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Construction Law Newsletter

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COVID-19: Essential Workplaces and Construction Projects

In response to the COVID-19 pandemic, the government of Ontario has imposed increasingly severe restrictions aimed at reducing contact between people in an effort to stop the spread of the virus. Following advice from Ontario's Chief Medical Officer of Health, the government of Ontario ordered all businesses not identified on the government's list of essential workplaces to close their physical locations before April 5, 2020. That list deemed certain construction projects and services to be essential workplaces as follows:

27. Construction projects and services associated with the healthcare sector, including new facilities, expansions, renovations and conversion of spaces that could be repurposed for health care space.

28. Construction projects and services required to ensure safe and reliable operations of, or to provide new capacity in, critical provincial infrastructure, including transit, transportation, energy and justice sectors beyond the day-to-day maintenance.

29. Critical industrial construction activities required for,

i. the maintenance and operations of petrochemical plants and refineries,

ii. significant industrial petrochemical projects where preliminary work has already commenced,

iii. industrial construction and modifications to existing industrial structures limited solely to work necessary for the production, maintenance, and/or enhancement of Personal Protective Equipment, medical devices (such as ventilators), and other identified products directly related to combatting the COVID-19 pandemic.

30. Residential construction projects where,

    i. a footing permit has been granted for single family, semi-detached and townhomes

    ii. an above grade structural permit has been granted for condominiums, mixed use and other buildings, or

    iii. the project involves renovations to residential properties and construction work was started before April 4, 2020.

31. Construction and maintenance activities necessary to temporarily close construction sites that have paused or are not active and to ensure ongoing public safety.

While some construction projects can be easily classified in accordance with this list, others cannot. If you are uncertain about whether a particular construction project qualifies as an essential workplace, it is best to consult with a lawyer.

— KC —

COVID-19: *Force Majeure*, Frustration, and Construction Contracts

COVID-19 is impacting every industry across Ontario. The construction industry is no exception. In many cases contractors have begun issuing, and owners have started receiving, notices of delay citing the COVID-19 pandemic as the cause. Accordingly, parties to construction projects should be reviewing their contracts for any provisions dealing with delays, including what are known as "*force majeure*" provisions.

Force Majeure

In short, a *force majeure* clause can relieve a party from fulfilling its contractual obligations where an event outside of either party's control renders contractual performance impossible. Typically the event must be unexpected or beyond foreseeability.

Such a clause will typically indicate that no party is responsible for failing to perform obligations if it is prevented from doing so by an event of *force majeure*. Sometimes these clauses cite specific examples of the types of events that will be considered *force majeure*, such as labour strikes or fires. They may also feature catch-all clauses that refer to acts of God or other causes or damages beyond a party's control.

The clause is intended to protect parties from liability for contractual breaches caused by things outside of their control and beyond

normal risks. However, they cannot be relied upon to excuse a party from the consequences of its own actions, nor where the event in question was reasonably foreseeable.

Typically, such a clause will also require that the party seeking to rely on it give notice to the other party of its intention to do so, and may even prescribe the time within which the notice must be delivered.

Interpreting Force Majeure *Clauses*

The interpretation of a *force majeure* clause is a contextual exercise that depends on the specific language of the clause. Generally speaking, courts tend to interpret these clauses narrowly, including limiting the scope of broad catch-all phrases. In interpreting the clause, courts will consider whether the alleged *force majeure* event is actually captured by the language of the clause, whether the risk of non-performance was foreseeable and capable of being mitigated, and whether the performance was really rendered impossible due to the event in question.

The onus is on the party relying on a *force majeure* provision to establish that the alleged *force majeure* event rendered its contractual performance impossible. With respect to whether a performance was "impossible", economic considerations are generally not a relevant factor. In addition, a party could be prevented from successfully relying on the clause where its contractual obligations could have been performed by alternative means, for example, by sourcing another supplier, even if those alternative means are more costly.

A court may require the party relying on the clause to prove a causal connection between the alleged *force majeure* event and its inability to fulfill its contractual obligations. In other words, it is likely insufficient for a party to simply allege a *force majeure* event without specific proof of the way in which its contractual performance was in fact rendered impossible by that event.

