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Manual of Construction Law

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

Release 2019-3 keeps you current with the addition of new case digests and adds valuable case law and commentary to Chapters 1 (The Construction Team), 2 (The Tendering Process), 3 (Contracts), 4 (Dispute Resolution), and 5 (Construction Liens).

Case Law Highlights

Tendering Process — Contractor Submitting Tender — Incorporating Subcontractor's Proposal — Subcontractor Revising Proposal — Where the general contractor submitted its tender for a construction project, incorporating a subcontractor's first proposal for its drywall services without formally accepting the subcontractor's proposal with its terms and conditions, and the subcontractor subsequently submitted a second proposal at a higher price within the specified timeframe, the subcontractor was not liable in damages as there was no agreement

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concerning the first proposal. In this case, the municipal district put to tender a contract for the construction of an operations and maintenance building. The subcontractor responded to an "invitations to bid" issued by DWC Ltd. The subcontractor forwarded a proposal to DWC Ltd. for the price of $165,000 for framing and drywall services. Subsequently, the subcontractor emailed DWC Ltd. to advise it made an error in its pricing, and provided an updated proposal with an increased price. DWC Ltd did not respond, but submitted its tender for a total of $1.142 million, which allocated the sum of $157,000 for the drywall work stated in the subcontractor's first proposal. DWC Ltd. was awarded the contract as the general contractor on the project, and forwarded a subcontract to the subcontractor based on its first proposal. The subcontractor did not execute documentation, and sent a letter to DVC Ltd. stating that it submitted its revised proposal within the specified time frame, and would complete the project for the updated price. DWC Ltd. subsequently retained a different drywall subcontractor for a price higher than the subcontractor's first proposal. DWC Ltd. brought an action for the additional costs incurred on the basis that the subcontractor was obligated to complete the contract at its first proposal price. DWC Ltd.'s action was dismissed. At trial, DWC Ltd. did not adduce the bid documents or any evidence to prove that the first proposal was submitted in accordance with the bid documents. The first proposal expressly indicated that DWC Ltd. was to evidence acceptance of the "quotation w/ all Terms & Conditions". DWC Ltd. did not accept the subcontractor's terms and conditions, but offered a different subcontract contract, with different terms and conditions. The subcontractor did not accept DWC Ltd.'s terms and conditions. Accordingly, no agreement was reached between the parties, and the subcontractor was not obligated to provide materials, work and services to DWC Ltd. for the price of $164,955: *Dawson Wallace Construction Ltd. v. TIC Interiors Ltd.*, 2018 CarswellAlta 2285, 2018 ABPC 237 (Alta. Prov. Ct.).

Subcontractor's Lien Action — Excessive Delay — Prejudice to Owner Offset by Reduction in Security Posted and Owner's Separate Action — The prejudice caused by the subcontractor's delay of over three years in pursuing its lien action against the general contractor and owner was offset by the fact that the amount posted as security was significantly reduced, and that the owner had brought a separate action against the subcontractor. In this case, the owner and developer of commercial shopping centre hired a general contractor to undertake substantial earthworks on the site. The general contractor hired a subcontractor to complete certain parts of the earthworks and underground servicing. The subcontractor hired a number of sub-subcontractors. As a result of a payment dispute, the subcontractor walked off the job site, and filed a lien under the former *Construction Lien Act*. The owner paid roughly $3.1 million into court to lift various registered liens. The subcontractor brought a lien action in July 2014 against the general contractor and the owner. The amount that the owner had posted as security had been reduced in increments to $400,000. A trial record was passed on February 11, 2015. The discoveries commenced in November 2015, but were not completed. Following a

pre-trial conference in April 2016, it became clear that the subcontractor needed an expert report from a quantity surveyor. In May 2017, an engineering report was produced, but was not in the nature of a quantity survey. In February 2018, the general contractor obtained leave to bring a motion to dismiss the subcontractor's action for delay. The motion was dismissed.

