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GLAHOLT BOWLES LLP
NEWSLETTER

IN THIS ISSUE

Once bitten, twice shy… price escalation clauses in a post-COVID-19 construction industry

Not long ago, our news feeds were dominated with worrying headlines …. "Global supply chain crises", "inflation", "labour shortages", to name a few. These factors prompted a volatile economy and set in motion a series of events that led to record price escalation in the construction industry. Projects ground to halt, parties up and down the construction pyramid went out of business, and those that survived the unprecedented volatility have prioritized the inclusion of price escalation provisions in their contracts.

What is a price escalation clause?

Material prices tend to rise steadily in a mostly predictable manner, which allows contractors, subcontractors, and suppliers to account for this in their bids. But what happens when these surges in material and labour prices become unpredictable? That's what a price escalation clause is for.

An escalation clause allows a contractor or supplier to impose price increases for certain labour and material during the term of the contract, thereby shifting the risk of the volatility in material price increases, from contractor to owner. Escalation clauses generally only apply to specified labour or material that can be tied to an objective price index, such as commodity prices or published union rates and will typically permit the contractor to recover all

or a portion of a price increase above a certain negotiated threshold (i.e., 10% relative to the index).

These clauses are generally used in lump sum or fixed fee contracts, particularly when the duration of a project is long and potential fluctuation of material prices could be significant. In a time and materials contract, escalation is generally not a concern for a contractor, because the owner already takes on the risk of having to pay higher prices due to fluctuations in the market.

Why use an escalation clause?

The primary benefit for contractors that have an escalation clause in their contract is that they are shielded from volatile material prices and potential price surges. The construction industry, at least in Ontario, can be extremely competitive, forcing contractors to cut into their profit margins to get work.

What is the benefit for an owner? It seems that owners would be disincentivized to agree to an escalation clause. While not overly apparent, COVID-19 has shown us that well-drafted prices escalation clause can provide several benefits for an owner. One such benefit is that when price escalation clauses are used, bidders don't need to include contingencies for the risk of surges in material prices, which allows them to bid on the project more accurately, which can lower the initial contract price. As the owner bears the risk, it is less likely that a situation will occur where a contractor is in a position that surges in material prices will cut into all their profit, which is probably the last thing that an owner wants. A desperate contractor can cut corners to stay alive, walk off the project, or declare bankruptcy. All these situations could be avoided with a reasonable price escalation provision. The last thing an owner wants is to replace a contractor midway through a project, at a significant premium.

A further benefit for an owner is that escalation clauses can work both ways, creating the possibility where an owner can seek a decrease in the contract price, if material prices decrease below a certain threshold. Those situations create a win-win and a fair allocation of risk – the contractor doesn't carry the risk of price surges but cannot profiteer from price decreases.

How does a contractor negotiate the inclusion of a price escalation clause?

The starting position for most owners is that they would want to resist the inclusion of an escalation clause that pushes the risk of the price increase completely on them. An owner may want a contractor to provide a guaranteed price.

There are strategies that a contractor can use to negotiate a fair price escalation clause.

- Certain contractors have the necessary bargaining power if they are leaders in their field or provide a specialized service that only a handful of contractors can provide. Leveraging this bargaining power can make it easier to convince the owner.

- Many owners acknowledge the impact the past few years have had on the construction industry and have learnt from costly lessons. A contractor who can educate and inform an owner, in a quantifiable and transparent manner, as to the fluctuations in material supply and prices will have a better chance to make provision for such increases in their contract. An open and transparent contractor may be preferred over one that provides no insight on its pricing.

- An owner may be more willing to accept a price escalation provision if there is a reasonable allocation of risk, for example, if their liability is limited only to excessive price increases. One way to implement this is to have the contractor absorb the price increase up to a certain percentage, as it normally would in a more stable economy, and then have the owner pay for any increases above that percentage,

or that the parties share the risk, by splitting the difference in the price increase.

- A contractor can offset the risk, by passing on any saving to the owner by including a de-escalation clause so that the owner can benefit from any price decreases, or to have a maximum percentage increase that the owner will pay so that the owner knows there is a limit to the price increase.

What makes a good escalation clause?

While it is possible to have a "standard" price escalation clause, this is one of those instances where it really benefits the parties to formulate a project specific provision. There are primarily three things to consider when crafting an escalation provision, namely:

1. Specifying the labour and material that will be subject to escalation, as well as the base quantity and value that will be subject to adjustment.

2. Identifying the price index that will be used for quantifying the escalation, and specifying the base value from which any escalation will be measured.

