behaviour in the future. Defrauding a social housing company out of half a million dollars over two years qualified as behaviour worth condemning. As well, the fraudulently low bid of Argos kept its competitors from contracting with OCHC and injured the competition in the marketplace. For these transgressions the trial court ordered $250,000 in punitive damages against Mr. Grimes, Mr. Foustanellas, and Argos. However, on appeal, the court ruled that the trial judge made an error in ordering punitive damages against all the fraudsters. Punitive damages arise from the misconduct of a particular individual, and as such the damages have to be ordered solely against the individual. Citing the objectives of punishment, deterrence and denunciation, the Court of Appeal ruled that awarding the punitive damages solely against Mr. Foustanellas best advanced the objectives.

Costs

OCHC incurred a total of $660,586.36 in legal fees. The typical measure of damages is on a "partial or substantial indemnity scale", between 60 per cent and 90 per cent of the legal fees incurred. However, sometimes, the court can order payment of costs on a "full indemnity scale", meaning that the losing party pays the entirety of the other side's legal fees. Full indemnity is awarded only in a rare or exceptional case where the losing party engaged in reprehensible conduct either in their actions before the lawsuit or during the lawsuit. In this case the fraud Argos engaged in was of such a magnitude that awarding the full legal fees of OCHC was necessary.

An application for leave to appeal to the Supreme Court of Canada was filed August 5, 2015.

Ontario Court of Appeal

Cronk, Pepall, Benotto JJ.A.
April 21, 2015

CASE SUMMARY

Max Gennis
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NOTICE OF A LABOUR AND MATERIAL PAYMENT BOND: WHO TAKES THE INITIATIVE?

Valard Construction Ltd. v. Bird Construction Co.

The Alberta Court of Queen's Bench decision of *Valard Construction Ltd. v. Bird Construction Co.* helps clarify the duty of an obligee/trustee under a labour and material payment bond to provide subcontractors with notice of the bond's existence. The decision portends bad news for those who attempt to claim on a bond after the timely notice period but good news for obligee/trustees, who are not required to freely offer up information as to the existence of the bond unless that information is requested of them. Thus, this decision is necessary reading for anyone working on a project where a bond might exist, and it emphasizes the importance of always inquiring as to whether one does.

The defendant and general contractor in this matter was Bird Construction Company, who entered into a contract with Suncor Energy. Bird entered into a subcontract with Langford Electric Ltd. to perform the electrical work on a project. One condition of the subcontract required Langford to obtain a labour and material payment bond. The bond was issued by the Guarantee Company of North America (GCNA) in the amount of $659,671 and was a standard CCDC 222-2002 bond. Langford also entered into a subcontract with the plaintiff, Valard Construction Ltd., to perform services such as directional drilling.

Valard was not fully paid by Langford and ultimately obtained default judgment against it. Following default judgment, Valard asked Bird whether there was a bond on the project and was advised that there was. Valard attempted to claim on the bond, only to have the claim denied by GCNA because Valard had not provided the timely notice required by the bond. Valard began an action against GCNA and eventually added Bird as a defendant. Bird counterclaimed against Valard. Valard ultimately discontinued its claim against GCNA.

Valard took the position that it did not have knowledge of the bond until after the expiration of the notice period and argued that the obligee/trustee under the bond had a fiduciary duty to inform them of the bond's existence in a timely manner.

In order to claim under the bond, Valard had to satisfy three conditions: (1) it had to fall within the definition of claimant, (2) it had to provide notice to the surety, obligee, and principal within 120 days from when the last work or provision of materials was made to Langford, and (3) it had to commence an action within one year of when Langford ceased work on its contract with Bird.

Bird, although it acknowledged that it had certain fiduciary duties, denied that it had a duty to take the initiative to inform Valard as to the bond's existence. Valard had previously asked Bird whether there was a bond, and Bird told them that there was and provided contact information for GCNA. In Bird's eyes, this was the extent of their duty. Valard, on the other hand, advocated for a wider fiduciary duty where, with Bird being a trustee required to act for the sole benefit of the beneficiary, there was a positive obligation to inform potential claimants that a bond existed. Valard argued that to meet this obligation, Bird could have taken several simple courses of action: posting it on the bulletin board of their worksite, distributing copies at site meetings, or contractually requiring Langford to take reasonable steps to notify certain relevant parties as to the existence of the bond. Valard also submitted that this obligation was increased because Bird had learned of potential problems in the construction process that caused Valard to incur additional costs.

Justice Verville first determined that Valard was not a claimant until it had contracted with Langford. Until then, it was an unnamed third-party beneficiary. Justice Verville discussed the controversy associated with the third-party beneficiary rule, which states that only a party to a contract may sue on it. Justice Verville ultimately found in favour of Bird. After examining the wording of the bond, and after surveying the case law, he determined that the trust wording in the bond was designed purely to get around the third-party beneficiary rule and to allow a claimant to sue the surety and that it was never intended to impose a duty on the obligee to protect potential claimants and their interests.

Justice Verville stated that it would be more reliable to have Valard make a standard inquiry as to the possibility of a bond than to compel Bird to provide notice. While acknowledging that some subcontractors may overlook the possibility of a bond, Valard was a large and sophisticated entity that should have mandatory protocols requiring the request of bond information on all subcontracts. Justice Verville faulted the company for not inquiring sooner, because when they did inquire, Bird revealed the bond's existence immediately.

Justice Verville ultimately dismissed Valard's claim. Costs were awarded on a full-indemnity basis due to a paragraph in the bond stating that "if any action or proceeding is taken by joining the obligee as a party, the claimant who takes such action or proceeding shall indemnify and save harmless the obligee against all costs, charges and expenses or liabilities incurred thereon and any loss or damage resulting therefrom".

While this decision seems, at first glance, to be very clear that there is no positive obligation to inform as to the bond's existence unless asked, Justice Verville's distinction between "large sophisticated" companies and those that are "disadvantaged and infirm" offers an interesting wrinkle that causes slight pause by hinting at different treatment depending on the size and level of

experience of a company. It therefore remains to be seen whether (1) this ruling will be applied uniformly, or (2) smaller, newer, less sophisticated companies who are not aware to ask whether a bond exists might try to distinguish it in their favour. This distinction may need to be sorted out in future case law. Until that time, however, the moral of this story is clear: one should always inquire as to the existence of a bond.

Alberta Court of Queen's Bench

Verville J.
February 27, 2015

CITATIONS

A.G. Clark Holdings Ltd. v. HOOPP Realty Inc., [2014] A.J. No. 20, 2014 ABCA 20.
Advanced Construction Techniques Ltd. v. OHL Construction Canada, [2013] O.J. No. 6013, 2013 ONSC 7505 (Master).
Arbitration Act 1991, S.O. 1991, c. 17.
Builders' Lien Act, C.C.S.M. c. B91.
Carillion Construction Inc. v. Imara (Wynford Drive) Ltd., [2015] O.J. No. 3084, 2015 ONSC 3658.
Cityscape Richmond Corp. v. Vanbots Construction Corp., [2001] O.J. No. 638, 8 C.L.R. (3d) 196.
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Mantini v. Smith Lyons LLP, [2003] O.J. No. 1831, 64 O.R. (3d) 505 (Ont. C.A.).
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Stuart Olson Dominion Construction Ltd. v. Structal Heavy Steel, division of Canam Group Inc., [2013] M.J. No. 71, 2013 MBQB 48.
Valard Construction Ltd. v. Bird Construction Co., [2015] A.J. No. 237, 2015 ABQB 141.

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