Court of King's Bench of Alberta

Citation: Alberta Social Housing Corporation v Dawson Wallace Construction Ltd, 2023 ABKB 471

Date: 20230815
Docket: 2203 12068
Registry: Edmonton

2023 ABKB 471 (CanLII)

Between:

Alberta Social Housing Corporation

Plaintiff

- and -

Dawson Wallace Construction Ltd, Eko Wall Systems Ltd and Adexmat Inc

Defendants

Reasons for Decision
of
Applications Judge W.S. Schlosser

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[1] These are three competing cross applications for a fund of money paid into Court under the *Public Works Act*, RSA 2000, c P-46.

Cases Cited

By the Parties

Public Works Act, RSA 2000, c P-46; ***Alberta v Opron Construction Company,*** 1985 CanLII 1211 (AB KB); ***Graham Construction and Engineering Inc v Alberta (Infrastructure),*** 2021 ABQB 184; ***Graham Construction and Engineering Inc v Alberta (Infrastructure)***, 2019 ABQB 769; ***Graham Construction and Engineering Inc v Alberta (Minister of Infrastructure),*** 2019 ABQB 543; ***Moonview Builders Ltd v Alberta Housing Corporation,*** 1983 CanLII 1009

(AB KB); ***Leverton v Andrews,*** 2010 ABQB 516; ***Alberta Government Telephones v Canada Great Lakes Casualty & Surety Co,*** 1985 CarswellAlta 93, [1985] 5 W.W.R. 186.

By the Court

Bankruptcy and Insolvency Act, RSC 1985, c B-3 (s 38); ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49.

2023 ABKB 471 (CanLII)

Facts

[2] Alberta Social Housing Corporation hired Dawson Wallace as construction manager for the Gilchrist Gardens Phase II construction project in Calgary. They were hired in October 2020. Dawson Wallace engaged D'Amani Stucco Solutions Inc to do the exterior finish and insulation. D'Amani hired Eko Wall Systems to do the stucco, and Adexmat to the exterior cladding.

[3] According to Dawson Wallace, D'Amani's work was unsatisfactory and substandard. In late April 2021, D'Amani abandoned the job and their subcontract was terminated. Only eighteen percent of the work had been completed.

[4] Dawson Wallace withheld payment to D'Amani. Dawson Wallace then hired Holt Construction (AB) Ltd to complete D'Amani's work. The cost to complete this work and to correct deficiencies apparently totalled $647,838.00 plus legal expenses.

[5] D'Amani went bankrupt. Eko and Adexmat went unpaid.

[6] After D'Amani walked off the job, Eko and Adexmat filed *Public Works Act* claims. The claims were filed under s 14(1) of the *Act* and were in compliance with s 14 (3).

[7] When faced with a *Public Works Act* claim, the Crown has the option of paying the claims under s 15(1), or paying the money into Court under s 15(4), which provides:

> (4) Instead of paying the claimant as provided in this section, the Crown may apply to the Court of King's Bench to pay the money into Court *on the terms and conditions, if any, determined by the Court* and, on the money being paid into Court, *the Court may determine the persons who are entitled to the money and direct payment of the money in accordance with that determination.*
>
> (emphasis added)

[8] In this case, the s 14 notices set out the nature and the amount of the claims. The *Act* does not require the claims to be particularised, like an affidavit proving lien. In this case, and unlike the ***Graham Construction*** case, they were not first submitted to a third party hired to evaluate and approve progress claims.

[9] $311,164.27 was paid into Court pursuant to s 15(4) of the *Public Works Act*, representing the sum of Eko and Adexmat's unpaid claims: $151,164.27 for Adexmat and $160,000.00 for Eko. I note that Adexmat's claim consists of $151,164.27 worth of cladding materials (exclusive of tax) that were supplied to the job site and later purported to be kept 'under the contract' by Dawson Wallace. I expect that some of the materials were incorporated into the work Dawson Wallace claims to have been substandard. Dawson Wallace asked for a statement of the accounts between Adexmat and D'Amani. It appears that the entire materials claim of Adexmat remains unpaid.

[10] Eko's claim is for labour and materials. Apart from Dawson Wallace's assertion that the work was substandard and had to be remediated, the particulars of the deficient work were not particularised. Both Adexmat and Eko's claims arose under the subcontract with D'Amani.