3. The method of price adjustment should be specified, including how the change in the price index will be used to escalate the base price, including any thresholds and which parties will bear the risk of any increase or decrease.

What if you already have a contract and no provisions has been made for price escalation?

While the general rule is that if the parties have not made provision for material price escalation in their contract, a contractor would not be entitled to claim an increase in the contract price from the owner, there are still mechanisms that a contractor could use.

Nothing hurts to ask – we have seen it firsthand, that many owners would much prefer to keep a dependable contractor on a project, by paying a reasonable price escalation, rather than entering a dispute that could run up legal costs and ruin a relationship or negatively impact the completion of the project.

Force majeure clauses, depending on the wording, can allow the parties to change certain contractual obligations if an event beyond the parties' control occurs, such as a worldwide pandemic. Generally, most off the shelf construction contracts do not allow for price escalation in the event of a force majeure, but if care has been taken in the drafting, then there are instances where increases in material and labour will permit such a claim.

Where a project is delayed, and the contract does not contain a price escalation clause, contractors might instead be able to recover material and labour costs for price escalations that occur because of owner-caused delays or suspensions.

Conclusion

Anticipating an issue before it arrives can be critical towards avoiding claims and conflicts. A well thought out price escalation clause can assist the parties to ride the storm when things become unpredictable, by identifying and sharing the risks of increases in material and labour prices.

AUTHOR:

Show Me the Damages: No Presumption of Loss for Breaches of Contractual Duty of Honest Performance

In December 2020, the Supreme Court of Canada released its landmark decision in *C.M. Callow Inc. v. Zollinger,* 2020 SCC 45 ("*Callow*"), establishing a contractual duty of honest performance. Since the decision, a multitude of questions have arisen as to the requirements of the duty, and the implications of any breaches thereof.

In *Bhatnagar v. Cresco Labs Inc.,* 2023 ONCA 401 ("*Bhatnagar*"), the Court of Appeal for Ontario weighed in on this second issue, and specifically, whether a breach of the duty creates a legal presumption of loss, regardless of whether any actual loss had been established by the innocent party. In considering this question, the Court of Appeal ultimately upheld the application judge's decision that a finding of such a breach does not relieve a claimant from having to show an evidentiary foundation for which a court could conclude that a loss occurred.

Background

The Court of Appeal's decision in *Bhatnagar* related to the sale of 180 Smoke, a retailer, wholesaler, and manufacturer of vaporized tobacco products.

Through a share purchase agreement dated February 19, 2019 (the "**SPA**"), the Appellants Boris Giller, Ashutosh Jha, and Gopal Bhatnagar sold 180 Smoke and its affiliates to CannaRoyalty Corp., operating as Origin House ("**Origin House**"). On April 1, 2019, Origin House announced that it had entered into an agreement with the Respondent, Cresco Labs Inc. ("**Cresco**"), under which Origin House would be purchased by Cresco (the "**Cresco Transaction**").

Origin House paid the Appellants the sum of $25,000,000 for the purchase of 180 Smoke on closing of the SPA. The SPA, however, also provided the Appellants with the opportunity to earn additional sums if 180 Smoke met certain revenue and licensing milestones.

Pursuant to the SPA, the Appellants had the opportunity to earn an additional $12,500,000 if 180 Smoke achieved specified revenue milestones during the initial three years following closing of the SPA (the "**Revenue Milestone Payments**"), and an additional $2,500,000 if 180 Smoke obtained a standard processing license for cannabis products within a specified period (the "**License Milestone Payment**"). The Revenue Milestone Payments were broken down into three installments of $4,166,667 for each of the 2019, 2020, and 2021 calendar years.

The potential acquisition of Origin House was contemplated by the parties at the time that they negotiated the SPA. Accordingly, the parties negotiated a term into the SPA providing that if there was a change in control of Origin House during the three-year period in which Revenue Milestone Payments could be earned, the Appellants would be paid an "Unearned Milestone Payment Commitment", equal to the amount of all future entitlement to Revenue Milestone Payments.

When the Cresco Transaction was announced, it was expected to close before the end of 2019. If this were to occur, the Appellants would be entitled to the entirety of the Revenue Milestone Payments, regardless of whether or not 180 Smoke achieved the specified revenue milestones provided under the SPA.

It subsequently became known, however, that the closing of the Cresco Transaction would be delayed by several months. The Appellants acknowledged operating on the assumption that the transaction might not close, and that they would need to meet their revenue targets to be entitled to the Revenue Milestone Payments, despite Origin House's assurance that there was no reason to doubt that the Cresco Transaction would close. The Appellants further acknowledged that by September 2019, it became clear that there was little or no chance that 180 Smoke would meet its 2019 revenue milestone.

