Canadian College of Construction Lawyers

LEGAL UPDATE

L.U. #136

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Acciona Infrastructure Canada Inc. v. Allianz Global Risks U.S. Insurance Company
2015, BCCA 347

LUC #136 [2016]

Primary Topic:
XIII Insurance
Jurisdiction:
British Columbia
Author:
E.Jane Sidnell, Rose LLP

CanLII Reference:
BC Court of Appeal

Insurer Unsuccessful on *Acciona* Appeal in BC Court of Appeal

This decision is the appeal of the trial decision reported at L.U.C. #125 (December 23, 2014). The summary in L.U.C. #125 provides an excellent review of the facts and legal issues.

The case relates to the construction of a hospital in Victoria, British Columbia. The contractor was engaged under a design build contract. The reinforced concrete slabs were designed as thin slabs and were to be pre-cambered. The cambor, or crown, was built into the slabs to accommodate the anticipated deflection: (1) as the slabs cure; and (2) over the life of the slabs.

Notwithstanding the cambor, the slabs over-deflected resulting in concave recessions in the centre of the slabs. While there was permanent deformation, the slabs were deemed to be structurally sound. To correct what would otherwise be uneven floors, the contractor ground down the slabs to make them flat and then sealed the slabs. The contractor claimed nearly $15M on its course of construction policy (the "**Policy**"). At trial, the contractor was awarded approximately $8.5M. On August 5, 2015, the British Columbia Court of Appeal upheld the trial decision and the appeal and cross-appeal were dismissed.

Of particular issue in this case is the provision of the Policy addressing exclusions for defects, set out in clause 5(b):

> *all costs rendered necessary by defects of material workmanship, design, plan, or specification, and should damage occur to any portion of the Insured Property containing any of the said defects, the cost of replacement or rectification which is hereby excluded is that cost*

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> *which would have been incurred if replacement or rectification of the Insured Property had been put in hand immediately prior to the said damage.*
>
> *For the purpose of this policy and not merely this exclusion it is understood and agreed that any portion of the Insured Property shall not be regarded as damage solely by virtue of the existence of any defect of material workmanship, design, plan or specification.*
>
> ...
>
> (the "**Defects Exclusion**")

The Court of Appeal noted that, after weighing the expert evidence, the trial judge made a "critical finding of fact: the over-deflection and cracking of the slabs and bending of the rebar was not caused by defective design, but by defective formwork and re-shoring procedures to account for the thin design[1].

In relation to the coverage under the Policy, Justice Willcock set out the insurers' position:

> *[37]The Insurers' submission that there was no physical loss or damage is, in my opinion, entirely answered by the uncontested findings of fact. The trial judge found as a fact that the slabs were not defective as designed and built but were damaged as a result of inadequate support while they cured. In particular, because of the inadequate shoring procedures, the slabs over-deflected and cracked, and the rebar inside the slabs was damaged irreparably. The Insurers do not contest these factual findings.*

[1] See paragraph 13

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Addressing the argument that the damage was a result of faulty workmanship, Justice Willcock said:

> [46] *The Insurers' argument – that the over-deflection, bending and cracking was a manifestation of faulty workmanship and therefore not damage to property – is inconsistent with the trial judge's finding of fact that the defect was a state of affairs (faulty or defective shoring) and the damage was the result of an occurrence (over-deflection).* . . .

The Insurers also argued that there was no physical loss or damage and therefore the Policy did not provide coverage. The Court referred to the cases relied on by the Insurers and disagreed with the Insurers' position:

> [55] *In my view, these cases have no application to the case at bar. I would not accede to the Insurers' argument that there cannot have been physical loss or damage in this case because the slabs had not cured into a satisfactory state before the over-defection, bending and cracking occurred. To accept that argument would be to deprive the Contractor of any insurance coverage for unfinished work during construction, which cannot be what the parties intended. The Policy, a course of construction policy, was clearly intended to afford coverage for damage to property that was in a partially finished state. In any event, the rebar that was damaged was installed correctly and undamaged before the faulting shoring caused it to become deformed.*

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> [56] *I conclude the judge did not error in holding that the irreparable damage to the rebar and the over-deflection, bending and cracking of the slabs fell within the Perils Insured Clause.*

The Court went on to look specifically at the Defects Exclusion, and found that it did not apply so as to exclude the damage from coverage under the Policy:

