KEEL
COTTRELLE LLP
Barristers and Solicitors

Toronto —
36 Toronto Street, Suite 920
Toronto ON M5C 2C5

416-367-2900
416-367-2791 (fax)

www.KeelCottrelle.com

Construction Law Newsletter

Fall 2022

IN THIS ISSUE -

Owner Found Guilty of Safety Violation in Death of Contractor's Employee

In *R. v. Halifax Port Authority*, 2022 NSPC 13, the Halifax Port Authority (the "Authority") was found guilty of health and safety violations that contributed to the death of its contractor's worker while carrying out a project on the Authority's property.

Background

The Fairview Cove Sequestration Facility (the "Facility") was the site of a marine infill project that was "designed to extend useable land for a potential container terminal expansion" (the "Project"). The Project also provided a location for the disposal of pyritic slate, which is generated from local construction projects, and is hazardous unless sequestered.

The Authority administered the Facility as federal property and was paid a fee to receive the slate. In turn, the Authority paid a private company, SiteLogic, to oversee the Facility. SiteLogic's president and sole employee, David Seaboyer ("Mr. Seaboyer"), managed the daily operations at the Facility.

The main activity on the site was the Project. The Authority had agreements with companies (the "Generators") that wished to dispose of the slate. Pursuant to these agreements, rear-dumping trucks were used to deliver and discharge loads of slate at a designated location within the Facility, at the water's edge, for a fee. The slate was then placed below the waterline and capped with non-hazardous fill, thereby extending the shoreline and creating more useable land. The trucks and their operators were provided by the Generators. The Authority did not employ any of the operators or own any of the trucks.

Mr. Seaboyer designated the specific area where the trucks were to dump their load every day. This area, referred to as the "active working face", was on the working platform at the water's edge, and its location changed over time as the Project progressed. The working platform and active work face were not fenced off or otherwise physically separated from the rest of the Facility.

The Authority's environmental manager oversaw the operation of SiteLogic to ensure that the infill area, and the types of materials used for infill, were compliant with environmental laws. The Environmental Manager communicated with Mr. Seaboyer daily, attended the Facility frequently, and was generally familiar with many of the features and procedures at the site. However, neither he nor any other employee of the Authority operated any dump truck, nor were they otherwise exposed to the risks identified in the relevant health and safety regulations.

Incident

On July 9, 2018, there was "a sudden drop in grade level" from the platform level to the water level. Although there was normally a safe dump ramp that sloped to the water's edge, that ramp was not inspected or recreated after every dump, but was only monitored in a general way. As well, although there had previously been a signaller (spotter) employed by a third party as part of the operation, that individual had been terminated and no signaller was then employed.

On that day, Michael Wile ("Mr. Wile") drowned while operating a dump truck and discharging material at the active working face when his truck went into the water (the "Incident"). Mr. Wile was not an employee of the Authority.

Charges

The Authority was charged under the *Canada Occupational Health and Safety Regulations* (SOR/86-304) (the "Regulation") of the *Canada Labour Code***,** R.S.C., 1985, c. L-2 (the "*Code*") for failing to meet the following duty imposed upon it*:*

> 125(1) Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,
>
> (b) install guards, guard-rails, barricades and fences in accordance with prescribed standards;

The "prescribed standards" are as follows:

> 14.40 Where rear-dumping motorized materials handling equipment is used to discharge a load at the edge of a sudden drop in grade level that may cause the equipment to tip and in order to prevent the motorized materials handling equipment from being backed over the edge,
>
> (a) a bumping block shall be used; or
>
> (b) a signaller shall give directions to the operator of the equipment.

Mr. Seaboyer and SiteLogic were also charged with offences under Nova Scotia's occupational health and safety legislation. They pled guilty of failing to take reasonable precautions to ensure the health or safety of persons at the work place, in particular, by failing to ensure there was a 'spotter' and a safe ramp in place.

Dispute over Meaning of "Work Place"

The key issue in dispute was the meaning of "work place" under the aforementioned provisions.

The Crown argued that "work place" required only that the location of the alleged offense be a place where employees of the defendant employer were engaged in work for it, and that the duties imposed on employers were not limited to the protection only of its own employees. As the Facility was an "integrated whole" where employees of the Authority engaged in work, it was a "work place" where the Authority failed to take the necessary precautions in accordance with the Regulations.