Force Majeure *and COVID-19*

To date, a court has not specifically interpreted whether a pandemic qualifies as a *force majeure* event. Whether or not the COVID-19 pandemic will constitute a *force majeure* event will depend on a contextual reading of the particular clause in question. In our view, at least with respect to contracts entered into after it became apparent that there was a growing health crisis in places like China and Italy, it may difficult to make the case that the emerging pandemic was not reasonably foreseeable. That will most certainly be the case for contracts presently being negotiated.

We also note that, despite the government of Ontario declaring a state of emergency, many construction projects kept operating. Further, when the government of Ontario released its list of essential services, the construction industry was largely deemed essential, thus permitting many construction projects to remain operational. Many are still operational. As such, parties receiving notices of delay may require that the notifying party provide specific proof of the causal connection between the COVID-19 pandemic and their inability to perform their contractual obligations before recognizing the impossibility of performance.

Doctrine of Frustration

Where a construction contract does not have a *force majeure* provision, parties may resort to the doctrine of "frustration". This doctrine applies where an event occurs, or circumstances are altered, such that it renders a contract radically or fundamentally different in character from what the parties

intended. Where the doctrine applies, the contract can be terminated without liability. However, the doctrine only applies where the event or change in circumstances was unforeseeable and occurred through no fault of either party. As such, many of the same considerations as those outlined above apply where a party seeks to rely on this doctrine to excuse contractual non-performance.

Takeaways

Parties should take care to review their construction contracts for any delay or *force majeure* provisions. In the event that a party wants to rely on such provisions, they should ensure compliance with any notice requirements. For those parties that are presently negotiating contracts, it would be prudent to include *force majeure* provisions that specifically refer to the COVID-19 pandemic (as well as pandemics and epidemics generally), and to allocate risks, including delay and costs, accordingly.

— KC —

Lien Expiry Periods Suspended Amid COVID-19 Pandemic

As part of the government of Ontario's efforts to combat the COVID-19 pandemic, the government has issued an order under ss. 7.1 of the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9, wherein it has suspended limitation periods and procedural time periods retroactive to March 16, 2020 (the "Suspension Order"). Although the maximum suspension period is set at 90 days, the Suspension Order can be further renewed.

In this article we review the impact of the Suspension Order on the preservation and perfection of lien claims, as well as on the holdback obligations of payors in the construction pyramid.

The Suspension Order

The Suspension Order is set out in O. Reg. 73/20 and reads as follows:

> 1. Any provision of any statute, regulation, rule, by-law or order of the Government of Ontario establishing any limitation period shall be suspended for the duration of the emergency, and the suspension shall be retroactive to Monday, March 16, 2020.
>
> 2. Any provision of any statute, regulation, rule, by-law or order of the Government of Ontario establishing any period of time within which any step must be taken in any proceeding in Ontario, including any intended proceeding, shall, subject to the discretion of the court, tribunal or other decision-maker responsible for the proceeding, be suspended for the duration of the emergency, and the suspension shall be retroactive to Monday, March 16, 2020.

Lien Periods Generally

The *Construction Act*, R.S.O. 1990, c. C.30, establishes time periods for preserving and perfecting lien claims. For contracts governed prior to the July 1, 2018 amendments to the *Construction Act*, the period within which a party must preserve a lien by registering a claim for lien is 45 days. The period within which that party must perfect that lien claim by commencing a court action and registering a certificate of action is 45 from last day the claim for lien could have been preserved.

For contracts governed by the post-July 1, 2018 amendments to the *Construction Act*, the lien claim must be preserved within 60 days and perfected within 90 days from last day the claim for lien could have been preserved.

We note that, as of March 23, 2020, the *Rules of Civil Procedure* were amended to allow for the electronic filing of a certificate of action through the Civil Claims Online Portal. As

such, lien claims can now be preserved by electronic registration on Teraview, and perfected by electronically issuing a Statement of Claim and e-filing the certificate of action.

