CITATION: Westport Insurance v. BDA Inc., 2024 ONSC 5450
COURT FILE NOS.: CV-23-00707677-0000 and CV-23-00702210-0000
DATE: 20241002

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
WESTPORT INSURANCE CORPORATION	Michael Mandarino & Michael Mazzuca, for the Plaintiff
Plaintiff	
– and –	Jaspal Sangha, for the Defendant High Tech Power Inc. and Benyamin Mehraban
BDA INC., HIGH TECH POWER INC., and BENYAMIN MEHRABAN	Laura Delemere and Camilo Silvera for the Defendant BDA Inc.
Defendants	
	HEARD: August 26 and September 11, 2024

PAPAGEORGIOU J.

Overview

[1] This is a dispute between a surety, Westport Insurance Corporation ("Westport"), and High-Tech Power Inc. ("High Tech").

[2] By way of background, BDA Inc. ("BDA") is the general contractor for a construction project located in Bronte, Ontario (the "Project"). BDA engaged High Tech to provide electrical supply and install electrical works to the Project for the agreed upon contract price of $2,050,339, pursuant to a written agreement dated May 18, 2022 (the "Subcontract").

[3] BDA required High Tech to provide performance security. On July 12, 2022, Westport executed and delivered a performance bond and labour and material bond in the amount of $2,050,339 (the "Bonds"). The Bonds name Westport as surety, BDA as the obligee, and High Tech as the principal.

[4] The defendant, Benyamin Mehraban, is the shareholder and an officer of High Tech. As a precondition to Westport issuing the Bonds, on May 12, 2022, High Tech and Mr. Mehraban executed an indemnity agreement (the "Indemnity Agreement") in favour of Westport, where they agreed to indemnify Westport for all losses, damages, charges, expenses, claims, judgments, demands, and liabilities which Westport may sustain or incur in s. 1.

[5] There was a dispute between BDA and High Tech such that BDA terminated the Subcontract. Following this dispute, BDA made a claim pursuant to the Bonds. On an interim basis, Westport entered into a mitigation agreement on August 22, 2022 (the "Mitigation Agreement") and paid BDA advances in the amount of approximately $340,000 (the "Advances").

[6] The Mitigation Agreement specified that Westport was entering into the agreement having not completed its investigation. The Mitigation Agreement was subject to a full reservation of BDA's rights under the Bonds and law and stated that the parties wished to cooperate to achieve the most commercially reasonable, effective, and expeditious completion of the Project on a without prejudice basis. The Mitigation Agreement provided that if Westport denied liability at any time, BDA would not be entitled to any further advances and would have to reimburse and indemnify Westport for any amounts paid.

[7] High Tech made an application for an adjudication pursuant to s. 13.5(1) of the *Construction Act*, R.S.O. 1990, c. C.30.

[8] On March 2, 2023, an Adjudicator of the Ontario Dispute Adjudication for Construction Contracts ("ODACC") issued a determination under Part II.1: Construction Dispute Interim Adjudication of the *Construction Act*, whereby BDA was ordered to pay High Tech for two unpaid invoices under the Subcontract in the amount of $316,960 (the "ODACC Determination").

[9] The Adjudicator rejected BDA's claim for set-off for delay because BDA did not provide the Adjudicator with any schedule binding on High Tech with respect to the demolition work.

[10] The Adjudicator specifically noted that he had not determined whether the Subcontract had been properly terminated by BDA, and whether there were grounds for such termination.

[11] When Westport learned of the ODACC Determination, it wrote to BDA advising that in light of the ODACC Determination, Westport's view was that High Tech was not in default under the Subcontract, that BDA had not properly performed its obligations thereunder, and that BDA was not entitled to make a claim under the Bonds as Westport's obligations had not been triggered. It advised that it would not be making any further payments pursuant to the Mitigation Agreement and requested that BDA reimburse and indemnify Westport for all payments made to BDA thus

far. It requested that BDA not release to High Tech the funds awarded in the ODACC Determination, referencing provisions of the Indemnity Agreement.

