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NEWSLETTER

IN THIS ISSUE

Architect Discipline – Two Recent Decisions

The Ontario Divisional Court has recently heard appeals from two decisions of the Discipline Committee of the Ontario Association of Architects. In both cases, the appeal was dismissed. *Di Sarra v. Ontario Association of Architects*, 2021 ONSC 2697, dealt with a conflict of interest arising from an architect bidding on construction work on a project designed by himself. The second case, *Saplys v. Ontario* Association of Architects, 2021 ONSC 2784, concerned the question whether a design was "intended to govern the construction of a building" and therefore constituted the practice of architecture.

Conflict of Interest – *Di Sarra v. Ontario Association of Architects*

The Regulation under the Ontario *Architects Act* prohibits an architect who provides architectural services on a building project from also having an ownership interest in another company that has submitted "tenders or bids" on a project. To do so would constitute a conflict under section 43(1)(f) of the Regulation.

The architect in this case provided millwork drawings used by the owner of the home to solicit quotes for the work, and at the same time was an owner in a company that submitted a quote to carry out that work.

The Discipline Committee of the Ontario Association of Architects found that the architect was in a conflict of interest in doing so and was guilty of professional misconduct.

The architect appealed to the Divisional Court and argued that "tenders or bids" as used in the Regulation were misinterpreted by the Committee, had no application to the informal process of obtaining quotes for the millwork on

this renovation project and should be limited to a formal process of tendering, in which an invitation to tender is made and the presentation of a responding offer creates a binding contract between the parties, of the kind referred to as "Contract A" in the Supreme Court of Canada's decision in *R. v. Ron Engineering*.

The architect argued that the Discipline Committee's interpretation created an illogical or absurd result; was inconsistent with the plain wording of the provision; was inconsistent with the purpose of the legislation; and was inconsistent with the legislative history of the conflict of interest provisions.

The Divisional Court rejected all of these arguments.

Section 43 of the Regulation provides as follows:

> 43. (1) A member or holder has a conflict of interest where the member or holder or an officer, director, partner or employee of the member or holder,
>
> (a) has a direct or indirect financial or other interest in any material, device, invention or service used on a building project with respect to which the member or holder provides architectural services;
>
> (b) makes use of any service offered by a contractor, subcontractor or manufacturer or supplier of building materials, appliances or equipment, that may adversely affect the judgment of the member or holder as to any question that arises on a building project with respect to which the member or holder provides architectural services;
>
> (c) has a direct or indirect financial or other interest, whether personal or otherwise, in or with a person, firm, partnership or corporation that is the owner, contractor, subcontractor, construction manager, design-builder or project manager of a building project with respect to which the member or holder provides architectural services;
>
> (d) has a direct or indirect financial or other interest in a contract or transaction, other than the agreement between the architect and the client, to which the owner, contractor, subcontractor, construction manager, design-builder or project manager is a party on a building project with respect to which the member or holder provides architectural services;
>
> (e) has a direct or indirect financial or other interest, whether personal or otherwise, that may adversely affect the judgement of the member or holder as to any question that may arise on a building project with respect to which the member or holder provides architectural services; or
>
> (f) has a direct or indirect financial or other interest, whether personal or otherwise, in or with any person, firm, partnership or corporation that submits or has submitted tenders or bids on a building project with respect to which the member or holder provides architectural services.
>
> (2) Clause (1) (a) does not apply to create a conflict of interest where the interest is disclosed in the contract documents and the consent in writing of the client is obtained.
>
> (3) Clause (1) (c) or (d) does not apply to create a conflict of interest where the interest is disclosed in the contract documents.
>
> (4) Subsection (1) does not apply to create a conflict of interest in the provision of architectural services with respect to a building project of which the member or holder is a substantial owner or that is controlled by the member or holder where the interest is disclosed in the contract documents.

The court focused on subsections 43(1)(c) and (f) and noted that while under the previous version of the Regulation, if an architect simply had an interest in a company that provided construction services, that construction company was categorically barred from providing services on any project in which the architect was retained, s. 43(3) of the current version removed the general prohibition if the architect's interest in the construction company is disclosed in the contract documents.

Importantly, however, there is no such exemption for s. 43(1)(f). If a company in which the architect has an interest "submits or has submitted tenders or bids" on a building project with respect to which he or she is providing architectural services, that is deemed to be a conflict of interest, and disclosure to the owner or the owner's consent or waiver does not change that.

As for legislative intention, the architect submitted that the language in ss. 43(1)(f) flowed directly from the decision in *Ron Engineering* and was enacted with the intention that it would apply only in a Contract A/ Contract B scenario as set out in that case. The Divisional Court held that there was nothing to support that contention apart from the possible coincidence of timing and dismissed that argument.

The architect next argued that the purpose of the legislation was the protection of the public, not the protection of other contractors, and the Committee's finding that the architect had an "unfair advantage over other bidders by having this pre-tender knowledge of the requested scope of millwork services" misconstrued the purpose of the Act. That argument was rejected as well. The Divisional Court held as follows:

> If an owner of property decides to accept multiple bids on work to be carried out on the property, surely it is in the public interest for there to be

> fair competition amongst the bidders for the work. This may also be in the best interests of the other firms involved in the bidding process, but that does not take the matter outside the public interest.

The architect submitted that the Committee's finding led to an absurd result by prohibiting an architect from having an interest in a company that "bids" on a project, with no exceptions, but at the same time allowing the architect to have an interest in a company doing other work on the project provided there is full disclosure of the architect's interest. In other words, the architect can do the work, but is not permitted to bid on the work.

The Divisional Court disagreed again, finding that there was nothing absurd about such a finding. It is perfectly permissible for an owner to hire whoever they want on a project without engaging in a competitive process, and to have any architect do some of that work, again without a competitive process as long as any conflict is disclosed. However, once the owner chooses to procure the work by way of a competitive process, the owner is entitled to an actual competitive process, not one in which a company owned by the architect has an advantage over everybody else, and the designing architect cannot bid to do work on that project as well.

The architect's final argument was that this reading of the Act led to the anomalous result that it would be in an unscrupulous architect's interests to persuade an owner not to seek competitive bids so that the architect can have their own company do the work. While the court agreed with that argument, it held that that danger arose when the Regulation was changed to permit such relationships to exist provided disclosure was made.

