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MANUAL OF CONSTRUCTION LAW

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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.

Release 2026-2 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).

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Highlights :

Recent case law introduced with this release include the following:

Construction Liens—Action to Enforce Lien—Failure to Fix Date for Trial—COVID-19 Pandemic Adversely Affecting Contractor's Business—Action Not Further Advanced for Several Years—Motion to Dismiss Action for Delay Denied—Discoveries Completed—Presumption of Prejudice Rebutted—Reasonable Excuse for Delay—Although the contractor's action had been pending for more than eight years, the owner's motion to dismiss the action for delay was dismissed as court accepted the contractor's evidence that the COVID-19 pandemic severely impacted its business from 2020–21 and made it lose a major client, and that the contractor made efforts to retain new counsel to move this matter ahead, despite its difficulties with its previous lawyers. In this case, the contractor registered a claim for lien in the amount of $338,327 against the owner's property. On February 27, 2017, the contractor started its action in order to perfect its lien. In December 2018, the parties exchanged affidavits of documents. The examinations for discovery took place in August 2019. On November 01, 2024, the owner delivered a motion to dismiss the action. The owner argued that the contractor had not taken the necessary steps to advance its claim in a timely fashion since the examinations for discovery were completed, and this default had resulted in inherent and actual prejudice to the owner. The contractor explained that its business was severely impacted by the COVID-19 pandemic, which effectively halted its projects in 2020. The owner's motion was dismissed.

The court was not persuaded that the high threshold of the intentional and contumelious delay was met, and the owner did not pursue this in argument. In all the circumstances the delay was not inexcusable. The COVID-19 pandemic and its impact, in particular in 2020, was significant. The court accepted the contractor's evidence that its business was severely impacted by the pandemic in 2020 and in 2021 when it lost a major client, and this delayed its pursuit of this action. The delay in having this motion argued related to the owner's request to cross-examine the contractor's principal on his affidavit. The court also attributed some delay where the contractor tried to retain new counsel and move the matter ahead in late 2020. Litigation between the contractor and its previous counsel started in 2021. The current counsel only received the previous counsel's file in the fall of 2023, and this delay related to a solicitor's lien on the file. In addition, the contractor had rebutted the presumption of inherent prejudice. Discoveries were completed early in the proceedings. The trial record had been passed, and the action was ready for trial. The court concluded that the contractor had provided a reasonable excuse for the delay incurred in prosecuting this case. In the court's view, the delay occasioned to date did not undermine public confidence in the administration of justice. The contractor was accordingly entitled to have this dispute decided on its merits: *Cy Rheault Construction v. Danark Enterprises Ltd*., 2025 ONSC 4935, 2025 CarswellOnt 14710, [2025] O.J. No. 3885 (Ont. S.C.J.).

Contracts—Creation of Contract—Misrepresentation by Principals of Corporate Builder—Piercing Corporate Veil—"Wrongful Act"—Civil

Fraud—Principals Misrepresenting Status of Project—Principals Inducing Payment by Purchasers When No Obligation to Pay—Principals Personally Liable to Return Payments—Where the builder's "wrongful thing" was misrepresentation of the status of the construction project to induce the purchaser to pay money, which they were under no obligation to pay, the principals of the company were personally liable as their subjective beliefs about being able to complete the project in timely way was irrelevant to the issue of civil fraud. In this case, the purchaser entered into a contract with CB Ltd. for a prefabricated modular home for a total price of $610,184 including HST. The contract was entered into on January 28, 2019 with the target delivery date to be in July of 2019. The agreement called for payments to be made when the builder reached certain milestones. The purchaser paid the first three payments with the first payment for signing the contract in January 2019, with the second payment for framing in the factory/warehouse in March 2019, and with third payment for the start of the roof trusses. The three payments totaled $269,861. The principals of the company were RG, the sole director and shareholder of the company, and his son, who was Director of Sales. When the latter two payments were made, the principals were aware of production backlogs at their factory/warehouse but never advised the purchasers. In August 2019, the plaintiffs discovered that CB Ltd. had been locked out of its warehouse in June 2019. The purchasers sued CB Ltd, and its principals for recovery of their three payments.

