CITATION: Monalt Environmental Inc. v. BDA Inc., 2024 ONSC 1417
COURT FILE NO.: CV-20-650113
DATE: 2024 03 07

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF the *Construction Act*, RSO 1990, c. C.30, as amended

B E T W E E N:	)	
	)	
MONALT ENVIRONMENTAL INC.	)	R. Kalanda, *for the plaintiff / defendant by counterclaim*
	)	
Plaintiff / Defendant by counterclaim	)	
	)	
- and -	)	
	)	
	)	
YORK UNIVERSITY and BDA INC.	)	D. Goodman, *for the defendant / plaintiff by counterclaim, BDA Inc.*
	)	
Defendants / Plaintiff by counterclaim	)	
	)	
	)	
	)	**HEARD:** November 30, December 1, December 12, 2023 and March 7, 2024 (by videoconference)

REASONS FOR JUDGMENT

Robinson A.J. (orally)

[1] This lien action and counterclaim arise from renovation work performed at the two student residence buildings at the York University Glendon Campus: the Hilliard Residence and the Wood Residence. BDA Inc. ("BDA") was contracted by York University to perform renovation work at the two student residences, which had been confirmed to contain large amounts of asbestos. BDA tendered out various aspects of the job, including asbestos remediation, demolition, renovation of washrooms, mechanical and electrical upgrades, and installation of new elevators.

[2] Monalt Environmental Inc. ("Monalt") was one of the trades who successfully bid the job. Monalt is an abatement contractor specializing in the removal of hazardous materials, such as asbestos and mould. It was subcontracted to perform asbestos abatement and demolition work.

BDA has made no payments to Monalt at all for the work performed. The core disputed issue in this lien action is the scope of Monalt's subcontract work.

[3] There is no dispute on earned and unpaid amounts under the subcontract. During closing submissions, BDA conceded that the percentages of work invoiced by Monalt and the amounts billed represent the value of services and materials actually supplied by Monalt. I thereby find that the amount earned by Monalt and unpaid under the subcontract is $99,121.70, comprised of $75,527.30 incl. HST in contract work and $23,594.40 incl. HST in extras.

[4] The parties' impasse, and the basis for BDA's non-payment, arises from their divergent positions on Monalt's required scope of demolition work. Monalt did not complete demolition work of stairs and a ceiling slab above those stairs in the Hilliard Residence in an area that was to be converted into an elevator. Monalt says it did not have to complete it. BDA says that it did. They were unable to reconcile their positions, as a result of which Monalt preserved and perfected a lien, commencing this lien action in which BDA claims set-off and counterclaims against Monalt for completion costs to finish Monalt's work on both residences.

POSITION OF THE PARTIES

[5] Monalt provided two quotes for its work on the two residences: one for abatement work and one for demolition work. It relies on the scope of work as outlined in those two quotes as being the extent of work it was required to perform. Specifically, Monalt takes the position that it was not subcontracted to do any demolition work beyond what is outlined in its demolition quote. It completed its scope of abatement work, including extra abatement approved by BDA, and all required demolition work on the Hilliard Residence, and never commenced work at the Wood Residence because BDA refused to make payment. Monalt's position is that it was entitled to cease work by reason of BDA's breach of contract for non-payment.

[6] BDA relies on the purchase order that it issued to Monalt, which was signed back on behalf of by Monalt by John Paduraru, Monalt's project manager. That purchase order refers to Monalt supplying all work under Division 02 of the specifications, which BDA argues includes all demolition work for the project.

ISSUES

[7] There are three main issues to be decided in this action:

(a) Did Monalt's scope of work include the disputed demolition of stairs and ceiling slab in the Hilliard Residence?

(b) Who breached the contract? Specifically:

(i) If the demolition work was <u>not</u> within Monalt's scope, did BDA breach the contract by non-payment?

(ii) If the demolition work was within Monalt's scope, did Monalt breach the contract by not completing it or is failing to complete the work excused by any breach of contract by BDA?

(c) Which of the parties is entitled to damages, if any, and in what amount? Specifically:

(i) If BDA breached the contract, is BDA entitled to any set-off against the undisputed earned and unpaid amounts under the subcontract?

(ii) If Monalt breached the contract, has BDA proved its claim for rectification and completion costs exceeding the agreed subcontract price?

ANALYSIS

a. Scope of the work

[8] I deal first with whether Monalt's contractual scope of work included demolition of the stairs and ceiling slab. I find that it does.

[9] Monalt relies on the evidence of two witnesses: John Paduraru and Monalt's site superintendent, Rob Kinaschuk. Rob Kinaschuk gave evidence on Monalt's scope of work, but confirmed during cross-examination that he had nothing to do with the bidding process, the quotes, or acceptance of the work and that his knowledge of Monalt's scope of work is from John Paduraru. I have accordingly given his evidence on Monalt's scope of work no weight in assessing what was contractually required of Monalt.

[10] John Paduraru was directly involved in the bidding process. His evidence at trial was consistently that Monalt proceeded with work on the basis that the items outlined in its quotes, plus agreed extras, was the entirety of its scope of work.

[11] There is a direct conflict in the evidence of John Paduraru and BDA's primary witness, Stephanie Alatsas, who was BDA's project manager. Mr. Paduraru's evidence is that that he was clear that Monalt would not perform any stair demolition work. He says that BDA agreed that it would be retaining others to do that work. Ms. Alatsas says the opposite. In her affidavit, Ms. Alatsas outlines that she had a call with "Monalt" prior to issuing the purchase order and that "Monalt" confirmed that the full demolition scope, including the staircase work, was "covered in full". She does not identify with whom she spoke, but Mr. Paduraru's supplementary affidavit acknowledges that he did have a call with Ms. Alatsas after Monalt provided its quotes. He denies that there was any agreement that the quote included all demolition.

[12] Monalt argues that BDA's position does not make sense. The total costs claimed by BDA to complete the stair demolition work is nearly three times Monalt's entire demolition quote. Monalt argues that it makes no sense that it would have agreed to perform that work effectively for free and that it would be unreasonable to find that it did. There is a certain logic to that argument. Nevertheless, in my view, the evidence at trial supports that, objectively, Monalt did

agree to a subcontract that included the stair demolition work and acted in a manner supporting that it was within its contractual scope of work.