The Ontario Association of Architects has provided guidelines on conflict of interest. The OAA takes the position that construction services should not be provided through a certificate of practice in Ontario. The OAA is also of the view that with the design-bid-build project delivery model, there is an inherent conflict of interest where the architect provides both architectural and construction services to the same project. Therefore, while the OAA does not discourage its members from pursuing other avenues of business such as construction services under separate entities, architects should avoid conflicts by not performing construction services on projects in which they are involved as design professionals.

Saplys v. Ontario Association of Architects – When is a design "intended to govern the construction of a building"?

Section 11 of the *Architects Act* prohibits the "practice of architecture" by any person who is not a licensee or a holder of a certificate of practice. The practice of architecture includes the provision of a "design" to govern the construction of a building. Design includes a "plan, sketch, drawing, graphic representation or specification intended to govern" the construction, of a building.

In this case, a service corporation which was neither a licensee nor the holder of a certificate of practice under the Act prepared drawings and plans for a hotel project. The architect stated that the drawings in question here were made for the purpose of obtaining branding approval from the hotel chain. That statement was apparently accepted by the Committee. Nevertheless, the Committee found that the drawings were intended to govern the construction of the hotel.

The appeal was from a finding of professional misconduct on the following count:

> During the years 2012 and 2013 you provided architectural services [all parties concede that this was meant to say 'engaged in the practice of architecture'] with respect to the construction of a hotel, Hampton Inn & Suites at 12700 Hwy 50, Bolton, Ontario, through "API International Marketing and Architecture & Planning Initiatives", which does not hold a certificate of practice, contrary to Subsection 1 of Section 42 of the Regulation and contrary to Section 11 of the Act.

The Committee decided that the appellant had caused his service corporation to engage in the practice of architecture, contrary to s. 11(1)(b) of the Act. The architect appealed from that finding.

The architect argued that a plan, sketch or drawing could only be said to be intended to govern construction if it was prepared with the intention that it be submitted for the issuance of a building permit. The Committee rejected the argument and held that this interpretation of the word "design" was too narrow. The Committee found that pre-building-permit drawings could also have a controlling influence on the construction of the building. The Committee held that "design" includes "everything in the process from initial concept to final construction documentation."

The Divisional Court first established the applicable standard of review based on the Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. Where the legislature has provided for an appeal from an administrative decision to a court, as it did here, the court hearing the appeal is to apply appellate standards of review to the decision. In considering questions of law including questions of statutory interpretation and those concerning the scope of a decision maker's authority, the Court must apply the standard of correctness. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding

error (as it is for questions of mixed fact and law where the legal principle is not readily extricable).

The Divisional Court found that whether the drawings referred to in Count 5 were intended to govern the construction of the hotel was a question of fact or mixed fact and law, with no extricable legal issue. Therefore, the finding of the Committee could only be set aside if the Committee made a palpable and overriding error. A palpable error is one that is readily or plainly seen. An overriding error is one that must have altered the result or may well have altered the result.

In reviewing the Committee's decision on that standard, the court held that the test was whether the drawings were intended to govern, i.e., to exert a controlling influence on, the construction of the hotel. The court rejected the architect's argument that that could only be the case if the drawings were entirely sufficient to construct the hotel. Nor did the court accept the argument that the drawings had to be prepared for the purpose of obtaining a building permit.

The Discipline Committee had held that the drawing in this case satisfied the test:

> In this case, each of the four sets of drawings at issue in Allegation 5 was prepared with the understanding of both the Architect and his client that the ultimate *intended product of the design* was the construction of a building. As described in more detail in our first Reasons for Decision in this matter, these four sets of drawings were prepared between April 2011 and January 2012 and followed in October 2012 and April 2013 with drawings issued for building permit and construction respectively. While the initial four sets of drawings were issued for brand approval rather than to obtain a building permit, the content of these drawings and circumstances surrounding their production *demonstrate to us that they were produced on the understanding that the ultimate intended product of those designs was the construction of a Hampton Inn & Suites in Bolton*. Our review of the content of the six drawings also shows that the *designs in the first four sets of drawings established the parameters for and had a controlling influence on the subsequent drawings*, as one would expect in the design process. As a result, in our view each of these four sets of drawings can be properly regarded as "designs" within the meaning of s. 1 of the Act.

The court agreed with the architect's argument that "design" could not possibly mean "everything in the process from initial concept to final construction documentation". However, the court also held that when reading the Committee's decision as a whole, especially the paragraph cited immediately above, it was clear that the Committee applied the correct test, i.e. it found that the drawings were intended to "govern" the construction.

The court held that it was open to the Committee to review the drawings and surrounding circumstances for itself and to make an assessment of whether these drawings were intended to exert a controlling influence on the construction of the hotel. The Committee was within its rights to reject the appellant's argument that only drawings in support of a building permit could ever be "intended to govern" construction. Nor was there anything wrong with the Committee's finding that because the drawings were initially used for branding approval by Hampton Hotels, the drawings could not also have been intended to govern construction. There was consequently no error of law or palpable and overriding error of fact committed by the Committee.

The Committee's finding of professional misconduct was therefore upheld.

The Divisional Court has helpfully clarified the test as to whether a design professional's work product constitutes "design" for the purposes of the *Architects Act*. Architects should be aware that not all drawings from the early stages of their engagement will be construed as "design", but those which are intended to govern or exert a controlling influence on the construction of the project will be captured by section 11(1)(b) of the Act.

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Releasing Modern *Sattva* on Antiquated *Blackmore*: The New Approach to Interpreting Release Clauses

Many everyday contracts contain a form of release, whether it is a gym membership where a person agrees not to file an action in the event they are injured or a multi-million-dollar settlement of a dispute – at its core, a release is an agreement between two parties in which the rights to potentially file a lawsuit are renounced by one or both of the parties.

When considering such clauses, Canadian courts have often referenced a 150-year-old interpretative principle called the Blackmore Rule,[1] which states that, "*general words in a release are limited always to that thing or those things which were specifically in the contemplation of the parties at the time the release was given*".

In the recent decision of *Corner Brook (City) v. Bailey*, 2021 SCC 29, the Supreme Court of Canada confirmed that no special rule of interpretation applies only to releases – a release is a contract, and therefore the general principles of contractual interpretation as laid down in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 should apply.

The approach embodied in *Sattva* provides that, "*contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.*"

Background

The dispute in *Corner Brook (City) v. Bailey* arose from a motor vehicle accident, where Mrs. Bailey struck an employee of the City (Mr. Temple) while he was busy conducting roadwork.