The Effect of the Suspension Order on Preserving and Perfecting Liens Claims

Section 31 of the *Construction Act* governs the time period for the preservation of lien claims. Section 36 concerns the expiry of a preserved lien. Both of these sections are exempt from the presumptive limitation periods set out in the *Limitations Act, 2002*, S.O. 2002, C. 24, because they are specifically referred to as "other limitation periods" under s. 19 of that legislation. As such, in our view, the Suspension Order is effective in suspending the time period for preserving and perfecting liens.

The Effect of the Suspension Order on Preserved Lien Claims

Section 37 of the *Construction Act* requires a perfected lien either be set down for trial, or that an order for trial be made, before the two year anniversary of the lien being perfected by commencement of an action. Section 37 is not referred to as an "other limitation period" under s. 19 of the *Limitations Act, 2002*. In fact, the Ontario Superior Court of Justice in *QH Renovation & Construction Corp. v. 2460500 Ontario Ltd.*, 2019 ONSC 3237, recently affirmed the view of the Divisional Court that s. 37 extinguishes a lien and "is not a limitation period". As such, in our view, the time period with respect to expiring perfected lien claims is not be governed by s. 1 of the Suspension Order. Rather, s. 37 is governed by s. 2 of the Suspension Order. Note however, that s. 2 makes the suspension of steps in a proceeding "subject to the discretion of the court". It is not yet clear what position the courts may take with respect to a lien claimant's compliance with s. 37 of the *Construction Act*.

Holdback Obligations

Under normal circumstances, every payor on a construction project must retain a 10 per cent holdback from all payments made to payees. This holdback functions as a type of reserve fund for the benefit of service and material subcontractors and suppliers further below in the construction pyramid. If a subcontractor or supplier is not paid, they can preserve a lien claim, which will prevent the release of holdback (to the extent of the amount of the lien claim), until the lien is either by discharged by payment to the lien claimant, or vacated by payment of security into court. Where a lien period has expired and no lien claims have been preserved, the payor can safely release the holdback.

If the time period within which a lien claim must be preserved does not expire on account of the Suspension Order, which is our view, then a payor cannot safely release the holdback, at least until the suspension period ends and the lien period expires in the normal course. Absent further government intervention on this issue, this will likely have a large impact on the cash flow of construction projects as Owners or financiers will have legitimate concerns about releasing holdback monies while the Suspension Order is in effect.

Takeaways

This is an uncertain and unprecedented time in Ontario. Despite our view that the Suspension Order suspends the time periods with respect to preserving and perfecting lien claims, in our view, it is always better to err on the side of caution. As such, it would be prudent for lien claimants to behave as though the time periods for preserving and perfecting liens have *not* been suspended, and

to preserve and perfect their lien claims electronically and in accordance with the relevant time periods that govern their construction contracts. Conversely, it would be prudent for payors in the construction pyramid to act as though the time periods respecting persevering lien claims have been suspended so as to avoid prematurely releasing holdback funds.

— KC —

Divisional Court Clarifies Test for Contractor's 'Abandonment' of Contract

In *Scepter Industries Ltd. v. Georgian Custom Renovations Inc.*, 2019 ONSC 7515, Ontario's Divisional Court (the "Divisional Court") clarified the test for determining when a construction contract has been 'abandoned' for the purposes of determining when the period for lien claim registration began.

Background

Scepter Industries Ltd. ("Scepter") supplied services and materials as the general contractor to Georgian Custom Renovations Inc. ("Georgian"), the owner of the lands on which the improvement was located. Georgian refused to pay Scepter for a substantial portion of the work performed due to its dissatisfaction with the quality, and non-completion, of some of the work. While Scepter and Georgian attempted to negotiate a resolution to their dispute, Georgian provided Scepter with a notice of termination on April 18, 2016. Scepter subsequently registered its claim for lien on June 28, 2016.

Georgian then brought a motion to discharge Scepter's claim for lien on the basis that Scepter failed to 'preserve' its claim for lien within 45 days of the completion or abandonment of the work, as required by ss. 31(2) of the *Construction Lien Act*, R.S.O. 1990, c. C. 30 (the "*CLA*").