The Authority argued that "work place" had to be interpreted contextually "so as to require a reasonable nexus between the

area in which an employee is 'engaged in work' and the risk that the specific duty and regulation are intended to address". On that view, the "work place" was restricted to the active work face. As no Authority employee was engaged in work there, the location of the Incident was not a "work place" within the meaning of the legislation.

Analysis

The Court disagreed with the Authority's position, holding that the statutory definition of "work place" did not refer to risk, limit the type of work engaged in to any specific type of work, or otherwise require a nexus between risk and the employee's work.

The Court further found that the general purpose of the legislation was "to prevent accidents and injuries arising out of, linked with, or occurring in the course of employment", and that such a duty extended to "all users without distinction between employees and other persons", particularly where "the person is doing the very work for which the place exists". On the facts of the case, the Court found that:

> …there is no logical reason to treat the work face as a separate work place. Geographically and functionally, the [Facility] was an integrated whole. Once on the property, the waters edge and the working face were not separated from the rest of the property. The work face was not fenced off and was not a great physical distance from the rest of the property. This differentiates it from an airport where the tarmac and concourse are physically separate and often have restricted access. It also differentiates it from a multi-floor building. The primary purpose for the existence of the [Facility] was to accept and sequester slate. The active working face was the heart of that operation. So, functionally, it was not separate from the property on which it was located. There were different risks there than would have existed in the scale house, or along the drive from the scale house to the water, but those parts existed together as a functionally related work site.

The Court found that the duty at issue here was "aimed at making the physical space safe for those who used it in the manner specified in the regulation". The Authority created the Facility to accept and sequester slate for the Project, and required dump truck operators to dump the slate at the edge of a sudden drop in grade level. The Authority had the ability to control the site, including the ability to install a bumping block or provide a signaller. As it did neither, holding the Authority responsible for that failure was not unreasonable. Consequently, the Court found the Authority guilty of the offence charged.

Takeaways

This case is yet a further example of the general trend in the case law of decision makers broadly interpreting occupational health and safety legislation so as to expand the scope of parties that may be held legally responsible for the protection of workers. As such, this case and others like it have important implications for owners on construction projects, reminding them to take their health and safety duties and obligations seriously, including by making efforts to ensure that their premises are operated in accordance with the governing regulations, and ensuring that any contractors which may be relied upon do the same.

Michael Tersigni, Associate

— KC —

Appeal Court Finds Surety Not Absolutely Precluded From Rescinding Bonds Where Evidence of Fraud

In *Urban Mechanical Contracting Ltd. v. Zurich,* 2022 ONCA 589, the Ontario Court of Appeal held that third party rights do not necessarily preclude a surety from rescinding performance and payment bonds where there has been a fraudulent misrepresentation.

Background

In 2011, St. Michael's Hospital (the "Hospital") entered into a public-private redevelopment project with Infrastructure Ontario to build a 17-storey patient care tower (the "Project"). A procurement process was held and the construction contract was awarded to 2442931 Ontario Inc. ("ProjectCo"), a wholly owned subsidiary of Bondfield Construction Company Limited ("Bondfield"). Bondfield was made the general construction contractor for the $301 million Project. A group of lenders financed the Project by way of a $230 million loan to ProjectCo through a credit agreement, which named Bank of Montreal ("BMO") as the administrative agent for the lenders.

Both the construction contract and the credit agreement required ProjectCo to obtain and maintain surety bonds: a Performance Bond for the construction and design contract (the "Performance Bond") and a Labour and Material Payment Bond for labour, services and materials (the "Payment Bond").

On January 27, 2015, Zurich Insurance Company Ltd. ("Zurich") issued the Performance Bond of around $156 million and the Payment Bond of around $142 million. Beginning in 2017, Bondfield struggled to meet payment deadlines, but Zurich paid the subcontractors and suppliers to keep the Project going. However, Bondfield continued to experience difficulties, and on November 2, 2018, the Hospital issued a Notice of Default under its agreement with ProjectCo. Shortly thereafter, BMO, as the obligee, informed Zurich that Bondfield was in default and demanded payment of the Performance Bond.