[13] I turn now to my reasons for finding that Monalt objectively agreed to perform the stair demolition and ceiling slab work and, as a result, was contractually required to complete it as part of Monalt's contract scope of work.

[14] I have discussed the relevant law on contract formation in my decision in *Bellsam Contracting Limited v. Torgerson*, 2023 ONSC 468 at paras. 35-38. That decision has been cited by Monalt in its written closing submissions. The salient legal aspects of deciding whether a contract was formed are as follows:

(a) A contract is formed where there is an offer by one party accepted by the other with the intention of creating a legal relationship, which is supported by consideration.

(b) There are five elements to an enforceable agreement: offer, acceptance, consideration, certainty of essential terms, and an intention to create a legal relationship.

(c) Determining whether a contract is formed is assessed on an objective standard. The court examines how each party's conduct would appear to a reasonable person in the position of the other party in the factual matrix between the parties.

(d) The intention to create legal relations does not turn on the subjective views or understanding of the parties themselves. It does not matter that one party may have had no intention to enter a legally-binding contract. What matters is whether their conduct was such that a reasonable person would conclude that they intended to be bound.

[15] The above principles are consistent with the other cases cited by both parties: *Aluma Systems Inc., v. Resolute FP Canada Inc.,* 2019 ONSC 6293; *Kernwood Ltd. v. Renegade Capital Corp.*, 1997 CanLII 846 (ON CA); *Ahuja v. Ahuja*, 2022 ONSC 3906; *Ottawa Convention Centre Corporation v. Treefort Hip Productions Inc.*, 2018 ONSC 5233.

[16] There are three main reasons that have led me to find that Monalt did agree to perform the stair demolition work:

(a) Monalt bid the job in circumstances where it had the complete Division 02 demolition specifications, but its quote does not clearly exclude the stairwell and ceiling slab demolition.

(b) BDA's purchase order expressly refers to completing all work under Division 02 as required by drawings and specifications. It does not incorporate Monalt's quotes as contract documents or even refer to them. Monalt signed back the purchase order without seeking any express limitation on its scope of work or revising the purchase order.

(c) Despite its position that stair demolition is not and was never part of its scope of work, the surrounding circumstances tend to support that, objectively, Monalt did agree to perform that work.

i. Monalt's quotes

[17] Dealing first with Monalt's quotes, I have closely reviewed them in context of the evidence at trial. Monalt issued two separate quotes on its own initiative: one for asbestos abatement and another for demolition work. The first quote is not the subject matter of the main dispute. The second quote, dealing with demolition work, was the subject of specific examinations at trial. Both quotes were submitted by John Paduraru under cover of an email dated February 4, 2020. That email states, "Please find attached our Quotation for asbestos and demolition at York University, Hilliard and Wood residences." It does not indicate that the demolition quote is for only a portion of the total demolition provided in the bid documents.

[18] The demolition quote states as follows:

> We propose to supply all labour, equipment and materials to remove and dispose of all the finishes and materials scheduled for demolition as required by drawings and specifications.

[19] It is then followed by a heading of "Work Included", after which there are six bulleted items of work, namely:

- Removal and disposal of all the carpets, threshold, tack strips and underpads
- Removal and disposal of all millwork and cabinets as required
- Removal and disposal of all the doors and hardware, as required
- Removal and disposal of all the ceilings from corridors and rooms as per demolition spec and drawings.
- Sawcut openings in the walls and ceilings to accommodate new doors and hardware.
- Removal and disposal of all washroom finishes and accessories as indicated in the demolition drawings.

[20] A further heading of "Note" follows, with a single bullet stating, "The disconnection of the plumbing and electrical system is not included in our price."

[21] The asbestos abatement quote similarly has general language at the outset and then lists specific abatement locations for each of the two residences under a "Work Included" heading.

[22] Mr. Paduraru confirmed during his cross-examination that Monalt had access to all of the project specifications, including the Division 02 specifications, drawings that included the disputed stairwell and ceiling slab, and the survey prepared by York University's environmental consultant, The Pinchin Group ("Pinchin"), which outlined necessary asbestos abatement areas.

[23] Mr. Paduraru's evidence at trial was consistent that, notwithstanding the general language at the outset of the two quotes, Monalt was only proposing to complete the bulleted items. In the case of the demolition quote, that was subject to the noted exclusion. His evidence is that the quotes were limited to removal and disposal of specific finishes and materials and abatement of asbestos in specific areas and that the scope of work was "specifically considered and selected to be included in the quotations". His affidavit evidence explains that demolition work performed by Monalt is "usually minor and related to the abatement work it is otherwise doing."

[24] Monalt cites the decisions in *Delco Automation Inc. v. Carlo's Electric Limited*, 2014 ONSC 7157 and *Core Excavation Ltd. v. Metropolitan Toronto (Municipality)*, 2001 CarswellOnt 3657, 110 ACWS (3d) 279 as supporting that a purchase order may not be determinative as to parties' agreement. In both cases, the formal purchase order was held not to be the governing document. However, in both cases, there were facts supporting that the parties had formed a contract based on a pre-purchase order statement of work and quotation. They are distinguishable from this case. The evidence in this case does not support any agreement between Monalt and BDA on a limited scope of demolition work.

[25] Monalt also argues that its demolition quote outlines only non-structural work in the "work included" section, with no mention of stairwell demolition or anything similar. In my view, the quote is not as unambiguous as Monalt argues it to be.

[26] The language of the quotation is significant. Monalt's quote offered to "remove and dispose of all the finishes and materials scheduled for demolition as required by drawings and specifications." Monalt submits that I should put weight on the fact that the quote was for "finishes and materials". However, the language used refers to "all the finishes and materials" (emphasis added). Evidence and argument at trial did not clearly address whether the quote dealt with one category (*i.e.*, finishes and materials) or two categories (*i.e.*, finishes, materials) and, if the latter, what was captured by removing and disposing of all "materials" scheduled for demolition. Does that include the stairwell and ceiling slab? Evidence supports that the drawings and specifications called for them to be demolished.

[27] Also, one of the bullets of work included sets out that Monalt would be responsible for removal and disposal of "all the ceilings from corridors and rooms as per demolition spec and drawings." Is a stairwell a corridor? Could demolition of the ceiling slab reasonably be understood to fall within that work? In my view, these questions were not adequately addressed in evidence or argument at trial.

