IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kinsol Timber Systems Inc. v. Oliphant Properties Inc.,* 2023 BCSC 1168

Date: 20230707
Docket: 195232
Registry: Victoria

Between:

Kinsol Timber Systems Ltd.

Plaintiff

And:

Oliphant Properties Inc.

Defendant

And:

Kinsol Timber Systems Ltd.

Defendant by way of Counterclaim

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment

Counsel for the Plaintiff and Defendant by way of Counterclaim:	J. Hall J. Bloomenthal
Counsel for the Defendant:	M. Peirce H. Yu
Place and Date of Hearing:	Victoria, B.C. January 9, 2023
Place and Date of Judgment:	Victoria, B.C. July 7, 2023

Introduction

[1] In this action arising out of the alleged breach of a construction contract, the defendant applies for severance and summary trial of a single issue: whether the Guaranteed Maximum Price clause in the contract (respectively, the "GMax Clause" and the "Contract"), setting a guaranteed maximum price of $1.5 million (the "GMax Price"), is binding on the parties.

The Contract

[2] The Contract, which is dated November 30, 2017, and was signed on or about March 28, 2018, was in the form of a CCDC 5B Construction Management Contract - for Services and Construction. The plaintiff contracted as construction manager to construct a large lodge building on a barge (the "Lodge"), to be transported to the defendant's resort in Nimmo Bay, British Columbia. The Contract provided that both parties were to serve the role of Consultant. The design of the Lodge was undertaken by a third party retained directly by the defendant.

[3] Some reference to specific terms of the Contract gives context:

a) Article A-2 provided that the Contract could be amended only as provided in the contract documents.

b) Article A-3 of the Contract, Description of the Project, described the project:

- assist in design and budgeting for construction of new lodge building
- procure sub contract work and materials for construction of the new lodge
- develop project schedule
- create financial tracking documents, and report to owner on financial health of project on regular intervals
- coordinate and manage all construction activities
- coordinate and manage all shipping (BARGE) activities
- coordinate and manage all commissioning of new lodge on site after delivery

Article A-3 further provided for the project to proceed in four phases (the "Phasing Clause"):

> Phase one: conceptual design and costing;
>
> Phase two: procurement and planning;
>
> Phase three: construction and delivery;
>
> Phase four: commisioning.
>
> Note: each phase of work shall not commence without agreement in writing from both owner and construction manager that the previous phase of work is considered complete. Project feasability (ie- cost and schedule) must be confirmed following each phase of work and agreed upon by both owner and construciton manager prior to work beginning on successive phase of work.
>
> Shall it be determined that the planning process results in a cost prohibitive result to the project goals, the owner reserves the right to terminate this contract without penalty. However, all cost incurred during the course of either the services or the work TO DATE shall be paid in full to the construction manager prior to termination of the contract.
>
> [*sic*]

c) The Contract listed the Contract Documents under Article A-4, and provided that further contract documents—architectural and structural drawings, project specifications and selections, project schedule, and project budget—were to "be added to the contract as completed during phase one of the work".

d) Article A-8 of the Contract listed a number of pricing options, which could be exercised by both parties either at the time of signing, or subsequently through issuance of a change order. It is common ground that in signing the Contract, the parties agreed to Clause 8.2, the GMax Clause, under which the plaintiff as construction manager guaranteed that the sum of the price of work and price of services under the Contract were not to exceed the sum of $1.5 million, subject to adjustment through change orders and change directives. The Contract specified:

> Any amount, consisting of the sum of the *Price of the Services* and the *Price of the Work*, in excess of this *Guaranteed Maximum Price*

> will be paid by the *Construction Manager* without reimbursement by the *Owner*.
>
> [Italic emphasis in original.]