> [61] *I discern no error in the trial judge's reasoning. The trial judge interpreted the Defects Exclusion to exclude from coverage the costs that would have been necessary to rectify defective workmanship immediately before that defect caused damage to the insured property. His critical finding that defects in the framing and shoring workmanship resulted in damage to the slabs was not challenged on appeal. Given that finding, the floor slabs cannot be considered to be a "portion of the insured property containing any of the said defects" within the meaning of the Defects Exclusion.*
>
> [62] *In other words, there was no defect in the slabs that could have been rectified in order to prevent the over-deflection, bending and cracking. The defect was in the workmanship. The judge found that if the defect in the workmanship had been identified early enough, there would have been no material additional costs to implementing appropriate workmanship. There was no evidence of such costs. It was a coincidence, in this case, that the necessary rectification costs were equivalent to the*

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> *avoidance costs – but this does not mean the judge misinterpreted the Defects Exclusion to generally exclude only avoidance costs.*

The Insurers relied on an article by Gregory J. Tucker, "*Not My Fault; Current Issues Under The Design And Workmanship Exclusion*" (Continuing Legal Education Society of British Columbia, September 24 2014). The Court of Appeal did not agree with Mr. Tucker's criticism of the trial judge, and said:

> [73] . . . *The judge expressly found that the slabs were properly designed; the defect that resulted in damage to the slabs was embodied in the supporting structures and workmanship. Accordingly, the Defects Exclusion did not exclude the cost of rectifying "defective slabs" (which were not defective); it excluded the cost of rectifying defective workmanship. The slabs were not part of the insured property containing the defect.*

The Court of Appeal also addressed the fact that the wording of the Policy was the London Engineering Group (LEG) wording. The Court discussed the different versions of exclusions found in LEG1, LEG2 and LEG3. Ultimately, however, the Court found that the "*trial judge's construction of the Defects Exclusion was in accord with the words chosen by the Insurers and Contractor in the commercial context in which the Policy was written*".[2]

The contractor's cross-appeal to increase the damages beyond the $8.5M awarded was dismissed. The contractor argued that its increased subcontractor costs were covered by the Policy.

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[2] See paragraph 74

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The Court made quick work of this argument finding that the sub-contractor's costs did not arise from the damage to the slabs. The Court specifically stated that the interpretive principles employed by the United States District Court in *Zurich American Insurance Company v. Keating Building Corporation*, 513 F. Supp. (2d) 55 (N.J. 2007) were at odds with the interpretation principles employed in British Columbia:

> [92] *That is not the rule here; we must look for the plain meaning of the words used to describe the coverage and only if there is an ambiguity which cannot be resolved for the general cannons of contractual interpretation should we read the policy against the interests to the insurer . . .*

As noted above, the trial judgment was upheld, and the appeal and cross-appeal were dismissed.

Project Owner Penalized by Costs Sanctions: A Cautionary Tale

Pillar Resource Services Inc. v Primewest Energy Inc.
2014 ABQB 317,
2016 ABQB 120

LUC #136 [2016]

Primary Topic:
V Payment of Contractors and Subcontractors
Secondary Topic:
I General
Jurisdiction:
Alberta
Author:
Todd W. Kathol, Field Law

CanLII References:

Trial Judgment

Costs Judgment

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On May 30, 2014, Madam Justice B. Romaine of the Alberta Court of Queen's Bench granted Judgment in favor of Pillar Resource Services Inc ("Pillar")., the general contractor hired by PrimeWest Energy Inc. (now TAQA North) ("PrimeWest") on a fast track upgrade to a sour gas processing plant in northwestern Alberta. Her thirty –one page trial judgment determined a relatively pedestrian case of a general contractor collecting on unpaid invoices for construction services. On March 10, 2016, Justice Romaine issued a much more remarkable four page decision on costs.

The crux of the dispute in this case was that Pillar's final billing far exceeded early estimates. Pillar's preliminary estimate based on incomplete design was $391,357 and noted in many areas "not enough information at this time". Pillar's estimate increased to about $500,000 as design information progressed. Two contentious issues at trial were whether Pillar's estimates were based on 1,100 or as much as 2,000 diameter inches of welding and whether they included a 15% mark-up. Pillar was well under way before those involved became aware that the project cost might exceed $1 million.