Scepter took the position that the contract had not been completed, nor had it been abandoned, as negotiations between the parties had been ongoing and only reached an impasse at the time Scepter registered its claim for lien on June 28, 2016.

Motion Judge's Decision

The motions judge considered whether the contract was either 'completed' or 'abandoned' for the purpose of triggering the commencement of the 45 day period for registering a claim for lien under the *CLA*. The motions judge found that the contract was not 'completed' within the meaning of ss. 2(3) of the *CLA* because 2% of the work remained outstanding.

The motions judge also found that although the contract had not been abandoned by Scepter, Georgian's notice of termination triggered the commencement of the 45 day period within which Scepter had to register its claim for lien. The motions judge held that an owner's unilateral termination of a contract constitutes 'abandonment' of the contract for the purposes of the *CLA*. As such, Scepter's claim for lien had expired before it was registered. The motions judge thus ordered the claim for lien discharged and the lien security cancelled.

Divisional Court

Scepter appealed the motions judge's decision to the Divisional Court. The Divisional Court allowed the appeal and set aside the decision of the motions judge.

The Divisional Court held that, for the purpose of the commencement of the 45 day period under the *CLA*, an owner cannot unilaterally force 'abandonment' of the contract by sending a notice of termination to

the contractor, unless the contractor *knew or ought to have known* that the owner would not complete the contract.

The Divisional Court explained that a contractor may be considered to have abandoned a contract where it becomes impractical or impossible to perform the contract, for example, where the parties reach an impasse in their dispute resolution discussions. However, a unilateral notice of termination from an owner is not determinative, but is merely one factor to be taken into account in the analysis of whether a contract has been abandoned. The Divisional Court noted that in reality, even after a notice of termination has been given, negotiations often continue and disputes may be resolved, or a contractor may be ready, willing and able to complete a contract. In such scenarios, the contract cannot be said to have been abandoned by the contractor.

The Divisional Court found that Scepter had not abandoned the contract as it was still ready, willing and able to complete the contract and did not consider that it had reached an impasse in its negotiations with Georgian, which was objectively reasonable on the facts of this case. As such, despite the fact that Georgian sent a termination notice, it could not be said that Scepter knew or ought to have known that Georgian would not complete the contract. Therefore, the contract had not been abandoned.

The Divisional Court thus dismissed Georgian's motion to discharge the claim for lien.

Takeaways

As this case demonstrates, in cases in which provisions of the former *CLA* continue to apply (pursuant to s. 87.3 of the amended *Construction Act*, RSO 1990, c C30), the test for contract abandonment requires that the lien claimant abandon the contract. Additionally, where an owner has provided a notice of termination of the contract, courts will have to consider whether the lien claimant abandoned the contract because it *knew or ought to have known* that the owner would not complete the contract. Nevertheless, where an owner has provided a termination notice, it is advisable for lien claimants to register their lien claims expeditiously or else risk a finding that the failure to do so was not objectively reasonable.

Importantly, where the amended *Construction Act* applies, ss. 31(2) has been expanded such that the lien preservation period commences when the contract is "completed, abandoned or terminated". Under this expanded provision, an owner's formal notice of termination will now trigger the commencement of the lien preservation period, which has also been extended to 60 days under the amended *Construction Act*.

— KC —

Court Confirms Lien Claim Takes Priority Over Mortgage Where No Proof of Mortgage Advances

In *Pollard Windows Inc. v 1736106 Ontario Inc.*, 2019 ONSC 4859, Ontario's Divisional Court held that a supplier's claim for lien took priority over a competing mortgage claim because there was no evidence that any amounts were actually advanced under the mortgage.

Background

1736106 Ontario Inc ("173") was building a house as part of a subdivision development. 173 hired Pollard Windows Inc. ("Pollard Windows") in 2008 to supply $12,813.62 worth of windows to be installed in that

house. The principal of 173, Andrew Ferri ("Mr. Ferri"), paid Pollard Windows only $2,500.00 through another company he controlled. Pollard Windows then sued for payment of the balance for the windows sold and delivered. Pursuant to the *Construction Lien Act*, R.S.O. 1990, c. C.30 (the "*CLA*"), Pollard Windows registered a claim for lien against the property on which the windows had been installed.