Accordingly, 180 Smoke's only opportunity to collect the 2019 Revenue Milestone Payment would be if the Cresco Transaction closed in 2019, and the Appellants were paid the Unearned Milestone Payment Commitment for all three years.

Ultimately, 180 Smoke did not meet its 2019 revenue milestone, and due to a weakness in market conditions and Cresco's difficulty raising capital, the Cresco Transaction did not close until January 8, 2020. As a result, the Appellants were paid the Unearned Milestone Payment Commitment for the years 2020 and 2021 in the total amount of $8,333,814.51, but did not receive the Revenue Milestone Payment or the Unearned Milestone Payment Commitment for 2019 in the amount of $4,166,667.

As it turned out, Origin House learned in October 2019 that Cresco was proposing a new closing date for the Cresco Transaction of January 15, 2020, but did not directly disclose to the Appellants that the Cresco Transaction was being deferred to 2020.

Lower Court Decision

The Appellants subsequently brought an application in the Ontario Superior Court of Justice against Cresco, seeking payment of the 2019 Revenue Milestone Payment, in addition to the License Milestone Payment. The Appellants alleged that they were entitled to the 2019 Revenue Milestone Payment pursuant to the terms of the SPA, or in the alternative, that they were deprived of their ability to achieve the 2019 revenue targets or access the Unearned Milestone Payment Commitment due to Origin's breaches of the SPA and of the contractual duty of honest performance.

In reasons dated March 21, 2022, the application judge determined that the Appellants were not entitled to the claimed payments. After dismissing the Appellants' claims based on breaches of the SPA, the application judge considered the Appellants' claims that Origin House breached its duty of good faith in contractual performance.

The Appellants alleged three breaches of the duty, two of which were rejected by the application judge. The application judge, however, found that Origin House breached its duty of honest performance of the SPA by repeatedly advising the Appellants that the Cresco Transaction would close in 2019, and not updating the Appellants when it learned in October 2019 that the Cresco Transaction would not close until January 2020. The application judge did not find that Origin House misled the Appellants, just that it failed to update the Appellants when it received new information regarding the Cresco Transaction.

While finding that Origin House breached its duty of honest contractual performance, she made no award of damages for the breach. Rather, the application judge determined that even had the deferral of closing of the Cresco Transaction been immediately disclosed to the Appellants in October 2019, 180 Smoke would still not have achieved its 2019 revenue target, nor would the Appellants have been able to force the closing of the Cresco Transaction to occur in 2019. The application judge refused to presume damages resulting from the breach, and because there was no evidence of lost opportunity, she held that the Appellants were not entitled to damages.

The Appeal

The Appellants subsequently appealed the application judge's decision to the Court of Appeal for Ontario. Amongst other grounds, the Appellants alleged that the application judge erred in failing to presume loss by the Appellants as a result of Origin House's breach of the contractual duty of honest performance. The Appellants relied on paragraph 116 of the Supreme Court's decision in *Callow*, which stated:

> *"[E]ven if I were to conclude that the trial judge did not make an explicit finding as to whether Callow lost an opportunity, it may be*

> *presumed as a matter of law that it did, since it was Baycrest's own dishonesty that now precludes Callow from conclusively proving what would have happened if Baycrest had been honest." [Emphasis added]*

The Appellants therefore argued that the Court is required to presume damages when a breach of the duty is found, even absent evidence of an opportunity being lost. Applying the presumption from *Callow*, the application judge should have presumed that the Appellants lost the opportunity of obtaining the 2019 Revenue Milestone Payment, and that loss should be compensated in damages.

In response, Cresco argued that the application judge correctly dismissed the Appellants' claim for damages on the basis that there was not an evidentiary foundation for the claim. Even if a lost opportunity is presumed, the evidentiary record must establish what was lost, and how it was lost due to a breach of contract. To hold otherwise would open the floodgates to all manner of speculative claims. Cresco also brought a cross-appeal, seeking to set aside the application judge's finding that Origin House had breached its duty of honest performance of the SPA due to its failure to disclose the deferral of closing of the Cresco Transaction.

Ultimately, the Court of Appeal dismissed the Appellants' appeal, and granted Cresco's cross-appeal. Despite finding that there was no breach of the duty of honest contractual performance, the Court of Appeal still provided detailed analysis as to whether there is a legal presumption of loss when a breach has been established, agreeing with the application judge's finding that there is not.