Pillar completed the project in the summer of 2004 and billed in total about $1.8 million. PrimeWest advised Pillar that Primewest was prepared to pay about one third that amount. Pillar sued Prime West in November, 2004 at which time PrimeWest had paid Pillar only $522,498.95. In June, 2007, PrimeWest paid Pillar an additional $423,828.73. This left a balance of $854,150.45 plus interest outstanding when the trial commenced in February, 2012.

One interesting aspect of the Trial Judgment was the analysis by Justice Romaine of the legal consequence, if any, of the Pillar estimates. She rejected the proposition that the estimates effectively capped Pillar's costs or that PrimeWest was induced by Pillar's estimates to hire Pillar. It appeared to be critical to Justice Romaine that Pillar clearly identified the limitations of its estimates by expressly noting the lack of sufficient design and specification detail. She also rejected PrimeWest's related claim of negligent misrepresentation absent proof that Pillar's underestimate(s) resulted from lack of skill, competence or diligence.

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Justice Romaine concluded that PrimeWest was obliged to pay Pillar's account balance in full less only $2,723.10 (a reduction of 0.3 %) arising from a modest error in invoicing and a small credit for unused material. Notably, Justice Romaine rejected the argument that PrimeWest's series of offers to pay reduced amounts to Pillar were an effort to better understand the Pillar invoices and why they differed from initial estimates. Instead, she concluded that the owner bore the inherent cost risk under a reimbursable contract in which the scope and details of the fast track project were not clearly defined before start-up.

In her recent ruling on costs, Justice Romaine agreed with counsel for Pillar that this was one of the "rare and exceptional" cases where full indemnity of the Plaintiff's solicitor and client costs was appropriate. In so doing, she revisited her finding that PrimeWest's efforts to negotiate down the Pillar invoices were "ethically suspect" and agreed with counsel for Pillar that this warranted a higher costs sanction than the usual party and party costs.

One legal observation to be made is that the two decisions are consistent with the Supreme Court's direction that parties must carry out their contractual obligations in good faith including the fundamental contractual to pay for services performed. Justice Romaine did not cite this case law or mention good faith in her reasons in either judgment but the absence of same plainly informed her decision making:

``*A business model that discourages creditors from asserting their justifiable rights by delay, misleading negotiation tactics and lack of cooperation in the trial process should be deterred*."

The practical observation to be made is that "disingenuous" post-contract grinding tactics may attract judicial sanction. In the end, the cost to PrimeWest of a decade's delay in payment to Pillar of $850,000 was about $225,000 in interest and two sets of ten years of legal fees and expenses including expert disbursements.

It is understood that PrimeWest is pursuing an appeal of the costs award.

Can You Ask For and Receive Extra Work but Avoid Paying for it Because the Contract Requires Authorization in Writing?

Jessco Structural Limited v Gottardo Construction Limited,
2016 ONSC 2189 (Div.Ct.)

LUC #136 [2016]

Primary Topic:
III Building Contract
Secondary Topic:
V Payment of Contractors and Subcontractors
Jurisdiction:
Ontario
Author:
Ken Crofoot, Goodmans LLP

CanLII References:

Superior Court

Divisional Court

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Jessco Structural Limited ("Jessco") and Gottardo Construction Limited ("Gottardo") entered into two contracts for concrete forming for the Brampton Business Centre in Brampton and the Maxum Building in Scarborough. Each contract provided that "*No changes shall be made without a written order…*" . Appendix "B" to the contract further provided that "*No extras will be considered for any reason whatsoever unless negotiated with [Gottardo] before the work is done.*"

At the request of Gottardo's site superintendent, Jessco performed extra work on the two projects and claimed payment. A judge ordered Gottardo to move on the narrow issue of whether it could rely on the contractual provisions to avoid compensating Jessco, in order to streamline issues for trial. The motion judge then determined that Gottardo was not liable because the work was not performed in accordance with the contract. Under the contract, a written order was required to perform a change and without a written order, Jessco had no obligation to do the work the Gottardo superintendent had requested. He further found that, while under Appendix "B", the referenced negotiation did not have to be in writing, the extras were not on account of a negotiation between Gottardo and Jessco but merely a request from the site superintendent. He refused to find that the site superintendent's conduct was a waiver of the contract or acquiescence to Jessco's non-compliance. This ruling applied to both the request to do the work and the signing of the purchase orders presented by Jessco afterwards to confirm the work was done. The motion judge considered *Colautti Construction Ltd. .v. City of Ottawa*, (1984), 46 O.R. (2d) 236 (Ont. C.A.) and distinguished it on the basis that there was no pattern of prior conduct sufficient to constitute a waiver.