In March 2020, Zurich uncovered numerous email communications between Bondfield and Hospital representatives showing allegedly fraudulent misrepresentations and collusion which appeared to have enabled Bondfield to secure the contract for the Project.

In April 2020, Zurich ceased paying the trades and started an action seeking to have both Bonds rescinded due to fraud in the construction procurement process. Several trades had unpaid claims under the Payment Bond.

The Application Decision

The lenders represented by BMO claimed that they were induced to lend funds to the Project by the guarantees provided under the Performance Bond. They brought two applications seeking declarations that, as a matter of law, Zurich could not rescind the Bonds as it would affect their rights as innocent third parties.

The application judge began by noting that the issue before her was whether rescission is available as a matter of law on a construction bond where there has been fraud and collusion in the procurement process.

The application judge found that the legislature, in enacting the *Construction Lien Act* (the "*CLA*"), could not have intended that liability of a surety be absolute. Rather, common law and equitable remedies remained available. The application judge also cited s. 69 of the *CLA*, which provides that a right of action must be in accordance with the terms of the Bond. As such, limits are imposed on the statutory rights of trades under the *CLA*.

The application judge dismissed both applications, concluding that equitable remedies must be decided on a complete record, which was not yet available. BMO and the trades (the "Appellants") appealed to the Ontario Court of Appeal.

The Court of Appeal's Decision

The Court of Appeal stated that the issue was whether, as a matter of law, an order for rescission can ever be made where an innocent party was induced to enter a contract by virtue of fraudulent

misrepresentation, and there are third parties who have asserted their rights. As the issue was a question of law, the standard of review was correctness.

The Court of Appeal confirmed that rescission is an equitable remedy that seeks to put the contracting parties back in the positions they were in before entering into the contract, and is available to a party that has been improperly induced to enter into a contract, for instance, by a fraudulent misrepresentation.

Whether Rescission Can Co-Exist with the CLA

The Appellants argued that s. 69 of the *CLA* prevented Zurich from rescinding the Bonds because they had valid claims against Zurich pursuant to the Bonds. They claimed that these statutory rights could not be extinguished by equitable remedies such as rescission. The Court of Appeal acknowledged that a statutory scheme may oust equitable rights, but only where the legislature expressed its intention to do so with "irresistible clearness".

The Court of Appeal found that nothing in the *CLA* explicitly addressed the trades' right of action on a payment bond when the bond agreement was based on fraud. Nor was there anything in the legislative record to show whether the legislature specifically intended s. 69 to sustain the bond even in the face of fraud. Additionally, the parties produced no cases that specifically address the issue of fraud where a bond has been issued. The Court of Appeal noted that Zurich had alleged that some of the trades participated in the fraud, however, as examinations for discoveries had not been completed, that argument had not been fully developed.

As such, the Court of Appeal held that it was not appropriate to foreclose the rescission argument at this stage of the proceeding without hearing full submissions on the issue. Rather, the Court of Appeal held that the issue should be left to the trial judge and decided on a complete record and full submissions to see what, if any, equitable claims may arise

Whether Rescission can be Granted Where there are Innocent Third Parties

The Appellants also argued that rescission is not available whenever the rights of innocent third parties are engaged. The Court of Appeal noted that there are two key concerns about the rights of third parties in rescission cases: (1) the impossibility of putting the contracting parties back in the positions they were in before entering into the contract when third parties have acquired an interest in property subject to the contract; and (2) unavoidable prejudice to, or adverse effect on, third parties.

The Court of Appeal acknowledged the well established principle that when property is purchased by an innocent third party for value without notice, the pre-existing equitable interests of other parties are extinguished. In such circumstances, the original owner cannot be restored to the pre-contracting position. However, this does not pose an absolute bar to rescission. Even when the parties cannot be restored precisely to the state they were in before the contract was signed, courts may still grant rescission because it is an equitable remedy focused on practical justice, not rigid technicalities. Rescission operates to relieve and prevent unconscionability and unfairness. The court may therefore order rescission so long as it avoids injustice between the parties, and the availability and form rescission may take will vary depending on the facts of the case. Courts are more willing to exercise discretionary power in cases of fraud than in cases of innocent misrepresentation.

