

Court of King's Bench of Alberta

Citation: Welcome Homes Construction Inc v Atlas Granite Inc, 2024 ABKB 301

Date: 20240524
Docket: 2303 23435
Registry: Edmonton

Between:

Welcome Homes Construction Inc

Applicant
(Respondent)

- and -

Atlas Granite Inc

Respondent
(Applicant)

**Memorandum of Decision
of
Applications Judge W.S. Schlosser**

[1] Does an adjudicator's decision under the *Prompt Payment and Construction Lien Act* depend on the validity of the lien? In my view, the answer is no. An adjudicator deals only with contractual disputes between contracting parties. Beyond framing the dispute, the lien does not form the basis of the right being adjudicated.

Authorities Cited

By the Parties

- *SRK Woodworking Inc v Devlan Construction Ltd et al*; 2022 ONSC 1038;
- *Prompt Payment and Construction Lien Act*, RSA 2000, c P-26.4;
- *Prompt Payment and Adjudication Regulation*, Alta Reg 23/2022;
- *Construction Act*, RSO 1990, c C.30;
- *Anatolia Tile & Stone Inc v Flo-Rite Inc*, 2023 ONSC 1291 at para 3;

- *Ledore Investments v Dixin Construction*, 2024 ONSC 598 at para 34.
- Alberta, Legislative Assembly, *Alberta Hansard*, (4 November 2020) excerpts.

By the Court

- *Tervita Corporation v ConCreate USL (GP) Inc*, 2015 ABCA 80
- *Equinox Electric Ltd v Progress Construction & Development Ltd*, 2014 ABQB 552 (per Robertson, M)

Facts

[2] Welcome Homes hired Atlas Granite to supply marble countertops for various rooms in a new home. The total cost was \$17,614.70 including GST.

[3] Between January 10, 2023 and February 21, 2023 most of the countertops were installed. However, a dispute arose about the length of the kitchen island countertop. The builder denied specifying the dimensions of the island countertop and took the position that the marble slab provided by Atlas Granite was too short. Welcome Homes refused to pay for any of the work or materials supplied by Atlas Granite, or take delivery of the kitchen island countertop. They terminated the contract March 9, 2023.

[4] Atlas Granite filed a lien in the sum of \$19,376.17 on May 17, 2023. Welcome Homes then served Notice to commence an action July 4, 2023 (pursuant to s 45 of the *Act*).

[5] Before a court action was commenced, the parties agreed to follow the new adjudication process. Counsel for Welcome Homes held the full value of the lien plus 10 percent for costs in trust pending the adjudication.

[6] The parties then agreed upon an adjudicator. The matter was adjudicated with lengthy reasons: \$12,775.29 (including GST) was awarded to Atlas Granite. Interestingly, the adjudicator was based in Oakville Ontario. The parties split the adjudicators costs (\$5,650.00 including HST). No other costs were awarded.

[7] After the adjudicator's order, Welcome Homes then served a Notice to Prove Lien pursuant to s 52 of the *Act*. The proceedings were stayed by Consent Order pending this application for advice and directions.

[8] I note (but do not find) that the lien appears to be filed out of time. Section 41(1)(a) provides:

41(1) A lien for materials may be registered at any time within the period commencing when the lien arises and

- (a) subject to clauses (b) and (c), terminating 60 days from the day that the last of the materials is furnished or the contract to furnish the materials is abandoned,

Section 41(2)(a) provides:

41(2) A lien for the performance of services may be registered at any time within the period commencing when the lien arises and

- (a) subject to clauses (b) and (c), terminating 60 days from the day that the performance of the services is completed or the contract to provide the services is abandoned,

In *Equinox*, Master Robertson noted:

[26] The argument before me seems to have proceeded on the misunderstanding at the [then] 45 day period runs from the last day that the subcontractor was on site. That is clearly not the law. This was discussed by Master Funduk in *Kershaw Financial Corporation v. Jehan Holdings Ltd.*, 1988 CanLII 3853 (AB KB), 1988 CarswellAlta 567, [1988] A.J. No. 627, where he said, at paragraph 41:

The case law bears out that a mere cessation of work is not sufficient to constitute an abandonment. In order to constitute an abandonment there must be both a cessation of work and a coexisting intention not to carry on with the project. The cases are set out in Macklem and Bristow, *Construction and Mechanics Liens in Canada* (5th ed.) at pp. 80 – 81.

[27] A review of the current edition of the same text indicates that the law on this point has not changed. In fact, this has been the law since at least 1915: *Anderson v. Fort William Commercial Chambers Limited*, 1915 CanLII 543 (ON CA), 34 Ont. L.R. 567, 1915 CarswellOnt 201 (C.A.).