Analysis

In confirming the application judge's decision on the issue of damages, the Court of Appeal rejected the Appellants' submission that *Callow* requires the Court to presume that the aggrieved party has suffered damages when it has found a breach of the duty of honest contractual performance. Rather the Court of Appeal interpreted *Callow* to place the burden on the claimant to show some evidence of lost opportunity to be entitled to damages.

In addressing paragraph 116 of *Callow*, the Court first noted that the relied upon language was permissive – that it "may" be presumed that the claimant lost an opportunity. Thus, a Court would be entitled to presume that a claimant lost an opportunity, but is not obliged to do so, as alleged by the Appellants.

Second, the Court of Appeal noted that the Supreme Court's finding at paragraph 116 of *Callow* that a loss of opportunity may be presumed was followed by two qualifications. The Supreme Court in *Callow* held that a loss of opportunity may be presumed because (i) it was the breaching party's dishonesty that precluded the other party from (ii) conclusively providing what would have happened.

In terms of the first qualifier, the Court of Appeal found that Origin House's failure to advise the Appellants of the deferred closing of the Cresco Transaction in October 2019 did not in any way preclude the Appellants from proving what would have happened had they been so advised. The factual findings of the application judge established that that by October 2019, there was little or no chance that the Appellants could have hit the 2019 Revenue Milestone, and that there was nothing the Appellants could have done to require the Cresco Transaction close in 2019.

In terms of the second qualifier, the Court of Appeal emphasized the word "conclusively", noting that the facts in *Callow* were distinguishable from the facts in the matter before it. In *Callow*, the Supreme Court found that there was "ample evidence" of lost opportunity, and that the breaching party's dishonesty precluded the claimant from "conclusively" proving the lost opportunity. In the within matter, the Appellants had no evidentiary foundation of their claim of lost opportunity.

Takeaway

The important takeaway from the Court of Appeal's decision in *Bhatnagar* is that the implications of a breach of the contractual duty of honest performance are no different than any other breach of contract or breach of duty in tort. A Court will not just assume that damages were suffered and make an award of damages without an evidentiary foundation to support the claim. While an aggrieved party may feel empowered by the Supreme Court of Canada's decision in *Callow* to advance a claim for breach of the contractual duty of honest performance, it must ensure that it has a sufficient evidentiary basis to prove not only the breach, but the lost opportunity resulting from the breach, before doing so.

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Procedural Unfairness and the Limits of Arbitrator Discretion

The decision in *Mattamy (Downsview) Limited v. KSV Restructuring Inc. (Urbancorp)*, 2023 ONSC 3013 *[Mattamy]* provides an insightful review of the limits of an arbitrator's discretion in decision making. It is also an instance where the Court takes the uncommon step of overturning an arbitration award and ordering a new hearing by a different arbitrator.

The key parties in this dispute were major residential developers Mattamy (Downsview) Limited and Urbancorp Downsview Park Development Corp. Together these companies formed a separate entity, Downsview Homes Inc., as the vehicle through which they would build a residential complex consisting of condominiums, townhomes, semi-detached homes and rental units.

When Urbancorp went insolvent, its 51% ownership interest in Downsview Homes Inc. was sold to Mattamy.

Within the context of Urbancorp's CCAA proceeding, a dispute arose concerning whether Urbancorp was entitled to a $5.9 million consulting fee from Mattamy. Urbancorp's position was that the consulting fee, a 1.5% fee of the gross receipts on the project, was payable prior to the sale of its interest in Downsview Homes Inc. On the other hand, Mattamy argued that Urbancorp was not entitled to the $5.9 million payout based on an interpretation of gross receipts per the partnership agreement that, for instance, included the revenues received from the sale of residential units.

Upon hearing each party's account of entitlement to the payout, the arbitrator came up with a series of question geared toward an issue that had not been addressed by either of the parties' filings. Namely, the arbitrator wanted to know the following:

1. What did the ASPE accounting principles require for the sale of residential condominium units?

2. How did the auditors on the project account for the sale of residential condominium units?

3. What was the closing status for [Phase 2] Block A and P units, including dates of actual and anticipated closings?

These questions came as a surprise to Mattamy because there was no previous disagreement between the parties concerning the application of gross receipts for Phase 2 of the residential units. Urbancorp never claimed the sale of the Phase 2 units were deemed received prior to Urbancorp's sale of its interest to Mattamy. In other words, it appeared as if the arbitrator was making hay of a non-issue.