[28] Having regard to the totality of the evidence at trial, I find that the quotation does not clearly and unambiguously exclude demolition of the stairwell and ceiling slab. Nevertheless, that is not an end to the matter. Case law requires that I consider the totality of the surrounding circumstances in deciding formation of the contract. BDA's purchase order and discussions between the parties are thereby also important.

ii. Purchase order

[29] Turning to the purchase order, there is no dispute that Mr. Paduraru signed the purchase order on behalf of Monalt. I agree with BDA that the purchase order is clearly worded to include all demolition work in Division 02. The purchase order includes the following description of work:

> Provide all Labour, Material & Equipment to complete all work under Div.02 for Sitework Including IFT as per Drawings, Specifications, Contractos [sic] and Reports including Owners Policy Addenda 1 to 3 and Separate Prices to be upheld as it relates to additional scope of work given.

[30] The purchase order price listed is $120,000, approximately $4,000 less than the aggregate of Monalt's two quotes. I need not deal with that discrepancy based on the parties' agreement on the value of Monalt's work and my other findings. What is important to note, though, is that neither quote is listed or referenced in the purchase order.

[31] The language used in the purchase order is unequivocal. The fact that "Div.02 for Sitework" is bolded in the description was pointed out to Mr. Paduraru during cross-examination. He was specifically asked if he had not read the purchase order when he signed it. Mr. Paduraru confirmed that he did read it, but that he only signed it with the intent to complete the work that Monalt had quoted and that Monalt never agreed to do all of the demolition work.

[32] When asked how BDA would understand that he was signing on that basis, Mr. Paduraru pointed to a telephone call that he had with BDA's estimator prior to the purchase order being submitted. His evidence is that he clearly highlighted in that discussion what was included and what was not included. He testified that he mentioned what was not included, but gave no specifics about what he said was not included. It was only in re-examination that he identified the estimator he was speaking about and raised having specifically discussed the stairwell demolition work and ceiling slab.

[33] Mr. Paduraru's cross-examination and re-examination evidence on the discussion with BDA's estimator is not reflected in his affidavit evidence-in-chief. In his first affidavit, Mr. Paduraru does talk about a discussion with BDA's estimator, Svitlana Maksyutynska (the same person identified in re-examination). Mr. Paduraru outlines that the discussion occurred after Monalt sent its quotes and that Ms. Maksyutynska asked for Monalt to remove certain stairwell fixtures, such as floor tiles, at no additional cost, and that he agreed to do that work because the work was minor. That is the extent of his affidavit evidence on his discussion with Ms. Maksyutynska.

[34] Despite the parties' central dispute being about whether Monalt agreed to perform the demolition work, Mr. Paduraru's affidavit says nothing about discussing with Ms. Maksyutynska (or anyone else at BDA) what was and what was not included in the scope of work. He acknowledged during cross-examination that he had no notes from his conversation and that he had no memory of emails dealing with the conversation. Notably, it was not until re-examination that Mr. Paduraru specifically confirmed that he had discussed being asked by Ms. Maksyutynska about the stairwell demolition and ceiling slab.

[35] During Ms. Alatsas' cross-examination, Mr. Paduraru's evidence on discussing the stairwell demolition with Ms. Maksyutynska was put to her. Ms. Alatsas' testimony was that she could only comment on her own discussions with Ms. Maksyutynska, who Ms. Alatsas' said advised that she had confirmed it was included.

[36] Other than Mr. Paduraru's convenient re-examination evidence, there is nothing in the evidentiary record at trial supporting that, prior to Mr. Paduraru signing back the purchase order, anyone at Monalt advised anyone at BDA that Monalt was not agreeing to and did not intend to perform "all work under Div.02 for Sitework", despite the unequivocal language in the purchase order. The only evidence of clearly relaying that position is from a period in time much later in Monalt's work.

[37] Ms. Maksyutynska was not called by a witness by either party. She was on BDA's trial witness list, but she was not ultimately put forward as a witness at trial. Monalt asks that I draw an adverse inference against BDA for failing to call her. Drawing an adverse inference is a discretionary decision. I decline to do so.

[38] No case law was specifically cited by Monalt in support of its request for an adverse inference. I discussed the relevant law in *Bellsam Contracting Limited v. Torgerson*, *supra* at para. 49, as follows:

> Where a party fails to call a material witness, the court may draw an adverse inference that failing to call the witness is an implied admission that their evidence would be contrary to the party's case, or at least would not support it. Drawing an adverse inference is discretionary. In exercising that discretion, I am to consider factors such as (i) whether the absent witness has material evidence to give at trial; (ii) whether the absent witness is best placed to provide, or the only person who can provide, the evidence; (iii) whether the absent witness is available to both parties equally; and (iv) whether there is a legitimate explanation for the decision to not call the absent witness.

[39] The fact that Ms. Maksyutynska may have had discussions with Mr. Paduraru prior to the purchase order being issued and signed is not enough to ground an adverse inference. That alone does not make her a material witness. The only evidence of a discussion with Ms. Maksyutynska tendered by Monalt is found in Mr. Paduraru's first affidavit, as discussed above. It refers only to a request for minor work to be performed.

[40] Monalt raised the issue of what was discussed between Mr. Paduraru and Ms. Maksyutynska itself, but in the course of examinations at trial. It was not until Mr. Paduraru's re-examination that a specific discussion with Ms. Maksyutynska was alleged in which Mr. Paduraru says he confirmed that Monalt would not be performing the stairwell demolition and ceiling slab.

[41] Ms. Alatsas did ultimately testify that Ms. Maksyutynska told her that Monalt had agreed to perform the stairwell demolition work, but that was in response to cross-examination questions seeking an admission confirming Mr. Paduraru's re-examination evidence. Ms. Alatsas' affidavit

evidence speaks about her own discussions about the scope of work, not those of Ms. Maksyutynska.

[42] This was a summary trial. I do not think it fair or appropriate to draw an adverse inference against BDA on an issue that Monalt opted to raise for the first time itself during re-examination of its own main witness and then again during cross-examination of BDA's main witness.