[4] Part 6 of the Contract's General Conditions dealt with changes to the Contract. GC 6.2 provided for the issuance of change orders. In the event a change in the Work was proposed or required, the Consultant was to provide the Construction Manager with a description of the proposed change; the Construction Manager was to present an amount of adjustment or a method of adjustment of the Construction Manager's Fee or the Guaranteed Maximum Price; agreed adjustments were then to be recorded in a written Change Order. GC 6.3 provided that if the Owner required the Construction Manager to proceed with changes in the Work prior to agreeing to a price adjustment, the Owner, through the Consultant, was to issue a Change Directive, and if no adjustment in price was agreed to, the GMax Price was to be adjusted by changes in the Cost of Work, all as defined in the Contract.

Commencement of Proceedings

[5] By way of letter dated August 8, 2019, the solicitors for the defendant put the plaintiff on notice (the "Notice Letter") that the defendant considered the plaintiff to have repudiated the Contract, through failing to complete the Lodge within the GMax Price, on schedule, and, generally, as agreed upon in the Contract; that the defendant accepted the plaintiff's repudiation; and that the defendant required the plaintiff to cease work to allow the defendant to mitigate its damages. The Notice Letter went on to reference recent correspondence in which the plaintiff claimed there had been material changes to the scope of work, significant changes in design, and issues with control of the project. The Notice Letter denied these claims, and noted the lack of any of the change orders or change directives required under the Contract to change the plaintiff's scope of work.

[6] The plaintiff commenced this action by way of a notice of civil claimed filed November 26, 2019, claiming arrears of $228,128.79, and alleging, *inter alia*:

a) That the plaintiff was not provided with any plans until April 1, 2018 (the "Initial Plans"), that the Initial Plans were inadequate, and that the plaintiff advised the defendant that the Initial Plans were inadequate;

b) That the plaintiff was provided on or about March 1, 2019 with an amended set of plans marked "preliminary", and, on or about March 10, 2019, with a further set of plans, both of which were materially different than the Initial Plans, and both of which were inadequate;

c) That the production of those plans and amendments to the specifications and scope of the project resulted in changes to the cost;

d) That the plaintiff, as Construction Manager, routinely provided the defendant with updated budgets and proposed costs as the specifications and scope of the project changed;

e) That the defendant unilaterally terminated the Contract on or about August 8, 2019, at which time the defendant was in arrears in the claimed amount.

[7] By way of a response to civil claim and a counterclaim, both filed February 5, 2020, the defendant claimed, *inter alia*:

a) That budgets provided by the plaintiff between July and December 2018 were all within the GMax Price;

b) That the plaintiff first provided a budget of $1.7 million, in excess of the GMax Price, in March 2019;

c) That the plaintiff provided a further draft budget to take construction to a "modified lock-up stage", and not to full completion, of $1.9 million, in July 2019;

d) That the plaintiff did not begin requesting agreement to change orders until July 2019, at which point the defendant had paid or been invoiced for amounts totalling the GMax Price;

e) That the plaintiff informed the defendant on or about July 17, 2019, that it could not complete the project for the GMax price;

f) That the plaintiff repudiated the Contract;

g) That construction work undertaken by the plaintiff prior to its repudiation of the Contract was deficient and required remediation;

h) That the defendant was required to retain a third party to complete the project, at a cost well in excess of $900,000 over the GMax Price.

The defendant counterclaimed for the increased expense to remediate the project and to complete it, and for losses and expenses occasioned by the plaintiff's delay.

[8] The plaintiff's response to counterclaim filed April 28, 2020 repeated allegations made in the notice of civil claim as to, *inter alia*, the defendant's submission of plans that materially changed the project; the plaintiff's provision of updated budgets and proposed costs; the defendant's failure to pay invoices; and the reasonable quality and conformance with specifications of the plaintiff's work.

Evidence

[9] On this application, the defendant relies on evidence of the plaintiff's chief operating officer, Mr. Stevenson, as taken on examination for discovery on November 9, 2021 and on September 21, 2022. Mr. Stevenson admitted that the plaintiff agreed to the Contract including the GMax Clause, and that the GMax Price was subject to adjustment provided by way of change orders and change directives.

[10] There is no evidence of any such change orders or change directives having been issued or agreed to.