Mr. Temple filed an action against Mrs. Bailey, similarly, Mrs. Bailey (and her husband who owned the vehicle) commenced an action against the City for property damage to the vehicle and physical injury suffered by her.

Before proceeding to trial, Mrs. Bailey and the City managed to reach a settlement, which included Mrs. Bailey signing a broadly worded, full and final release, which stated:

> "... the [Baileys], on behalf of themselves and their heirs, dependents, executors, administrators, successors, assigns, and legal and personal representatives, hereby release and forever discharge the [City, its] servants, agents, officers, directors, managers, employees, their associated, affiliated and subsidiary legal entities and their legal successors and assigns, both jointly and severally, from all actions, suits, causes of action, debts, dues, accounts, benefits, bonds, covenants, contracts, costs, claims and demands whatsoever, including all claims for compensation, loss of use, loss of time, loss of wages, expenses, disability, past, present or future, and any aggravation, foreseen or unforeseen, as well as for injuries presently undisclosed and all demands and claims of any kind or nature whatsoever arising out of or relating to the accident which occurred on or about March 3, 2009, and without limiting the generality of the foregoing from all claims raised or which could have been raised in the [Bailey Action] .... [Emphasis added…]"

Years later, Mrs. Bailey brought a third-party claim against the City for contribution and indemnity in respect of the action brought against her by Mr. Temple. The City responded by bringing a summary trial application arguing that the release barred the third-party claim.

Mrs. Bailey's position was that because the third-party claim was not specifically contemplated by the City and the Baileys (as per the Blackmore Rule) when they signed the release, it was not excluded.

Blackmore Rule

Justice Rowe, writing for the Court, spent considerable time going through the evolution of contract interpretation, specifically as it applies to release clauses, going back as far as 1861, where English courts had the following to say:[2]

> "[i]t is a principle long sanctioned in Courts of equity, that a release cannot apply, or be intended to apply to circumstances of which a party had no knowledge at the time he executed it, and that if it is so general in its terms as to include matters never contemplated, the party will be entitled to relief".

Release clauses are often drafted so generally that a literal interpretation "*…could prevent the releasor from suing the releasee for any reason, forever.*" In Canadian jurisprudence, this has led to an increasingly narrow application of the Blackmore Rule to the point where is adds nothing "*… new to the regular repertoire of contractual interpretation principles in the wake of Sattva.*"

1. *London and South Western Railway v. Blackmore (1870)*, L.R. 4 H.L. 610.

2. *Lyall v. Edwards (1861)*, 6 H. & N. 337, 158 E.R. 139, at p. 143, per Pollock C.B; Para. 22

To understand why this has happened, one needs only look at the rationale for these interpretive maxims that developed under the common law, particularly in the Court of Equity. The determination of legal rights and obligations under a written contract was considered a question of law, the rationale being that in 18th and 19th century England, there was widespread illiteracy, which was of particular concern in civil jury trials. This necessitated the courts to develop rules to ensure that interpretive duty rested with the literate judge, who could be assured of being able to read the contract. As Justice Rowe summarized, "*The jurisprudential concerns that gave rise to the rule in Blackmore no longer exist. It is no longer needed. It has outlived its usefulness and should no longer be referred to.*"

The Blackmore Rule has been overtaken by *Sattva*

Sattva directs courts to "*…read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.*" The interpretation of contracts is accordingly a mixed question of fact and law.

While an investigation of the surrounding facts will be considered in interpreting the terms of a contract, Justice Rothstein provides some words of caution – the facts must never be allowed to overwhelm the words of that agreement. The purpose of an examination of the factual matrix, "*… is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract.*"

The specific text of the contract remains the basis when interpreting a provision, which must be read in light of the entire contract and the surrounding circumstances. The Court in *Sattva* goes on to clarify what is meant by surrounding circumstances: "*… consist only of objective evidence of the background facts at the time of the execution of the contract…, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting.*"

Surrounding evidence, as outlined in *Sattva*, would, on a plain reading, include party-to-party correspondence in relation to the settlement, which seems to contradict the longstanding, traditional rule that evidence of negotiations is inadmissible when interpreting a contract. Justice Rowe raised this observation, but ultimately left his own question unanswered, stating, "*I leave for another day the question of whether, and if so, in what circumstances, negotiations will be admissible in interpreting a contract. That issue needs to await a case where it has been fully argued and is necessary in order to decide the appeal.*"

The Court, when considering the factual matrix (including party correspondence), found that Mrs. Bailey was aware of the claim filed against her by Mr. Temple at the time she entered into the settlement with the City, and consequently it was within her contemplation at the time that she may need to include the City as a third-party to indemnify her.

The court ultimately agreed that the release covered the third-party claim against the City, as was held by the Application Judge.

Things to keep in mind when drafting a release clause

Lastly, what strategies can be used to draft a valid and enforceable release? This is the difficult part, as each release will be determined on the specific wording and the surrounding evidence to understand what exactly the parties had intended.

When preparing a release, parties should be as specific as possible by referencing identifiable events or circumstances and tying release conditions to those events. The broader the wording of the release, potentially the narrower the interpretation by the courts. This does not preclude a party from using terms such as "all claims" or "foreseen or unforeseen" in relation to a specific event, as it is impossible and unreasonable to expect a party to provide an exhaustive list of all the claims that could potentially arise.

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Can an Owner Sue a Subcontractor in Negligence? The Supreme Court Decision in *1688782 Ontario Inc v. Maple Leaf Foods Inc.* Suggests the Answer Will Usually be "No"

Where there is no privity of contract, an action in negligence is usually the avenue by which parties will advance claims. At times, these claims seek to recover pure economic losses. In *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35, the Supreme Court narrowed the scope of pure economic loss and provided further guidance as to when that loss may be recovered. In this 5-4 split decision, the Supreme Court found no duty of care was owed to the plaintiffs by Maple Leaf Foods as the relationship lacked the requisite proximity either within the existing categories or to establish a new category of duty of care. The Supreme Court also opined that where parties could have entered into a contract to allocate the risk between themselves, but elected not to, it would generally be unfair to permit them to circumvent this deliberate decision and recover in negligence.

What is the significance of this case to construction law? Consider a situation where there is no privity of contract between an owner and subcontractor. The subcontractor delays the project. Can the owner claim against the subcontractor in negligence for pure economic loss and recover damages for delay? The answer, following *Maple Leaf Foods*, is likely "no": on most projects, and for most owner-subcontractor relationships, there is unlikely to be the requisite proximity sufficient to establish a duty of care. Further, if the owner wanted to have an avenue to claim against the subcontractor, it could have entered into a direct agreement with it (effectively turning the subcontractor into a contractor).