[43] I accept that, given the testimony at trial, Ms. Maksyutynska would have been a material witness. However, she did not become a material witness until Mr. Paduraru's re-examination. Had his alleged discussion with Ms. Maksyutynska been put squarely in his affidavit, but BDA failed to call her as a witness, my view may have been different.

[44] Mr. Paduraru's evidence is that he would never have agreed to take on all demolition work for this project, since Monalt is not primarily a demolition company. In the course of his affidavit evidence and testimony, he drew a distinction between abatement-related demolition and structural demolition. His evidence is that Monalt did not do stair demolition work because it did not have the large cranes and other equipment or personnel required for such work. All of that may be subjectively true. However, determining whether a contract is formed is assessed on an objective standard.

[45] Mr. Paduraru's affidavit evidence and testimony has convinced me that Monalt did not subjectively intend to include demolition of the stairwell and ceiling slab in its scope of work. However, objectively, the trial evidence does not support a mutual understanding of the distinction that Mr. Paduraru draws between asbestos-related demolition and structural demolition. Objectively, the evidence supports that Monalt was bidding the full Division 02 demolition work, which included the stairwell and ceiling slab. Monalt did not relay any clear and unambiguous exclusion of that work prior to executing the purchase order and starting the job.

[46] In my view, a reasonable person in the position of BDA would understand that Monalt had quoted and, by signing back the purchase order without reservation, was agreeing to perform the disputed demolition work.

[47] I find that all of the requirements of a legal contract were objectively present at the time that Mr. Paduraru signed back the purchase order: offer and acceptance, consideration by exchange of promises to perform work for payment, certainty of price, scope, and terms by reference to the listed drawings and specifications, and objective intention.

iii. Surrounding circumstances

[48] In my view, the surrounding circumstances also support that, objectively, Monalt agreed to perform the work.

[49] As noted, there is no contemporaneous evidence corroborating Mr. Paduraru's position that Monalt made clear that it would not perform the stairwell work or, more pertinently, that Monalt was limiting its demolition work exclusively to abatement-related demolition. The bid documents included Division 02 and the purchase order expressly states that Monalt was to perform all work

under Division 02. Nevertheless, other than unclear telephone calls that were not recorded, there were no emails, texts, or letters sent confirming the limited scope of demolition that Monalt would perform. Mr. Paduraru signed back the purchase order without committing his understanding of the parties' agreement to writing in any form.

[50] In my view, given Monalt's position that the stairwell demolition work was a substantial component of the demolition work and far from trivial, the lack of any express communication on that work being excluded is stark.

[51] Monalt argues that BDA did not communicate their understanding that Monalt had agreed to do the work. I give that argument no effect. There is no evidence supporting that BDA solicited bids for part of the demolition work. I agree with BDA that it would be commercially unreasonable to request bids on the full Division 02 specifications and expect that individual bidders would quote only part of the total work.

[52] In context of the tender process as described by Ms. Alatsas in her affidavit (which was undisputed by any evidence at trial), it would be more commercially reasonable to expect Monalt to clearly stipulate limitations on the scope of is bid, both in the quotes and in response to BDA's purchase order indicating a scope of work that exceeded what Monalt was prepared to do. Moreover, even if I were to accept John Paduraru's evidence that he discussed the matter with Svitlana Maksyutynska, she was a bid estimator. Nothing before me supports that she had any authority to bind BDA on the scope of a contract.

[53] I have also considered the shoring drawings prepared by Monalt for the stairwell. They are, in my view, a piece of the factual matrix that reinforce my finding that, objectively, Monalt had agreed to perform the stairwell demolition and ceiling slab work.

[54] Mr. Paduraru's evidence is that the drawings covered only Monalt's scope of work. He says that Monalt instructed the engineer to prepare drawings based on Monalt's quotes, which he argues demonstrates that Monalt never agreed to do the additional demolition work claimed by BDA. However, no evidence other than Mr. Paduraru's statements was tendered by Monalt on the purpose for preparing the shoring drawings, the instructions given to the engineer preparing them, or the circumstances under which they were prepared.

[55] When Mr. Paduraru submitted the drawings, it was under cover of an email stating, "Please find attached our shoring drawings, <u>for the demolition of the stairs</u>" (emphasis added). I was directed to no contemporaneous email or record corroborating Mr. Paduraru's testimony at trial. The specific language used in his email is, on its face, inconsistent with his trial evidence that the shoring drawings were <u>not</u> for the demolition of the stairs, but rather for Monalt's scope of work.

[56] I note that, in response to the submittal, Ms. Alatsas emailed back to identify an issue in the drawings that dealt specifically with stair and ceiling slab removal. I was directed to no response by Mr. Paduraru or anyone else at Monalt in the evidentiary record clarifying that the shoring drawings did not address that item because they were limited to a portion of demolition work. In my view, that silence is material.

[57] There is no other evidence on discussions or communications about the stairwell demolition work prior to or at the time of the purchase order being signed back. Monalt argues that I should consider several other factors as surrounding circumstances.

[58] First, Monalt argues that I should consider the evidence of John Paduraru and Rob Kinaschuk that Monalt had not previously done any structural demolition work and lacked the expertise or experience to do stairwell demolition work. I accept that evidence, but it does not assist Monalt.

[59] As already noted, the assessment is done on an objective standard. It has not been established at trial that BDA knew or reasonably ought to have known that Monalt lacked the requisite experience to perform structural demolition and, accordingly, was unlikely to have bid that work.

[60] Monalt argues that I should give weight to evidence that a similar abatement contractor, R-Services Environmental Group Inc. ("R-Services"), which was also involved in the project, was not suited to performing structural demolition work. Monalt points to the cross-examination of Lewis Cowan, the President of BDA, during which Mr. Cowan conceded that BDA's completion abatement subcontractor, R-Services, was not suited to performing the structural demolition so BDA did not ask it to quote that work. Monalt submits that R-Services is a similar company to Monalt and that it is reasonable that Monalt would similarly be unsuited to perform structural demolition work.

[61] I give that argument no effect. I find no basis to draw any inference on what type of demolition work that BDA may or may not have reasonably believed Monalt was capable of doing. It is the core disputed issue in this action. Neither Mr. Cowan nor Ms. Alatsas were asked about whether they knew or agreed that Monalt was not suited to perform structural demolition at the time of entering the subcontract. There is also insufficient evidence before me on R-Services to find that it operates substantially the same business as Monalt. I accordingly find no basis in evidence to draw any inference about BDA's views of R-Services' capabilities in respect of whether the stair demolition work was included in Monalt's scope of work.