[11] Further, Mr. Stevenson admitted that the Contract requirement that the parties sign-off on completion of each phase of the work before advancing to the next phase was not adhered to by either party, and that the plaintiff had advanced to construction work under the project's "Phase 3":

> Q791 And it says here:
>
> "Each phase of work shall not commence without agreement in writing from both owner and construction manager that the previous phase of work is considered complete."
>
> Did Kinsol ensure that that was done in this case?
>
> …
>
> A Are you asking was there written and signed-off notification from both parties at the end of those phases?
>
> Q794 Essentially.
>
> A No.
>
> Q795 No. That didn't happen, correct? By the time -- correct? It didn't happen?
>
> A Both parties? Correct.
>
> Q796 I appreciate that, but this didn't occur, and phasing proceeded up until Kinsol's involvement ceased which was well into Phase 3; correct? Construction.
>
> A We were undertaking construction.
>
> Q797 So you were well into Phase 3?
>
> A We were performing work in Phase 3.
>
> Q798 All right. And at no time did Kinsol object to the lack of any formal agreement in writing from both parties; correct?
>
> A We were told to proceed with construction by the clients.
>
> Q799 You didn't raise it. They didn't raise it. You kept going; correct?
>
> A Correct.

[12] The defendant has tendered no evidence as to the nature of the plans submitted to the plaintiff throughout the course of the Contract, the materiality of any changes in plans, or communications with the plaintiff as to budgets or as to work proceeding without sign-off on completion of the project's phases.

[13] The plaintiff has tendered an affidavit of Mr. Stevenson, in which he makes a general statement as to delays in obtaining final design specifications and the cost implications. He says:

> 8. From the time the contract was signed until the time construction commenced in early 2019, there were continuing discussions about design and specifications. In addition, during the time the construction was proceeding in 2019, discussions concerning design and specifications continued. The process of obtaining design decisions from the designer and the owners was difficult. As well, delivery dates for decisions and design clarification were not met on a regular basis. I communicated my concern to the owner that this process was driving the price up, and creating considerable difficulties in determining the final pricing for the completion of the Lodge.

His affidavit is, however, short on specifics. Attached to his affidavit as exhibits are ten separate email chains exchanged between the parties and the designer, but half of those email chains predate the signing of the contract. None of the emails set out any form of warning or even concern that the GMax Price was going to be exceeded or that change orders would be necessary.

Positions of the Parties

[14] Simply put, the defendant says that the plaintiff was aware of the need for price certainty. The GMax Clause is clear and unambiguous, and nothing in the Contract modifies its applicability. Its application, the defendant submits, is a simple, discrete question the resolution of which should have a significant impact on further proceedings.

[15] The plaintiff has taken the position, in submissions made in Chambers and on Mr. Stevenson's examination for discovery, that the GMax Clause was not binding because the project never emerged from the design phase. On an application of the defendant related to a notice to admit and document discovery, heard before Master Scarth on August 31, 2022, counsel for the plaintiff described varieties of construction contracts, and submitted:

> …This CCDC 5B is in essence an engagement of a general contractor to be involved in the design and pricing process at the beginning stages of a project and at the point when the design and the budget have been clarified, then it can convert, at the option of the parties, to a fixed price contract. So,

> this is simply by way of background to say this is not as simple as a fixed price 1.5 million dollar project because it had not been designed, specifications had not been completed by the time the contract was entered into…

[16] Then again, when Mr. Stevenson underwent further examination for discovery in September 2022, counsel for the plaintiff objected to questions as to change orders:

> COUNSEL HALL: -- I'm objecting to that question because I don't think that is exactly what the structure of this contract is. And so you are describing a change order in a fixed price regime, and that's not what this contract is, so --
>
> COUNSEL PIERCE: Pardon me, Mr. Hall. We're --
>
> COUNSEL HALL: I'm objecting to the question.
>
> COUNSEL PEIRCE: Mr. Hall, we're dealing with a CCDC 5B with a guaranteed maximum price option; correct?
>
> COUNSEL HALL: We're dealing with the contract that you put before the witness earlier today, yes.
>
> COUNSEL PEIRCE: Okay. Pardon me. I was directing that to Mr. Stevenson.
>
> …
>
> Q831 Okay. And in order to make changes to the scope of work to that project, you use a change order; correct?
>
> COUNSEL HALL: Again, I object to the question.
>
> COUNSEL PEIRCE: On what basis, Mr. Hall?
>
> COUNSEL HALL: Because you're setting up a question based upon a contractual regime that is not yet in place. This project was still in the design phase. That's the problem.

