Dolden
Affiliated with RSS Insurance Law avocats lawyers

INSURE UPDATES MARCH 2025

Canada's Specialty Insurance Law Firm

IN THIS ISSUE

"Construction Law Newsletter"

This special edition of our newsletter focusses on contract pitfalls in construction litigations, including the impact of recovery schedules on contract performance, the risks of verbal contracts, and the perils of ceasing contract performance.

18th FLOOR – 609 GRANVILLE ST
VANCOUVER, BC. V7Y 1G5
Tel: 604.689.3222
Fax: 604.689.3777
E-mail: info@dolden.com

302-590 KLO RD
KELOWNA, BC. V1Y 7S2
Tel: 1.250.980.5580
Fax: 1.250.800.8761
Toll Free: 1.855.980.5580
E-mail: info@dolden.com

850 – 355 4th AVE SW
CALGARY, AB. T2P 0H9
Tel: 1.587.480.4000
Fax: 1.587.475.2083
Toll Free: 1.888.380.0130
E-mail: info@dolden.com

#101 – 111 FARQUHAR ST
GUELPH, ON N1H 3N4
Tel: 1.519.286.2496
Fax: 1.519.286.2501
Toll Free: 1.877.286.0112
Email: info@dolden.com

14th FLOOR –20 ADELAIDE ST E
TORONTO, ON. M5C 2T6
Tel: 1.416.360.8331
Fax: 1.416.360.0146
Toll Free: 1.855.360.8331
E-mail: info@dolden.com

1959 Upper Water Street
Suite 1301, Tower 1
HALIFAX, NS B3J 3N2
Tel: 1.416.360.8331
Fax: 1.416.360.0146
Toll Free: 1.855.360.8331
E-mail: info@dolden.com

What to Watch Out for When Agreeing to a Recovery Schedule and the Consequences of Distorted Builders Liens

By Jonathan Weisman, Dolden Vancouver and Corey Smith, Dolden Vancouver

Background

A recent decision from the B.C. Court of Appeal in *Centura Building Systems (2013) Ltd. v. 601 Main Partnership*, 2024 BCCA 76, provides a rare interpretation of standard CCDC contract provisions. It makes clear that (a) accepting a recovery schedule under a CCDC contract means abandoning any other rights in respect of accumulated delays, and that (b) liens based on unrealistic claims are likely to be considered abuses of process.

In *Centura*, project owners and their contractor entered into a CCDC stipulated price contract (CCDC-17) with an agreed construction schedule. The contractor fell behind schedule and, in keeping with the contract, the owners accepted a "recovery schedule" with a revised timeline for the work. Later, citing further delays, the owners terminated the contract. The contractor filed a builder's lien which included a claim based on alleged interference by the owners. The contractor sued to enforce the lien and the owners counterclaimed for abuse of process on the grounds that the lien claim was improperly overstated. The trial judge concluded that, having

accepted a recovery schedule, the owners could not rely on earlier delays as grounds to terminate the contract. Delays after the recovery schedule was issued could not be relied on either, because the project's architect determined that the recovery schedule was unrealistic, placing these latter delays beyond the contractor's control. Although the evidence for interference was poor, the trial judge concluded that this alone was not enough to establish that it was an abuse of process.

The owners appealed, arguing that (1) the CCDC contract preserved all other rights, even when a recovery schedule was accepted; and (2) that the trial judge failed to consider that the person who established the lien value was not credible, and knew that the owners had not interfered with the work.

The Court of Appeal affirmed that by accepting the recovery schedule, the owners had waived any other rights in respect of the earlier delays. The CCDC provision which preserved "other rights" meant that the owners could choose between a recovery schedule and other legal remedies, not that they could pursue both.

On appeal, the owners argued that the trial judge failed to attribute to the contractor the knowledge of the contractor's primary witness – the man who had calculated the value of the claim for lien purposes. That witness knew that there had been no interference, and so the contractor did, too. The contractor contended that an abuse of process required an improper motive, which was not proved on the facts.

The Court of Appeal agreed that the lien assessor's knowledge had to be attributed to the contractor, and that no improper motive was required – merely the filing of a claim which was known to be unsound. The trial judge erred in characterizing the evidence as weak – it was a misrepresentation. The witness's evidence made clear that the lien was filed on a falsehood, not uncertainty.