In the Divisional Court Justices Horkins and Perell dismissed the appeal and Justice Wilson dissented. The majority decision is very brief. The majority firstly noted that the standard of review on an appeal from a judge's order is correctness. The majority then reviewed the motion judge's approach and determined that he fully understood that conduct could, in some circumstances, waive the strict contractual provisions but his determination was

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that such had not occurred in this case. The majority found that Gottardo's site superintendent had requested the extra work but it was merely a request and there was no negotiation. The documentation that was generated arose after the work was done and merely confirms that it was done without fixing a price. The majority found the motion court judge's decision consistent with the law of waiver.

Justice Wilson's dissent is much more detailed and reaches the conclusion that the facts presented amply support the contention that Gottardo had waived the terms of the contract. She found that the motions court judge did not have the benefit of the full presentation of the law on the issue and that the established case law establishes waiver of the strict terms of the contract.

Justice Wilson firstly expressed the view that a determination of waiver by conduct should not occur on a Rule 21 motion (i.e. determination of an issue of law) because a full examination of the facts is required. Perhaps a Rule 20 summary judgment motion might have been capable of examining the issue but a full trial is most likely the best approach.

Justice Wilson then examined the decision of the Court in *Anowara Construction Ltd. v Tom Jones Corporation (2006),* 54 C.L.R. (3d) 165 (Ont. S.C.) to reach the conclusion that when extra work outside the scope of work of the contract is requested by a party, the courts have made it clear that the party so requesting should have an expectation of having to pay for it. However, if the extra is within the scope of the contract, the courts have imposed a much stricter approach to ensure the owner would be aware and unsurprised by demands for payment. She noted that the motions court judge in this case had determined that all the extras were outside the scope of work of the contract. She also referred to *Deminico v Earls,* [1945] O.W.N. 375 (H.C.) and *Vallie Construction Inc. v Carol Minaker* (2012), 21 C.L.R. (4th) 215 (Ont. Master) as cases supporting the distinction between extras outside or inside the contract. She noted that *Colautti* is an instance of the extra being inside the contract. She listed a string

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of cases in which orally requested work outside the contract was held to constitute waiver by conduct.

Justice Wilson then proceeded to review facts and circumstances not considered by the motions court judge and the majority. She noted that the Gottardo site supervisors had not been available to provide evidence and Gottardo had refused to provide documentation as to the instructions to the site supervisors. It had also refused to provide documentation as to how extras had been handled with other subcontractors. She noted that the Jessco representative had provided evidence as to the practicalities of work progressing on a day to day basis on a construction project which often involved work proceeding based on oral instruction due to the need for immediate action. She then reviewed the circumstances surrounding each of the extras to reveal that they had been essential extras to the project and that several were major required items while several others were day to day items necessary to maintain project momentum.

In conclusion, Justice Wilson indicated that the record clearly showed a pattern of conduct by Gottardo to waive the strict terms of the contract and it was not until other larger issues arose between the parties that Gottardo took the position they did not have to pay for these extras. She expressed the view that the motions court judge had erred in law by failing to recognize the importance of the fact that the extras were outside the contract to the application of the case law. She noted that it was Gottardo that failed to follow the contract procedures for extras by requesting them without "negotiating" them.

Counsel for Jessco has confirmed that leave to appeal this decision is being sought from the Court of Appeal. Given the strong and detailed dissent, it seems unlikely that it would not be granted. One might predict that the Court of Appeal may be reluctant to make a decision in the face of the Justice Wilson's comments on the need for a full factual basis and that the end result, in a year or so, if the matter does not settle earlier, will be a dismissal of the Rule 21 motion and referral of the issues to a trial.