The Court of Appeal reviewed case law where rescission was granted despite the presence of innocent third parties, finding that where a third party is entitled to keep the property originally owned by one of the

contracting parties, a court may still exercise its equitable power to do what is practically just and order a remedy that makes the original owner whole.

The Court of Appeal found that at this stage of the litigation and in the absence of a factual record, it was not possible to say whether rescission could be crafted to achieve practical justice, as this was a fact-laden question that was more appropriate for trial than an application.

The Appellants also argued that rescission must be refused if it would adversely affect or prejudice an innocent third party. They stated that because third parties are to be returned to the positions they occupied prior to the contract, rescission cannot be allowed if it would adversely affect third parties. The Court of Appeal disagreed, noting that rescission unwinds the contractual relationship between contracting parties, not contractual relationships with third parties. The case law demonstrates that rescission may be ordered even where a third party acquires an interest in the contract property.

The Court of Appeal acknowledged that rescission *may* be refused if third party rights are significantly adversely affected, but it found that the bars to rescission are flexible. It could not be said that rescission is unavailable as a matter of law where it would adversely affect third parties. In any event, a full factual record would be required to determine whether prejudice to the Appellants would be unavoidable. Before a court can determine what the rescission remedy would unwind, the possible interconnections among the various agreements must be explored. This is an issue that can only be determined by a trial judge upon consideration of the factual matrix and the parties' intentions.

Conclusion

Given the foregoing, the Court of Appeal held that the application judge correctly concluded that, as a matter of law, the rights of innocent third parties are not an absolute bar to rescission in all cases where there is an allegation of fraudulent misrepresentation. Courts exercise flexibility in determining whether rescission can and should be ordered, and such an issue should be determined at trial on a full factual record. The Court of Appeal therefore dismissed the appeals.

Takeaways

This case has a significant impact on trades and lenders which rely on surety bonds in construction projects. The Court of Appeal's decision on the narrow legal question at issue in this case demonstrates that a surety can potentially rescind bonds issued due to fraudulent misrepresentation even if innocent third parties are engaged. Whether rescission is ultimately ordered in this case will depend on how the full factual record develops at trial.

Alex Smith, Associate

— KC —

Divisional Court Clarifies Jurisdiction of Adjudicator

In *Pasqualino v. MGW-Homes Design Inc.*, 2022 ONSC 5632, the Ontario Divisional Court dismissed a motion for leave to bring an application for judicial review of the determination of an adjudicator. In so doing, the Divisional Court further clarified the role and jurisdiction of an adjudicator under the *Construction Act*, R.S.O. 1990, c. C.30 (the "*Construction Act*").

Background

Domenic Pasqualino ("Mr. Pasqualino") had a fixed price contract with MGW-Homes Design Inc. ("MGW") to perform renovations on his home. A dispute arose between them, following which MGW registered a Claim for Lien in the amount of $169,184.94, and issued a Statement of Claim (the "Lien Action"). Mr. Pasqualino obtained an order

vacating the Claim for Lien by posting security (the "Security") with the Accountant of the Superior Court of Justice, and thereafter delivered a Statement of Defence and Counterclaim.

MGW subsequently filed a Notice of Adjudication. Both parties participated in the Adjudication. The Adjudicator determined that Mr. Pasqualino must pay MGW $119,314.00, inclusive of HST (the "Determination"). As Mr. Pasqualino refused to pay, MGW took steps to enforce the Determination.

Mr. Pasqualino's Position

In order to review an adjudicator's determination, leave of the Divisional Court is required. As well, a determination can only be set aside in limited circumstances as set out in s. 13.18(5) of the *Construction Act*.

Of those available circumstances, Mr. Pasqualino argued that (a) "the contract or subcontract is invalid or has ceased to exist" because it had been abandoned or terminated prior to the Notice to Adjudicate; or (b) "The determination was of a matter that may not be the subject of adjudication under this Part, or of a matter entirely unrelated to the subject of the adjudication".

Analysis

The Divisional Court noted that, although Mr. Pasqualino submitted that the "Adjudicator did not consider whether the contract ceased to exist", this was because he failed to raise this challenge before the Adjudicator. Further, section 13.5(1)7 of the *Construction Act* permits the parties to refer to adjudication "any other matter that the parties to the adjudication agree to". In his reasons, the Adjudicator expressly noted that the parties agreed to proceed to adjudication, and that no issue was raised regarding the Adjudicator's jurisdiction. The Court held that, if there was to be a challenge to the Adjudicator's jurisdiction, it should have been raised before the Adjudicator.