As requested, both parties nonetheless provided supplementary material on these questions. Mattamy included several supporting documents for evidence including a handbook published by the Real Property Association of Canada which offers guidance on how accounting principles are applied to the sale of condominium units. The arbitrator later decided to strike any and all references to the handbook with no reason other than to say he "had a mind of his own". In the end, the arbitrator awarded Urbancorp the full $5.9 million consulting fee.

In its application to set aside the arbitrator's award, Mattamy claimed that the new questions raised by the arbitrator was beyond the arbitrator's jurisdiction and the failure to allow Mattamy to present

a complete record of evidence was procedurally unfair and a breach of the principles of natural justice.

The central issues the Court was asked to determine were as follows:

1. Should the Award be set aside pursuant to s. 46(1) 3 of the Act for exceeding the scope of the Arbitration and the Arbitrator's jurisdiction?

2. Should the Award be set aside pursuant to s. 46(1) 6 of the Act for breach of procedural fairness?

With respect to the first issue, the Court determined that the arbitrator did not exceed the scope of his jurisdiction because the parties specifically asked the arbitrator to determine entitlement to the $5.9 million consulting fee. The Court cited the leading Ontario Court of Appeal decision in *Mexico v. Cargill, Incorporated,* 2011 ONCA 622, which provided the framework for assessing whether an award went beyond the scope of the arbitrator's jurisdiction:

1. What was the issue that the arbitral tribunal decided?

2. Was that issue within the submission to arbitration?

3. Is there anything in the arbitration agreement, properly interpreted, that precluded the tribunal from making the award?

When the arbitrator asked about Phase 2 of the residential units and whether those payments could be considered "received" as well as how calculations were made based on accounting principles, the Court determined this was merely an attempt to "shift the analysis by introducing a new point of interpretation". In other words, the arbitrator was simply providing a new perspective on how to assess the issue in dispute and not an attempt to, for instance, introduce completely unrelated considerations. The new question did not fall outside of the scope of the broad questions that had been submitted to the arbitrator to decide. Therefore, the arbitrator was not acting outside of his jurisdiction.

With respect to the second issue, the Court determined that there was procedural unfairness by the arbitrator in refusing to consider the full scope of Mattamy's evidence. By denying the inclusion of the handbook, Mattamy was denied a sufficient opportunity to present their case. As part of its analysis, the Court acknowledged that while arbitrators have the authority to determine the procedure of a hearing, they cannot make rulings that result in procedural unfairness. The handbook was relevant because it addressed the questions the arbitrator himself asked concerning the calculation of general receipts and provided important context and an "interpretive guide" for the arbitrator. Furthermore, no real reason was given by the arbitrator for rejecting the evidence.

The Court took umbrage at Urbancorp's suggestion that the award should stand because neither the new questions put forward by the arbitrator nor the exclusion of the handbook were ultimately dispositive or central to the final award decision. The Court made clear, citing the seminal Supreme Court of Canada ruling in *Université du Québec à Trois-Rivières v. Larocque,* [1993] 1 S.C.R. 471, that once there is found to have been procedural unfairness or a failure of natural justice the arbitrator's award must be set aside and a new arbitration must be ordered. It does not matter if the procedural unfairness related to matter that had no bearing on the result. Once unfairness is identified, the award must be set aside.

Moreover, in its decision, the Court also found it necessary to distinguish between discrete procedural

decisions of an arbitrator, which are generally immune from review of a Court, and a procedure that is so flawed as to amount to procedural unfairness. Such a distinction is not always clear on its face but heavily driven by context.

Taken together, the Court decided that while the arbitrator was within his right to introduce new questions and raise an issue not originally presented by the parties, the arbitrator's decision to exclude certain evidence presented by Mattamy pertaining to these new questions and issue amounted to procedural unfairness and a failure of natural justice. It was ordered the award be set aside and the parties proceed to a new arbitration before a different arbitrator.

While Courts are generally deferential to the arbitration process and the decision of parties to resolve disputes privately through this alternative dispute mechanism, this case highlights a clear instance where the Court will not hesitate to step in.

The Court criticized the lack of explanation given by the arbitrator for excluding important evidence. While the arbitrator has significant discretion, that discretion must be exercised reasonably. The arbitrator has power in dictating procedure with the agreement of the parties, but power has it limits particularly when it comes to the evidentiary record.

In this case, the exclusion of evidence despite the lack of any objection from the respondents to that evidence; Mattamy's request for an opportunity to bring a motion for leave to file an affidavit if there was a question about the admissibility of any of the evidence contained in it; and the admission of other evidence about the application of ASPE principles amounted to a confluence of factors which deprived Mattamy of its right to procedural fairness.

