

Construction Law Forum Case Law Update

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Earthco Soil Mixtures Inc v Pine Valley Enterprises Inc

2024 SCC 20

Earthco Soil Mixtures Inc v Pine Valley Enterprises Inc

- Statutes can create implied conditions in contracts. This means that the court will read conditions *as if they exist* in the contract, even if they are not written in the contract.
- In Ontario's *Sale of Goods Act*, RSO 1990, c S.1, section 14 is an implied condition that requires goods to correspond with the description and sample provided.
- However, section 53 of the same act allows parties to a contract to remove the protection provided by section 14, through "express agreement". Terms like these are called exclusion clauses.

Earthco Soil Mixtures Inc v Pine Valley Enterprises Inc

- This case involved a contractor, Pine Valley, who wanted to buy a specific mix of topsoil from Earthco. Pine Valley needed the soil quickly and chose to skip Earthco's usual testing procedures. Instead, Pine Valley relied on test results provided by Earthco, from an earlier batch of topsoil.
- Based on the testing results, Pine Valley decided to buy the soil. However, the parties modified the contract with two exclusionary clauses: 1) Pine Valley had the right to test and approve the material before it was shipped, and 2) if Pine Valley waived those rights, Earthco would not be responsible for the quality of the material.

Earthco Soil Mixtures Inc v Pine Valley Enterprises Inc

- Pine Valley did not test the topsoil before using it. The project flooded. Pine Valley discovered that the topsoil did not match the soil test results (from the earlier sample). Subsequently, it sued Earthco, seeking \$350k in damages.
- The 6-1 majority on the Supreme Court of Canada sided with Earthco. They interpreted the contract to determine what the parties intended to do. Pine Valley needed the soil fast and took the risk of not testing it. Therefore, Earthco was not liable for damages.
- **Takeaway:** Explicit language directly ousting an implied condition is optimal but is not a prerequisite. Courts will consider the objective intent of the parties when determining whether exclusion clauses remove statutory protections.

MGW-Homes Design Inc v Pasqualino

2024 ONCA 422

MGW-Homes Design Inc v Pasqualino

- An adjudicator determined that Pasqualino was required to pay MGW. MGW obtained a writ of enforcement for the determination but failed to give notice to Pasqualino within ten days after filing, as required by section 13.20(3) of the *Construction Act*. Pasqualino brought a motion to challenge the enforceability of the writ and was successful. MGW was barred from further enforcing the adjudicator's order.
- **Reminder:** Adjudication determinations cannot be appealed but can be judicially reviewed if leave of the Divisional Court is obtained (section 13.18(1) of the *Construction Act*).
- **Takeaway:** An appeal of an order on the enforceability of an adjudicator's determination goes to the Ontario Divisional Court.

Ledore Investments v Dixin Construction

2024 ONSC 598

Ledore Investments v Dixin Construction

- In a dispute between an unpaid subcontractor, Ross Steel, and a contractor, Dixin, the adjudicator determined the case on a technical point about whether the contractor's invoices to the Owner constituted "proper invoices" under the *Construction Act*. Neither party had raised nor made submissions on this point. The Divisional Court sent the decision back to the adjudicator because of procedural fairness considerations, discussed in section 13.6 of the *Construction Act* and Ontario Regulation 306/18.
- **Takeaway:** Parties have the right to be heard on determinative issues. Adjudicators may invite additional submissions from the parties if these issues have not been addressed.

Arad Incorporated v Rejali et al

2023 ONSC 3949

Arad Incorporated v Rejali et al

- The plaintiff, Arad Inc., registered a lien on the defendants' property, which the defendants vacated by posting security into court. In two adjudications that followed, the adjudicator found that no amounts were owing to either party (the “determinations”).
- The defendants brought a motion under section 44(5) of the *Construction Act* to have their security returned. In support of the motion, the defendants filed two affidavits that included as evidence the determinations of the adjudicator.
- The issue before the court was whether the determinations of the adjudicator that no monies were owed to the plaintiff means that the money paid into court by the defendants should be returned.

Arad Incorporated v Rejali et al

- On a motion to return security posted to vacate a lien, the court must be satisfied, on the basis of the motion material, that there is “no reasonable prospect” of the lien claimant proving that the lien claimed attracts the requirement to attract security under the *Construction Act*.
- The only evidence provided by the defendants in support of the motion was the determinations of the adjudicator.

Arad Incorporated v Rejali et al

- The court dismissed the motion.
 - The findings and conclusions of an adjudicator set out in the determination is evidence that the court may take into consideration in determining whether to exercise its discretion to reduce security “where it is appropriate to do so.” But an adjudicator’s conclusions are not determinative on the decision to reduce security.
 - Adjudication is an interim measure designed to keep money flowing down the construction pyramid, not to determine the parties’ legal rights on a final basis.

Arad Incorporated v Rejali et al

- **Takeaways:**

1. Adjudication determinations are interim.
2. Determinations may be used as evidence on a section 44 motion to return or reduce security paid into court to vacate a lien, but they are not determinative of the issue.