The Divisional Court noted that the Adjudicator did not decide whether the construction contract was abandoned or terminated, nor was the adjudication process designed to make such determinations:

> …the Adjudication process was not intended to require an Adjudicator to delve into making factual and legal determinations on whether a contract was abandoned or terminated, whose fault it was, did it amount to a repudiation, is the claim advanced by the innocent party and such types of determinations. The simplified and expeditious process of adjudication would be defeated if the Adjudicator was required to consider and decide such issues.

Although Mr. Pasqualino argued that adjudication was intended only to be available "while construction proceeds", the Divisonal Court rejected that argument, noting that the legislation does not use the terms "terminated" or "abandoned", but rather the words "cease to exist". The Divisional Court noted that, even if a contract is abandoned or terminated, that does not mean the contract ceases to exist:

> The innocent party can elect to affirm the contract or accept the repudiation and bring the performance of the contract to an end. But the terminated or abandoned contract does not cease to exist. Its performance is brought to an end. The innocent party is excused from performing its obligations and can sue for damages for breach of contract. The guilty party generally (although not in all cases) loses its right to claim damages. Accordingly, the abandoned or terminated contract cannot "cease to exist" because the parties will have acquired rights during the performance that can and do survive a termination or abandonment of the contract.

The Divisional Court also noted that the position of Mr. Pasqualino was absurd, given that he issued a Counterclaim seeking damages arising from MGW's alleged breach of the same contract he now claims "ceased to exist".

The Divisional Court went on to note that the Adjudication provisions of the *Construction*

Act were introduced to provide "a quick, efficient, interim determination allowing funds to flow down the contractual 'pyramid'". If a party to a construction contract could allege that the contract had "ceased to exist" due to the termination or abandonment of the contract, adjudication could be easily avoided, which would result in "a return to the prior lengthy and expensive legal process with the likelihood that the flow of funds would not flow down the construction pyramid for a very long time". This would defeat the very purpose of the adjudication provisions.

Mr. Pasqualino also alleged that there was a conflict in proceeding with adjudication at the same time as the Lien Action. The Divisional Court disagreed, noting that the *Construction Act* expressly provides that construction disputes may be referred to adjudication regardless of whether there is a court action regarding the same subject matter.

As well, pursuant to s. 44(5) of the *Construction Act*, Mr. Pasqualino had a right to seek a reduction of the amount of the security he posted. Mr. Pasqualino argued that permitting the Adjudicator's decision to stand undermines the purpose of section 44. Again, the Divisional Court disagreed, and noted that "permitting the Owner to seek a reduction of the security posted in court by the amount paid pursuant to the Adjudicator's decision demonstrates how the two processes work harmoniously together".

Finally, the Divisional Court noted that the *Construction Act* did not set out a test for a motion for leave for judicial review. Mr. Pasqualino argued that the test should be whether the moving party demonstrated a "reasonably" or "fairly" arguable case. MGW argued that the standard should be higher, such as the need to demonstrate a "strong prima facie case", and whether it is in the balance of convenience to grant leave. The Divisional Court determined that it did not need to decide this issue as, even on the lower standards preferred by Mr. Pasqualino, he failed to demonstrate that he has a reasonably or fairly arguable case.

The Divisional Court thus dismissed the motion for leave.

Takeaways

As this case notes, to the extent a party wishes to challenge the jurisdiction of an adjudicator, that challenge should be raised directly before the adjudicator or else risk the inability to raise that challenge in subsequent proceedings. As this case also notes, the purpose of adjudication is to provide a quick, efficient, and interim determination of construction disputes so as to allow funds to flow down the contractual pyramid while also preserving the rights of the parties to challenge that determination in subsequent lien proceedings. As such, adjudication and lien proceedings should be seen with a view to their harmonious and interactive nature.

Michael Tersigni, Associate

— KC —

Divisional Court Upholds Cost Award Against Non-Party to Construction Lien Action

In *Marcos v. Lad*, 2021 ONSC 4900, the Ontario Divisional Court upheld a cost award against a non-party to a construction lien action due to that party's egregious litigation conduct.