[12] BDA paid the money to its counsel in trust and took the position that it would not release the funds awarded to High Tech pursuant to the ODACC Determination because there were competing claims.

[13] However, the parties did agree to release $161,037 of the funds held by BDA's counsel to subtrades, leaving a total of $155,882 still held by BDA's lawyers in trust (the "Disputed Funds").

[14] Westport sought a summary determination from this Court directing that the Disputed Funds be paid to it immediately or that they be paid into court.

[15] Essentially, the issue is whether a surety may assert a security interest over funds awarded pursuant to a determination made under the *Construction Act*.

[16] There is no case law that specifically addresses this issue and the parties advanced legal and policy arguments.

Decision

[17] In my view, a surety may assert a security interest on funds awarded pursuant to an ODACC Determination.

[18] Notwithstanding, I am not satisfied that in this case, Westport is entitled to payment of the Disputed Funds immediately as a final order.

[19] Although it has a security interest, Westport is only entitled to losses as defined in the Indemnity Agreement. There are several ongoing proceedings involving Westport, High Tech, Mr. Mehraban, and BDA that have not been resolved, which may affect Westport's entitlement.

[20] Therefore, I am directing that the Disputed Funds be paid into court pending the outcome of the proceedings being litigated, as more fully discussed below.

Issues

- Issue 1: Is there a defect in the procedure employed?
- Issue 2: Was there an Event of Default pursuant to the Indemnity Agreement?
- Issue 3: Does Westport have a security interest or trust claim over the Disputed Funds?
- Issue 4: Does High Tech have priority over Westport to the Disputed Funds by virtue of the provisions of the *Construction Act*?

- Issue 5: Has Westport proven an Indemnity Loss such that Westport is entitled to payment of the Disputed Funds immediately as a final order?

Issue 1: Is there a defect in the procedure employed?

[21] High Tech takes the position that there is a significant defect in procedure such that Westport has no entitlement to the relief it seeks.

[22] I disagree.

[23] On January 24, 2024, the parties attended at Civil Practice Court to schedule Westport's motion seeking a preservation order over the funds held in trust by BDA's counsel. Chalmers J. directed that the matter would be heard at a case conference on February 23, 2024.

[24] By endorsement made February 23, 2024 at the case conference, Brownstone J. explained that this was a competition between High Tech and Westport over the Disputed Funds, that the matter would be determined by interpleader, and that BDA would not participate but would abide by its result.

[25] High-Tech sought clarification to the procedure that Brownstone J. said the parties had agreed to at the last attendance. In her March 6, 2024 endorsement, she noted that High Tech objected to Westport being able to obtain any relief in an interpleader motion and indicated that it believed that Westport should be limited to an order for preservation. Brownstone J stated:

> The discussion at the last conference that resulted in the parties' agreement to schedule an interpleader motion was focused on the most expeditious way to resolve the issue of entitlement to the funds at issue. High Tech wants funds released to it, Westport claims priority over those funds, and BDA's counsel only wishes to pay out the funds in accordance with a court order.
>
> The motion will proceed as scheduled.

[26] Westport then brought a motion for a declaration that it had priority over the Disputed Funds and an Order releasing the Disputed Funds to it, or alternatively, an Order that the Disputed Funds be paid into court. It cited rr. 37, 43, and 60.08(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. No argument on the applicability of r. 60.08(1) was made before me.

[27] Rule 43.04(2)(d) provides that on the hearing of a motion for an interpleader order, the court may determine the rights of claimants in a summary manner if, having regard to the value of the property or the nature of the issues in dispute, it is desirable to do so. Under r. 43.04(1)(a), the court may also determine that the monies be paid into court to await the outcome of a specified proceeding or order a trial of an issue.