Set Off against Trust Funds under the Construction Lien Act is not available in a Simple Contract Action

Architectural Millwork & Door Installations Inc. Provincial Store Fixtures Ltd., 2016 ONCA 320

LUC #136 [2016]

Primary Topic:
IX Construction and Builders' Liens
Secondary Topic:
V Payment of Contractors and Subcontractors
Jurisdiction:
Ontario
Authors:
Ken Crofoot, Goodmans LLP

CanLII References:

Court of Appeal

Superior Court

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In this short case in the Ontario Court of Appeal, the Court was called upon to consider whether the Judge on a summary judgment motion in a contract claim had correctly denied the Defendant the defence of a set off under Section 12 of the *Construction Lien Act* ("*CLA*").

The Plaintiff was a subcontractor that had sued the Defendant contractor for amounts alleged owing for millwork manufactured for an OLG Casino construction project in Brantford. The claim was pled by the Plaintiff in contract, unjust enrichment and *quantum meruit*. The Defendant admitted that the amount claimed was due and that there were no deficiencies with the work but pleaded a set off for amounts claimed owing pursuant to a credit memo issued by the Plaintiff on another project. The motion Judge rejected the claim for set off on the basis that both Section 12 of the *CLA* and equitable set off were inapplicable.

Section 12 of the *CLA* states:

> *Subject to Part IV, a trustee may, without being in breach of trust, retain from trust funds an amount that, as between the trustee and the person the trustee is liable to pay under a contract or subcontract related to the improvement, is equal to the balance in the trustee's favour of all outstanding debts, claims or damages whether or not related to the improvement.*

In denying the availability of Section 12, the motion Judge had noted that the Plaintiff had not claimed the benefit of the trust provisions of the *CLA* and that therefore the *CLA* was not engaged. The Court of Appeal first noted that it chose to read the trial judge's decision as effectively holding that an ordinary breach of contract claim cannot be met with a claim for set-off of trust funds under Section 12 where the Plaintiff has not asserted a claim to trust funds in the first place. The Court noted that it did not consider the case as dealing with the mere framing of the Plaintiff's pleading. The proposition being considered was more fundamental - the party seeking to invoke Section 12 of the *CLA* is required to prove the existence of specific circumstances and considerations, including the existence of trust funds against

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which set-off can be applied. If no trust funds are retained or all the monies are spent, the purpose of the trust provisions is defeated and any right of set-off is extinguished.

The Court stated that neither party had pleaded the existence or breach of a trust fund, the Respondent did not assert any claim to trust funds and the Appellant did not allege there was a trust fund at all. In the discovery transcripts, the Defendant had admitted that it did not maintain a separate bank account for the OLG project. As a result, there was no right to claim a set-off against trust funds under Section 12 of the *CLA*.

With respect to the claim for equitable set-off the Court affirmed that this also could not apply because the projects were unrelated, entirely separate and undertaken at different times, in different places and for different owners.

While the Court seemed to try to make this something other than a determination based on pleadings, the fact is that, applying the Court's reasoning, shrewd counsel wishing to assert a set-off claim may still be able to rely on Section 12 of the *CLA* in some contract actions, if the requisite facts are pleaded to establish the existence of the trust fund. If the Defendant is holding trust funds and claims the set-off right under Section 12, it does not make much practical sense that the set-off right would somehow be lost just because the Plaintiff chooses not to reference the trust.

Subcontractor Fails in Trust Claim Against Owner

Robert Nicholson Construction Company Limited v Edgecon Construction Inc.
2016 ONSC 3107 (Div. Ct.)

LUC #136 [2016]

Primary Topic:
IX Construction and Builders' Liens
Secondary Topic:
V Payment of Contractors and Subcontractors
Jurisdiction:
Ontario
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Ken Crofoot, Goodmans LLP

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In this case Robert Nicholson Construction Company Limited ("Nicholson"), as a subcontractor, had been successful in obtaining summary judgment against the Owner, RSC Stratford LP ("Stratford"), for breach of the trust obligations of the *Construction Lien Act* (the "*Act*") because Stratford had made their payments under the general contract to another entity at the direction of the general contractor, Edgecon Construction Inc. (Edgecon").

Stratford appealed the ruling. On the appeal, the Nicholson conceded that the motion judge had erred in law in granting the relief. It was conceded that the judge had erred in finding that a subcontractor could be a beneficiary of the statutory trust created under Section 7(1) of the *Act*, as the wording of that section clearly limits the trust as existing for the benefit of the contractor. The Court also noted that the trust under Section 8 was a separate and distinct trust imposed on contractors and subcontractors for the benefit of other subcontractors. Finally the Divisional Court noted that it had been conceded that the motion judge had no jurisdiction to find liability on the part of Stratford's officers and directors because there was no factual basis for this order.