Background

The Defendants, Ishver Lad and Sumitra Lad (the "Lads"), hired Marcos Building Design Consultants ("Marcos Building") to design and build them a custom home. The Lads moved into the home in August 2010, believing they had fully paid the construction costs. They subsequently discovered a number of deficiencies, and also received an invoice from Marcos Building in the amount of around $523,000.00. Marcos Building registered a construction lien on the property

and initiated an action. The Lads counterclaimed against Marcos Building.

Trial Decision

Following the trial of the action and counterclaim, the claim of Marcos Building was dismissed while the counterclaim of the Lads in the amount of $65,000.00 was allowed. The trial judge also awarded costs against Marcos Building and one of its principals, Manny Marcos ("Mr. Marcos"), jointly and severally in the amount of around $579,000.00.

Notably, Mr. Marcos was not a party to the litigation. However, in making the cost award against Mr. Marcos, the trial judge relied on her findings that Mr. Marcos made statements during his examination for discovery and/or at trial that were inconsistent, contradictory, or blatant lies. He also created false documents, including altered invoices with false and/or backdated dates, and substituted altered pages into a purported agreement in an effort to suggest that the Lads agreed to a construction cost of $718,000.00, as opposed to $440,000.00. The trial judge went on to say the following:

> The fraud and gross misconduct on the part of the non-party must relate to conduct during litigation for the costs to be awarded against the non-party. Findings of this Court are replete with acts relating to Mr. Marcos gross misconduct during the litigation for the purposes of advancing the claim. Mr. Marcos conduct amounted to an abuse of the process being the purported subject matter in the litigation. The action was of a construction company claiming for its work. The misconduct of Mr. Marcos, as this Court has found, was deliberate in an attempt to justify and falsely support an inflated claim outside the scope of the agreement between the parties.

The trial judge's decision was covered in greater detail in our Summer 2019 Construction Newsletter.

Divisional Court

The Divisional Court granted Mr. Marcos leave to appeal on the question of whether the trial judge erred in ordering costs payable by him.

Mr. Marcos argued that the costs award was plainly wrong for the following reasons:

1. The discretion to award costs against a non-party is limited to "where the non-party is the real litigator who, in order to avoid liability for costs, puts forward a 'man of straw' to prosecute the litigation", which was not the case here;

2. The trial judge improperly pierced the corporate veil where there was no evidence that Marcos Building was being used as a shield for fraudulent or improper conduct;

3. The trial judge erred in finding that s. 86 of the *Construction Act*, which concerns the Court's discretion to award costs in construction matters, applied so as to render him personally liable; and

4. The trial judge erred in finding that Mr. Marcos was given adequate notice of the Lads' intention to seek costs against him.

The Divisional Court noted that the trial judge was in the best position to determine the conduct of Mr. Marcos. In its view, the trial judge "properly interpreted and applied her inherent jurisdiction to order costs against a non-party who had committed an abuse of process", particularly as Superior Courts have an inherent jurisdiction to control their own processes and protect them from abuse. It also noted that the award was "entirely justified" because, "[b]ut for his deceitful and fraudulent conduct, it is more than likely, and in fact entirely probable, that the trial of this action would never have been required".

The Divisional Court also found no merit to the argument that Mr. Marcos did not receive adequate notice that the Lads would seek costs against him. The Divisional Court noted that the Lads appeared to have doubts

about their own liability during the litigation, as suggested by the fact that they offered Marcos Building $400,000.00 to settle the case at one point. It was not until they received the trial judge's reasons that "they could know the extent of the fraud accepted by the court". As well, their written submissions regarding costs provided Mr. Marcos the requisite notice, and he was given the opportunity to respond to them.

Consequently, the Divisional Court determined that the costs award was "not clearly wrong", but rather, that the trial judge properly exercised her discretion. The appeal was thus dismissed with costs of the appeal and the leave motion in respect of same being awarded to the Lads.

Takeaways

The conduct of Mr. Marcos was an egregious abuse of the litigation process. This case serves as a warning to litigation participants that such conduct may merit punishment by way of a significant adverse cost awards. It also serves as a reminder that parties should seriously consider offers to settle. Marcos Building could have received $400,000.00 had it accepted the Lad's offer. Instead, it and its principal opted to proceed to trial on fabricated evidence, and now, between the counterclaim and adverse costs awards, are collectively liable to pay over $660,000.00.