In *Tervita*, Slatter JA explains:

[8] The *Builders' Lien Act* creates an extraordinary statutory remedy. The lien rights under the *Act* must be given a practical interpretation, so as not to unduly prejudice the rights of owners and third parties: *Canbar West Projects Ltd. v Sure Shot Sandblasting & Painting Ltd.*, 2011 ABCA 107 at para. 14, 39 Alta LR (5th) 38, 502 AR 235. An interpretation which indefinitely delays the time limitation for filing a lien is unlikely to be in accordance with the intention of the legislature: *Dieleman Planer Co. Ltd. v Elizabeth Townhouses Ltd.* (1973), 1973 CanLII 1110 (BC CA), 38 DLR (3d) 595 at p. 600 (BCCA), affirmed 1974 CanLII 175 (SCC), [1975] 2 SCR 449.

[9] There are two interpretive approaches that accomplish a practical result. The first is with respect to “completion of the contract”. Where a contract is objectively terminated by the repudiation or breach of one of the parties, there are a number of consequences, and various legal remedies then become available. One consequence of a termination from breach is that both parties are relieved from any further performance under the contract: *Keneric Tractor Sales Ltd. v Langille*, 1987 CanLII 29 (SCC), [1987] 2 SCR 440 at p. 455; *Vallieres v Vozniak*, 2014 ABCA 384 at paras. 9-10; *Think Kitchen Cabinets Ltd. v Harbourvista Apartments Ltd.*, 2014 NSSC 28 at para. 40, 339 NSR (2d) 327. Thus, when the receiver for ConCreate effectively terminated the contract, Tervita’s future performance obligations were at an end. While in a physical or functional sense there was still “undone work”, in a contractual sense all of the work required by the (now terminated) contract had been exhausted. The contract

was “completed” in the sense that no further work would be done under it: *Think Kitchen Cabinets* at paras. 45-6.

...

[11] The second interpretive approach relates to the term “abandonment”. The term “abandonment” can have a narrow meaning, denoting conduct of the contractor that signifies a subjective intention to cease performing its obligations. This would include the contractor “walking off the job” or “no longer showing up”. Abandonment may often be assumed upon the insolvency of the contractor, although in this case Tervita was never insolvent. Under the *Act*, however, a purely subjective test for abandonment as adopted in cases like *W.M. Fares & Associates Inc. v 3035605 Nova Scotia Ltd.*, 2006 NSCA 120 at para. 23, 249 NSR (2d) 156 is inappropriate.

[12] In some cases a contract may be “abandoned” on an objective basis. The statute just requires abandonment, not necessarily abandonment by the lien claimant. Certainly a subjective abandonment by the lien claimant will be sufficient. However, when it becomes clear that the contract has been rendered un-performable by the conduct of either or both parties, by the actions of third parties, or as a result of external factors, the contract is essentially “abandoned”. Once it becomes impractical or impossible to perform the contract, no reasonable party would persist in saying they are “ready, willing and able” to continue performing: *Lake of the Woods Electric (Kenora) Ltd. v Kenora Prospectors & Miners Ltd.*, (1996), 27 CLR (2d) 184 at para. 49 (OCJ Gen Div). There comes a point in time when it is clear that the contract is at an end. That will also start the [then] 45 days running. At some time between the date when ConCreate’s receiver posted guards and blocked access to the site, and the email of July 23, this contract was essentially abandoned.

[13] The summary trial judge noted that in a physical sense the work was never completed, because the “anchor lift-off testing” was never done. He applied a primarily subjective test to “abandonment”, noting that Tervita was always ready, willing and able to do the anchor lift-off testing. Tervita’s statement on July 23 that the contract was terminated did not indicate that it had been terminated by Tervita, but rather that it had been terminated by others. There was always the possibility that ConCreate’s receiver would affirm Tervita’s contract, or that the City of Calgary would separately retain Tervita to do the same work. Notwithstanding Tervita’s acknowledgment on July 23 that its contract had been terminated, he held that it was not until October 24, 2012 that the City conclusively told Tervita that it would not be allowed to complete performance.

[14] The trial judge relied on *Dieleman Planer Co. Ltd. v Elizabeth Townhouses Ltd.*, 1974 CanLII 175 (SCC), [1975] 2 SCR 449. That decision does not, however, mandate a purely subjective approach to abandonment. It decides that a temporary cessation of work (for example, as a result of temporary financial problems of the owner) is not the same thing as a permanent abandonment of the contract. *Dieleman Planer* implies that there can be an

“abandonment” even if the contractor is ready, willing and able to do more work, if the work or the contract is permanently terminated.