[62] In my view, the evidence does not support a finding that a reasonable person in BDA's position would believe Monalt lacked the experience or expertise to perform the required structural demolition work, including by subcontracting it out.

[63] Second, Monalt argues that I should have regard to the fact that BDA obtained an estimate from Highpoint Environmental Services Inc. for the stairwell work in mid-June 2020, which was prior to the parties' dispute clearly crystallizing in August 2020. Ms. Alatsas explained that quote during her cross-examination. She testified that she was concerned about Monalt's failure to perform and was taking steps to set up an alternate contractor in the event Monalt's non-performance continued given the timelines on the project. That explanation aligns with the lack of response discussed above around the shoring drawings and the timing of BDA also engaging an engineer to prepare revised shoring drawings. I accept Ms. Alatsas' explanation.

[64] Third, in his affidavit evidence, John Paduraru argues that BDA's acceptance of Monalt's invoice for extras shows that Monalt had not agreed to perform all demolition. I also give that argument no effect. Evidence at trial supports that the additional work that is subject to the extras purchase order and invoice was additional abatement in areas that had not been identified in the Pinchin survey. That is work beyond the original scope of the contract. Since the approved extras were for additional work beyond the scope of the bid documents, BDA's agreement to pay extras for that work does not assist in deciding whether Monalt had objectively agreed to complete the stairwell demolition.

[65] Fourth, Monalt argues that BDA's general use of "all work" under a division in its purchase orders for other trades was proven to be inaccurate. I reject this argument as well. The focus of the analysis in this case is on what a reasonable person in the position of the parties would objectively believe had been agreed. The circumstances of the negotiations with other trades were not before me at trial. The purchase orders to which witnesses were directed at trial are unsigned by the relevant trades, whereas Monalt's purchase order was signed back. I find no fair basis in the evidence to compare Monalt's situation and those of other trades.

[66] Fifth, Monalt has pointed to the limited items that BDA noted to Monalt as remaining outstanding in July 2020. During cross-examination of BDA's site superintendent, Guy Chevrefils, he was taken to an email from John Paduraru on July 10, 2020, in which Mr. Chevrefils was asked to confirm what was still to be completed at the Hilliard Residence. In response, Mr. Chevrefils provided a list of seven items. He confirmed that the list did not include stair work. During re-examination, though, he confirmed that the stairwell work would have been the last thing BDA was to do, and that he was transferred to another site before that work commenced. He confirmed that his list was as of when he was about to leave the job site.

[67] In my view, the fact that Mr. Chevrefils did not indicate the stairwell work was outstanding is not dispositive of the parties' agreement. This is circumstantial evidence and post-dates the contract formation. It is not a surrounding circumstance that is material to assessing the objective intentions of the parties.

[68] For these reasons, having considered the factual matrix between the parties as presented at trial, I am satisfied that the evidence supports that, objectively, Monalt agreed to complete the stairwell and ceiling slab demolition work in Division 02 of the specifications. I find accordingly.

b. Breach of contract

[69] Given my finding that Monalt's scope of work included demolition of the stairs and ceiling slab, it follows that the refusal by Monalt to perform that work was a breach of contract.

[70] The evidence supports that Monalt demobilized in July 2020 on the basis that it had completed its work on the Hilliard Residence and was awaiting further instruction on proceeding with the Wood Residence. Identified deficiencies were rectified. Monalt sought payment of its invoices. BDA advised Monalt that it would be back charging Monalt amounts in excess of its quotations.

[71] At a meeting on August 20, 2020, BDA confirmed it would not be paying Monalt and Monalt advised it would not proceed with any further work. The following day, on August 21, 2020, Mr. Paduraru sent an email to Ms. Alatsas confirming in writing that Monalt was suspending further work pending payment of unpaid invoices.

[72] At the time of suspending work for non-payment, Monalt had already been advised of the set-off claim being advanced for Monalt's failure to complete the stairwell and ceiling slab demolition. It was also demanding payment for its extras invoice, which had not yet been approved (although ultimately was approved). No evidence or argument was put forward on the payment terms of the parties' subcontract. There is accordingly nothing before me supporting that BDA lacked any contractual entitlement to withhold payment in the circumstances and was required to pay Monalt's invoices.

[73] I find that Monalt had no contractual basis to demand payment as a precondition to continuing work. Given my finding that the disputed demolition work was included in Monalt's subcontract scope, Monalt was in breach of contract for refusing to complete that work. I find that BDA was justified in withholding payment from Monalt in the circumstances.

[74] In that context, I find that Monalt's refusal to continue work without payment was an evinced intention not to complete the subcontract work, which was an act of repudiation. BDA was entitled to refuse that repudiation and sue for damages, which it has done.

c. Damages

[75] Since I have found that Monalt breached the subcontract by refusing to complete its scope of work and demanding payment without contractual basis to do so, BDA is entitled to set-off against the unpaid contract amounts under the subcontract for any proven damages flowing from Monalt's breach of contract.

[76] BDA advances a set-off claim and counterclaim for its costs of completing the Division 02 scope of work, including its direct payment of Classic for work that it performed on Monalt's behalf, and the costs of completing the Wood Residence. The claim quantification is outlined in BDA's written closing submissions, consisting of the following amounts:

(a) Classic Demolition Services ("Classic Demolition"): $30,132.50;

(b) R-Services: $71,695.00 (higher than the amount of $68,531.44 noted as being claimed in Ms. Alatsas' affidavit);

(c) A-D Engineering Group Ltd. ("A-D Engineering"): $2,450.00;

(d) Bigshow Scaffolding & Shrink Wrapping (Ontario) ("Bigshow"): $55,090.62 (higher than the amount of $40,711.82 noted as being claimed in Ms. Alatsas' affidavit);

(e) GRIZZLY Concrete Cutting ("Grizzly"): $26,095.00; and

(f) Highpoint Environmental Services Inc. ("Highpoint"): $89,935.00.