[11] The order paying the funds into Court confirmed that the funds were due and owing to Dawson Wallace by the Applicant, ASHC, and provided, in part:

> 1. Pursuant to section 15(4) of the *PWA* and Rule 6.56 of the *Alberta Rules of Court,* the Applicant shall deliver to the Clerk of the Court the sum of $311,164.27 (the "Security") representing the claims of EKO and Adexmat, to be held in Court as security solely for the *PWA* claims of EKO and Adexmat *and the claim of Dawson Wallace* until further order of this Court as to who amongst the Respondents is entitled to the Security.
>
> (emphasis added)
>
> ...
>
> 3. The payment into Court as directed in this Order shall:
>
> > (a) discharge the Applicant's obligations to EKO and Adexmat, under the *PWA* ; and
> >
> > (b) be a credit to the benefit of the Applicant in reducing the amounts owing to Dawson Wallace under contract on the Project by the amount of the Security;
>
> ...
>
> 8. The posting of the Security by the Applicant is not an admission of the validity of the *PWA* claims by EKO and Adexmat or EKO and Adexmat's entitlement to any portion of the Security.
>
> ...

[12] Both Adexmat and Eko commenced actions[1], which were then discontinued.

[13] These two discontinued lawsuits were not before the Court. However, (and notwithstanding that they named both the Crown and Dawson Wallace as Defendants) neither have any obvious direct right of action against Dawson Wallace. Relying on ***Moonview Builders Ltd***, they argue that this is not necessary to advance a claim to these *Public Works Act* funds.

Can Dawson Wallace Claim the Funds?

[14] EKO and Adexmat argue, relying on ***Graham Construction*** (2021 ABQB 184), that, Dawson Wallace, is disentitled to the funds because it has not filed a *Public Works Act* claim.

[15] In the ***Graham*** case Justice Inglis held: "The Act does not apply to Graham or other parties that did not file claims according to the Act" (para 57).

[1] Adexmat Inc v D'Amani Stucco Solutions Inc, Dawson Wallace Construction Ltd, Alberta Social Housing Corp, 2101 13331; Eko Wall Systems Ltd v Dawson Wallace Construction Ltd, D'Amani Stucco Soutions Inc, Guarantee Co of North America, Alberta Social Housing Corp, Her Majesty the Queen in right of Alberta, 2103 17804

2023 ABKB 471 (CanLII)

[16] Eko and Adexmat argue that they should split the funds in Court according to their respective claims to the exclusion of Dawson Wallace.

[17] This argument, disentitling Dawson Wallace to the funds in Court can be answered in two ways: First, the *Act* requires funds to be paid into Court: 'on the terms and conditions ... determined by the Court' (s 15(4)). The Court is to: 'determine the persons who are entitled to the money' (also s 15(4)).

[18] To the extent that it is the order that prevails, it is my view that the learned Justice's pronouncement in ***Graham*** is limited to the specific facts of that case and, with respect, not a pronouncement that applies universally to claims made under the *Public Works Act*.

[19] In ***Graham***, the order paying money in (in that case, $30,019,141.47), referred only to the *PWA claimants*. The security was to be *credited* against any amounts owing to Graham by the Crown. While Graham was to get the benefit of the funds it did not provide for Graham to claim the funds.

[20] The Grand Prairie Hospital litigation that gave rise to the *Public Works Act* proceedings in the ***Graham*** case arose because Graham was not paying its subcontractors and money was not moving down the chain. In that case, all of the *PWA* claimants had had their invoices approved by a third party hired to review and evaluate progress payments. There was consent of all of the parties that the approved claims be paid out of the fund. As it turned out, there wasn't a surplus.

[21] This case is quite different. For someone to become a *PWA* claimant, the *Act* only requires that notice be sent by someone supplying labour and materials on a public work (by registered mail), within 45 days of the last provision of labour or materials; setting out the nature and amount of the claim (s 14(3)). The *Act* does not provide any built-in evaluation mechanism other than by payment in under s 15(4) order and for the Court then to determine entitlement as permitted by the order. The Crown has the option and discretion to pay s 14 claimants directly under s 15(1), but the *Act* does not otherwise create any rights.

[22] The starting point for payment in under the *Public Works Act* has to be that the Crown (at least arguably) owes money to the general contractor on the project. The *PWA* does not establish rights against the Crown in the way that the *Builders Lien Act* does against an owner (I am unable to think of any circumstances where the Crown would pay in when the general contractor has been paid in full). Justice Stevenson says, writing for the Court of Appeal in ***AGT***: "The court's responsibility, acting under subs. (4), is to determine who is *entitled* to the moneys." (emphasis added).