In 2010, Pollard Windows was granted judgement in its favour for the balance, plus interest and cost, as well as a declaration that its lien was valid. However, Mr. Ferri refused to pay the award and instead challenged the rights of Pollard Windows. This resulted in a decade long legal battle, with Pollard Windows having cost awards approaching $200,000.00 enforceable against the property under its lien.

Judicial Sale and Mortgage Claim

In 2014, Pollard Windows obtained an order for judicial sale of the property under the direction of a referee. The sale produced roughly $358,000.00 in proceeds. 173 had held a mortgage on the property, which it assigned in 2000 to another corporation controlled by Mr. Ferri, 1746878 Ontario Inc. ("174"). 174 claimed it was entitled to payment of its mortgage from the proceeds of the sale in priority to Pollard Window being paid on account of its lien security.

Priority Hearing

Lawrence Beam ("Mr. Beam"), the principal of the original buyer of the property, swore that there was an advance of $400,000.00 under the mortgage. Note as well that 174 was also eventually held in contempt as it attempted to sell the property under its mortgage even after a court ordered that no further steps to be taken to sell property.

At the priority hearing before the Ontario Superior Court of Justice (the "Court"), the Court held that Pollard Window's lien claim took priority over 174's mortgage claim because Mr. Ferri and his company were unable to establish that any amounts were actually advanced under that mortgage. Further, the Court also found that the mortgage was a fraudulent attempt to defeat creditors. Despite this, 174 continued to rely on the notice of sale that it argued was validly delivered under its mortgage.

Divisional Court

On appeal to Ontario's Divisional Court, (the "Divisional Court"), the Divisional Court concluded that there was no palpable and overriding error in the lower Court's previous rulings, and thus no reason to interfere with those decisions.

The Divisional Court relied on ss. 78(3) and (4) of the *Construction Act* (which are identical to the same section in the *CLA*), which deal with determining and limiting priorities by providing that a mortgage claim registered prior to a claim for lien has priority to the extent of any advance made in respect of that mortgage. The Divisional Court found that both subsections limit the priority "to the amount advanced under the mortgage prior to the lien arising". The Divisional Court found that, on a balance of probabilities, 174 did not prove that any amounts had ever been advanced under the mortgage prior to Pollard Window's claim for lien in 2008.

The Divisional Court also agreed with the lower Court's finding that the evidence proposed by Mr. Beam that there was an advance of $400,000.00 under the mortgage lacked common sense. Particularly, the Divisional Court found that there was strong evidence that the mortgage was not an arm's length transaction because Mr. Beam and Mr. Ferri had been working together for years to

defeat creditors. The Divisional Court also relied on lower the Court's finding that there was a lack of documentation to support Mr. Beam's assertion, especially because no party provided a trust statement showing the advance, a reporting letter on the mortgage transaction, or any bank records.

The Divisional Court thus reaffirmed that in the absence of evidence of any amounts actually being advanced under a mortgage, a subsequently registered claim for lien will take priority over the mortgage.

Takeaways

The above summary canvasses only some of the issues, both procedural and substantive, at issue between these parties. As the Court said in its opening comments: "All this over $10,000.00". While the case serves as a cautionary tale about endless and reckless litigation, it also simply confirms that insufficient evidence of an advance under a mortgage will be fatal to a claim of priority over a subsequently registered claim for lien.

— KC —

Lien Claimant Replaces Erroneous Lien Claim and Ends up with Nothing

A lien claimant registered its claim for lien, but incorrectly stated the time the claimant's services were supplied. The claimant then replaced the claim for lien with a second claim for lien with the correct time. In *9585800 Canada Inc. v. JP Gravel Construction Inc.*, 2019 ONSC 7022, Ontario's Divisional Court (the "Divisional Court") held that the original lien, once discharged, could not be revived, and consequently, by having discharged the first lien, the claimant had lost its lien rights.