However, the concessions that the motion judge had erred did not dispose of the appeal. Nicholson argued that Section 13 of the *Act* should result in liability. Section 13 (1) states:

> *In addition to the persons who are otherwise liable in an action for breach of tustt under this Part,*
>
> > *(a) every director or officer of a corporation; and*
> >
> > *(b) any person, including an employee or agent of the corporation, who has effective control of a corporation or its relevant activities,*
>
> *who assents to, or acquiesces in, conduct that he or she knows or reasonably ought to know amounts to breach of trust by the corporation is liable for breach of trust.*

The Divisional Court noted that the only connection between Stratford and Edgecon is that Stratford, as owner, paid the

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Edgecon's invoices, as general contractor. There was no suggestion that Stratford knew of Nicholson's claim or that they knowingly participated in any scheme to defeat that claim. The question therefore was whether sending money to pay the invoices of a general contractor is enough to create a situation where the owner has sufficient control over the activities of a general contractor that he or she can be exposed to liability under Section 13.

The Divisional Court noted that to allow this argument to succeed, every owner would be potentially liable under Section 13. Similarly, in situations where a project is financed, the lending institution could be similarly potentially liable. The Divisional Court rejected the Nicholson argument that sending money was sufficient to represent the degree of control required by Section 13 over the activities of the general contractor.

This case affirms that the trust obligation is owed by those with whom one has a privity of contract and extending it beyond that circumstance will continue to require quite exceptional facts and evidence.

General Contract Limits Lien Rights of Subcontractors in Subdivision Construction

Yorkwest Plumbing Supply Inc. v Nortown Plumbing (1998) Ltd.
2016 ONCA 305

LUC #136 [2016]

Primary Topic:
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Yorkwest Plumbing Supply Inc. ("Yorkwest") was a subcontractor to Nortown Plumbing Supply (1998) Ltd. ("Nortown") in connection with two home development projects. In each case, Nortown's general contract with the owner provided that liens would expire on a lot-by-lot basis. Section 20 of the Construction Lien Act (the "*Act*") provides:

> *20. (1) Where an owner enters into a single contract for improvements on more than one premises of the owner, any person supplying services or materials under that contract, or under a subcontract under that contract, may choose to have the person's lien follow the form of the contract and be a general lien against each of those premises for the price of all services and materials the person supplied to all the premises.*
>
> *(2) Subsection (1) does not apply and no general lien arises under or in respect of a contract that provides in writing that liens shall arise and expire on a lot-by-lot basis.*

Nortown failed to pay its suppliers and ultimately went bankrupt. Yorkwest filed a general lien against each project for the total amount owed for what it had supplied to multiple lots in each subdivision. The liens were discharged on summary judgment and an appeal upheld the discharge in the Divisional Court. Yorkwest appealed to the Court of Appeal.

Yorkwest had an oral agreement for the supply of its services and materials and there was no agreement between it and Nortown pertaining to liens expiring on a lot-by-lot basis. It argued that because Section 20(2) does not refer to a subcontract, but only to a contract, then regardless of whether the owner and the contractor agreed in their written contracts that liens would arise and expire lot-by-lot, a subcontractor may still register a general lien as long as it has not agreed in its subcontract that its liens will arise and expire on a lot-by-lot basis. Yorkwest argued that the *Act* defines "contract" and "subcontract" separately and refers specifically to each where applicable. It also argued that the result that its general lien was invalid was unfair because it was not a party to the general contract and did not know its contents.

Yorkwest Plumbing Supply Inc. v Nortown Plumbing (1998) Ltd.
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General Contract Limits Lien Rights of Subcontractors in Subdivision Construction

The Court of Appeal reviewed the history of the inclusion of Section 20 in the *Act*. It noted that the "contract" referred to in Section 20 must be the contract between the owner and the contractor because this is the only contract that can be the "single" contract referred in Section 20(1). It then noted that Section 20(2) refers to no general lien arising *"under or in respect of"* the contract so that no one who claims a lien under that contract or in respect of that contract can claim a general lien. The Court referred to the French wording of Section 20(2) "*Dans ce cas aucun privilège général ne naît."* as further support that the general lien was inapplicable to subcontracts as well.