Michael Tersigni, Associate

— KC —

Appeal Court Overturns Finding that Contract "Emergency" and Time Extension Clause Was Triggered

In *Crosslinx Transit Solutions General Partnership v. Ontario (Economic Development, Employment and Infrastructure)*, 2022 ONCA 187 ("*Crosslinx*"), the Ontario Court of Appeal allowed an appeal and set aside the judgment of an application judge that had found an "emergency" clause in a construction contract had been triggered, thereby requiring a delay to the date by which the contractor was to achieve project milestones.

Background

Crosslinx concerned the appeal of an application judgment involving the interpretation of a complex project agreement (the "Project Agreement") concerning the design, construction, and maintenance of a large-scale public infrastructure project (the "Project"), being the Eglinton Crosstown Light Rapid Transit line (the "Crosstown LRT") in Toronto. Of particular concern, was the effects of the COVID-19 pandemic on the interpretation of the Project Agreement.

The appellants are agencies of the Crown that commissioned the Project (the "Appellants"). The respondents are a consortium of four construction companies that are building the Project (the "Respondents").

The Project Agreement requires the Project to be completed by the Substantial Completion date, failing which the Respondents faced significant penalties for failing to do so. The Project Agreement also contains caluses permitting the Applicants to require the Respondents to implement additional or overriding procedures in the event of an "emergency". In the event that the Applicants request such procedures, the Respondents can invoke a "Variation Enquiry" process to determine whether there ought to be an extension to the Substantial Completion date.

Application Judgement

In *Crosslinx v. Ontario Infrastructure*, 2021 ONSC 3567 (the "Application Decision"), the Respondents sought a declaration that the COVID-19 pandemic was an "emergency" within the meaning of the Project Agreement, which thus required the Appellants to provide the Respondents with a Variation Enquiry.

The application judge concluded that, by way of a March 25, 2020 email, the Appellants had notified the Respondents that they required compliance with additional and overriding COVID-19 health and safety procedures. As such, the application judge concluded that the COVID-19 pandemic constituted an "emergency" within the meaning of the Project Agreement, and that delays due to the pandemic allowed the Respondents to invoke the Variation process to extend the deadline to achieve Substantial Completion.

The Application Decision was covered in greater detail in our Fall 2021 Construction Newsletter.

The Appeal

At issue on the appeal is whether the application judge erred in concluding that the "emergency" provision, being s. 62.1(c) of the Project Agreement, was triggered, thus requiring the parties to engage in the Variation Enquiry.

The Appellants argued that the application judge made a palpable and overriding error in finding that s. 62.1(c) had been triggered by the March 25, 2020 email because it was an internal email that was not directed to the Respondents. The Appellants also assert that the application judge erred by failing to conclude that the Respondents "had assumed the risks of additional health and safety measures required by the pandemic in their contractual obligation to comply with 'Applicable Laws'", and in their obligation to prepare and to follow an Emergency Response Plan.

The Respondents argued that the application judge did not make an extricable error of law in interpreting the Project Agreement, nor did the application judge make a palpable and overriding error in concluding that s. 62.1(c) had been triggered. Further, to the extent that the application judge may have erred in characterizing the March 25 email, there was other evidence to support the application judge's conclusion.

Analysis

Although several grounds of appeal were raised, the Court of Appeal determined that it was sufficient only to consider the question of whether the application judge made a palpable and overriding error by finding that the Appellants had actually given requisite notice under under s. 62.1(c) by way of the email of March 25, 2020 email.

The Court of Appeal also noted that the standard of review for palpable and overriding error is well-established:

> Appellate courts may not interfere with the findings of fact made and the factual inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. The imputed error must, moreover, be plainly identified. And it must be shown to have affected the result. "Palpable and overriding error" is a resonant and compendious expression of this well-established norm.

The Court of Appeal noted that the application judge's error was palpable as that judge had "clearly and obviously erred in finding that the appellants' March 25, 2020 email was sent to the respondents" as there was no dispute that this email was an internal one. The error was also overriding as it was central to the application judge's determination that s. 62.1(c) had been triggered.

