Publisher's Note

An Update has Arrived in Your Library for:

Please circulate this notice to anyone in your office who may be interested in this publication. *Distribution List*
☐
☐
☐
☐

MANUAL OF CONSTRUCTION LAW

Howard M. Wise

Release No. 4, April 2024

This publication provides a practical step-by-step explanatory approach through every phase of a construction project, from the preparation stages to the completion of the project. A complete set of forms and precedents for use in construction projects is also included.

Highlights

Release 2024 - 4 keeps you current with the addition of new case digests and adds valuable case law and commentary to Chapter 1 (The Construction Team), Chapter 2 (The Tendering Process), Chapter 3 (Contracts), Chapter 4 (Dispute Resolution), and Chapter 5 (Construction Liens).

Case Law Highlights:

Contracts – Creation of Contract – Certainty of Price – Fixed Price Contract vs. Cost-Plus Contract – No Meeting of Minds – No Clear Evidence of Contract – Contractor to be Paid Final Invoice Based on Proven Labour Value - For an enforceable building contract to exist, there must be certainty about the scope of the work to be done, the timeline for completion. There was no contract where there was no clear evidence to support where the contract was for a fixed price or on a cost-plus basis, and the facts could be construed to support either position. In this case,

THOMSON REUTERS®

Customer Support
1-416-609-3800 (Toronto & International)
1-800-387-5164 (Toll Free Canada & U.S.)
E-mail CustomerSupport.LegalTaxCanada@TR.com

the owner inherited an old house on a desirable lot. He and his wife eventually decided to retire to this premises. Prior to his retirement, the owner worked as a project manager for refinery design, construction, and repair. As a result, he was familiar with construction issues. The owner decided to rebuild the premises and arranged for its demolition and reconstruction on the existing foundation. The owner hired the contractor, who was a licensed carpenter, to build the house. The contractor proposed to build the house on a cost-plus basis, and the owner would be responsible for the cost of materials, subcontractors, and his labour costs plus a 15 per cent markup plus HST. The contractor further submitted the agreement to that effect was reached on a handshake basis in May 2017. The owner alleged there was a fixed price contract based on the contractor's written estimate of $414,000, which included the contractor's labour rates. A demolition permit and a septic permit was issued in 2017. A disagreement between the parties began when the contractor rendered invoices to the owner. However, full payment was made for each invoice by the owner. The owner paid around $538,900 for all the invoices. The final invoice of $125,862 was unpaid. The plaintiff sought a judgment for $125,647 pursuant to the construction contract plus interest. The owner submitted that he had overpaid the contractor in the sum of $128,326. The contractor's claim was allowed; the owner's counterclaim was dismissed.

There was no written between the parties. In the absence of a written contract or an acknowledgement of the oral agreement, the court must look to the conduct of the parties to determine objectively whether a binding agreement was made. The court was satisfied that the scope of the work to be performed was established early in the relationship between the parties. There were initial architectural drawings with some subsequent changes that were not substantial. None of the alterations such as a change in the location of the septic tank system represented a change in the scope of work. Based on the evidence at trial, there was a meeting of the minds on the contractual terms for an approximate timeline for completion of the project being May 2018. However, there was an absence of certainty about the price. The contractor maintained that his estimate of $414,000 was an "educated guess", and the authorized expenses were greater than originally estimated due to the increase of price of lumber, and the change in location of the septic tank system. On the other hand, the owner sought to control the cost of construction on a cost-plus basis, and at the same time, wanted the premises to be built to his and his wife's specifications.

Contract – Breach of Contract – Roofing Contractor – Faulty Roof installed – Immediate Hazard – Partially Collapsing - Contractor Liable for Diminution in Value of Building - Where the roofing contractor installed a faulty roof that posed an immediate hazard, and partially collapsed, the contractor was liable for breach of contract and negligence that resulted in a $200,000 reduction in the sale price of the building. In this case, in 2014, the owner of an apartment building contracted with the roofing contractor concerning a leaking roof on its building. The owner entered a contract with the contractor to have a new roof installed for the price of $100,000 plus HST. The contractor performed the work on the roof, but within months, the roof was leaking and failing to adequately channel rainfall. Eventually a portion of the roof collapsed and several apartments sustained water damage. The owner retained an engineer to inspect the roof and provide a report. The engineer concluded that the roof was defective in both design and installation. In addition to the problem of inadequately discharging rainwater to the ground, the engineer concluded that the roof was not properly attached and was at risk of blowing off from the top of the building. He concluded that the roof posed an immediate risk to the

safety of the building occupants and the public and should be immediately replaced. The owner had some repair work done. According to the owner, because the roof was installed so poorly, when it sold the building in 2021 to a third party, there was a reduction of $200,000 to its sale price. The owner claimed that its damages resulting from the contractor's breach of contract and negligent work were $200,000 plus the costs of repairs amounting to $3,330. The contractor argued that its damages should be limited to the costs of the repairs done before the building was sold, or, in the further alternative, that damages should be limited to the $100,000 plus HST. The owner was awarded damages of $203,330, and whether damages were assessed as breach of contract for negligence, they were the same.