[28] High Tech argues that, technically, Westport cannot bring a motion for an interpleader order because r. 43.02(1)(b) provides that only the party with no beneficial interest in the fund may be the moving party on such a motion, and BDA did not prepare its own Notice of Motion. However, BDA was present on both days of the hearing, as well as at the case conferences before Brownstone J. Her endorsement indicates that the parties had agreed that the matter would proceed in this way.

[29] As such, even if BDA did not deliver a Notice of Motion, BDA was before me implicitly and expressly bringing an interpleader order. All parties knew this and had agreed that this matter would proceed in this way.

[30] I also reject the argument that this is implicitly a motion for a preservation order pursuant to r. 45. In that regard, High Tech made the following arguments as to why Westport would not be entitled to a preservation order: i) there is no specific fund claimed in Westport's Statement of Claim; ii) preservation orders are only granted in exceptional circumstances; and, iii) a claim that arises from an indemnity agreement is a contractual fund which does not result in a claim to a specific fund.

[31] In my view, this does nothing but obfuscate the issues. In the end, no motion for a preservation order was sought, and again, the parties agreed that the matter would proceed by way of an interpleader motion where there would be argument and determination by the court as to the priority of the parties.

Issue 2: Was there an Event of Default pursuant to the Indemnity Agreement?

[32] I agree that High Tech committed an Event of Default.

[33] Contractual interpretation, at its heart, is a search for the parties' objective intentions. A court must take a practical, common-sense approach, not dominated by technical rules of construction. It must read a contract as a whole, giving the words their ordinary grammatical meaning in accordance with sound commercial purposes and good business sense, and take into account the surrounding circumstances known or reasonably known to the parties at the time of the contract: *Sattva Corp v. Creston Moly Corp*., 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 47-58.

[34] Section 15(d) of the Indemnity Agreement provides that an Event of Default includes but is not limited to: i) any breach or **alleged breach** of any of the **covenants and agreements**; ii) any abandonment, forfeiture or breach of, or failure, refusal or inability to perform, the Subcontract or any liability under the Bonds; iii) **any failure, refusal or inability to pay bills or indebtedness; and, iv) any other occurrence, condition or circumstance which may expose Westport to loss, cost or expense.** [Emphasis added.]

[35] The plain and ordinary meaning of s. 15(d) is that any breaches **alleged** by BDA, any **failure** of High Tech to pay its bills, or anything that **may** expose BDA to a loss, constitute an Event of Default.

[36] As will be seen, a variety of uncontradicted facts support the conclusion that there was an Event of Default committed by High Tech.

[37] On July 28, 2022, BDA gave High Tech a notice of breach (the "Notice of Breach") pursuant to the Subcontract. It claimed that High Tech had not completed the demolition work in accordance with the Schedule, that it had failed to meet its obligations to submit all required documentation, that it had delayed in change order quotations, and that it had failed to pay its suppliers, including various union workers.

[38] Westport received a copy of the Notice of Breach.

[39] On July 30, 2022, Westport then wrote to High Tech and Mr. Mehraban advising that it had received a copy and that it had retained a consultant to conduct an investigation. The letter advised that pursuant to the Indemnity Agreement, High Tech and Mr. Mehraban were required to indemnify Westport.

[40] On August 12, 2022, Westport received a Notice of Claim from BDA alleging that High Tech was in default. In its letter, it provided Westport with copies of all written communications between BDA and High Tech, copies of any contract documents, progress payment requests, certificates of payment, statutory declarations, liens, summary of work to be completed, and other relevant documents to assist Westport to investigate BDA's claim.

[41] BDA further advised that it elected to complete High Tech's contract in accordance with an enclosed completion proposal to mitigate the costs of completing the work, that it received three quotes, and that it had selected a contractor to complete the electrical work.

[42] On or around August 17, 2022, Westport also received claims from the trade union representing High Tech's electrical employees at the Project alleging that High Tech defaulted on employee wages and remittance payments (i.e. monetary supplemental benefits) to the trade union's members as per the collective agreement. The trade union received judgment from the Ontario Superior Court of Justice for unpaid employee wages and remittances ordered by the Ontario Labour Relations Board ("OLRB"). The trade union then obtained Notices of Garnishment in relation to the judgment against High Tech and registered two lien claims against the Project.