Background

JP Gravel Construction Inc. ("Gravel") was the general contractor for a construction project (the "Project") on property owned by Morguard Realty Holdings Inc. (the "Owner"). 9585800 Canada Inc., operating as "Earth Movers", was a subcontractor to Gravel in respect of the Project.

Earth Movers registered a claim for lien of $662,100.48 against the Owner's property on May 15, 2018 (the "First Lien"). On June 4, 2018 Earth Movers discharged the First Lien because it had erroneously stated that its services were provided to the Project in 2017 rather than in 2018. Earth Movers then registered a second claim for lien for the same amount, but with the corrected time period (the "Second Lien").

Issue

At issue in this case was whether, and to what extent, the discharge of the First Lien affected the registration of the Second Lien.

Positions

Gravel took the position that the Second Lien should be discharged under s. 48 of the *Construction Lien Act,* R.S.O. 1990, c. C.30 (the "*CLA*"), which states as follows:

> A discharge of a lien under this Part is irrevocable and the discharged lien cannot be revived, but no discharge affects the right of the person whose lien was discharged to claim a lien in respect of services or materials supplied by the person subsequent to the preservation of the discharged lien.

Despite its position, Gravel nevertheless paid a lien bond of $16,553.00 to remove the

Second Lien from the Owner's property. Gravel then sought leave to bring a motion for an order discharging the Second Lien, dismissing the lien action, and for the repayment of the bonding invoice.

Motions Judge's Decision

The motions judge granted Gravel leave to bring the motion, but ultimately dismissed the motion and awarded costs against Gravel. She reasoned that, because the time frame in the First Lien was clearly incorrect, the First Lien was a "nullity" because "it was a lien for non-existent work". However, she then found that the Second Lien was appropriate and valid such that s. 48 of the *CLA* did not apply.

Divisional Court

On appeal to the Divisional Court Gravel argued that the motions judge erred by failing to give effect to the clear wording of s. 48. It also argued that the determination that the First Lien was a nullity denied Gravel procedural fairness because this issue had not been argued before the Court. As such, Gravel was unable to make submissions on the effect of s. 6 of the *CLA*, which was relevant:

> No certificate, declaration or claim for lien is invalidated by reason only of a failure to comply strictly with subsection 32(2) or (5), subsection 33(1) or subsection 34(5), unless in the opinion of the court a person has been prejudiced thereby, and then only to the extent of the prejudice suffered.

Note that, ss. 34(5) specifies the content of a claim for lien, which includes "the time within which the services or materials were supplied."

Conversely, Earth Movers argued that the decision of the motions judge was based on a finding that the First Lien was a nullity and that this finding of fact deserved deference. However, it conceded that the issue of nullity and s. 6 were not raised in oral argument before the motions judge.

Analysis

The Divisional Court determined that, because the appeal turned on the correct legal interpretation of s. 48, the standard of review was whether the decision of the motions judge was "correct" as opposed to "reasonable", and thus the motions judge's decision was not entitled to deference. The Divisional Court also had to determine whether the motions judge had accorded procedural fairness to the parties.

The Divisional Court held that the wording of s. 48 was clear and that the motions judge failed to apply it correctly:

> In my view, the motions judge erred in failing to give effect to s. 48 of the *Act*. The wording of the section is clear, as set out earlier in these reasons. If a lien is discharged under Part VII, the discharge is irrevocable, and the discharged lien cannot be revived by the registration of another lien. That is what happened here: the Respondent discharged the first lien and registered a second lien for the same amount.

The Divisional Court acknowledged that this result was harsh to the lien claimant, but it was what the legislation required. Further, the lien claimant could have proceeded to try and have the mistake corrected without discharging the First Lien.

In addition, the Divisional Court also held that the motions judge also denied the parties

procedural fairness by deciding the motion on the basis of nullity without giving the parties a chance to make submissions on that issue. The Divisional Court noted that the combined effect of s. 6 and ss. 34(5) of the *CLA* was that an error made with respect to the time within which services or materials are supplied is a minor irregularity, such that a court can refuse to declare the claim for lien invalid, or vacate the lien, provided that there is no prejudice to the other parties. Gravel conceded that it would not have suffered any prejudice if Earth Movers had sought such an order. Instead, Earth Movers chose to discharge the First Lien and register a Second Lien; s. 48 of the *CLA* makes that discharge irrevocable. Accordingly, the motions judge erred by not ordering the Second Lien be vacated.