The principals of CB Ltd. denied liability for any part of the claim. The purchasers asserted that they entered into the agreement based on representations by RG and his son that the house would be delivered in the summer of 2019. The purchasers claimed that RG and his son should be liable for the first deposit of $122,036 because they knew or ought to have known when the contract was signed on January 28, 2019, that the home could not be delivered by the target delivery date of July, 2019 because of construction backlogs within their factory/warehouse. RG admitted that he was aware by March 2019 that the factory/warehouse was incurring delays in its production schedule. RG's son asserted on his cross-examination that he did not know the date by which he became aware of construction backlogs. The defendants resisted personal liability by arguing that RG's son could not be liable for a misrepresentation made in the course of his duties as an employee of CB Ltd. unless he made the misrepresentation in a capacity separate and apart from that of the corporation. The purchasers brought a motion for summary judgment concerning personal liability of two principals of CB Ltd. Their motion was granted in part.

The first deposit was due at the time the contract was signed. The only representation at issue at that point is whether the defendants could deliver the home by the target delivery date. There was no evidence before the court that the principals were aware of facts as of January 28, 2019, that would make that representation untrue. The statements of RG and his son to the effect that they believed CB Ltd. could complete the homes in time, in the absence of any conflicting evidence, relieved them of personal liability for the first deposit. The second and third payments fell into a different category. The contract entitled the defendants to demand the second deposit on the commencement of framing and to demand the third deposit on the commencement of the

roof trusses. However, the "wrongful thing" was the misrepresentation of the status of construction to induce the purchasers to pay money which they were under no obligation to pay. The test for fraud was whether the principals made statements that they knew not to be true or that were made with reckless disregard of the truth. The principals' representations to the purchasers that the work would be completed on time contained a reckless disregard to the truth. The principals' subjective beliefs about being able to complete the project in a timely way was irrelevant to the issue of civil fraud.

RG was liable as the directing mind of CB Ltd. He was not an absentee shareholder, but was the President, CEO and sole director, and was regularly on the premises. RG's son, who reported to RG, was liable in making false representations when invoicing the purchasers. RG was aware that the purchasers were being invoiced for framing and roof trusses when the work had not commenced. At no point did RG deny knowledge that the purchasers were being invoiced for work that had not been commenced. Piercing the corporate veil to hold RG and his son personally liable was appropriate. They were personally liable to the purchasers for the sum of $147,824 plus partial indemnity costs fixed at 53.5% for a total of $22,328, including disbursements and HST. CB Ltd. was liable to the purchasers for the return of the three payments in the amount of $276,861: *Crowder v. Canada Builds Company Ltd*. 2022 CarswellOnt 15975, 2022 ONSC 6018, 39 C.L.R. (5th) 236, [2022] O.J. No. 4897 (Ont. S.C.J.).

Dispute Resolution—Arbitration—Jurisdiction—Arbitrator Capable of Ruling on Limitation Defence—Prior to Deciding Issues Properly Before Arbitrator—Under s. 17 (1) of the *Arbitration Act, 1991*, SO 1991, c 17, arbitrators might rule on their own jurisdiction, including whether the notice of arbitration was statute-barred, and then decide the issues that were properly before them. In this case, the contractor contracted to perform construction services with the municipality. The parties agreed to arbitrate any disputes under their construction agreement. The contractor filed a notice of arbitration, and sought to appoint an arbitrator. The municipality refused to appoint an arbitrator, claiming that the notice of arbitration was statute-barred and, in any event, the contractor had failed to comply with the preconditions required before the contractor was entitled to commence arbitration under the construction agreement. The contractor brought an application for the appointment of an arbitrator; the municipality brought a cross-application for summary judgment for a declaration that the notice of arbitration was statute-barred, and a declaration that the contractor had failed to satisfy the preconditions for arbitration. The contractor's application was granted; the municipality's cross-application was dismissed.