[15] A review on appeal discloses that the trial judge applied too narrow a legal test. The test is when the lien claimant knew or should have known that the other party would not complete the contract. Once it would have been obvious to a reasonable contractor that the cessation of work caused by the receivership was not merely temporary, but represented a termination of the contract, the contract was effectively “abandoned”. An abandonment can occur without a formal communication from the other parties that the contract is terminated. Here the insolvency of ConCreate, the actions of its receiver in blocking access to the site, the discussion with the City about the possibility of doing the remaining work directly for the City, combined with the other surrounding factors, would cause a reasonable person to conclude that the contract was terminated. Tervita acknowledged that in its email of July 23. The fact that the City of Calgary might enter into a new contract for the same work was irrelevant to the ability to file a lien for the work done under the first contract.

[16] The time to file the lien starts running when the lien claimant knew or ought to have known that the other contracting party would not complete (i.e. had “abandoned”) the contract. To resolve this appeal, it is not necessary to determine exactly when the [then] 45 days started to run. The contract had been abandoned, at the very latest, by the time of Tervita’s acknowledgment on July 23 that its contract had been terminated. In an objective sense, Tervita realized by that day that the cessation of work was not just temporary. The last day on which a lien could have been filed was approximately September 6, 2012, making the second lien ineffective.

[9] An application of this test strongly suggests that the time for a lien under s 41 started to run on or about March 9, 2023. This would make the May 17 lien late by eight days; though this might well change depending on what transpired between the parties after March 9, 2023. However, for the reasons that follow, the validity of the lien is irrelevant to what is essentially a contractual dispute.

The New Adjudication Process

[10] The *Prompt Payment and Construction Lien Act* provides (in part):

33.4(1) Provided that no party has commenced an action in court with respect to a dispute, a party to a contract or subcontract may refer to adjudication a dispute with the other party to the contract or subcontract, as the case may be, respecting any prescribed matter in accordance with this section and the regulations or the procedures established by the Nominating Authority responsible for that matter.

(2) An adjudication may not be commenced if the notice of adjudication is given after the date the contract or subcontract is completed, unless the parties to the adjudication agree otherwise.

(3) If a party commences an action in court with respect to a dispute on the same date that the dispute is referred to adjudication under subsection (1), the adjudicator shall discontinue the adjudication and the action shall proceed.

And further:

33.6(1) Subject to subsections (2) and (3), an adjudicator may hear a dispute regarding any matter prescribed under this Part.

(2) An adjudicator may refer any matter to the court if the adjudicator does not have the jurisdiction to hear the matter or where, in the opinion of the adjudicator, the court is the more appropriate forum for hearing the matter.

(3) An adjudicator may refuse to hear a dispute if, in the opinion of the adjudicator, the dispute is frivolous or vexatious.

(4) The adjudicator shall issue a written notice of determination accompanied by the adjudicator's order, if any, concerning the matter.

(5) The determination of a matter by the adjudicator is *binding on the parties* to the adjudication, *except* where

- (a) a court order is made in respect of the matter,
- (b) a party applies for a judicial review of the decision under section 33.7,
- (c) the parties have entered into a written agreement to appoint an arbitrator under the *Arbitration Act*, or
- (d) the parties have entered into a written agreement that resolves the matter.

(6) Except in the case of an application for judicial review under section 33.7, nothing in this Part restricts the authority of the court or an arbitrator to consider the merits of a matter determined by an adjudicator.

[emphasis added]

The *Act* further provides that an adjudicator's order may be filed as an order of this court and it has the same effect as if it were an order made by the court (s 33.61). These amendments came into force August 29, 2022.

[11] Welcome Homes argued that the purpose of these amendments are merely to keep money flowing on a project on a 'without prejudice' basis. They further assert that an adjudicator's order is subject to proceedings to challenge the validity of a lien, as well as any other requirements under the *Act*.

[12] There are decisions in Ontario interpreting their similar but not identical sections, but none in Alberta, as yet.

Construction Lien Legislation

[13] Construction lien legislation creates new rights where none existed before, such as the right of a subcontractor to claim against the owner of land that they have improved, instead of

being limited to suing the next person up the chain; with whom they have a contract. The payoff for these rights is a complex, time-limited process with many pitfalls.

Adjudication in Practice

[14] Adjudicators are picked by a nominating authority after satisfying an impressive list of qualifications. They are governed by a Code of Conduct. There is a fee schedule for the services that they perform.