[77] There has been no admission or concession by Monalt that the work performed by any of these trades was within its scope of work, with two exceptions: Classic Demolition and R-Services. Monalt's position is that the balance of BDA's set-off claim and counterclaim have not been proven.

[78] BDA has the evidentiary onus of proving its completion costs. When a contractor advances a damages claim for completion work that has already been performed, there are three elements that must be proven:

(a) That the work claimed is the same scope of work under the breached contract, and does not include any extras or changes in scope.

(b) The work claimed was actually performed.

(c) The work was paid for by the contractor or the contractor is liable to pay for it.

[79] BDA's position is that Stephanie Alatsas' affidavit evidence and testimony is ample, sufficient, and solid evidence on which to find that BDA hired the various trades to complete Monalt's work, that the work was completed, and that BDA incurred the costs of paying for that work to complete the project. I disagree.

[80] Ms. Alatsas' affidavit provides no details on the work performed. It simply outlines the back charges and confirms that she approved the amounts for payment, and that she has confirmed with BDA's accounting department that they were paid. That evidence is insufficient to meet BDA's evidentiary onus. During cross-examination, Ms. Alatsas was demonstrated to have no specific knowledge of the work performed by the completion contractors. No other evidence was tendered by BDA on completion work.

[81] Evidence on the completion work was elicited during oral examinations. However, BDA has not met its evidentiary onus of proving many of its set-offs and counterclaim.

[82] I turn now to my findings on each of the claimed amounts.

i. Classic Demolition Services

[83] With respect to Classic Demolition, Monalt concedes that two of the three invoices, which total $24,621.75 plus HST, are for work performed during Monalt's work on-site and were within its scope of contract work. The final invoice is challenged, but BDA withdrew its claim for it, so I need not address it.

[84] Monalt does not dispute that BDA is entitled to set-off for the two invoices, but the parties do not agree on whether that set-off is against the total contract price or the admitted earned and unpaid amounts.

ii. R-Services Environmental Group Inc.

[85] R-Services was contracted by BDA to complete the asbestos removal work in the Wood Residence. Monalt concedes that it was retained to complete Monalt's scope of work, but only concedes that the base purchase order amount of $18,195 plus HST was within its scope of work. The balance of R-Services' invoices are disputed.

[86] I agree with Monalt that the total amount claimed has not been proven. The base contract amount showing on the purchase order issued by BDA is $18,195.00, plus HST, which is consistent with invoicing under that purchase order. Various revisions and credits are added and subtracted from that base amount to reach a final total of $104,797.94. There is no evidence on those revisions at all, let alone evidence correlating them to Monalt's original scope of work on the Woods Residence. Also, only $68,531.44 is claimed in Ms. Alatsas' affidavit, but the calculation of that amount is not addressed. During cross-examination, she was unable to confirm how it was calculated. Ms. Alatsas also testified that some of the revisions were changes and some were original scope of work, but did not (or could not) identify which items were said to form Monalt's original scope of contract work. A higher amount has been claimed in BDA's closing submissions, which seems to correlate to two quotations from R-Services. However, given Ms. Alatsas' uncertain evidence, they have not been connected to Monalt's scope of work.

[87] BDA has not met it's onus. I thereby find that only $18,195 plus HST has been proven as damages flowing from Monalt's breach of contract.

iii. A-D Engineering Group Ltd.

[88] Ms. Alatsas' affidavit evidence deals with the work invoiced by A-D Engineering. She outlines that A-D Engineering was retained to produce shop drawings to replace those that had been provided by Monalt and rejected after Monalt failed to provide revised shop drawings. The first two invoices from A-D Engineering are consistent with that evidence. They cover structural engineering services and preparation of drawings for the crash deck and shoring for demolition of the stairwell and slab in June 2020. Between Ms. Alatsas' testimony and corroborating documentary evidence, I find that those invoices, totalling $1,850 plus HST, are damages flowing from Monalt's breach of contract.

[89] The third invoice, though, refers to a site visit on July 15, 2020 and subsequent reports on July 16 and 20, 2020. There is no evidence on the purpose of the site visit or reports. The reports were not put to witnesses or correlated to Monalt's scope of work or any breach of the contract. BDA has not proven this set-off.

iv. Bigshow Scaffolding & Shrink Wrapping (Ontario)

[90] I am satisfied from Ms. Alatsas' cross-examination testimony that work invoiced by Bigshow for $35,287.91, plus HST, was work performed and costs incurred by BDA to complete the stairwell and ceiling slab demolition work, dealing with the supply of necessary scaffolding and shoring.

[91] I accept that Monalt was required to provide scaffolding as part of its supply of all labour, equipment and materials to complete its scope of work. No convincing argument has been put forward, nor have I been directed to anything in the specifications, that support that BDA was reasonably required to supply scaffolding for Monalt to complete its own scope of work.

[92] Bigshow's purchase order refers to completing work in Division 18, but Ms. Alatsas confirmed during cross-examination that it was a typographical error and that Bigshow supplied the scaffolding for the stairwell demolition. I accept that evidence. It is consistent with Bigshow's quotation. The purchase order amount is the same as the quotation, which is to supply, install & dismantle scaffolding, shoring and crash deck in stairwell, and aluminum beam support for roof opening. As project manager, I accept that Ms. Alatsas has personal knowledge of the work performed by Bigshow with respect to scaffolding. I accordingly find that this portion of Bigshow's invoicing is properly viewed as damages flowing from Monalt's breach of contract.

[93] Bigshow also quoted and invoiced for an extra to provide scaffolding to access new window openings to be installed. Ms. Alatsas' evidence is that the window openings were part of Monalt's demolition scope of work. Other than that bare statement during cross-examination, though, there is no evidence correlating that work to Monalt's scope. BDA has not proven this set-off.

v. Grizzly Concrete Cutting

[94] With respect to work performed by Grizzly, Rob Kinaschuk's affidavit directly challenges whether Grizzly's work as outlined on the invoice was within Monalt's scope of work. Mr. Kinaschuk's suggests that core drilling would have been needed for new plumbing. BDA's site superintendent, Guy Chevrefils, confirmed during cross-examination that they were penetrations through the slab for piping and conduits to be used for plumbing and electrical.