The evidence led to the conclusion that the contractor's work was not competent. The roof did not drain properly because appropriate steps were not taken by the contractor to promote drainage. The failure to design the roof to prevent the ponding of water and to encourage drainage was an important failure on the contractor's part. The court accepted the expert's evidence that the roof represented a public safety hazard. The evidence indicated that what remained of the old roof was wet, that it was a risk to the structural integrity of the building, and that it should be removed down to the deck and replaced. The repairs and reduction of sale price was solely attributable to the poor state of the roof. If the contractor's work was executed properly, there would be no need for the replacement. If the contract had been properly performed, the owner would not have incurred the costs associated with paying another roofer for its repair work and would not have had to agree to a $200,000 reduction of the sale price of the building. The latter compensatory damages represented the diminution in value of the building. The contractor appealed, and its appeal was dismissed.

The contractor appealed on the basis that the trial judge erred in finding that the roof posed immediate danger to anyone. The roof had not leaked since some comparatively inexpensive remedial measures had been put in place, and neither had it blown off. The contractor further argued that the trial judge ought not to have put any weight on the engineer's opinion, because the opinion contained in his final expert report was contradicted by the first draft of his report. In the draft, the engineer stated that the roof presented an immediate danger to the public, and that it was his professional duty as an engineer to report the problem to the municipality. The final version of the report was identical to the draft, with the exception that it did not contain the statement that the engineer had a professional duty to report the problem to the municipality. The contractor argued that the deliberate omission of this statement, coupled with the fact that the roof had not failed in the years since the draft was written, meant the engineer had exaggerated the problems with the roof and that his evidence should not have been relied on.

The trial judge made no error in not finding a contradiction between the two drafts. There was ample evidence to support the trial judge's conclusion that the roof was not properly installed and posed an immediate hazard. The engineer explained in his testimony at trial that his reason for omitting the statement about his obligation to report was that he did not believe that the scope of his professional reporting obligations were of interest to the court; statements about his professional duties would not help the court come to a conclusion about the condition of the roof. He specifically maintained his opinion that the roof was at risk of blowing off in a severe storm and required immediate correction. The trial judge made no error in accepting this evidence and reaching the conclusions he did. There was no basis for the appellate court to interfere. Although the contractor also appealed the trial judge's assessment of

damages, this ground of appeal was not pursued. In any event, the Court of Appeal saw no basis to interfere with the trial judge's determination: *Vangar Properties Inc. v. Belmar Roofing Inc.* 2022 CarswellOnt 10506, 2022 ONSC 4258, 31 C.L.R. (5th) 279, [2022] O.J. No. 3360 (Ont. S.C.J.), affirmed 2023 CarswellOnt 11082, 2023 ONCA 506 (Ont. C.A.).

Dispute Resolution – Arbitration - Appeal of Arbitration Award – Leave to Appeal — Public Tender For Road Building Project – Successful Bidder Alleging Differences in Character of Work - Arbitrator Dismissing Bidder's Compensation Claim – Procedural Unfairness Alleged – Leave to Appeal Denied – Arguable Questions of Law Not Raised - Where the road construction contractor, on a public tender, was awarded the contract for a road building project, and the contractor claimed there were differences in the character of the work from what it reasonably anticipated based on the tender documents, but the contractor's claims for additional compensation was dismissed by the arbitrator, leave to appeal was dismissed as no arguable questions of law were raised. In this case, the Ministry of Transportation and Infrastructure issued a public tender for a road building project, involving widening and regarding of three roads. The tender document package included project drawings, geotechnical reports, environmental investigations, and a traffic study. The geotechnical reports contained a range of information, including information regarding the soils at a number of auger holes. They also indicated that variations in subsurface conditions should be expected between augur holes, that unsuitable materials for road-building might be encountered, and that embankment materials should be sealed and well-drained to prevent saturation. The reports did not specify the expected volume or location of unsuitable materials. Nor did they specify the extent of sub-excavations that would likely be required. The contract was awarded to the applicant, a road construction contractor. The applicant's project manager assumed that an expected deficit of Type D material suitable for use in constructing two of the roads could be made up from surplus excavation materials from the excavation for the third road. This was an error because the tender documents stated that the two roads were to be constructed in 2015, while the third work was not to start until 2016. Consequently, a "borrow source" for Type D materials had to be located and utilized. Furthermore, the manager erroneously assumed that because the tender did not specify a separate price for sub-excavation of unsuitable materials there would be an insignificant number of sub-excavations. However, it turned out that the project involved numerous sub-excavations and off-site removals of unsuitable Type D materials.

