to require B&P to reimburse Mr. Blair for any of what he has already paid. In the court's view, even if B&P's hours were excessive, a point Mr. Trodella made, the contract calls for B&P to be compensated based on percentage completion standards, not by the hour. The court accepts and adopts B&P's claim to have earned the fees it has already been paid, under the percentage completion standards of the contract, and Mr. Blair has failed to prove that he should be able to recover them. Also, the fact that he paid the fees speaks for itself—it can readily be inferred that he agreed they had been earned. Thus, the only fees remaining at issue are the unpaid fees claimed by B&P in its counterclaim.

91. On the other hand, Mr. Blair has plainly proved that B&P's failure to issue a change order deprived him of the ability to make an informed decision about whether to proceed with the renovation in its expanded scope. The court is unable, however, to translate this conclusion into a specific damages award that would quantify exactly how much more Mr. Blair spent on the renovation than he would have spend had B&P timely issued a change order. Accordingly, he will be awarded nominal damages of \$100 on his breach of contract claim.

92. The analysis turns to B&P's counterclaim.

93. The AIA Contract provides:

8.4 This Agreement may be terminated by either party on not less than seven days' written notice should the other party fail substantially to perform in accordance with the terms of this Agreement through no fault of the party initiating the termination.

8.6 In the event of termination not the fault of the Architect, the Architect shall be compensated for services performed prior to termination, together with Reimbursable Expenses then due and all Termination Expenses as defined in Paragraph 8.7

8.7 Termination Expenses are in addition to compensation for the services of the Agreement and include expenses directly attributable to termination for which the Architect is not otherwise compensated, plus an amount for the Architect's anticipated profit on the value of the services not performed by the Architect.\

94. Because the termination was for cause based on a breach of contract by B&P, B&P is not entitled to recover either termination expenses or an amount for B&P's anticipated profit.

95. Turning to B&P's claim for fees attributable to work done but not paid for, B&P has failed to prove that it is entitled to the full amount it claims under the AIA Contract. The reason for this is that most, if not all, of B&P's claim covers work done by B&P after it should have issued the change order reflecting the increased scope of structural work required to complete the renovation. As noted above, the change came to B&P's and Mr. Putnam's attention on April 26, 2012, after which point Mr. Putnam immediately set about revising his structural analysis. The revised structural drawings appear to have been completed within two months, meaning that B&P was in an position to issue a change order to the Goodwin Company, which would have required the Goodwin Company to revise its March 31, 2012 estimate.

96. As noted above, what revision the Goodwin Company would have made to its estimate of cost and time for completion of the project is not possible to determine with any certainty, but given the Goodwins' adamant position that it made more sense to tear down the structure and start over than to continue, what can readily be inferred is that the revised estimate would have been substantially different than the March 31, 2012 estimate.

97. In other words, B&P's failure to issue a timely change order in response to the major change in the project deprived Mr. Blair, B&P's client, of the opportunity to make a more

timely decision about whether to continue with the project, and thus, about whether to avoid the cost of B&P's work during the summer of 2012. It thus becomes apparent that to compensate B&P for blithely proceeding with its work at a time when it should already have triggered a process for enabling its client to have an accurate picture of the cost and scope of the project would be, in effect, to reward B&P for a breach of contract.

98. Accordingly, the court concludes that B&P is not proved that Mr. Blair breached his contract with B&P, and hence concludes that B&P is not entitled to recover under the AIA Contract for any of its breach of contract claim. However, it has pleaded alternate theories of recovery that must be considered.

99. Of the alternate theories, B&P has proved only its unjust enrichment claim. Specifically, B&P has proved that Mr. Blair likely benefited from B&P's work by using its work product in the construction of the new structure on his property. In other words, B&P has proved that it has conferred a benefit on Mr. Blair in the form of its work product; that he has knowingly received and retained the benefit, and that it would be unjust and inequitable not to require him to compensate B&P for any of the work for which it has not been paid. *See Paffhausen v. Balano*, 1998 ME 47, ¶ 6, 708 A.2d 269, 271; *Aladdin Elec. Assoc. v. Old Orchard Beach*, 645 A.2d 1142, 1145 (Me.1994). A party in breach of an express contract is not necessarily precluded from restitutionary recovery in unjust enrichment. *See id.*

100. The amount by which Mr. Blair would be unjustly enriched if not required to pay anything to B&P has to reflect the fact that he has already paid for most of B&P's work product, and also because, as noted above, the conclusion that he should not have to pay the entire amount that B&P claims is due under the AIA Contract.

101. Accordingly, the rulings on B&P's counterclaim are as follows:

- Count I (breach of contract): B&P has failed to prove any breach of contract by Mr. Blair. Judgment will be for the Plaintiff.
- Count II (breach of contract/conversion): B&P has failed to prove that Mr. Blair is liable for conversion. What he obtained from B&P in terms of its work product was given to him; he did not steal or purloin anything. He may have refused B&P's demand to return what he had, but since B&P was in breach of its contract and since Mr. Blair had already paid for most of what he had, his retention of possession was not wrongful.
- Count III (unjust enrichment): B&P has proved that Mr. Blair has knowingly retained and made use of a benefit conferred upon him by B&P, and that he would be unjustly enriched if not required to make restitution for \$25,000. Judgment will be for Defendant Bernhard & Priestley Architecture, Inc. in the amount of \$25,000. Because this is not an award made under the AIA Contract, interest will run only at the statutory prejudgment and post-judgment rates, not at the contract rate.
- Count IV (account annexed): B&P failed to prove it is owed according to its account. Judgment is for the Plaintiff.
- Count V (punitive damages): B&P's claim for punitive damages is viable only to the extent Mr. Blair is liable for an intentional tort, upon proof of which punitive damages may be awarded. There is thus no basis for B&P to be awarded punitive damages. Plaintiff is granted summary judgment on this count as well.

IT IS HEREBY ORDERED AS FOLLOWS:

1. Plaintiff is hereby awarded judgment in the amount of \$100 against Defendant Bernhard & Priestley Architecture, Inc. on Count I of the Amended Complaint.
2. Defendant Bernhard & Priestley Architecture, Inc. is awarded judgment on Counts II through VII of the Amended Complaint.

3. Defendants Richard Bernhard and John Priestley are awarded judgment on Counts I through VII of the Amended Complaint.
4. Defendant Bernhard & Priestley Architecture, Inc. is awarded judgment in the amount of \$25,000 on Count I of the Counterclaim.
5. Plaintiff is awarded judgment on Counts II through V of the Counterclaim.
6. The net judgment is for \$24,900 in favor of Bernhard & Priestley Architecture, Inc.
7. Interest shall run at the statutory prejudgment and postjudgment rates.
8. Each party shall bear its own costs, neither side having prevailed for purposes of M.R. Civ. P. 54(d).

Pursuant to M.R. Civ. P. 79(a), the clerk is hereby directed to incorporate this order by reference in the docket.

Dated April 8, 2016

s/ J. Horton  
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Justice, Business and Consumer Court