[43] On or around September 8, 2022, the trade union received another judgment from the Ontario Superior Court of Justice for further unpaid wages and remittances ordered by the OLRB. The trade union then obtained further Notices of Garnishment in relation to the judgment. On October 13, 2022, the trade union provided Westport with a notice of a claim under the Labour and Material Bond.

[44] At a minimum, High Tech committed an Event of Default because it failed to pay amounts found due and owing to union employees.

[45] While it is arguable that High Tech did not pay its employees because BDA did not pay its invoices, s. 15(d)(i) simply states that an Event of Default includes "**any failure**" or "**inability**" to

pay bills or indebtedness. The clear and unambiguous meaning of these words means High Tech's non-payment satisfies the definition, and the reason for the nonpayment is irrelevant.

[46] BDA's Notice of Breach was also an Event of Default because it was an "**alleged"** breach and could "**expose Westport to loss, cost or expense**."

Issue 3: Does Westport have a security interest and trust claim over the Disputed Funds?

[47] I conclude that the objective intention of the parties, as set out in the Indemnity Agreement, was that any funds payable to High Tech, including any funds awarded pursuant to a determination under the *Construction Act*, were subject to a security interest and impressed with a trust in favour of Westport.

[48] Pursuant to s. 15(b) of the Indemnity Agreement, High Tech assigned to Westport as collateral, High Tech's right of title and interest to every contract, whether or not an Event of Default had occurred, all retained percentages, holdbacks, progress payments, demands, deferred payments, earned moneys, compensation, all other **funds and properties, whatever that may be due or become due under the Subcontract or that may be due, become due, or are awarded or allowed in connection with the Subcontract or work thereunder, as well as all other contract assets**. [Emphasis added].

[49] The clear and unambiguous wording of s. 15(b) includes all funds to which High Tech may be entitled or which are awarded in High Tech's favour.

[50] Westport registered its security interest pursuant to the Indemnity Agreement under the *Personal Property Security Act*, R.S.O. 1990, c P.10 (the "PPSA") of Ontario.

[51] Further, s. 16 of the Indemnity Agreement states that **all funds due or to become due under the Subcontract, whether in possession of High Tech or BDA, constitute trust funds** for the benefit of Westport. [Emphasis added.] Again, this wording is broad and unambiguous and includes all funds to which High Tech is entitled.

[52] As noted, the ODACC Determination was made on March 2, 2023, awarding High Tech approximately $316,960 pursuant to s. 13.5(1) of the *Construction Act*.

[53] The amendments to the *Construction Act* establishing the provision for determinations by the ODACC came into force in July 2018, which was before the parties entered into the Indemnity Agreement. These provisions are a surrounding circumstance that the parties knew or ought to have known. Thus, when the parties negotiated the Indemnity Agreement, they were aware that High Tech could make applications for interim determinations and receive funds as a result. And yet, they did not carve any such funds out of the provisions of the Indemnity Agreement and the security interest and trust interest that it establishes in any funds payable to High Tech.

[54] Additionally, it would not be a commercially reasonable interpretation to exclude from the security interest such interim awards. High Tech was only able to obtain the Subcontract on the

condition that it obtain the Bonds. Westport would not provide the Bonds absent the Indemnity Agreement giving Westport security over all of High Tech's entitlements. Bonding is an important commercial agreement that permits subcontractors like High Tech to obtain high value work and income. It would be an absurd result if interim awards were excluded without the parties specifically agreeing to this.

[55] Thus, taking into account the surrounding circumstances, the clear and unambiguous provisions of the Indemnity Agreement, and commercial reasonableness, Westport has a security interest in the Disputed Funds, as well as a trust claim over them.

Issue 4: Does High Tech have priority over Westport to the Disputed Funds by virtue of the provisions of the Construction Act?