[17] The plaintiff reiterated this position on the present application. The plaintiff in essence submits that the GMax Clause had no contractual effect and was only aspirational. The plaintiff says in its application response:

> 6. The contract was entered into in February 2018, when the design and specifications of the project had not yet been made. The position of the Defendant appears to be that the Plaintiff was obliged to construct the project for $1.5 million notwithstanding the ongoing evolution of the design and specification.
>
> …

> 10. The wording and intent of a CCDC5 B is such that the parties collaborate on design and costing and proceed with construction once those issues have been determined. The contract clearly calls for the owner to be able to withdraw from the contract or revise the design and specification if the cost is too high. The project correspondence clearly demonstrates decisions on design and specifications were being made on an ongoing basis both in the eleven month period after the Contract was entered into and indeed for the following six months while construction was underway.
>
> …
>
> 12. The clear intent in wording of the Contract is such that the parties agreed to collaborate on the design and costing of the project with a budget amount of $1.5 million in mind. In the circumstances, the design and specification decisions had to be made to fit within the budget or the Defendants would have to bear the cost implications of the decisions they and their designer made.

[18] This position, however, is not pleaded by the plaintiff.

[19] The defendant says that this interpretation flies in the face of the Contract's explicit terms. The defendant submits that the resolution of this issue of contract interpretation through summary trial is pragmatic and indeed necessary to the efficient conduct of the litigation. Its arguments are set out forcefully and succinctly in its written submission:

> 76. Simply put, Kinsol's position on this issue is patently untenable, as it flies in the face of the entire evidentiary record.
>
> 77. Kinsol's continued pursuit of this specious position has already muddied the waters and interfered with this proceeding, both during the recent Chambers application and subsequently at the continued examination of Mr. Stevenson.
>
> 78. If Kinsol, as the initial plaintiff, maintains this position at trial, its opening argument will be completely untethered to the evidentiary record. This will confuse and misdirect the trier of fact and obfuscate the actual issues in the proceeding.
>
> 79. Should this occur, the court time taken to correct this unfounded narrative will result in a significant lengthening of trial time, if not a full derailing of the trial. It will require the leading of evidence, and cross-examination, of witnesses, as well as the presentation of additional documentation, to debunk a theory which has no factual underpinning, and which should not be allowed to interfere with the proceedings.

The Test for Summary Trial of Issues in an Action

[20] Rule 9-7(2) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*SCCR*] provides for the court granting judgment by way of summary trial, either on an issue or generally. Subrule (15)(a) provides that the court may grant judgment on a summary trial application, either on an issue or generally, unless,

> i. the court is unable, on the whole of the evidence, to find the facts necessary to decide the issues, or
>
> ii. the court is of the opinion that it would be unjust to decide the issues on the application.

[21] In *Coast Foundation v. Currie*, 2003 BCSC 1781 [*Currie*], Mr. Justice Groberman, when a judge of this Court, discussed the considerations that factor into deciding whether issues should be tried discretely, apart from and in advance of the main trial:

> [12] A summary trial can serve as an efficient manner of disposing of issues or claims in appropriate circumstances. Where the court has the entire claim before it on a summary trial application, it will generally endeavour to grant judgment unless credibility issues preclude the fair adjudication of matters on affidavit evidence. There are, of course, exceptions. Discoveries, for example, may not have progressed to the point where the court is satisfied that each side has had an opportunity to uncover all of the evidence that might be important to its case. In such a case, it might be unjust to grant judgment: *Bank of British Columbia v. Anglo-American Cedar Products Ltd.* (1984), 57 B.C.L.R. 350 (S.C.). The court will also decline to grant judgment where the complexity of the issues is such that the court is unable to absorb all of the evidence and legal argument in the compressed time available within the Rule 18A procedure: *Chen v. Chen*, 2002 BCSC 906, 22 C.P.C. (5th) 73.
>
> [13] The question of when the court ought to give judgment on an issue, as opposed to on the claim generally, is more complex. The court is justifiably reluctant to decide cases in a piecemeal fashion. In addition to all of the concerns that arise when the entire claim is before the court, there is a multitude of others. The result is that the court must exercise considerable caution before coming to the conclusion that it should grant judgment on an issue in a summary trial.
>
> [14] Where a Rule 18A [the predecessor to *SCCR* Rule 9-7] application requires determination of a difficult issue of law that might not need to be resolved in order to decide the claim at trial, for example, the court may conclude that the appropriate development of the common law demands

> restraint: *Bacchus Agents (1981) Ltd. v. Phillipe Dandurand Wines Ltd*., 2002 BCCA 138, 164 B.C.A.C. 300.
>
> [15] The court must also be wary of making determinations on particular issues on a Rule 18A application when those issues are inexorably intertwined with other issues that are to be left for determination at trial: *Prevost v. Vetter*, 2002 BCCA 202, 210 D.L.R. (4th) 649; inter-relatedness of issues is not always obvious, and caution is necessary whenever a party seeks judgment on an issue as opposed to judgment generally under Rule 18A: *B.M.P. Global et al v. Bank of Nova Scotia*, 2003 BCCA 534, [2003] B.C.J. No. 2383.
>
> [16] It must be borne in mind that the primary purpose of Rule 18A is the efficient resolution of disputes. Where the court does not consider that the determination of an issue under Rule 18A will assist in the efficient resolution of the dispute, it ought not to make the determination.
>
> [17] There are at least two aspects to be considered in gauging the efficiency of the summary trial process. First, this court must be concerned about the allocation of its own resources: *North Vancouver (District) v. Lunde* (1998), 60 B.C.L.R. (3d) 201 at 212 (C.A.) (paragraph 33). Summary trial applications that will not, even if successful, reduce the length of trial, should, in general, be discouraged. The court must recognize the reality that judicial time is a scarce resource.
>
> [18] Second, the court must consider the efficiency of a partial determination from the standpoint of the litigation itself. Piecemeal decision-making is rarely an efficient manner in which to resolve a dispute. It raises the possibility of multiple appeals on individual issues, and this will generally impede rather than hasten the orderly determination of the action.

[22] In *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 485 [*GVWD*], Madam Justice Griffin, when a judge of this Court, summarized at para. 110 the factors the court must consider on applications to determine by summary trial only part of the issues in an action:

> a) whether the court can find the facts necessary to decide the issues of fact or law;
>
> b) whether it would be unjust to decide the issues by way of summary trial, considering amongst other things:
>
> i. the implications of determining only some of the issues in the litigation, which requires consideration of such things as:
>
> (1) the potential for duplication or inconsistent findings, which relates to whether the issues are intertwined with issues remaining for trial;
>
> (2) the potential for multiple appeals; and
>
> (3) the novelty of the issues to be determined;
>
> ii. the amount involved;

iii. the complexity of the matter;
iv. its urgency;
v. any prejudice likely to arise by reason of delay; and
vi. the cost of a conventional trial in relation to the amount involved.

[23] Most recently, in the unanimous judgment of the British Columbia Court of Appeal in *Ferrer v. 589557 B.C. Ltd*., 2020 BCCA 83, Groberman J.A. reiterated at para. 33 that "absent good reason, courts should not isolate individual issues in a proceeding and decide them separately from the rest of the litigation", and confirmed at para. 34 that the approaches taken in *Currie* and *GVWD* may be followed.