Takeaways

CCDC clauses seldom make it to trial. This case clarifies that a clause which reserves "other rights" doesn't mean having your cake and eating it too – choosing an option means excluding others. Moreover, it reminds us of an important line between legitimate claims and abuses of process: legitimate claims can be advanced based on uncertainty, but never on something known to be untrue.

For further information or if you have any questions about the above article, please contact the authors: Jonathan Weisman, Dolden Vancouver, Email: jweisman@dolden.com and Corey Smith, Dolden Vancouver: Email: csmith@dolden.com.

No Keys to the Ferrari – The Risks of Verbal Contracts and an Unqualified General Contractor

By Dawson Horning, Dolden Calgary

In the Ontario Superior Court of Justice case of *1814219 Ontario Inc. v. 2225955 Ontario Ltd.*, 2023 ONSC 4672 cash deals, handshakes, text messages, unqualified supervisors, collusion, fraud and a Ferrari took center stage.

Many practical (hiring qualified supervisors, determining the scope of the project before commencing work, actually reading expert reports and listening to expert opinions) and legal lessons (the importance of contemporaneous agreements and documenting progress, fraud requires a loss, and vulnerability doesn't always equal fiduciary) can be learned from this case. Ultimately though, it is a tale about the pitfalls of overestimating one's own ability and cutting corners.

Background

The project owner, 2225955 Ontario Ltd. ("222"), purchased a plot of land with the intent of developing a portion of the lands into a car dealership. Although 222 and its principal had no experience in commercial construction, it chose to act as its own general contractor. Shortly after the purchase, a geotechnical report indicated that the land contained much inorganic debris, requiring extra excavation to reach load bearing soils. 222 received the geotechnical report, but did not read it and did not think it important. 222 retained several other additional experts, including an architect, a structural engineer, and a site servicing engineer, some of whom were provided with the geotechnical report and some of whom were not. The court ultimately determined that, although 222 had surrounded itself with personnel capable of providing advice to avoid the project difficulties, it chose not to consult them, which led to the many subsequent failures.

At the outset of the project, 222 hired a site supervisor with some construction experience – mostly in drywall and other handywork - but no experience at all in commercial construction. In exchange for the site supervisor's services, 222 promised to pay him with Ferrari at the completion of the project. There was no agreement in writing to document this unusual arrangement. In addition to the obvious warning signs that things could turn sour, 222 was warned by others that the site supervisor was not capable of completing a project of the intended magnitude, but 222 decided to proceed anyway to save costs.

Once excavation began, the issues with the soil stability quickly became apparent. Several options were proposed to remedy the issue, but all required additional excavation that was not contemplated in the original

architectural plans. The excavated soil was not suitable as backfill for the project, but the project's site plan approval from the municipality required all the site elevations to remain the same as pre-construction, meaning that the excavated soil could not stay on site. As the parties contemplated what to do, 222 told its site supervisor to "Just get it done". The excavated soil was transported off site by truck, incurring a significant cost overrun.

Near the end of the project, 222 stopped paying its excavation contractor and its site supervisor, suggesting that the trucking and excavation work was never done, or that it had not approved the additional expense. Both the site supervisor and the excavator filed liens against the project, and 222 countered, alleging that the excavation contractor and the site supervisor had colluded together to do work that was not required, charged for work that was not done, and fabricated extras.

Analysis

In the absence of written contracts, 222 attempted to rely on unusual legal arguments in an attempt to make the case that it had been overcharged.

Fiduciary duty – *Peculiarly Vulnerable*

222 first attempted to rely on the doctrine of fiduciary duty, arguing that its site supervisor owed it a fiduciary duty to act in its best interests. 222 alleged that it was peculiarly vulnerable to the site supervisor due to its own challenging financial times, and the pressure that the site supervisor put on 222 to hire him.

The Court dismissed this argument, finding that the site supervisor did not wield sufficient discretionary power (ordering materials and delivering invoices was not enough discretion) to establish a fiduciary relationship, nor was 222 particularly vulnerable to the site supervisor's discretion or power. 222 had available advisors it could have relied on, but chose not to, and was fully aware of the site supervisor's short comings and inexperience.

Fraud – *A serious allegation*

222 also attempted to establish a claim of fraud against the excavation contractor and the site supervisor. At the time they were issued, 222 had paid all of the invoices for work it later alleged was not required, and the principal of 222 had personally witnessed the work that it later said was not done. The court in its decision described 222's position as "beyond comprehension".