[95] During cross-examination, Ms. Alatsas was taken to the Division 02 specifications and challenged on the fact that there was no reference to coring. Ms. Alatsas was able to point to a section in the specifications that tends to support that certain coring activities were contemplated, but BDA has not tendered sufficient evidence to correlate the work identified in the invoice to the specification. Ms. Alatsas did not give evidence on specific purpose for the core drilling work, absent which I lack an evidentiary basis to find that it was within Monalt's contractual scope of work. The fact that some form of coring activity may be contemplated by the specifications is not enough to find the work claimed is the same scope of work under Monalt's subcontract, and does not include any extras or changes in scope.

[96] I thereby find that BDA has not met its evidentiary onus of proving that the invoice amount represents damages flowing from Monalt's breach of contract.

vi. Highpoint Environmental Services Inc.

[97] Evidence supports that Highpoint was brought in by BDA to perform the stair demolition and ceiling slab work. During Lewis Cowan's cross-examination, he was specifically asked to

confirm that point. Ms. Alatsas similarly confirmed it during her cross-examination. As project manager, I accept her evidence in that regard.

[98] BDA claims for the full value of the demolition contract with Highpoint. Ms. Alatsas' affidavit evidence is that all of the completion contractor invoices "have been paid by BDA in their entirety." There are four invoice draws from Highpoint in evidence. The last of the four draws indicates a change order deleting certain scope and reducing the contract price to $89,435 plus HST. The invoices refer to a purchase order number, but no purchase order is in evidence. A quote from Highpoint from June 2020 outlines a scope of work, but the quote price is not the same as the contract price listed in the invoices.

[99] I accept Ms. Alatsas' evidence that Highpoint did complete the stairwell demolition and ceiling slab work and was paid the amounts in the invoices, but BDA has not tendered sufficient evidence to establish the full scope of work performed and invoiced by Highpoint. As a result, I am unable to correlate it entirely to Monalt's contractual scope of work. I thereby find that BDA has not met its evidentiary onus of proving that the full amount of $89,435 plus HST is damages flowing from Monalt's breach of contract.

[100] In my view, though, it would be unjust to deny the set-off in its entirety. In *TMS Lighting Ltd. v KJS Transport Inc.*, 2014 ONCA 1 at para. 61, the Court of Appeal held that a trial judge is obliged "to do his or her best" to assess damages on available evidence even where quantification is difficult. In all the circumstances, and taking into account the reality that the scaffolding rental cost for the work (which I have accepted) would reasonably be less than the substantive demolition work itself, I find it fair and appropriate to award $50,000 plus HST.

vii. Summary of Damages

[101] I accordingly find that BDA is entitled to damages of $146,848.77 ($129,954.66, plus HST), comprised of:

(a) Classic Demolition: $24,621.75 plus HST;

(b) R-Services: $18,195 plus HST;

(c) A-D Engineering: $1,850 plus HST;

(d) Bigshow: $35,287.91, plus HST; and

(e) Highpoint: $50,000 plus HST.

[102] If those damages of $146,848.77 are set-off against the total contract price of $159,194.40, which is comprised of the base contract price of $135,600.00 ($120,000 plus HST per the purchase order), plus the approved extras of $23,594.40 (incl. HST), then the result is a remainder of $12,345.63 in contract funds.

viii. Set-off against earned contract amounts or unpaid balance

[103] Monalt's claim for unpaid services and materials is $99,121.70, including HST. In closing, the parties raised whether proven set-offs should be applied first to the unearned contract balance

or to the earned and unpaid contract balance. No case law was tendered by either party on the point.

[104] I have no hesitation finding that the amounts invoiced by Classic Demolition should be set-off against the earned and unpaid contract funds. Although Monalt argues that it should be set-off against the unearned portion of the contract first, I disagree. It is undisputed that those amounts were to be paid by Monalt.

[105] Mr. Paduraru's evidence is that Classic Demolition was involved to help mitigate delays that were not caused by Monalt and beyond its control, which would free up Monalt to work on the approved extra work. Although BDA disagrees with that characterization, the dispute is legally moot. Mr. Paduraru conceded during cross-examination that Monalt was responsible for these costs. They were incurred in completing Monalt's scope of work on the Hilliard Residence. Monalt's invoices for the Hilliard Residence include the work performed by Classic Demolition. No convincing argument was advanced for setting off those amounts from the unearned portion of they contract funds. Since they directly relate to the services and materials already invoiced by Monalt, I find it is properly set off against the earned and unpaid funds.

[106] Whether the balance of BDA's proven damages are set-off first against the earned and unpaid contract funds or against the unearned contract balance will decide if there is any judgment awarded in this case. In my view, at a minimum, the circumstances of this case warrant setting off BDA's damages directly attributable to the Hilliard Residence against the earned and unpaid contract funds. I say this because Monalt's position is that it completed all work on the Hilliard Residence. I have found that it did not. The stairwell demolition and ceiling slab work has been held to be within Monalt's scope of contract work.

[107] Monalt has been found to have breached the contract. BDA has been found to be the aggrieved party. That is a factor in assessing the equities of where first to apply set-off.

[108] Excluding extras, Monalt has invoiced a total of $75,527.30 of the base contract work. As noted earlier in these reasons, BDA conceded in closing submissions that it is an accurate valuation for the services and materials actually supplied by Monalt. Given Monalt's position that it had completed all work on the Hilliard Residence, and based on the purchase order amount of $120,000 plus HST, that means Monalt would have been entitled to bill over $60,000 to complete the Wood Residence.

[109] The majority of BDA's claimed damages that I have allowed relate to completing Monalt's scope on the Hilliard Residence. I have allowed only $18,195, plus HST, for completing the Wood Residence. BDA claimed significantly more, but I have held that BDA failed to meet its evidentiary onus in proving those damages.

[110] Applying BDA's damages first against the unearned contract balance would effectively be accounting for the costs of completing the Hillard Residence against amounts that ought to have been paid to complete the Wood Residence. In my view, that puts the benefit on Monalt and the burden on BDA by ignoring the reality that Monalt would have invoiced more than $60,000 to complete the Woods Residence ($65,112.50 per the calculation in its own closing submissions).

[111] Subsection 17(3) of the *Construction Act*, RSO 1990, c C.30 provides that, in determining the value of Monalt's lien, I may take into account any amount in favour of BDA for all outstanding debts, claims or damages related to the improvement.