The municipality did not deny that there was an arbitration agreement between the parties and did not contend that the agreement was illegal. Instead, the municipality applied for an interpretation of the jurisdiction of the arbitrator under the agreement. The existence of a limitation defence might make arbitration inefficient, just as a full trial on the merits in court would be wasted if the claim could be defeated by a limitation period, no matter how valid the debt or underlying claim might be. That did not mean that the issue of whether a limitation pe-

riod had run could always be hived off from the main hearing, and dealt with summarily in advance. Moreover, the fact that there might be a defence on the merits available to a party did not undermine the jurisdiction of the arbitrator. The best course was to implement the "hands off" policy required by s. 6 of the *Arbitration Act, 1991,* S.O. 1991, c. 17, in order to respect the competence-competence principle to allow the arbitrator to consider the matter first. The issue of whether the contractor failed to follow the claims process, and therefore had no right to commence the arbitration should also be left to the arbitrator. The arbitrator would be fully steeped in the facts, including hearing any conflicting evidence, after appropriate production, and any other pre-hearing steps as may be agreed or allowed. The arbitration should proceed: *Cruickshank Construction Ltd. v. Kingston (City)* 2022 CarswellOnt 14316, 2022 ONSC 5704, 39 C.L.R. (5th) 264 (Ont. S.C.J.).

Construction Liens—Summary Judgment—Owners Hiring Contractor to Renovate Property—Contract Containing Penalty Clause for Late Completion—Plaintiff Replacing Contractor to Complete Renovation Project—Plaintiff Registering Lien and Commencing Action for Amount Owing—Plaintiff's Motion for Summary Judgment Dismissed—Genuine Issue Whether Original Contract Assigned or New Contract—Genuine Issue Whether Owners Waiving Penalty Clause—Where the owners entered into a contract with a contractor to renovate their residential property, but the contractor was unable to complete the renovation, and the plaintiff was approached to complete the project, the plaintiff's motion for summary judgment for the amount alleged to be owing and for a declaration of lien rights was denied as there was a genuine issue whether there was an assignment of the original contract, which contained a penalty clause, or whether a new contract was made with the plaintiff. In this case, the defendants were the registered owners of the subject property. They entered into a contract with a contractor for renovations to their property. The contractor commenced work on the renovations in August of 2018, but by October of 2018, the contractor ran into financial difficulties, and was unable to complete the renovation. The contractor approached the plaintiff general contractor for assistance in completing the renovation. The plaintiff alleged that a new contract was entered with the defendants on new terms. The plaintiff commenced the work, and completed the project in June of 2019. The defendants provided some payment, but there was miscommunication regarding the total amount owing on the project. The defendants denied having entered into a new contract with the plaintiff. The plaintiff registered a lien on the defendants' property, and commenced an action against the defendants seeking a declaration that it was entitled to the lien in accordance with the *Construction Lien Act*, and for payment of the sum of $68,790, plus interest, which the plaintiff alleged was owing for the renovation work performed at the property.

The plaintiff brought a motion for summary judgment for the amount owing, and for all declarations and judgments necessary to give effect to its construction lien rights, among the related relief. The plaintiff submitted that the only basis on which the defendants defended the plaintiff's claim was their reliance on a penalty clause contained in the defendants' contract with the contractor originally retained to do the renovation work. This clause stipulated a penalty of $3,500 per week to be paid by the contractor on a late completion date. The plaintiff

contended that there was no assignment of the original contract to it, and that it was not a subcontractor on the home renovation project. It was the plaintiff's position that the defendants entered into a new contract with the plaintiff for the work to be completed The plaintiff's motion was dismissed as the court found there was a genuine issue requiring a trial.

The court found that there was a genuine issue for trial with respect to the characterization of the relationship between the plaintiff and the original contractor, and the relationship between the plaintiff and the defendants. These were not issues that the court could resolve on the basis of the affidavit evidence and transcripts that were before the court given the clear conflict in that evidence. Accordingly, it was found that this was not an appropriate case for summary judgment and that a trial was required for the fair resolution of the case. In addition, the court was not persuaded that the defendants had any obligation to apply a penalty amount to any payment made prior to the final balance due on the month after completion. Moreover, the court declined to make a finding whether or not the penalty clause was waived by the defendants. It was also not possible to determine whether the penalty clause amount was unconscionable until it was determined whether there were any delays caused from unforeseen issues that served to reduce the penalty amount. In the circumstances, the court found that the defendants had shown that there was a genuine issue requiring a trial: *Jackman Construction Limited v. Brown et al*. 2022 CarswellOnt 16886, 2022 ONSC 6562, 39 C.L.R. (5th) 214, [2022] O.J. No. 5144 (Ont. S.C.J.).