In dismissing 222's claims, the court recounted the necessary elements of a fraud:(1) a false representation made by the defendant, (2) some level of knowledge of the falsehood by the defendant, (3) which caused the plaintiff to act, (4) resulting in a loss to the plaintiff. The court highlighted the need

for a plaintiff to prove all 4 elements to establish its claim. The court opined that, in some cases, fraud can be committed by half-truths or silence. The court did not consider whether the person making the fraudulent misrepresentation intended the claimant to rely on the statement.

The court determined that there was no misrepresentation (or misrepresentation by silence), and that 222 had not proven that it suffered a loss. All of the work that was charged for was done, and was necessary to complete the project.

But what happened to the Ferrari? In the end the site supervisor was awarded an amount for his services based on expert testimony, but did not get to ride off into the sunset with his Ferrari (but he did get it for a short time!).

Takeaways

Verbal agreements are difficult to prove without contemporaneous documentation. When determining if a site supervisor owes a general contractor a fiduciary duty, the court will analyze the parties' reasonable expectations, looking at factors such as loyalty, trust, confidence, complexity of subject matter, and community or industry standards, and the misuse of discretionary power. Fraud is a serious allegation, and requires, at minimum, that all of its factors be proven,. Fraud without damage gives no cause of action. In the context of collusion or overcharging, competing quotes demonstrating a loss are likely required. The remedy for breach of contract is to put the party back in the position it would have been in had the contract been performed.

For further information or if you have any questions about the above article, please contact the author: Dawson Horning, Dolden Calgary, Email: chorning@dolden.com.

Should I Stay or Should I Go Now: Lessons in Abandoning a Fixed-Price Project for Non-Payment

By Frank Caruso, Dolden Toronto and Andrea Trozzo, Dolden Toronto

Contractors and subcontractors facing non-payment for their role on a fixed-price project have long wrestled with the consequences of a stop-work strategy. Contractual provisions often add increasing pressure to the decision, with notice of default timelines mandating immediate attention. The Clash perhaps best summarizes the perilous position of these parties – if they go there will be trouble, and if they stay there could be double.

It is, of course, true that stoppage of work for non-payment can be contractually justified and provide a 'safety net' for contractors. Various payment terms under the CCDC 2 (2020) Stipulated Price Contract

("CCDC 2") and other project-specific contractual provisions each serve (subject to primacy) to impose requirements on a project owner to comply with prompt payment laws and specified deadlines for payment. However, these payment terms also impose obligations on contractors and subcontractors themselves to comply with a series of rules regarding submission of applications for payment and any resultant cessation of work. For instance, the CCDC 2 imposes a specific procedure for submission of applications for payment and explicitly requires that a contractor's application for payment constitute a "proper invoice". Further, prior to a contractor being entitled to employ a stop-work strategy for non-payment, CCDC 2 requires the contractor submit written notice to the owner of its non-compliance and provide 5 working days for correction of the default.

It is now clear that, if a contractor chooses to 'go now' and cease work on a project, it does so at its peril. Pursuant to the recent decision by the Ontario Superior Court of Justice in *Campus Contracting Inc v. Torbear Contracting Inc.* 2023 ONSC 6782, contractors must prove strict accordance with all requisite terms or risk being deemed to have 'abandoned' the project and denied any outstanding payments.

Background

Torbear Contracting Inc. ("Torbear") was hired as prime contractor for the construction of a pumping station in Vaughan, Ontario (the "Project"). Torbear subsequently contracted Campus Construction Inc. ("Campus") to provide the material and labour necessary for installation of high-pressure concrete watermains and sewers at the site.

Over the course of the Project, the watermain pipes installed by Campus failed a series of pressure tests. Competing positions emerged regarding the cause of the failures. In the face of these allegations and ongoing failures, Campus began threatening to stop work if Torbear did not make payment on recent uncertified progress invoices and for additional remedial work completed. In doing so, Campus delivered a final invoice seeking payment of an outstanding sum of $130,000.00, which sum was also not certified.

Torbear refused to pay any of the invoices and disagreed that any amount was owed, alleging Campus' work was not completed in accordance with the Project schedule and otherwise deficient. Campus ceased work on the project 3 days later, and Torbear issued a Notice of Default the same day (in the contractually-mandated format). Three days later, Torbear formally declared Campus in default pursuant to the contractual termination provision.

Campus commenced a number of proceedings as a result of the deterioration of this Project, including a claim for breach of contract, breach of trust, and a further claim under the posted labour and material bond.