The Divisional Court thus allowed the appeal and set aside the order of the motions judge. The Divisional Court also ordered that the lien action be dismissed, that the security posted by Gravel be returned to it for cancellation, and that Gravel be granted its costs in the appeal and the motion below.

Takeaways

Unfortunately the lien claimant here ran afoul of one of the stricter provisions of the *CLA*, being s. 48. As a general rule, lien claimants should err on the side of strict compliance with the *CLA*, even though the curative provision of s. 6 exists because that provision is limited in its scope. Had the lien claimant here sought an order to correct the First Lien on the basis of s. 6 rather than discharging it, it seems likely that it would still have its lien.

— KC —

Cost Savings Provisions Form Part of Contract 'Price' and are Lienable

In *Dominus Construction Corporation v. H&W Development Corp.*, 2019 ONSC 7235, the Ontario Superior Court of Justice (the "Court") held that a construction manager's share of a cost savings provision in its contract with the owner was lienable as it formed part of the contract 'price'.

Background

Dominus Construction Corporation ("Dominus") contracted with H&W Development Corp. ("H&W"), the owner and developer of a residential condominium complex (the "Project"), to provide construction management services in respect of the Project (the "Contract").

Dominus' fee for its services was the "Contract Price" comprising of (a) $3,028,400.00; (b) a share of any cost savings (the "Cost Savings") equally with H&W; and (c) any extras. "Cost Savings" was defined as the difference between the Projected Workable Budget (as defined in the Contract) and the actual total costs of the Project.

Dominus performed its managerial services as required, and thereafter invoiced H&W for $7,516,473.55, which Dominus calculated to be its 50% share of the total Cost Savings realized on the Project. H&W took the position that no Cost Savings were realized on the Project and thus no monies were owed to Dominus.

Dominus registered lien claims, following which H&W posted security with the Court in order to vacate the lien claims. H&W then brought a motion to discharge the lien claims.

Issue

The issue before the Court was whether the Cost Savings provision was part of the Contract Price, and therefore properly lienable.

Positions

Section 14 of the *Construction Act* describes when a lien arises:

> **14** (1) A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials.

H&W did not dispute that management services are lienable, but argued that there can be no lien in respect of a cost savings provision in a construction contract because costs savings are not part of the contract 'price'.

H&W argued that Dominus had been paid in full for all construction management fees, labour, supervisory services and disbursements, which constituted the 'price'. Conversely, cost savings are more akin to a profit-sharing or 'bonus' arrangement. H&W thus relied on cases where courts found that profit-sharing or bonus arrangements were not lienable.

Dominus took the position that Cost Savings are properly lienable and relied on one previous case that considered Cost Savings as part of the contract 'price'. Dominus argued that this approach was consistent with the previous recognition by courts that cost savings arrangements encourage cost savings, discourage cost overruns, and are mutually beneficial to parties in construction contracts.

Analysis

The Court was not persuaded by H&W's reliance on cases where profit-sharing or bonus arrangements were determined not to be lienable. The Court distinguished cost savings provisions from profit-sharing provisions, which allow the interested party to receive a direct share of the profits realized. Dominus was not entitled to a share of any of the profits realized by H&W on the sale of its condo units. The Court reasoned that cost savings, on the other hand, are integrally linked to the construction management services provided by Dominus. This 'service' is reflected in the contractor's proficiency in bringing a project to completion under budget, which is no different than the 'service' Dominus provided in managing the Project. The Court thus concluded that the Cost Savings at issue in this matter were lienable and dismissed H&W's motion to discharge Dominus' lien claims.

Takeaways

This case confirms that a cost savings provision in a construction contract can form the basis of a claim for lien because achieving such savings are part of the services provided by a party to a construction contract.

— KC —

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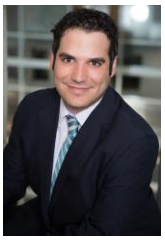

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