Welcome Homes Construction Inc v Atlas Granite Inc

2024 ABKB 301

Welcome Homes Construction Inc v Atlas Granite Inc

- Atlas Granite, a supplier of marble countertops, registered a lien for unpaid invoices against Welcome Homes. Before a court action was commenced, the parties agreed to go to adjudication. The adjudicator made an award to Atlas.
- After the adjudication, Welcome Homes served a notice to prove lien pursuant to s 52 of Alberta's *Prompt Payment and Construction Lien Act* ("**PPCLA**").
- The parties brought an application for advice and directions.

Welcome Homes Construction Inc v Atlas Granite Inc

- The court considered the following two issues:
 1. **Adjudication in practice:** What is the impact of a potentially invalid (out of time lien) on the adjudicator's decision; and
 2. **Interim or final?** What is the impact of Welcome Homes' service of a notice to prove lien on the adjudicator's decision.

Welcome Homes Construction Inc v Atlas Granite Inc

- The court found:
 1. **Issue 1 (Adjudication in practice):** The lien may be invalid (due to late filing), but the validity of the lien is irrelevant to the adjudicator's decision regarding the dispute. The adjudicator determines contractual rights between contracting parties in a construction dispute, not lien rights, even when they overlap.
 2. **Issue 2 (Interim or final):** An adjudicator's decision under Alberta's PPCLA is intended to be final and binding with respect to the parties to the matter in dispute, except where the court makes an order, or an application for judicial review provides a different result.
- The adjudicator's decision cannot be overridden by a notice to prove lien, and Welcome Homes must pay the award to Atlas.

Welcome Homes Construction Inc v Atlas Granite Inc

- **Takeaways:**

1. There is an important difference between the Ontario and Alberta lien legislation:
 - a. Alberta's *PPCLA* appears to provide for an adjudication result that remains binding on the parties *except* where the adjudicator's decision is displaced by court order or judicial review;
 - b. Ontario's *Construction Act* sets out an interim dispute process that is temporarily binding on the parties *until* a determination of the matter by a court or by way of arbitration.

*Sjostrom Sheet Metal Ltd v
Geo A. Kelson Company
Limited*

2023 ONSC 4959

Sjostrom Sheet Metal Ltd v Geo A. Kelson Company Limited

- When a sub-sub-contractor, Sjostrom, walked off the job, the contractor, Kelson, formed an oral agreement with Sjostrom to return to work. Sjostrom later brought a lien claim against Kelson for unpaid invoices.
- Associate Justice Robinson found that an enforceable oral agreement existed between Sjostrom and Kelson that was similar to a cost-plus arrangement whereby a contractor is compensated for actual costs incurred plus an agreed markup.

Sjostrom Sheet Metal Ltd v Geo A. Kelson Company Limited

- **In assessing Sjostrom’s damages claim, Associate Justice Robinson applied the following principles:**
 - even in an open-ended contract, there is still an obligation on the parties to exercise a degree of diligence in carrying out the work so that they do not incur costs significantly higher than the estimate without prior approval;
 - where an estimate is given, the final price should fall somewhere near the estimate, although the degree of variance between the estimate and the final price is subject to the “bounds of reasonableness”, which will be circumstance specific;
 - a contractor is obliged to promptly notify an owner if there are cost overruns to a budget estimate in a cost-plus contract;

Sjostrom Sheet Metal Ltd v Geo A. Kelson Company Limited

- **Principles (continued):**

- where a contractor is seeking to recover on a cost-plus basis the evidentiary burden of proving these costs is a heavy one. It is not necessary that the accounts be kept in any particular manner or to a high standard, but well enough to show proof of the contractor's charges;
- once a contractor proves that he has kept proper accounts and is able to show supporting documentation, the onus shifts to the opposing party to adduce evidence to show that the amounts claimed or the accounts are incorrect or unreliable; and
- once doubt is cast upon the accounts the onus shifts back to the contractor to satisfy the court that his accounts are accurate and support his claim. If the court is left in doubt, the contractor fails.

Sjostrom Sheet Metal Ltd v Geo A. Kelson Company Limited

- **Held:** Sjostrom failed to prove that its labour hours claimed were, in fact, spent.
 1. The only documents tendered supporting Sjostrom's invoicing were weekly time summaries. The time summaries are charts identifying labourers and the total number of hours worked on a day in a particular week.
 2. Sjostrom's weekly time summaries were unsigned, did not include a description of the specific work performed during the hours claimed, and were not sent to Kelson each week.

Sjostrom's action was dismissed and its lien discharged.

Sjostrom Sheet Metal Ltd v Geo A. Kelson Company Limited

- **Takeaways:**

1. When proving the value of services and materials supplied under a cost-plus or time and materials contract, there is a high evidentiary burden on the contractor.
2. Contractors must track labour hours in particular in a reliable and accurate manner, using detailed time sheets.
3. Contractors must provide accurate estimates and promptly notify the owner if the estimated budget will be exceeded.

Questions?

Meet the team



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