The Respondents argued that the application judge's decision could be maintained by substituting the March 25, 2020 internal email with a letter the Appellants sent to the Respondents dated April 21, 2020.

However, the Court of Appeal found difficulties with this submission. First, the April 21st letter was at best ambiguous, particularly as the Appellants explained therein that they did not require any additional and overriding procedures in

addition to those the Respondents had already undertaken. More importantly, the Respondents never stated in their contemporaneous correspondence with the appellants that the April 21, 2020 letter, or any other letter, constituted actual notification under s. 62.1(c). Rather, the Respondents repeatedly complained that the Appellants "should declare an emergency and direct them to implement additional or overriding procedures with respect to the project". This was also the primary relief the Respondents sought under their Notice of Dispute, and was the thrust of their argument before the application judge.

Additionally, the Respondents "did not frame their application or arguments before the application judge on the basis that any communication from the appellants constituted actual notice under s. 62.1(c)". Rather, they maintained that the Appellants should be deemed to have notified them given "their actions as Crown agencies were indivisible from those of the provincial government that ordered the additional or overriding pandemic procedures", or that the Appellants failed to exercise their contractual discretion in good faith.

Finally, the application judge did not consider what would constitute proper notification under s. 62.1(c), and whether the April 21, 2020 letter (or any other communication) would comply with the requirements thereof.

In such circumstances, the Court of Appeal determined that the application judge's decision could not be upheld by simply substituting the April 21st letter for the March 25th email.

Conclusion

The Court of Appeal thus concluded that the application judge made a palpable and overriding error, and allowed the appeal and set aside the Application Judgment.

However, the Court of Appeal declined to dismiss the application altogether, but rather, remitted it back to the application judge for further directions.

Takeaways

Given the way in which the March 25, 2020 email was mischarazterized, which was key to the application judge's ruling, it was appropriate for the Court of Appeal to set aside the decision on that basis. That said, we do not expect this case to be the last word in this litigation, given the large scope of the Project, the impact of the pandemic on its progression, and the potential application of contractual penalties.

Michael Tersigni, Associate

— KC —

News

Keel Cottrelle LLP partner, Christopher Wirth, has again been recognized by Best Lawyers in Canada for Corporate and Commercial Litigation and for Administrative and Public Law. Keel Cottrelle LLP is also pleased to announce that on September 1, 2022, Chris assumed his role as the Vice-Chair of the Ontario Bar Association's Administrative Law Section.

More information about all of the lawyers at Keel Cottrelle can be found on our firm's website - www.keelcottrelle.com. During this unprecedented pandemic period, rest assured that Keel Cottrelle LLP remains open and available to meet your legal needs.

KEEL COTTRELLE LLP
Barristers and Solicitors

36 Toronto St. Suite 920
Toronto, Ontario M5C 2C5
Phone: 416-367-2900
Fax: 416-367-2791

Keel Cottrelle LLP
Construction Law Newsletter

The information provided in this Newsletter is not intended to be professional advice, and should not be relied on by any reader in this context.

Keel Cottrelle LLP disclaims all responsibility for all consequences of any person acting on or refraining from acting in reliance on information contained herein.

For advice on matters with respect to construction liens or litigation, please contact Christopher Wirth or Michael Tersigni at Keel Cottrelle LLP:

Christopher Wirth
Tel: 416-367-7708
E-mail: cwirth@keelcottrelle.ca

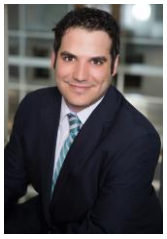
Michael Tersigni
Tel: 416-367-7688
E-mail: mtersigni@keelcottrelle.ca

For advice on matters with respect to public procurement or contract negotiation, please contact Anthony Rosato or James Easto at Keel Cottrelle LLP:

Anthony Rosato
Tel: 416-367-7697
E-mail: arosato@keelcottrelle.ca

James Easto
Tel: 416-367-7703
E-mail: jeasto@keelcottrelle.ca

Christopher Wirth
Executive Editor
Tel: 416-367-7708 |
E-mail: cwirth@keelcottrelle.ca



Michael Tersigni
Managing Editor
Tel: 416-367-7688
E-mail: mtersigni@keelcottrelle.ca