Analysis

Justice Sutherland heard the first of these actions, and bifurcated the trial to first address liability for breach of the Project contract. In doing so, His Honour identified two core issues:

i) Non-payment: whether Torbear breached the contract for non-payment of the progress invoices Campus demanded prior to its cessation of work; and
ii) Abandonment: whether Campus had abandoned the Project, or Torbear unlawfully terminated the contract.

In the end, Campus was entirely unsuccessful in recovering any of the claimed amounts prior to its cessation of work, and was deemed to have abandoned the Project.

In adjudging the non-payment issue, Justice Sutherland noted Campus failed to comply with its requirements pursuant to the contractual payment process. Payment applications by Campus were due by the 25th of each month, and Campus was late in submitting each payment application in advance of the cessation of work. Further, the amounts Campus claimed in its final payment application were not in fact due until a month after it had 'walked off' the Project (at which point Torbear would receive funds from the Project owner to pay the invoices).

Vitally, Justice Sutherland provided a clear warning to all contractors and subcontractors who fail to follow 'the letter of the law' regarding certification provisions. As noted above, the invoices delivered by Campus prior to ceasing work were not certified by the Payment certifier. This was in clear non-compliance with the Project contract's explicit mandate that payment of invoices was contingent on their certification by the designated Payment Certifier. Employing a stringent approach, Justice Sutherland rendered this non-compliance fatal to Campus' claims and affirmed that such provisions will be upheld "as long as the payment certifier acts fairly, honestly and impartially and provided there is no collusion between the owner and the certifier."

On the abandonment issue, Justice Sutherland once again ruled in favour of Torbear and deemed Campus to have abandoned the Project. Campus was noted to have 'walked off' the Project on the basis of non-payment when those payments were not yet owing under the contract, and when it had not yet completed its contractual obligations. In doing so, Campus also failed to provide the requisite 10-day notice pursuant to the Project contract. Each of these factors were, both independently and collectively, a fatal blow to Campus. In fact, the totality of the circumstances led Justice Sutherland to conclude that it appeared Campus simply wanted "out of the ordeal it was in". As it is well established that contractors cannot

recover for unpaid amounts following abandonment/repudiation of a contract, Campus' claims for payment were dismissed.

Should I Stay or Should I Go Now? Review the Payment Terms

Campus was a subcontractor in a lose-lose position as a result of the intractable problems it faced – either it continued to complete work sans payment, or treated its contract as at an end and hoped for a reprieve. However, in such circumstances, careful contract management becomes all the more vital to ensure compliance with all payment provisions and contract terms. In the case of Campus, its failure to follow the framework of the contract's payment, notice, and certification provisions jeopardized the availability of its contractual remedies and left it exposed to rightful termination by Torbear. Instead, Torbear was rewarded for its strict contractual compliance.

Campus Contracting has set the bar for contractors facing the decision to 'walk away' from a project. The realities of contract administration must make way for strict compliance with contractual provisions. Contractors and subcontractors employing a stop-work strategy will leave their claims for non-payment vulnerable to dismissal unless they ensure, at a minimum:

i) All contractual preconditions for payment are satisfied;
ii) Notice requirements, particularly regarding default, are complied with in accordance with the contract's terms and support the reasons for cessation of work;
iii) Payments are certified as owing in strict compliance with any certification provisions; and
iv) The non-payment of invoices truly goes to the root of the contract, and supports the decision to halt the contract's performance requirement.

The strict judicial approach to these issues is not entirely surprising. Although the court in Campus Contracting acknowledges that walking away from a project before completion may be excused where it occurs for reasons outside a subcontractor's control, a subcontractor or contractor's has statutory lien rights that remain preferable to a stop-work strategy that bring an entire project to a standstill. Alternate avenues, should be explored as a manner of practice to avoid the risk of a finding of abandonment. Similarly, contractors should seek to ensure their contracts provide for a clearly-defined termination right based on non-payment. Particularly where a 'pay when paid' clause exists rendering payment by a contractor contingent on receipt of payment from the owner, subcontractors should be alive to any impact on their termination rights.

For further information or if you have any questions about the above article, please contact the authors: Frank Caruso, Dolden Toronto, Email: fcaruso@dolden.com and Andrea Trozzo, Dolden Toronto: Email: atrozzo@dolden.com.

EDITOR

Elka Dadmand
T: 647 362 0346
E: edadmand@dolden.com

Please contact the editor if you would like others in your organization to receive this publication.