Parties must be given a fair opportunity to present their case and this ruling is a reminder, perhaps a warning, that the arbitrator must ensure principles of procedural fairness and natural justice are upheld.

AUTHOR:

Suing on Unpaid Invoices: Don't Wait Too Long

Over the last few years, we discussed a series of Ontario Court of Appeal decisions in this newsletter in which the court held that despite having become aware of a claim more than two years ago, the claimant had not "discovered" its claim for the purposes of the *Limitations Act* because the person with the claim did not know that a proceeding would be an appropriate means to seek to remedy it.

In *Presley v. Van Dusen*, 2019 ONCA 66, which we wrote about here, the Court of Appeal held that legal proceedings against an expert professional were not appropriate if the claim arose out of the professional's alleged wrongdoing but could be resolved by the professional himself or herself without recourse to the courts. In that case, which concerned the failed installation of a septic system, the contractor kept assuring the owners that the problem could be readily fixed and that he would fix it. The owners reasonably relied on those assurances, which led them to the reasonable belief that the problem could and would be remedied without cost and without any need to have recourse to the courts. The owners therefore did not know that a proceeding would be the appropriate way to deal with their claim.

That decision was based on two earlier Court of Appeal decisions, *407 ETR Concession Co. v. Day*, 2016 ONCA 709 and *Presidential MSH Corp. v. Marr, Foster & Co. LLP*, 2017 ONCA 325, both of which we discussed here.

Last summer, the court extended the *Van Dusen* principle to any situation in which a defendant created a problem, the remedy for which was beyond the reach of the plaintiff's understanding, and assured the plaintiff that it would take care of the problem. In *Thermal Exchange Service Inc. v. Metropolitan Toronto Condominium Corporation No. 1289*, 2022 ONCA 186, the Court dealt with the issue when a contractor who is not paid for its invoices should know that a proceeding is an appropriate means to seek to remedy the non-payment.

The condo corporation argued that this was a simple matter of non-payment of invoices and that *Van Dusen* was therefore entirely distinguishable, given that the contractor was not relying on the condo corporation to fix a mechanical problem beyond the expertise of the contractor; it never promised unequivocally to pay the invoices, but was simply stringing a creditor along; and the contractor waited substantially longer to begin

a proceeding than the plaintiff in *Van Dusen* did.

The Court of Appeal disagreed and held that *Van Dusen* was analogous, as we discussed here. The condo corporation created a barrier to a contractor receiving payment by not paying unless it first received payment from the unit owners, but not taking any steps to getting the unit owners to pay. Rather than telling the contractor, the condo corporation led the contractor to believe that it would take care of the problem. That prevented the contractor from understanding the nature of the problem and made the situation analogous to *Van Dusen*.

One could be forgiven, therefore, for thinking that the two-year limitations period imposed by the *Limitations Act* had lost some of its draconian aspect, and that one could likely get away with adopting a wait-and-see stance in light of unpaid claims. A recent Superior Court decision serves as a reminder that that is a risky proposition.

In *Normar Drywall v. 4241258 Canada Inc o/a Laurin General Contractor and Dennis Laurin*, 2023 ONSC 3106, the court granted a motion for summary judgment and held that the plaintiff's action was barred by the *Limitations Act* because an action seeking damages in the amount of $361,674.19 for breach of contract based on alleged non-payment of invoices had been brought out of time.

On November 24, 2016, the parties met to discuss outstanding issues for payment. The parties disagreed as to what was agreed upon during this meeting. The defendant stated that he agreed to pay a total of $314,979.85 but did not promise any further payments on the contract. The plaintiff understood that further payments would be made in the future.

The parties met again in December 2016 and again disagreed as to what was discussed at this meeting. The parties did not communicate again for quite some time. In April 2018, Normar invoiced Laurin for holdback amounts owing on the contract. Laurin stated that the invoice was never received. In October 2018, the parties exchanged correspondence in which it became apparent that both parties believed that they were owed outstanding amounts on the contract.

The plaintiff stated that on October 16, 2018, he learned for the first time in an email that the defendant was taking the position that Normar owed Laurin for the Project and not the other way around. Until then, he believed that Laurin was still going to provide Normar with the outstanding amounts in satisfaction of the agreement reached on November 24, 2016. However, when he discovered that Laurin was not going to make any further payments for the Project, and was in fact claiming amounts owed, he commenced litigation. Normar issued its Statement of Claim in this action on September 15, 2020. The Statement of Claim was served on the Defendants on February 8, 2021.