1688782 Ontario Inc was a former franchisee of Mr. Sub and the class representative of 424 other Mr. Sub franchisees. Mr. Sub and Maple Leaf Foods had agreed to an exclusive supply agreement which made Maple Leaf the exclusive supplier of 14 core Mr. Sub menu items: ready-to-eat (RTE) meats served in all Mr. Sub restaurants.

The franchisees were bound to this exclusive supply agreement as part of their franchise agreements with Mr. Sub. However, there was no direct – and no contractual – relationship between the franchisees and Maple Leaf Foods. The franchisees placed an order with a distributor, which would in turn place an order with Maple Leaf Foods.

In 2008, Maple Leaf Foods learned that one of its products had been found to contain listeria. As a result, Maple Leaf Foods recalled several products, which included two of the RTE meat products used by the franchisees. Maple Leaf Foods also released Mr. Sub from the exclusive supply arrangement. By mid-September 2008, an alternate supplier had been selected.

In deciding to recall these products, Maple Leaf Foods interrupted an important source of supply to the franchisees and left them without those products for six to eight weeks. Consequently, the franchisees advanced a claim in tort law against Maple Leaf Foods, seeking compensation for lost past and future sales, past and future profits, capital value of the franchises and goodwill. The franchisees alleged that Maple Leaf, as a manufacturer, owed them a duty of care to supply a product fit for human consumption.

The franchisees argued that their claim fell within two categories of proximity that have been previously recognized when it comes to pure economic loss: negligent misrepresentation or performance of a service; and the negligent supply of shoddy goods or structures. The franchisees also advanced a claim for a novel duty of care in the alternative.

Maple Leaf Foods simply maintained that it owed no duty of care to the franchisees and therefore was not liable for the harms suffered. Maple Leaf Foods brought a motion for summary judgement to dismiss these claims.

The franchisees were initially successful. In the Ontario Superior Court, the motions judge held that Maple Leaf Foods owed a duty of care to the franchisees. The judge also found that the contaminated RTE meats posed a "real and substantial danger" as in *Winnipeg Condominium Corporation No. 36 v. Bird Construction*.

The Ontario Court of Appeal allowed the appeal and granted summary judgement in favor of Maple Leaf Foods. It found the cases relied upon by the motion judge to not be truly analogous to the franchisees' claims and held that the motion judge erred in finding that the facts in this case fell within a well-established category of duty to supply a product fit for human consumption. It was therefore necessary to review the motion judge's conclusion under the *Anns-Cooper* framework regarding a novel duty of care.

On the *Anns-Cooper* framework, the Court of Appeal found that the alleged damages were the result of the recall and the consequent bad publicity. Recognizing a duty here would have

been an unwarranted expansion of a duty owed to one class of plaintiffs, the customers, to the fundamentally different claim advanced by the franchisees. The court also found the motion judge erred in her conclusion regarding negligent misrepresentation by failing to consider the scope of the proximate relationship between the parties. The purpose of Maple Leaf Foods' undertaking was to ensure customers would not become ill or die from eating RTE meat, not protecting the business or reputational interest of the franchisees.

The franchisees appealed to the Supreme Court of Canada, but were unsuccessful. In the majority decision, the Supreme Court reiterated that while pure economic loss may be recoverable in certain circumstances, there is no general right, in tort, protecting against the negligent or intentional infliction of pure economic loss. There are three categories of pure economic loss incurred between private parties that have been recognized by the court:

1. Negligent misrepresentation or performance of a service;
2. Negligent supply of shoddy goods or structures; and
3. Relational economic loss.

These categories are analytical tools and by themselves do not replace the examination of the relationship between the parties. What matters is whether the requirements for imposing a duty of care are satisfied and, in particular, whether the parties were, at the time of the loss, in a sufficiently proximate relationship. The court analyzed the franchisees' claims to see whether they fell in a recognized category or whether a novel duty of care should be recognized. For both of those inquiries, the court looked to the proximity between the parties.

The Court confirmed that both foreseeability of harm and proximity are required for a prima facie duty of care to be established under the

Anns-Cooper framework. A party can find proximity based on a previously established or analogous category. But if none can be identified, there must be a full proximity analysis. The Court also confirmed that in cases of negligent misrepresentation or performance of a service, the proximate relationship is formed when the defendant undertakes responsibility which invites reasonable and detrimental reliance by the plaintiff upon the defendant for that purpose.

The Court found that the franchisees had failed to establish that they relied reasonably, or at all, on Maple Leaf Foods' undertaking that the RTE meats supplied were fit for human consumption. Reliance is manifested by the party changing its position and foregoing more beneficial courses of action. However, here there was no evidence of such a change and based on the exclusive supply agreement the franchisees could not have changed their position. They did not seek Mr. Sub's permission to find alternate suppliers. Given that there was no reasonable reliance, there was no proximity established under this category.

The franchisees also sought to rely on the principles established in *Winnipeg Condominium* and argue that a duty of care existed because Maple Leaf negligently supplied shoddy goods. The Court agreed with the franchisees that this principle is not limited to buildings and structures, as was the case in *Winnipeg Condominium*. However, in recognizing that, the Court also stated that the scope of the duty recognized here is narrow and exposes the defendant to liability for the cost of averting a real and substantial danger, and not of repairing a defect. For most goods, unlike buildings, averting danger can be done by simply discarding the goods.

In this case, firstly the Court found that any danger by the supply of the RTE meats could only be a danger to the ultimate consumer, not the franchisees. Even if there was a real and substantial danger, the most the franchisees could recover would be the cost to avert the danger. Secondly, any danger posed by the RTE meats evaporated when they were recalled.

The Court went on to conduct an analysis on whether the parties were in a relationship of proximity. The Court found that proximity could not be established by reference to a recognized category of proximate relationship and went on to conduct a full proximity analysis. The Court found no proximity: the franchisees had entered into the franchise agreement and obtained certain advantages and assumed certain risks. The fact that their franchise contract left them "vulnerable" was not a sufficient basis for a tort law duty. The Court went on to say:

> The appellant was not a consumer, but a commercial actor whose vulnerability was entirely the product of its choice to enter into that arrangement, and whose choice substantially informed the expectations of that relationship to which the proximity analysis must have regard. To allow the appellant to circumvent the strictures of that contractual relationship by alleging a duty of care in tort in a manner that undermines and even contradicts those strictures (in that the proposed duty would impose an

obligation to supply upon Maple Leaf Foods whereas its agreement with Mr. Sub imposed no such obligation) would not only undermine the stability of such arrangements, but also of the appellant's particular arrangement, which was predicated upon an exclusive source of supply.