[23] The order in ***Graham***, provided that the amount of security shall be credited against any amount due and payable to Graham pursuant to its Crown contract, or otherwise (Graham consent order, para 7).

[24] In this case, and this is the second answer to Eko and Adexmat's argument that Dawson Wallace should be disentitled to claim the funds, is that the consent order acknowledges, and ASHC confirms, that the funds in Court are due and owing to Dawson Wallace pursuant to the contract. Dawson Wallace's officer gives the same evidence.

[25] The order was made in the context of two actions; one by Adexmat and one by Eko naming (*inter alia*) D'Amani, Dawson Wallace and the Crown. The parties agreed that these actions would be discontinued on the basis that the resolution mechanism shifted from the lawsuits to the *Public Works Act*.

2023 ABKB 471 (CanLII)

2023 ABKB 471 (CanLII)

[26] The terms of the order in this case free us up somewhat. The ruling in ***Graham*** is a function of the terms of its order but it is not a corset. Based on the terms of the order paying funds into Court, Dawson Wallace is not disentitled to claim the funds either by default or otherwise, solely because it did not give notice under s 14 of the *Public Works Act*.

How Much and in What Proportions?

[27] Section 15(4) of the *Act* and the order require the Court to determine entitlement to the funds in Court. The decided cases, notably ***AGT*** and ***Opron***, hold that the *PWA* claimants must demonstrate a direct right to claim the funds that would otherwise belong to the general contractor. As noted, the lawsuits filed by Eko and Adexmat are not before the Court, and the basis for a cause of action against Dawson Wallace and the Crown named in those proceedings is unknown.

[28] Adexmat supplied materials to the job site. Presumably, these materials were used in the work that Dawson Wallace says was defective. But there is no claim that Adexmat's *materials* were in any way substandard or deficient. By the same token, we do not know what portion of Eko's stucco work was unacceptable or incomplete. There is no accounting for this other than that Dawson Wallace says that they were obliged to spend nearly $650,000.00 on and engage a replacement contractor to repair and complete the work.

[29] Dawson Wallace argues that Eko and Adexmat cannot have the funds because neither of them have a direct claim against Dawson Wallace, being two steps down the chain as subcontractors of D'Amani and sub-subcontractors on the job. Adexmat and Eko strenuously argued that the ***Moonview*** case, cited with approval by Inglis J in ***Graham***, permits *PWA* claims to be made by claimants with no direct rights against the assets of the contractor. The difficulty they are trying to avoid is that as sub-subcontractors, their remedy is only against the next person up the chain, in this case, D'Amani, who is now bankrupt.

[30] However, I do not see this point to be determinative. The objection is essentially procedural and not substantive.

[31] The right in the ***Moonview*** case a (at paras 18 and following) was the right of a worker for wages under s 48 of the *Alberta Labour Act,* 1973 (Alta.), c. 33 (or its replacement; s 100(1) of the *Employment Standards Act)*, though the Court held that the wording of the replacement statute and s 15(5) of the *Public Works Act* afforded the workers no special priority. In the ***Moonview*** decision, Miller J says:

> [22] However, when one examines the recent amendment adding s. 15(5) to the Public Works Act, it is apparent that the inclusion of the same phrase "notwithstanding anything to the contrary in any other Act" can only mean that this section takes priority over s. 100(1) of the Employment Standards Act. It would, therefore, appear that where a workman claims for wages under the Public Works Act, he has no special priority against other valid claimants just because his claim is for personal services.
>
> [23] If I am correct in this conclusion, the combined effect of the new s. 100(1) of the Employment Standards Act, and the new s. 15(5) of the Public Works Act would be that workmen's validly filed wage claims would be on the same footing as validly filed claims of contractors *and subcontractors* and I would then assume

> that the only equitable way of distributing the fund, if it were insufficient to cover all claims, would be on a pro rata basis. In the case at bar, therefore, it would have followed that if Marwest had filed a proper claim by 15th February 1982 the fund would then have been distributed pro rata between the workmen and Marwest.
>
> (emphasis added)

2023 ABKB 471 (CanLII)

[32] In this case, D'Amani is bankrupt. The bankruptcy trustee would have an obligation to pursue whatever claim D'Amani might have against the Dawson Wallace for the benefit of the estate. Eko and Adexmat would be unsecured creditors. ***Re Perlynn Const. Ltd,*** (1974), 20 CBR (NS) 115 (Alta SC) (cited by Stevenson JJA in the ***AGT*** case), tells us that the *PWA* claims of Eko and Adexmat are privileged and would be treated as secured claims in the bankruptcy, taking priority over the trustee; though I note that this may be subject to the Court's discretion: ***Golfside Ventures Ltd (Re),*** 2023 ABKB 86, per Nielsen ACJ.