[15] Part 3 of the *Regulations* sets out what matters can be made subject to adjudication. Section 19 of the *Regulations* provide:

19 A party to a contract or subcontract may refer to adjudication a dispute with the other party to the contract or subcontract, as the case may be, respecting any of the following matters:

- (a) the valuation of services or materials provided under the contract or subcontract, including in respect of a written change order, whether approved or not, or a proposed change order, as the case may be;
- (b) payment under the contract or subcontract, including in respect of a written change order, whether approved or not, or a proposed change order;
- (c) disputes that are the subject of a notice of non-payment under Part 3 of the Act;
- (d) payment or non-payment of an amount retained as a major lien fund or minor lien fund and owed to a party during or at the end of a contract or subcontract, as the case may be;
- (e) any other matter in relation to the contract or subcontract, as the case may be, that the parties in dispute agree to, regardless of whether or not a proper invoice was issued or the claim is lienable.

[16] The *Regulations* determine a timeframe for a decision. As noted earlier, the adjudicator's order becomes an order of the court (like the procedure required for decisions of the RTDRS and the Court of Justice). Once the adjudicator's order becomes an order of the court, it can be dealt with as such (including stays etc). Section 33 of the *Regulation* provides that a party to an adjudication may commence an action in court.

[17] Parties to an adjudication may apply for judicial review within the limited confines of s 34 of the *Regulation*.

[18] The crucial point is that an adjudicator determines contractual rights; not lien rights, even when they overlap. As I read it, the amended *Act* does not permit an adjudication between a subcontractor and an owner (for example), where the lien rights are the only basis for a direct claim. The amendments are designed to deal only with contractual rights between contracting parties in a construction dispute; though a lienable right gives access to this procedure and the lien frames the dispute.

Interim or Final?

[19] There is an important difference between the Ontario and the Alberta legislation.

[20] Both the Ontario *Construction Act* and the Alberta *Prompt Payment and Construction Lien Act* and *Regulations* provide that nothing restricts the authority of a court to consider the merits of a matter determined by an adjudicator (Ontario s 13.15(2) and Alberta s 33.6(6), quoted earlier). However, the mechanism for challenging an adjudicator's order in Alberta is judicial review.

[21] The Ontario *Act* provides:

13.15 (1) The determination of a matter by an adjudicator is binding on the parties to the adjudication *until* a determination of the matter by a court, a determination of the matter by way of an arbitration conducted under the *Arbitration Act, 1991*, or a written agreement between the parties respecting the matter. 2017, c. 24, s. 11 (1).

[emphasis added]

[22] The Alberta legislation provides:

33.6(5) The determination of a matter by the adjudicator is binding on the parties to the adjudication, *except* where

- (a) a court order is made in respect of the matter,
- (b) a party applies for a judicial review of the decision under section 33.7,
- (c) the parties have entered into a written agreement to appoint an arbitrator under the *Arbitration Act*, or
- (d) the parties have entered into a written agreement that resolves the matter.

[emphasis added]

[23] As I read this subsection, an adjudicator's decision under the Alberta *Act* 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 Ontario legislation, as described in *SRK Woodworking* case, provides that their *Act* "sets out *an interim dispute process that is temporarily binding on the parties*" (para 90, emphasis added. And see also *Anatolia Tile*, at para 3 and *Ledore Investments*, at para 34). The Alberta legislation appears to provide a result that remains binding on the parties *except* where the arbitrator's decision is displaced by a court order or judicial review.

The Validity of the Lien

[24] The parties here are governed by a contract. This is not a situation where a subcontractor is claiming against an owner based on lien rights rather than contract rights. When the scheme of the amended legislation is considered, Parts 3, 4 and 5 have to do only with the contracting parties: owner and contractor (s 32.2) contractor and subcontractor, (s 32.3) subcontractor and sub-subcontractor (s 32.5). The amendments provide that if a contracting party submits a "proper

invoice” to the next person up the chain they either have to pay or dispute the invoice following the adjudication procedure (eg s 32.3(5), contractor-subcontractor and 32.5(6) subcontractor to sub-subcontractor).

[25] From this perspective, the lien rights are irrelevant, except to the extent that the dispute engages lienable rights in a construction dispute. The types of dispute described by s 19 of the *Regulations* (quoted above) are wide, but the amendments do not purport to give a statutory claim against anyone outside the contracting parties.

[26] The determination of the validity of a lien is not something that would affect the outcome. The adjudicator determines contractual rights, not lien rights. The lien rights are superfluous and in the circumstances do nothing other than to frame the dispute and give access to the procedure. Accordingly, an adjudicator’s decision cannot be overridden by a Notice to Prove Lien by the opposing party.

Heard on the 27th day of February, 2024. Written Submissions April 5, 2024 and April 29, 2024.
Dated at the City of Edmonton, Alberta this 24th day of May, 2024.

W.S. Schlosser
A.J.C.K.B.A.

Appearances:

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