Therefore, the Court found that the parties were not in a proximate relationship that would give rise to a duty of care, which also defeated a finding that there was a novel duty.

This case is significant to construction law as there is no contractual privity between many of the parties to a project. The Supreme Court's decision will limit the ability of these parties to recover pure economic losses, outside of any presently established categories. So far, the courts have not recognized the "owner-subcontractor" relationship as one of these categories. *Maple Leaf Foods* thus suggests that courts will be hesitant to allow a party who is not in a direct contractual relationship to bring negligence claims against another party in the contractual pyramid. To allow these types of claims would be akin to rewriting contractual distributions of risk and incorrectly imposing a duty of care in tort law, beyond the contract, which the parties almost certainly never contemplated.

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Limitation Periods and Construction Invoices: *1838120 Ontario Inc. v. Township of East Zorra-Tavistock*

Introduction

Anyone who has provided services or materials in the construction industry has likely run into the issue of non-payment of their invoices. Payees usually hope that a payment dispute can be resolved before a lawsuit is required to be commenced. But how do you determine when the limitation period begins to run for an unpaid invoice, and in turn, the deadline for when a lawsuit must be commenced? Does the 'clock' start when the work is performed, or the materials supplied? Does it start when an invoice is issued and provided to the payor? Does each invoice come with its own limitation period, such that multiple lawsuits may be required? The recent case of *1838120 Ontario Inc. v. Township of East Zorra-Tavistock*, 2021 ONSC 3341, is of assistance in answering these questions.

Overview of Facts and Dispute

The dispute in this case arose out of the reconstruction of certain roads, sewers and sidewalks in Tavistock, Ontario (the "Project"). The Township of East-Zorra Tavistock ("Tavistock") retained K. Smart Associates ("K. Smart") as its consulting engineer and 1838120 Ontario Inc. ("183") as its contractor on the Project.

The bulk of the work took place during the summer of 2015. There was some dispute as to when the Project was completed. 183 was able to point to an inspection record showing that some work was performed on September 28, 2015, but was unable to provide evidence that it performed any work beyond that date.

The contract provided for the issuance of Progress Payment Certificates on a monthly basis. K. Smart issued four Progress Payment Certificates:

- #1, for work done through July 31, 2015, recommended for payment on August 6, 2015;
- #2, for work done through August 31, 2015, recommended for payment on September 17, 2015;
- #3, for work done through September 30, 2015, recommended for payment on October 7, 2015; and
- #4, for work done through October 31, 2015, recommended for payment on November 15, 2015.

K. Smart issued a revised certificate #4, which was also for work completed through October 31, 2015, and which was recommended for payment on December 22, 2015. This was the last Progress Payment Certificate issued for 183's work on the Project.

On October 25, 2017, 183 commenced an action and claimed payment of $134,502.71 from Tavistock, as well as a declaration that the work performed was substantially complete. 183's claim related to 'extra' work it claimed was performed at the request of Tavistock, primarily relating to changes to the scope of work. The most substantial change was that the contract called for the use of native backfill. 183's statement of claim alleged that the native soil was of poor-quality clay and was not suitable for use as backfill, which required 183 to remove the native soil and supply granular backfill. The first time that 183 claimed for the extras was in a May 5, 2016 letter written by its counsel.

Tavistock brought a motion for summary judgment to dismiss 183's action on the basis that there was no genuine issue requiring a trial. It stated that 183's claims should be dismissed for the following reasons:

1. The monies allegedly owing were for "extras" that were never approved in writing by the defendant.
2. The plaintiff's claims should have been raised in an earlier action which was commenced by a sub-trade and it was an abuse of process to "relitigate" the issues in the later proceeding.
3. The plaintiff's claim was for work done and materials supplied in July and August of 2015. The statement of claim was not issued until October 25, 2017. As such, the claims were statute barred.
4. The plaintiff could not demand final payment on the contract because it failed to comply with the contractual terms regarding the issuance of a Certificate of Substantial Performance, particularly the requirement that it provide a statutory declaration that all sub-trades were paid.

The principal and sole director of 183, Mr. Vozza, filed an affidavit on the motion wherein he expanded on the particulars of the amounts he claimed were previously invoiced and claimed in 183's statement of claim. In his affidavit, he also included amounts which were not previously claimed, and which increased the amount claimed in the statement of claim by more than double. Some of the amounts were supported by invoices attached as exhibits to Mr. Vozza's affidavit.

Although the amounts being claimed were not at issue on the motion, Justice Heeney noted that the changes to the amounts claimed, "made long after the fact", left him "with the impression that Mr. Vozza is making these numbers up as he goes along" and led him to draw the "inescapable" inference that "these invoices have been manufactured years after the work was done and have been backdated". In addition, Justice Heeney found that, "The fact that nine of these invoices are dated October 26, 2015, suspiciously amounting to two years less one day prior to the date the statement of claim was issued, supports the same inference".

Issue #1: The monies allegedly owing are for "extras" that were never approved in writing by Tavistock

For its authority to remove the native soil and replace it with granular backfill and then bill Tavistock for the extra costs, 183 relied on a job site inspection report of K. Smart's inspector. However, the report only stated that the existing material's moisture content was not optimal, not that it was required to be replaced. The report provided two options: one to replace the soil, the other to wait for the soil to dry out. Tavistock' s position was that it did not approve the removal or replacement of the native soil.

Justice Heeney noted that 183 should have sought Tavistock's input and agreement on which of the two options to choose. In addition, he noted that the extra costs claimed for this item were significant, that previous changes to the contract had been made in writing and that, although counsel did not direct him to any provision in the contract that required it, "it is entirely reasonable to expect the parties to agree on both scope and cost of any proposed extras in advance and in writing…" He determined that resolution of this issue would require a trial, subject to his rulings on the other issues.

Issue #2: The action constitutes an abuse of process

Tavistock argued that the action should be dismissed because 183 had an opportunity to advance these issues in a previous action against one of 183's subtrades but did not do so. As such, Tavistock argued it would be an abuse of process to "re-litigate the issues that were decided as between the parties" in the earlier action.