Based on those facts, the court dismissed the plaintiff's claim on a summary judgment basis. In so finding, Justice Jensen summarized a number of principles governing limitations in the context of unpaid invoices in the construction industry:

- In assessing when a plaintiff might have discovered a claim, courts will look at whether the plaintiff acted with reasonable diligence to ascertain the facts upon which a claim could be based. It is not acceptable to simply wait and see what might happen.

- A plaintiff cannot rely on assurances that payments will be made in due course and that the process will be handled fairly to delay the commencement of the limitation period. The case law clearly establishes that the tolling of a limitation period is not suspended while a party waits to see what may happen.

- The cause of action in construction claims does not necessarily arise when the invoice is issued and not paid; it arises from the expiration of a reasonable period of time for the plaintiff to deliver an invoice to the defendants and the expiration of a reasonable time for the defendants to pay that invoice. Otherwise, plaintiffs

could delay issuing invoices for tactical or strategic advantages.

- A reasonable time for an invoice to be delivered is one or two months after the work is completed.
- A reasonable time for payment is thirty days after receipt of an invoice.
- Once a reasonable time to issue an invoice and the reasonable time for payment of that invoice have passed, it would be appropriate for the contractor to commence a proceeding if the invoice remains unpaid.

Therefore, unless there is some conduct by the defendant that would bring the case squarely within the *Thermal* or *Van Dusen* line of cases (and probably even then), it remains a very good idea to diarize the time for commencing an action based on a date no more than a month after non-payment of the invoice on which the claim is based.

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Adjudicator's Determination "Not Determinative" on Motion to Return Security
Arad Incorporated v. Rejali, 2023 ONSC 3949

This was a motion brought by the defendants under section 44(5) of the *Construction Act* for the return of monies paid into court to vacate a lien. The sole issue on the motion was whether the court should order the return of the monies paid into court, on the basis that an adjudicator determined the lien claimant was not entitled to any amount.

The parties participated in two adjudications under Part II.1 of the *Act*. The adjudication initiated by the plaintiff contractor was for alleged monies owing for work performed. The adjudication initiated by the defendant owner was for monies allegedly overpaid to the plaintiff's principal. The adjudicator dismissed both adjudications, finding that neither party owed the other any amounts.

The defendant relied entirely on the adjudicator's determination in support of its motion. The only materials before the court on the motion were two affidavits sworn by one of the defendant's lawyers, setting out the history of the action and attaching the adjudicator's determination.

Justice Sutherland dismissed the motion, finding that the Court did not have sufficient evidence before it to conclude that the lien claim did not require security. On a section 44(5) motion, the court must be satisfied "that there is no reasonable prospect of the lien claimant proving that the lien claimed attracts the requirement to attract security". Justice Sutherland found that the adjudicator made some findings based on inadmissible evidence and based on his own opinion as an engineer rather than the expert reports. The adjudicator's determination alone did not meet the evidentiary threshold for the court to conclude that the lien claim did not require security.

Though it is appropriate for the court to consider an adjudicator's determination on a section 44(5) motion, "adjudicator's conclusions are not determinative" on the court's decision to reduce security. The Court went further, stating that "the court should be wary" of relying solely on the findings of an adjudicator to reduce or return security given that that adjudications have different rules of evidence, and all evidence led in adjudications is not subject to cross examination.

The Court further stated that to permit the plaintiff's security be returned or reduced would contradict the purpose of the *Act* by providing owners and contractors an easier means to invalidate security for lien claims. This would contradict the purpose of the adjudicative process, which is an interim procedure designed to keep monies flowing down the construction pyramid – not to determine parties' legal rights on a final basis.

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Notable Case Law

***Prasher Steel Ltd v. BWK Construction Company Limited and Peel District School Board*, 2023 ONSC 3494**

A failure to make an offer to settle amounts to unreasonable litigation conduct.

***Infinite Construction Development Ltd. v. Chen*, 2023 ONSC 2627 (Div. Ct.)**

Nothing in the *Construction Act* prevents a general contractor from subcontracting with a second general contractor to perform the full scope of the first general contractor's work. Practically, the first general contractor would cease to have any "boots on the ground" role on the project, since the second general contractor would be doing all of the work. That functional role of the second general contractor would demonstrate all the indicia of a typical general contractor, and it could even be the "constructor" with the Ministry of Labour for the purposes of the *Occupational Health and Safety Act*. Legally, though, absent a contract with the owner (or an agent of the owner), the second general contractor would still fall within the definition of a "subcontractor" under the *Construction Act*. Its services and materials would be supplied under an agreement with the first general contractor.