In answer to Yorkwest's argument that it was not aware of the terms of the main contract and would not know whether a general lien was available, the Court of Appeal referred to Subsection 39 ((1) (1) of the *Act* which specifically provided that any person with a lien is entitled to information from the owner or contractor within 21 days of making a written request and the information that could be requested included whether liens arise and expire on a lot-by-lot basis.

The Court further referred to the observation in the Divisional Court decision that if subcontractors could register general liens despite a general contract provision that liens arise and expire on a lot-by-lot basis, the intent of Section 20(2) would be rendered virtually meaningless. The Court of Appeal agreed with the Divisional Court that Yorkwest's interpretation would undermine the ability of contractors and owners to make provision in their contracts to allow the owner to release the holdback on a lot-by-lot basis and that would undermine the benefit of contracting out under Section 20(2).

Having found that Yorkwest did not have a general lien right, the Court of Appeal then considered whether the general lien claimed could be cured under the curative provision in the *Act.* Section 6 provides:

> *6. No certificate, declaration or claim for lien is invalidated by reason only of a failure to comply strictly with subsection 32 (2) or (5), subsection 33 (1) or subsection 34 (5),*

General Contract Limits Lien Rights of Subcontractors in Subdivision Construction

Yorkwest Plumbing Supply Inc. v Nortown Plumbing (1998) Ltd.
2016 ONCA 305

LUC #136 [2016]

Primary Topic:
IX Construction and Builders' Liens
Secondary Topic:
V Payment of Contractors and Subcontractors
Jurisdiction:
Ontario
Authors:
Ken Crofoot, Goodmans LLP

CanLII References:

Court of Appeal

ONTARIO

> *unless in the opinion of the court a person has been prejudiced thereby, and then only to the extent of the prejudice suffered.*

The Court noted several authorities that provided there was no basis to use Section 6 to cure an improper general lien.[1] The Court also refused to treat the general lien as individual specific liens registered for excessive amounts as to do so would have the effect of failing to give effect to Section 20(2) and undermining the fair and efficient operation of the *Act*. The Court lastly refused to allow a claim for *quantum meruit* or unjust enrichment to proceed as these were not claims permitted to be joined in a lien action under Section 55 of the *Act*, which permits only claims for breach of contract or subcontract to be joined.

1 *Leo P. Abrams & Sons Ltd. v MacDonald Homes Inc. (Trustee of)* (1996), 80 C.L.R. (3d) 143 leave to appeal refused [1996] S.C.C.A. No. 214; *Gillies Lumber v Kubassek Holdings Ltd*. (1999), 176 D.L.R. (4th) 334

Lawyers Swearing Affidavits: When Will We Learn?

Concord Pacific Acquisitions Inc. v. Hung Leong Oei, 2016 BCSC 1054

LUC #136 [2016]

Primary Topic: I General
Jurisdiction: British Columbia
Authors: Mike Demers, Jenkins Marzban Logan LLP

CanLII References:

BC Supreme Court

BRITISH COLUMBIA

This decision arises out of a dispute relating to an alleged agreement to purchase the Plaza of Nations land in Vancouver, a transaction worth approximately $500 million. The central issue in the main dispute is whether, as alleged by the plaintiff Concord, an agreement was reached which would allow it to purchase that property from one of the three related defendants, the registered owner of the property. Concord commenced an action and the defendants brought a summary trial application seeking to have the claim dismissed. The chambers judge hearing that application ultimately dismissed it as being premature. The defendants' legal counsel, who has 40 years at the bar, swore an affidavit which was intended to be used in the summary trial application. Concord went on the offensive and brought an application for an order requiring the defendants to produce counsel's complete file with respect to the services including advice he or his firm provided to the defendants about the underlying transaction.

Concord's allegation in the pleadings was that the agreement between it and the defendants for the purchase and sale of the property was partly written and partly oral with the written portion comprised of a heads of agreement, a draft share purchase agreement and a draft shareholders' agreement. Concord alleged that the oral terms were agreed to between certain named representatives of each side "and their respective advisors". Unlike the representatives, no particular advisor was named in the pleadings.