On this issue, Justice Heeney determined that, while it can constitute an abuse of process to attempt to relitigate issues that have already been decided, the issues were different between this case and the previous subtrade action, and 183's claims should not be dismissed on this ground.

Issue #3: The plaintiff's claims are statute-barred

The most noteworthy section of the decision is with respect to the issue of when 183's limitation period began to run, which is the date the claim is "discovered", as defined in s. 5(1) of the *Limitations Act, 2002* (the "Act").

Justice Heeney begins his analysis of this issue by outlining the approach to be taken in determining when the limitation period begins to run in relation to a claim for services performed, as set out in *G.J. White Construction Ltd. v.*

Palermo ("G.J. White").[1] In that case, Justice Nordheimer stated that the time the limitation period begins to run "is neither the time that the work was done nor is it the time when the invoice was delivered". He examined the practice of the parties with respect to payments on the project to determine a reasonable period for delivery of an invoice and payment of the invoice to help determine when the limitation period began to run.[2]

Does this mean a payee can wait to issue an invoice and prevent the limitation period from running indefinitely? No, payees cannot 'toll' the limitation period by delaying the issuance of an invoice and must issue invoices within a reasonable period of time.[3] Generally, in a construction case, "the contractor knows, at the moment the work is done, that he has a claim against the customer because he is not doing the work for free. However, he could not reasonably expect to be paid for that work until he renders a proper invoice. Once he does so, if the invoice is not paid within a reasonable time, the customer is in default, and from that point forward it would be [legally] appropriate for the contractor to commence a proceeding if it remains unpaid".[4]

Justice Heeney declined to follow *Newman Bros. Ltd. v. Universal Resource Recovery Inc.*,[5] which 183 relied on to argue that the court should not look at individual invoices and determine a separate limitation period for each, based on when that invoice should reasonably have been issued and when it should reasonably have been paid, because to do so would be unduly onerous on the parties. He disagreed that a ruling that separate limitation periods apply to each invoice would require separate actions to be commenced at different times, resulting in a potential waste of judicial resources. Rather, in his view, "having multiple limitation periods merely puts the onus on the contractor to keep track of when his invoices have been issued (assuming that they were issued within a reasonable time), so that he can ensure that an action is commenced within two years after the date that the earliest one should reasonably have been paid". Further, "giving consideration to things such [as] promises of payment followed by partial payments injects precisely the unacceptable element of uncertainty into the law of limitation of actions that Sharpe J.A. cautioned against" in *Federation Insurance Co. of Canada v. Markel Insurance Co. of Canada*.[6]

What if the parties are engaged in discussions regarding payment of the invoice or are considering a compromise on the invoiced amounts or the terms of payment? None of these steps would delay the commencement of the limitation period.[7] The court has held that the payee must commence a lawsuit within two years from the date the reasonably delivered invoice goes into default on the reasonable due date, in other words once "discovery" has occurred.[8] In sum, while recognizing that it was decided under the pre-2002 Limitations Act, Justice Heeney determined that G.J. White provides a framework for addressing the issue of discoverability in cases such as the case at bar as follows:

> The limitation period on an invoice, issued for having supplied goods and services in accordance with a contract, does not commence at the time the goods and services are supplied or at the time the invoice was issued and submitted to the payors. Instead, it commences after a "reasonable" period of time has passed for the invoice to be issued and a "reasonable" period of time has passed for the invoice to be paid. What is "reasonable" is context- and circumstance-dependent and follows the parties' contract and the parties' past practices with respect to when invoices were issued and submitted and when payments were made.[9]

Applying the framework set out in *G.J. White* to the case before him, Justice Heeney determined that, "since each Progress Payment Certificate was supposed to pay 183 for work done up to the end of that particular month, it follows that 183's invoices for work done up to the end of that particular month should have been submitted prior to the end of the month so that they could be included. This represents the 'reasonable' period for the submission of invoices. The Progress Payment Certificates also prescribe a specific date for payment within each certificate, which represents that 'reasonable' date for payment".

The evidence was that Tavistock paid the certified amounts within days of the date recommended for payment. As such, the limitation period commenced the day after the date recommended for payment with respect

1. (1999), 2 CPC (5th) 110 (Ont. SCJ).

2. Note that this case was decided on the *Limitations Act* as it was prior to the extensive amendments made in 2002 and, in particular, the statutory codification of the discoverability principle.

3. *G.J. White Construction Ltd. v. Palermo*, (1999), 2 CPC (5th) 110 (Ont. SCJ), at paras. 20-22. See also *Delmar Construction Inc. v. Toronto (City)*, 2008 CanLII 19223 (Ont. SC) at para. 12, *Bougadis Chang LLP v. 1231238 Triluc Enterprises Ltd.*, 2014 ONSC 7470 (Div. Ct.) at para. 27 and *1238235 Ontario Limited (Distinct Management Group) v. Toronto Common Element Condominium Corp. No. 1702*, 2017 CanLII 51564 (Ont. SC) at para. 24.

4. *Ibid*, at paras. 52-53.

5. 2018 ONSC 4019.

6. *Ibid*, para. 63; 2012 ONCA 218.

7. *1838120 Ontario Inc. v. Township of East Zorra-Tavistock*, 2021 ONSC 3341, at para. 53.

8. *Ibid.*

9. *Ibid* at para 54..

to each certificate. Most of the extras being claimed by 183 related to work performed in July 2015. As such, 183 was reasonably expected to invoice for that work by the end of July 2015 and would reasonably have expected to be paid for the work on August 6, 2015. The limitation period therefore commenced on August 7, 2015. The same analysis applied to extras allegedly performed in the other months. As there was no evidence of work performed after September 28, 2015, the limitation period for 183 to claim for any outstanding amounts for work performed in September 2015 commenced on October 8, 2015. The statement of claim was issued on October 25, 2017, more than two years after 183's claim was "discovered", and the limitation period began to run. Therefore, Justice Heeney concluded that there was no genuine issue requiring a trial on the limitations issue as 183's claims were barred by s. 4 of the Act.

Issue #4: Failure to provide the necessary statutory declaration

183 was required to provide a statutory declaration pursuant to the contract. It failed to do so, and no Certificate of Substantial Performance was issued. Pursuant to the contract, Tavistock was only obligated to pay, and 183 was only entitled to receive, the final payment on the contract once 45 days had expired from the date certified to be the date of substantial performance.