Discussion

[24] The plaintiff's position that the GMax Clause did not apply, given the evolving design process, is tenuous at best. Nothing in the Contract stated or implied that the GMax Clause was conditional upon the design being completed. To the contrary, the Contract contemplated that as part of the project, the plaintiff would "assist in design and budgeting", and the project's first phase was specified as "conceptual design and costing". The plaintiff contractually committed to construct the project for $1.5 million, knowing that the design had not been finalized. And, contrary to the plaintiff's application response, the risk of the project cost exceeding the GMax Price did not lie with the defendant; the GMax Clause clearly stated that amounts in excess of the GMax Price would be paid by the plaintiff, without reimbursement.

[25] The Contract afforded protection to the plaintiff against that risk, through the mechanisms of the Phasing Clause and the change order/change directive provisions of General Conditions 6.2 and 6.3.

[26] However, notwithstanding the merits of the plaintiff's stated position, I do not find that the issue of whether the GMax Clause is "binding" is suitable for summary determination as a discrete issue, at least not at this point in the litigation. This is because the parties appear to be in the anomalous position of neither of them having followed the requirements of either the Phasing Clause or the change order/change directive provisions of Contract.

[27] Under the Phasing Clause, both parties were obliged to sign off on completion of each phase, before work proceeded under the next phase, and yet it appears that construction—Phase 3—may have commenced before Phase 1 had completed, frustrating the protection against unforeseen cost increases that the Phasing Clause provided. There may be a triable issue as to whether the circumstances under which the Phasing Clause was apparently ignored or overridden, impacted the defendant's right to rely on the GMax Clause.

[28] Likewise, the wording of General Condition 6.2 required the "Consultant" to provide a written description of proposed changes in the work to the plaintiff, and the plaintiff to present to the "Consultant" a method of adjusting the contract price to reflect the changes. Yet, the Contract also provided that the role of "Consultant" was to be served by both parties; and, the pleadings, and the parties' submissions, suggest that this change approval and price adjustment process was not followed. Again, there may be triable issues as to whether the defendant had, through its conduct, implicitly waived strict compliance with GC 6.2 and 6.3; whether the plaintiff's provision of revised budgets in excess of the GMax Price and its communication of concerns relating to costs fulfilled the requirements of GC 6.2; and whether, having received those budgets, the defendant was contractually obliged to accept the revised budgets, or to issue change directives and to adjust the GMax Price, in accordance with GC 6.3.

[29] These issues may be fundamental to the parties' respective contractual liabilities.

[30] There is little evidence before me as to the specifics of the parties' conduct during the course of the Contract and it is not possible to determine how their conduct may have affected their rights and obligations thereunder. On the evidence, I am not satisfied that I can determine the facts necessary to decide the issue of whether the GMax Clause remained binding on the parties, and I find it would be unjust to decide the issue. I am conscious of the lack of evidence put forward by the plaintiff in response to the application, and of the plaintiff's obligation to have put its

best foot forward; but the defendant, as applicant, has the burden of satisfying me that severance of this discrete issue, and summary trial, are appropriate. The question before the Court is simply too abstract.

[31] Furthermore, even if I were to pronounce judgment on this discrete issue, there would still be substantial issues to be tried, among them: whether revision of the design plans and specifications materially impacted the plaintiff's ability to reasonably complete the project within the GMax Price; whether the plaintiff's conduct amounted to repudiation; whether the plaintiff is responsible for alleged construction deficiencies; and whether the defendant reasonably mitigated its loss. With those issues still to be determined, the costs saved through summarily trying the discrete issue of the GMax Clause being binding could well turn out to be modest or even negligible, and the risk of new evidence emerging that could lead to this issue being decided differently is significant. The potential prejudice that could arise through granting summary judgment outweighs the benefits.

[32] The application is therefore dismissed.

[33] The parties are at liberty to make further submissions as to the costs of this application. Arrangements may be made with Supreme Court Scheduling – Victoria for a brief oral hearing by MS Teams to address the issue. Alternatively, if both parties agree as to the process and the schedule, written submissions may be made, with the submissions to be sent to Scheduling as email attachments.

"A. Saunders J."