As part of the materials in support of the summary trial application, counsel swore an affidavit that contained a number of statements which Concord pointed to as waiving privilege. Concord's position was that counsel had "entered the fray" because his affidavit described, referenced, or relied upon privileged communications and, as a result, counsel had given evidence of the defendants' state of mind or internal processes by which they decided on positions taken by them throughout the negotiations. There are a number of examples listed in the decision which were raised by Concord and include such things as:

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Lawyers Swearing Affidavits: When Will We Learn?

- "I have never received instructions from the Defendants or any of them to accept the terms of Exhibit O."
- "The Defendants did not agree with the proposed working capital adjustments and excluded it from Exhibit C."
- "With the CMPC Property so encumbered, I was concerned that CMPC might have difficulty raising finance for the Project. … In that context … the Defendants were unwilling to commit in advance to providing joint guarantees."
- "Exhibit 'O' failed to resolve the differences described in paragraph 7 above and indeed introduced several new terms that if negotiations had advanced would have aggravated the differences between the parties."

Based on the all of the statements by counsel referenced in the case, Concord argued that counsel had crossed the line from being counsel to being a witness with the inevitable consequent waiver of privilege.

The defendants, in opposing the application, began with the argument that counsel had been effectively dragged into the fray as a result of the plaintiff's pleading an agreement between advisors. As a consequence, any response or averments from counsel were not voluntary and, as a result, could not constitute a waiver of privilege. In rejecting that argument, the court noted that the pleading did not reference counsel expressly, and that a demand for particulars as to who the "respective advisors" were would have flushed that out before counsel decided to swear an affidavit. Because the pleading was not obvious, the court could not conclude that counsel was involuntary obliged to give evidence.

The defendants also argued that simply conveying a client's position and describing having done that does not engage privilege. The pitch to the court was that the affidavit simply described the mechanics of the communications back and forth and that type of evidence does not bring counsel into the fray so as to waive privilege.

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While the court agreed with the proposition that counsel saying "I was instructed to prepare a counter proposal" would be insufficient to waive privilege, the court concluded that counsel in this particular affidavit went beyond and averred to the reasoning behind positions. That included both the solicitor's thinking and that of his clients. In this case, it amounted to entering the mind of the client, thus waiving privilege. The court noted that since the fundamental question of whether or not an agreement was reached, when counsel swears "I never received instructions to accept," it was evidence on that fundamental issue. The court reasoned that had counsel said the converse, i.e. "I received instructions to accept", it would surely have been evidence supporting the establishment of a contract. The court concluded that counsel's evidence was intended to disprove the existence of an agreement and went beyond the point required to waive privilege. The court ordered production of the complete file of the solicitor and his firm. [The time for filing an appeal from this decision has not yet passed as of the date of the writing of this case comment.]

While the wording chosen by counsel was what initially led the court to find there had been a waiver of privilege, the court concluded with a proposition that could be interpreted as having much broader application:

> [22] The other question arising, in any event, is that of fairness and consistency. Is it fair to offer Mr. Henshall as a witness and his affidavit as evidence in support of a summary trial, but to then refuse access to him or to his file? I think not. That, I think, is the very essence of the hazard of a solicitor entering the fray. Fairness and consistency, I conclude, require that the application be granted.
>
> [underlining added]

That concluding paragraph by the court could be used in future applications where a solicitor's file is sought to be produced in a

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circumstance where counsel's affidavit is innocuous and not directed to the substance at question in the action. However, such an application would probably be too broad, at least in British Columbia were the courts have consistently adopted a standard of requiring counsel to enter the fray on matters of substance before finding a waiver of privilege and consequent disclosure of the otherwise privileged file. [See, for example, *Mayer* v *Mayer* 2012 BCCA 77.] Regardless, a practice point for counsel arising from this decision, and all the others which have come before the court on this topic, is to simply stay out of the fray and not swear an affidavit. Almost always there is an option to get the required evidence before the court that does not entail counsel straying from that role into the role of witness. Getting one's legal assistant to swear the affidavit on information and belief will probably not avoid a waiver of privilege finding if that would have been the result had counsel sworn it themselves. (see *Re Mannix Resources Inc.*, 2004 BCSC 1315). In the exceptionally rare circumstance where counsel feels they must participate as a witness, the client must be fully advised of the consequences of taking that step, including both the waiver of privilege issue and whether or not the client is best served by retaining new counsel going forward.

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