Justice Heeney noted that "the requirement for a statutory declaration that all subtrades have been paid is not a mere formality". Rather, it is required by owners in order to ensure that the monies the contractor is demanding are not subject to a trust in favour of an unpaid subtrade pursuant to the *Construction (Lien) Act*. Accordingly, he determined that 183 had no contractual right to demand payment and its claims had to be dismissed.

Conclusion

Justice Heeney granted Tavistock's motion for summary judgment and dismissed 183's action based upon his rulings with respect to issues #3 and #4.

This decision highlights several important considerations for parties to construction contracts. First, it underscores the importance of invoicing properly, within a reasonable period of time and in accordance with the contract. Proper invoices, among other things, include all amounts owing for work performed during the payment period of the invoice, including extras. Payees should ensure that extras are approved in writing prior to being performed. It is also prudent to include a deadline for payment on the face of the invoice.

The decision is a reminder to be mindful of invoicing practices, particularly allowing invoices to be negotiated or paid late, as a court may later take these practices into account when determining when the relevant limitation period commenced. It is also important to remember that such negotiations do not toll the running of the limitation period, and lawsuits must be commenced within two years of discovery having occurred.

AUTHOR:

A Home Under Renovation is Not Necessarily "Under Construction": Ontario Court of Appeal

A home that is being renovated is not necessarily "under construction". That was the ruling handed down by Ontario Court of Appeal in *Tataryn v. Axa Insurance Canada*, 2021 ONCA 413, which upheld a motion judge's fact-based interpretation of a home insurance policy that purported to exclude loss or damage occurring while a building is under construction, vacant or unoccupied. Homeowners and insurers alike are reminded that exclusion clauses in insurance policies are to be construed narrowly and the insurer bears the burden of proving the exclusion clause applies to limit coverage. In this case, the insurer failed to do so.

Background

The property in question, located in Ottawa, served as the home and place of business for the plaintiff/respondent, Susan Tataryn. It was insured under a homeowner's comprehensive policy as well as a business interruption endorsement. The defendant/appellant, Axa (now Intact), provided the homeowner policy of insurance.

Ms. Tataryn commenced renovations to the second and third floor of her property while she lived on the first floor. Following the commencement of these renovations, two incidents of water damage occurred for which Ms. Tataryn sought coverage under her home insurance policy.

While Axa made some payments for the first loss, it denied coverage for the loss arising out of the second incident of water damage relying of the following exclusion clause in the home insurance policy:

> We do not insure loss or damages… caused by water unless loss or damage resulted from… the sudden and accidental escape of water or steam from within a plumbing, heating, sprinkler or air conditioning system or domestic water container, which is located inside your dwelling … but we do not insure loss or damage occurring while the building is under construction, vacant, or unoccupied, even if we have given permission. [Emphasis added.]

Ms. Tataryn commenced an action against Axa, her broker and the adjuster for damages arising out of the two occurrences of water damage. Mr. Tataryn and her broker both brought motions for a declaration that the "under construction" exclusion clause did not apply in these circumstances.

Decision of the Motion Judge

Roger J. of the Ontario Superior Court of Justice found that the home was not "under construction" and that the exclusion clause relied upon by Axa was not applicable. In doing so, he reaffirmed several important points of law as follows:

1. The onus is on the insurer to prove the application of any exclusion clause.
2. Coverage provisions are to be interpreted broadly, whereas exclusion clauses are to be interpreted narrowly.
3. Courts should give effect to the clear language of the policy, reading it as a whole.
4. If the policy is ambiguous, courts should rely on general rules of contract construction, including that it should prefer interpretations that are consistent with the reasonable expectations of the parties.

Pointing to a decision of the British Columbia Court of Appeal, Roger J. found that the exclusion clause that Axa relied upon was unambiguous:

> The exclusion clause that AXA relies upon is unambiguous:
>
> "we do not insure loss or damage: … occurring while the building is under construction, … even if we have given permission". The policy does not provide a definition of "construction". However, the term "construction" is defined in Black's Law Dictionary as the creation of something new, as opposed to the repair or improvement of something already existing (see *Wilson v. INA Insurance Co. of Canada (1993)*, 1993 CanLII 1187 (BC CA), 80 B.C.L.R. (2d) 361 (C.A.), at paras. 10 – 17).

He also opined that the interpretation argued by Axa ran contrary to the reasonable expectations of the parties and that the facts of this case did not support the conclusion that the house was "under construction". Consequently, the exclusion clause in question was found to not apply in such circumstances and therefore was not available as a defence by Axa.

Ontario Court of Appeal's Decision

Axa appealed to the Ontario Court of Appeal. It argued that Roger J. erred in his interpretation of the policy's terms because he failed to construe them in the entire context of the policy and the limited risk covered under a homeowner's policy of insurance as opposed to the risks covered in a builders' risk or other construction-oriented insurance policy. Axa also urged the Court to provide guidance on the meaning of "under construction".

The appeal was dismissed.

The Court found that Roger J. properly instructed himself on the applicable rules of contractual interpretation and correctly concluded that the finding as to whether a property is "under construction" is a question of fact and that in this case, "the extent of the renovations [is] not sufficient to support a finding that the house was 'under construction'".

The Court declined Axa's invitation to furnish a definition of "under construction" that Axa could have included in its standard form contract. It said it was not possible nor desirable for it to give a definition that would apply to all cases: "It is not this court's function to rewrite the parties' agreement, especially those terms that the motion judge found, and the parties agree, are unambiguous."

Key Takeaways

This case reaffirms that exclusion clauses in insurance policies are to be construed narrowly and the insurer bears the burden of proving the exclusion clause applies to limit coverage. However, it is important to note that in this case the policy in question did not provide a definition of what was meant by a building "under construction". Had that phrase been defined in the policy, the analysis and outcome of the case might have been much different.

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Notable Case Law

***Great Northern Insulation Services Ltd. v. King Road Paving and Landscaping Inc.*, 2021 ONCA 367**

The Ontario Court of Appeal confirmed that while interest is not part of a lien claim, it is part of the trust fund created by s. 8(1) and falls directly within the restrictions on the permissible use of those trust funds stipulated by s. 8(2).