The case was in a grey area between clearly acceptable and clearly unacceptable, and it was necessary to take a careful and nuanced look at all of the prevailing circumstances. The Ontario *Rules of Civil Procedure*, the relevant provisions of the *Construction Act*, R.S.O. 1990, c. C.30, and the animating principles of the Act supported the conclusion that lien actions were intended to be prosecuted diligently and expeditiously. This was a reasonably complex lien action, and the claim was sufficiently complicated that some leeway must be given to a subcontractor in terms of the time needed to get the case ready for trial. It was problematic that it took a year and a half to complete the discoveries, and it had been over two years since the discoveries had been completed, but the case was still not trial ready. The obvious prejudice to the owner in having its money tied up in court was lessened by certain factors, including (1) that this was a major project, and the posted security of $400,000 was less than 10 per cent of the value of the subcontract, and a fraction of the overall value of the project; (2) the subcontractor consented to numerous, significant reductions in the amount of security held in court, which had been reduced by almost 90 per cent; (3) there was some validity to the lien claims; and (4) the owner brought a separate action against the subcontractor for slander of title. Accordingly, regardless of the outcome of this motion, it would not bring an end to the litigation between the parties. The subcontractor could and should have moved the case along with more pace, but there were reasonable explanations for some of the delay due to the complexity of the action and a dispute regarding the production of documents. While the subcontractor had not moved as quickly as it ought to have, it had pushed the matter forward in a consistent manner, and it had been very compromising in consenting to the reductions of the amount of security paid into court, which went a long way to alleviating any ongoing prejudice to the owner. Given the reductions in the security, and the existence of an ongoing companion action, the prejudice to the owner or to the reputation of the administration of justice had not reached the point where dismissing the action was justified: *M. Fuda Contracting Inc. v. 1291609 Ontario Ltd.*, 2018 CarswellOnt 13069, 2018 ONSC 4663 (Ont. S.C.J.).

Remedies for Breach of Contract — Damages — Faulty Servicing of Gas Fireplace — Carbon Monoxide Exposure — General Damages — Where the home renovations involved the removal and reinstallation of a gas fireplace, and the subsequent servicing of the fireplace by the subcontractor failed to detect the emitting of CO in an unsafe manner, the general contractor was not liable for the reinstallation of the fireplace, but the subcontractor was negligent in servicing it, and the owners were awarded general damages for the worsening of their pre-existing brain abnormalities. In this case, the husband and wife owners hired the

general contractor to renovate their home. During the renovations in 2007 and 2008, the owners moved out of their home. As part of the renovations, the living room fireplace was removed, and later reinstalled in 2008, and subsequently serviced by the subcontractor, which performed the mechanical, gas and fireplace work. After the owners moved back into their home, they asserted that they were exposed to and suffered injuries from CO emissions from the living room fireplace. Prior to the CO exposure, the husband had brain abnormalities, which included hippocampal atrophy (degeneration of brain cells) and white matter changes. He also had behavioural and cognitive problems, such as forgetfulness, fatigue, and mild depression. Prior to the CO exposure, the wife had brain abnormalities, which included hippocampal atrophy and white matter changes. She also had anxiety, depression, and mood disorders, and cognitive problems involving verbal and visual learning. The owners brought an action claiming that both the general contractor, and the subcontractor were jointly and severally responsible for the negligent installation of the living room fireplace, and that the subsequent negligent servicing by the subcontractor alone, each independently caused their damages. The general contractor owed the owners a duty of care with respect to the reinstallation of the fireplace. The subcontractor owed duties of care to the owners with respect to both the 2008 reinstallation and subsequent servicing of the fireplace. The owners' action was allowed against the subcontractor.

The standard of care for installing and servicing the fireplace, according to the gas safety regulations, required the following:

> (a) reasonably inspect the fireplace to ensure it was:
>
> (i) operating in accordance with the manufacturer's specifications, and
>
> (ii) was venting in a safe and proper manner;
>
> (b) reasonably test for CO emissions using a suitable CO detector;
>
> (c) repair or remediate any defects or problems that would interfere with the safe operation and venting of the fireplace.

The general contractor did not breach the standard of care with respect to the 2008 reinstallation of the fireplace. The subcontractor breached the standard of care with respect to the subsequent servicing of the fireplace. These breaches occurred on February 10, 2009 and November 13, 2009. As result of the subcontractor's breach that occurred on November 13, 2009, the owners were exposed to CO in their residence, from that date until January 4, 2010, at levels above 50 ppm, but less than 1000 ppm. As result of the CO exposure, both owners' hippocampal atrophies were accelerated. The CO exposure caused the husband's depression to worsen, and the wife's depression, anxiety, and mood disorders to worsen. Non-pecuniary damages of $50,000 were awarded to the wife. Non-pecuniary damages of $200,000 were awarded to the husband. Special damages in the amount of $5,792 were also awarded. In addition, the cost of care in the amount of $53,000 was awarded: *Edwards v. Parkinson's Heating Ltd.*, 2018 CarswellBC 888, 2018 BCSC 593, 79 C.L.R. (4th) 294 (B.C. S.C.).