[112] On the facts of this case, I find it unjust to set-off BDA's damages first against the unearned contract balance when the bulk of allowed damages relate directly to Monalt's claimed supply of services and materials. In my view, it is appropriate to set-off at least those damages against the earned and unpaid contract funds. Since those amounts are greater than the balance of earned and unpaid contract funds after deducting the Classic Demolition amounts, I need not address whether amounts allowed for completing the Wood Residence should be first applied to the unearned contract balance.

CONCLUSION

[113] In the result, I find that the earned and unpaid amounts in favour of Monalt's are set-off in their entirety by BDA's proven damages, such that no amounts remain owing to Monalt. Since BDA's total proven damages do not exceed the total unpaid contract amount, BDA is also not entitled to any judgment against Monalt.

[114] I am dismissing the action and counterclaim, discharging Monalt's lien, and directing that the lien bond posted into court as security to vacate the lien be delivered up to BDA for cancellation. A report shall issue accordingly.

COSTS

[115] After reading my judgment, counsel were given an opportunity to seek to resolve costs of the action and this reference. The parties have been unable to agree as to costs.

[116] Following closing submissions, both parties exchanged and uploaded bills of costs. They are fairly consistent, particularly when accounting for the higher rate for BDA's lawyer, who was called to the bar in 1972.

[117] BDA seeks its costs of the action and this reference before me on a partial indemnity basis in the amount as set out in its bill of costs, plus a further $750 to $1,000 for costs of today's appearance. That last piece appears to have already been accounted for in the bill of costs. Monalt submits that, given the result that neither party has obtained judgment against the other, I should make an order that each party bear their own costs.

[118] Costs in a lien action are governed by s. 86 of the *Construction Act*. It provides me with broad discretion in deciding costs. By operation of s. 50(2) of the *Construction Act* (formerly s. 67(3) of the *Construction Lien Act*), the *Rules of Civil Procedure*, RRO 1990, Reg 194 also apply in a lien action except to the extent of any inconsistency with the *Construction Act*. Subrule 57.01(1) of the *Rules* outlines non-mandatory and non-exhaustive considerations for the court in assessing costs. The court has repeatedly held that subrule 57.01(1) is not inconsistent with the *Construction Act* and is applicable in the court's exercise of its discretion under s. 86.

[119] Ultimately, costs awards in lien actions are discretionary. As with non-lien civil actions, costs awards should reflect what the court views as a fair and reasonable amount that should be paid by the unsuccessful party, having regard to the expectations of the parties concerning the quantum of costs, rather than any exact measure of the actual costs of the successful litigant: *Davies v. Clarington (Municipality),* 2009 ONCA 722 at para. 52; *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 2004 CanLII 14579 (ON CA), 71 OR (3d) 291 (CA) at paras. 26 and 38.

[120] The costs claims of both parties are extremely reasonable and, in my view, are commensurate with the summary nature of lien proceedings and in the spirit of s. 86(2) of the *Construction Act*, which is a costs provision intended to encourage parties in a lien action to take the least expensive course of action.

[121] BDA argues that it should be awarded its costs because it has been entirely successful in defeating Monalt's lien and contract claims, regardless of the fact that it has not obtained judgment on its counterclaim. Monalt liened for $98,586.10, leading to costs being incurred vacating the lien, and further costs to defend the lien action. BDA characterizes the counterclaim as a minor part of the overall litigation.

[122] Monalt argues essentially that I should consider the flip side of that coin. Although Monalt was not ultimately successful in establishing its claim, so too was BDA unsuccessful in establishing its counterclaim. Monalt submits that BDA advanced a claim against it that was for nearly double the value of the contract price, but was only successful in proving damages roughly equal to the parties' agreed contract price.

[123] At trial, Monalt sought judgment against BDA for $99,121.70. BDA sought judgment against Monalt for $101,671.62. Although neither obtained judgment, both were successful in establishing their claims to an extent. Monalt's supply of services and materials was not ultimately disputed at trial, with BDA conceding the percentages claimed by Monalt as having been completed. Conversely, although BDA did not prove the full extent of its own claim, it did prove an amount higher than Monalt's claim and convinced me that BDA should be entitled to set-off most of those damages first against the earned and unpaid contract funds. However, BDA did not prove an amount in excess of the unpaid contract balance.

[124] There has clearly been a measure of divided success. Although I do not fully accept BDA's characterization that it has been successful enough to warrant full partial indemnity recovery, I acknowledge that there is no material distinction between its set-off defence and counterclaim as pleaded and advanced at trial. Importantly, though, BDA's lack of success on the set-off and counterclaim is not, in my view, equivalent to BDA's success in defeating Monalt's claim. I find that BDA is entitled to costs associated with the lien, which has been discharged, and some costs of the action.

[125] A costs award in favour of BDA is mitigated by the time and expense incurred in the course of the action and reference on productions, discoveries, trial preparation, and trial to deal with completion cost claims that were not ultimately proven at trial. In my view, it would be both unfair and unjust not to account for those costs in Monalt's favour when deciding costs.

[126] The hours and rates claimed by BDA are reasonable and essentially in line with those claimed by Monalt. They are within the reasonable expectations of Monalt. There is no conduct of either party in the course of this reference that would impact costs. Both counsel and their clients have acted throughout in a manner that I wish was the case in all lien actions.

[127] For the foregoing reasons, considering the result, I find that the fair and reasonable amount of costs payable by Monalt to BDA in respect of this action and the reference is $20,000.00, inclusive of HST and disbursements, payable within thirty (30) days after confirmation of my report.

ASSOCIATE JUSTICE TODD ROBINSON

Date: March 7, 2024

CITATION: Monalt Environmental Inc. v. BDA Inc., 2024 ONSC 1417
COURT FILE NO.: CV-20-650113
DATE: 2024 03 07

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF the *Construction Act*, RSO 1990, c. C.30, as amended

B E T W E E N :

MONALT ENVIRONMENTAL INC.

Plaintiff /
Defendant by counterclaim

- and -

YORK UNIVERSITY and BDA INC.

Defendants /
Plaintiff by counterclaim

REASONS FOR JUDGMENT

Associate Justice Todd Robinson

Released: March 7, 2024