***Feltz Design Build Ltd. v. Larson et al.*, 2021 ONSC 2469**

The trusts established by ss. 7(2) extend to all amounts received by the owner after the stipulated event has occurred, even if from sources entirely unrelated to the property that has been improved. In this case, even based on a limited evidentiary record, it was clear that the owner had received amounts in excess of the balance owed to the contractor and failed to use any part of them for the required purpose. The owners ignored the shifting onus in breach of trust actions (*St. Mary's Cement Corp. v. Construc Ltd.*, 1997 CarswellOnt 939 (Gen. Div.)) and declined the opportunity to provide an explanation on how the funds were treated. The owner was therefore liable for breach of trust to the full extent of the outstanding indebtedness.

***Matthews Equipment Limited v. YALDA CONTRACTING INC.*, 2021 ONSC 1823**

Section 178(1)(d) of the *Bankruptcy and Insolvency Act* provides that an order discharging a bankruptcy does not release the bankrupt from any debt arising out of fraud or misappropriation while acting in a fiduciary capacity. A finding of liability for breach of trust under the *Construction Act* can fit within s. 178(1)(d) of the BIA, but only if the breach of trust was not the result of "simple inadvertence, negligence or incompetence".

***Pomerleau v. New Brunswick*, 2021 NBQB 56**

Instructions to bidders required an accompanying insurance letter "from a New Brunswick resident agent of an insurance company", as required by the General Regulation under the *Crown Construction Contracts Act*. Pomerleau submitted a letter from AON Reed Stenhouse with a Halifax, Nova Scotia address at the bottom.

New Brunswick decided that AON Reed Stenhouse did not operate an insurance office in New Brunswick and therefore was not a New Brunswick resident agent. Pomerleau's submission was held to be non-compliant. In effect, New Brunswick used the term "office" in the sense of a physical space staffed with its own employees.

The court held that AON was a registered extra-provincial corporation and had an agent for service in New Brunswick and therefore carried on business and acted as a resident agent in New Brunswick. That AON did not have a physical office in New Brunswick staffed with its own employees did not affect its legal residence in New Brunswick for the purposes of legal liability in relation to that letter.

Applying the test for judicial review set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the court held that New Brunswick's decision was not only incorrect but also unreasonable. Accordingly, AON was a "New Brunswick resident agent," its letter was valid and the Pomerleau bid was compliant. New Brunswick's decision was quashed.

***Atlantic Construction Group Inc. v. 2567616 Ontario Inc.*, 2021 ONSC 2658 (Master)**

On a motion to extend the 90-day period for service of a statement of claim in a lien action, a contextual approach is required that considers the facts of a particular case, although tolerance for delay and assessment of prejudice in a lien action are viewed through a different lens than in a non-lien action. Although not an exhaustive list, factors to be considered include (a) the length of delay and whether the limitation period has expired, (b) the explanation for the delay both in serving the statement of claim and bringing the motion, and (c) prejudice to the defendant by the delay.

The insufficiency of any explanation for delay was a significant factor in assessing these motions. However, since the approach is contextual, it could not be viewed in isolation from the other factors discussed above, and was not itself dispositive of the motions. Therefore, even in the absence of any explanation, the motions were dismissed absent evidence of prejudice.

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Notable Case Law

***Kumar v. Singh*, 2021 ONSC 2959**

On a summary judgment motion to discharge a lien, the court applied the following test based on *Hryniak v. Mauldin*, 2014 SCC 7:

> First, it is the principle of proportionality that ought to drive the Court's decision on a request for summary judgment. There will be no genuine issue requiring a trial when the judge hearing the Motion is able to reach a fair and just determination on the merits.
>
> Second, what does that mean — a fair and just determination on the merits? It means (i) that the judge hearing the Motion is able to make the necessary findings of fact, (ii) is able to apply the law to the facts, and (iii) the process employed to do those things is a proportionate, more expeditious and less expensive means to achieve a just result (as compared to a trial). The judge must be able to have confidence in the conclusions reached on the Motion, otherwise, the case ought to proceed to trial.
>
> Third, the judge hearing the Motion should follow a two-stage procedure. Initially, consider only the evidence filed without regard to the expanded powers. Then, afterwards, if there appears to be a genuine issue requiring a trial, the judge may (but does not have to) weigh the evidence, evaluate credibility and draw reasonable inferences.

In this case, the lien was clearly perfected too late. As the court held: "The lien not having been perfected on time, it expired. It cannot stand and must, therefore, be ordered discharged. This Court has no discretion to do otherwise. It is that simple."

Emailing the claims in this case did not constitute effective or valid service. Service of an originating process on a lawyer is only effective if the lawyer endorses her/his acceptance of service and the date of acceptance on either the document or a copy of it. A signed endorsement of acceptance is expressly required, and service on a lawyer cannot be said to have been served in a manner authorized by the Rules without it. Accordingly, emailing the statements of claim to the lawyer in this case, even with his confirmation that he had instructions to accept service, did not satisfy the requirements of Rule 16.03(2).

***New Generation Woodworking Corp. v. Arviv*, 2021 ONSC 2184**

Following judgment granting the plaintiff the full amount of its lien and breach of contract damage claim, $73,767.26, the Master awarded costs in the amount of $135,000 based on the defendant's unreasonable conduct which unnecessarily lengthened the proceedings.

***1475182 Ontario Inc. o/a Edges Contracting v. Ghotbi*, 2021 ONSC 3477 (Div. Ct.)**

An owner's email to a contractor stating that "The balance will be paid once everything is completed as per your agreement. No payment will be made until everything is clear. I'm going to hire a third-party inspector and their fees will be deducted from your payments too." was held to constitute an acknowledgement of indebtedness for the purposes of s. 13 of the *Limitations Act, 2002*.

***Golfside Ventures Ltd. (Re)*, 2021 ABQB 427**

Nothing in the *Builders' Lien Act* requires that an amount be "immediately" or "presently" due to support a claim for lien.

***2259964 Ontario Inc. v. Wilkinson*, 2021 ONSC 4006 (Master)**

While 9 years delay may not be an inordinate period of time in a regular civil action, it amounts to inordinate delay in a lien action. The master noted that that the lien in question was modest in size and the proceeding was not complicated. The case should have moved forward crisply. It did not. The action was dismissed for delay and the claim for lien and certificate of action were discharged.

***Hans Demolition & Excavating Ltd. v. Green Oak Development (West 7th) Corp.*, 2021 BCSC 1472 (S.C.)**

While unjust enrichment claims by a subcontractor against an owner are generally precluded because the common contractual framework in the construction industry usually constitutes a juristic reason for denying recovery, such claims may still succeed in circumstances where an owner makes representations to the subcontractor on which the latter relies.

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