[33] If the trustee in D'Amani's bankruptcy had no appetite for this litigation, Eko and Adexmat could take it over by way of a s 38 *Bankruptcy and Insolvency Act* order. This would put them in the shoes of D'Amani and give them a claim, though still indirectly. It would also entail a reckoning about the quality of the work and the amounts owed but unpaid.

[34] I note further that the claimants in ***AGT*** were a surety and a bank, both claiming through others. To the extent that Eko and Adexmat may be disqualified as *Public Works Act* claimants based on dicta in ***AGT*** or ***Opron***, the problem has been overcome by the terms of the order.

[35] I am not willing to disqualify Adexmat and Eko's *PWA* claims. Eko and Adexmat have asserted an (unknown) direct right against the contractor in their now discontinued lawsuits. They could enjoy an (again indirect) right to claim against the contractor via s 38 *BIA* in D'Amani's bankruptcy. The order on the face of it, provides for a direct claim against assets that would otherwise belong to the general contractor. The order paying money in prevails and it specifies that the Court is to decide entitlement among these three claimants.

[36] The *Public Works Act* has received very little judicial consideration. If it is to do any work, it is to be interpreted pragmatically and remedially.

[37] The issue of entitlement under the *Act* consists of both a right, and a determination of the amount. While s 15(1) of the *Act* is discretionary and creates no rights, I am satisfied that all of the parties have demonstrated a sufficient basis to advance a claim, or, in the circumstances of this case, to create a vehicle by which these claims may be advanced.

[38] The residual problem is how much? Or in what proportions? I acknowledge that the order and the decided cases suggest that if entitlement is not proved (and again subject to the order), the funds in Court would go to the contractor by default if none of the other claimants demonstrate entitlement.

[39] This is a summary determination, in this case circumventing at least two lawsuits. It should be decided on the principles of ***Weir-Jones.***

> [46] Procedural and substantive fairness must always be a part of the summary disposition process. Considerations of fairness need not be a threshold requirement, nor should they only arise at the conclusion of the application. The chambers judge is entitled to take into consideration the fairness of the process, and its ability to

> achieve a just result, at all stages. Thus considerations of fairness will always be in the background, including during the fact-finding process, in determining whether the moving party has proven its case on a balance of probabilities, in deciding if there is a genuine issue requiring a trial, and in deciding if, considered overall, summary disposition is a "suitable means to achieve a just result". The ultimate determination of whether summary disposition is appropriate is up to the chambers judge: ***Hryniak v Mauldin*** at para. 83. As stated in ***Hryniak v Mauldin*** at para. 50 and ***Nelson v Grande Prairie (City),*** 2018 ABQB 537 at para. 47, 75 Alta LR (6th) 36, whether a summary disposition will be fair and just will often come down to whether the chambers judge has a sufficient measure of confidence in the factual record before the court. In practical terms, that level of confidence will not often be reached in close cases.

[40] I am not satisfied that the issue of quantum, at least with respect to any division of the funds in Court, can be adequately determined on the factual record presently before the Court. That being said, I do not think that it would be appropriate for the funds simply to revert to the Crown or the general contractor. In that case, the Court would not be doing its job and what's more, would engender the multiplicity of proceedings either by resurrecting, the two lawsuits discontinued on the strength of the order paying funds into Court, or by way of proceedings in D'Amani's bankruptcy.

[41] Accordingly, I am obliged to dismiss the applications for inadequate evidence. I invite the parties either to agree about quantum as they did in the ***Graham*** case, or come up with an agreement about a framework for how this might be accomplished. I would not be averse to giving procedural directions along the lines of a s 53 order under the *Prompt Payment and Construction Lien Act*, RSA 2000, c P-26.4 to achieve this end.

Heard on the 27th day of June, 2023.
Dated at the City of Edmonton, Alberta this 15th day of August, 2023.

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

Appearances:

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2023 ABKB 471 (CanLII)

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no appearance

2023 ABKB 471 (CanLII)