A dispute arose regarding the alleged differences in the character of work from what the applicant reasonably anticipated based on the tender documents. When the work concluded, the applicant brought claims against the Ministry under the contract dispute provisions. The arbitrator dismissed the applicant's claims for approximately $3.9 million in additional compensation and an extension of time, awarded the Ministry $67,500 in liquidated damages for delays and awarded the applicant $9,914 for extra work. The applicant sought leave to appeal the arbitral award under s. 59 of the Arbitration Act, S.B.C. 2020, c. 2 alleging arguable errors with respect to 13 questions of law. The applicant alleged the arbitrator applied incorrect legal principles or failed to give effect to relevant legal principles. For example, the arbitrator allegedly failed to adopt an appropriate cautious approach in assessing the Ministry's expert witness. In addition, the applicant submitted that the arbitrator failed to admit the applicant's project record documents as proof of their contents. The application for leave was dismissed. None of the applicant's proposed grounds of appeal raised an arguable question of law. Pursuant to s. 28 of the Act, the arbitrator was not

required to apply the law of evidence, other than the law of privilege. Where the complaints concerned procedural unfairness, not an alleged legal error, the applicant must apply to the B.C. Supreme Court to set aside the arbitral award under s. 58(1)(h) of the Act: *A.L. Sims and Son Ltd. v. British Columbia (Transportation and Infrastructure)* 2022 CarswellBC 3609, 2022 BCCA 440, 32 C.L.R. (5th) 6 (B.C. C.A.).

Construction Liens – Interlocutory Motions – Security for Costs – "Even the Playing Field" – Corporate Subcontractor Having Insufficient Assets in Ontario – Subcontractor Not Seeking Litigation Funding From Directors and Shareholders – Contractor Satisfying Onus For Security for Costs - The purpose of security for costs was to "even the playing field" by ensuring an insolvent plaintiff was not given risk-free opportunities to pursue litigation, and the defendant was only required to show "good reason to believe" that the plaintiff had insufficient assets in Ontario. In this case, the contractor sought to have the subcontractor post global security for costs for the subcontractor's three proceedings in the amount of $500,000 to the end of trial. The three actions concerned the contractor's subcontract work on various transit stations in the Crosstown LRT project. The subcontractor was subcontracted to perform formwork and concrete placement work at Station A and Station L, and was separately subcontracted to perform masonry work at Station A and Station C. The subcontractor alleged a further subcontract for masonry work at Station MP, but contractor denied that discussions for that work progressed beyond the negotiation stage. The contractor ultimately terminated the subcontractor's subcontracts, following which the subcontractor preserved its liens, and commenced lien and non-lien actions. The contractor submitted that the court might make such order for security for costs as was just where it appeared that the subcontractor was a corporation or a nominal plaintiff, and there was good reason to believe that the subcontractor had insufficient assets in Ontario to pay the costs of the contractor. The subcontractor argued that the court should take into account its significant claim against the contractor, and its earned and unpaid holdback amounts. The contractor's motion seeking security for costs against the sub contractor in each of the three lien actions was granted.

It was common in lien actions for a defendant to allege that a plaintiff was not owed the amounts claimed because its work was incomplete and deficient. The contractor pleaded set-off defences and counterclaims that were co-extensive. It could not be stated that a security for costs award would effectively end the litigation. The subcontractor had not made sufficient financial disclosure of its ability to secure funds from its directors, officers, shareholders, and affiliates for the court to accept that a security for costs order would prevent it from pursuing the litigation to trial. There was similarly no evidence of any efforts to obtain third party litigation financing, whether from lenders or the subcontractor's own subcontractors having a direct interest in the success of the subcontractor's claim.

There was no injustice in requiring security for costs in the circumstances of this case. The subcontractor ceased operations, appeared to have significant unpaid debts, did not own any real property in the area, failed to make corporate filings, admitted to being without resources, and that the only assets were its claim for accounts receivable. There was good reason to believe the subcontractor lacked sufficient assets in Ontario to satisfy the contractor's costs. Moreover, the subcontractor had not made substantive efforts to seek litigation funding from its shareholders It had opted not to tender robust particulars of its financial situation, including the alleged inability to secure funds to post security. It had failed to establish impecuniosity or that the contractor was the

cause of its insolvency. The subcontractor was seeking to advance contingent claims, for which the lien aspect was fully secured, with no corresponding prospect of costs recovery for the contractor if it was successful in its defences. The three actions were sufficiently interrelated and, as the parties had indicated, would be prosecuted together through until at least the end of discoveries. A single security for costs order to that point was appropriate. The amount of security imposed should not be excessive or disproportionate having regard to the scope of the litigation as a whole, including the counterclaim The subcontractor was ordered to post security for costs on a partial indemnity basis in the amount of $215,000: *10760919 Canada Inc. dha Harbels Construction Ontario v. Crosslinx Transit Solutions Constructors* 2023 CarswellOnt 1271, 2023 ONSC 887, 31 C.L.R. (5th) 86 [2023] O.J. No. 502 (Ont. S.C.J.).

ProView Developments

Your ProView edition of this product now has a new, modified layout:

- The opening page is now the title page of the book as you would see in the print work
- As with the print product, the front matter is in a different order than previously displayed
- The Table of Cases and Index are now in PDF with no searching and linking
- The Table of Contents now has internal links to every chapter and section of the book within ProView
- Images are generally greyscale and size is now adjustable
- Footnote text only appears in ProView-generated PDFs of entire sections and pages