***Convoy Supply Ltd. v. Elite Construction (Windsor) Corp.*, 2023 ONCA 373**

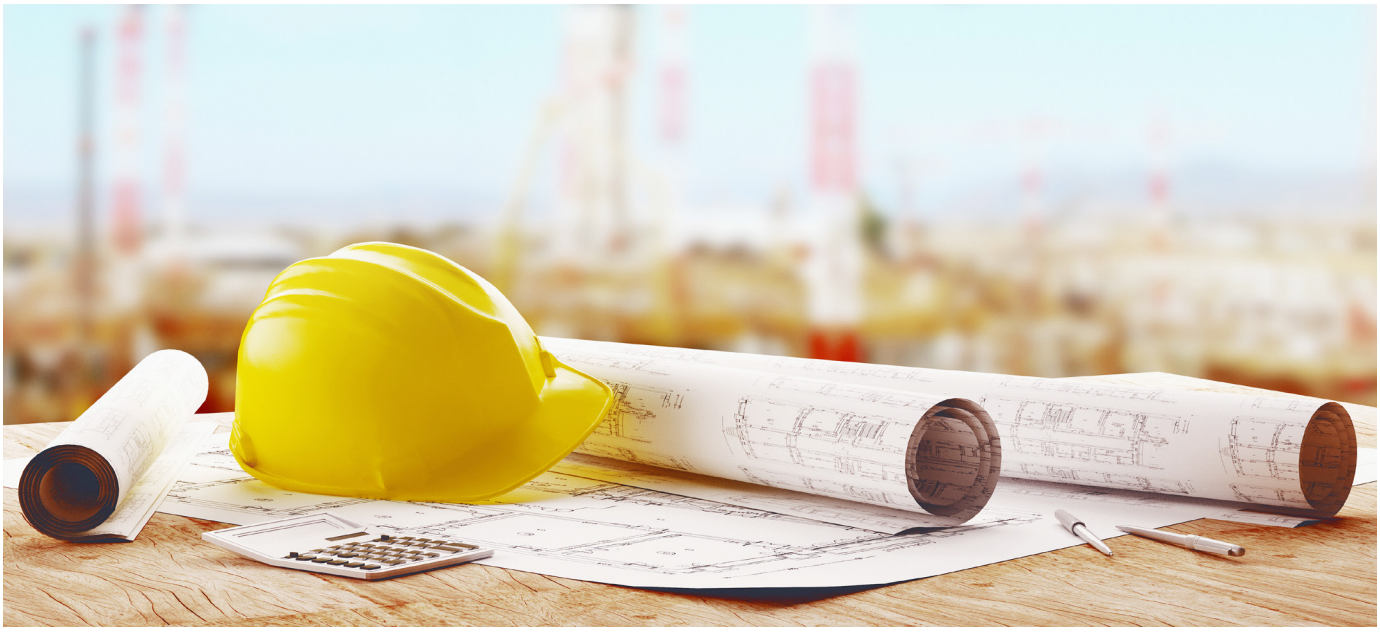
Based on a personal defendant's deemed admission that he "converted" and "appropriated" *Construction Act* trust funds for his own use or a use inconsistent with the trust, which the court characterized as intentional acts and not grounded in negligence or incompetence, the Court of Appeal upheld a finding that the personal defendant's debt survived his bankruptcy under s. 178(1)(d) of the BIA.

***Leblon Carpentry Inc. v. QH Renovation & Construction Corp.*, 2023 ONSC 3182 (Associate J.)**

Court orders are not mere suggestions that litigants may choose to follow if they wish. Whether a timetable order is made on consent, on an unopposed basis, or following opposed submissions, it remains an order of the court. Parties are expected to make honest and meaningful efforts to comply with all court orders, including timetables. In this case, the court dismissed a motion for an extension of a timetable after the time had expired. When an extension to a court-ordered timetable is opposed, the party seeking the extension must provide an explanation for why the deadline(s) cannot be met. The requirement for an explanation is even greater if an extension is sought after the order has been breached. There must still be an explanation for why the deadline(s) could not have been met, but it is also incumbent on the breaching party to explain why a default could not have been avoided. In this case, the explanation was not satisfactory.

***South West Terminal Ltd. v. Achter Land & Cattle Ltd.*, 2023 SKKB 116**

A 👍 emoji is "an action in electronic form" that can be used to allow to express acceptance of a contract as contemplated under *the Electronic Information and Documents Act*.



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