[56] High Tech's argument that it should immediately be paid the Disputed Funds is essentially a claim that it has priority over Westport's security. I reject this argument.

[57] Section 13.5 of the *Construction Act*, as amended in 2018, provides as follows:

> Availability of adjudication
> Contract
> 13.5 (1) Subject to subsection (3), a party to a contract may refer to adjudication a dispute with the other party to the contract respecting any of the following matters:
>
> 1. The valuation of services or materials provided under the contract.
>
> 2. Payment under the contract, including in respect of a change order, whether approved or not, or a proposed change order.
>
> 3. Disputes that are the subject of a notice of non-payment under Part I.1.
>
> 4. Amounts retained under section 12 (set-off by trustee) or under subsection 17 (3) (lien set-off).
>
> 5. Payment of a holdback under section 26.1 or 26.2.
>
> 6. Non-payment of holdback under section 27.1.
>
> 7. Any other matter that the parties to the adjudication agree to, or that may be prescribed.
>
> Subcontract

> (2) Subject to subsection (3), a party to a subcontract may refer to adjudication a dispute with the other party to the subcontract respecting any of the matters referred to in subsection (1), with necessary modifications.

[58] As noted, High Tech obtained an award pursuant to the ODAAC Determination in respect of outstanding invoices in the amount of $316, 960.

[59] The ODACC Determination was filed with the court on or around July 5, 2023, making it enforceable as if it were an order of the court pursuant to s. 13.20.

[60] High Tech argues that pursuant to s. 13.19(2) of the *Construction Act*, BDA was required to pay the full amount of the ODACC Determination no later than ten days after the ODACC Determination was communicated to the parties. It also argues that it would be an absurdity if BDA could satisfy the requirements of s. 13.19(2) of the *Construction Act* by paying a portion of the ODACC Determination amount in trust to its lawyer. It argues that even an order that the funds held by BDA be paid into court would have serious consequences for the entire prompt payment and adjudication regime and scheme of the *Construction Act*.

[61] Thus, it argues that it has a valid claim to the Disputed Funds, in priority to Westport, in accordance with s. 13.20 and the policy underlying the provisions of the *Construction Act*, irrespective of claims that Westport may have against it pursuant to the Indemnity Agreement.

[62] It points out that the adjudication provisions were introduced into the *Construction Act* to provide a quick, efficient, and interim determination which would allow funds to flow down the contractual "pyramid": *SOTA Dental Studio Inc. v. Andrid Group Ltd*., 2022 ONSC 2254, at para. 9; *Pasqualino v. MGW-Homes Design Inc*., 2022 ONSC 5632, 35 C.L.R. (5th) 453, at para. 30; *Anatolia Tile & Stone Inc. v. Flow-Rite Inc*., 2023 ONSC 1291, 33 C.L.R. (5th) 418, at paras. 3, 6.

[63] It also references *High Tech Power Inc. v. BDA Inc*., 2024 ONSC 4327, at paras. 9-10. In that case, Mills J. rejected BDA's motion to have the bond posted for High Tech's Claim for Lien reduced by the amount that included the Disputed Funds for the following reasons:

> The *Construction Act* contemplates the funds be promptly paid on an adjudication determination to ensure the flow of money on construction projects is protected. It is an adjudicative process on an interim basis "to keep money flowing down the construction pyramid." Paying funds into a lawyer's trust account fails to achieve this fundamental goal of the Act.
>
> I also appreciate the financial burden being placed on BDA to continue funding a bond that covers the full amount of the adjudication determination which it considers as having been paid. However, a deposit to counsel's trust account is not payment to the lien claimant. It is a payment to an agent of the respondent. The fact it is to a law firm is of no consequence. The lawyer is an agent for their client and is required to act on the instructions of their client.

[64] High Tech argues that this finding means that the Disputed Funds must flow to High Tech, despite Westport's competing claim and security interest. I disagree. Mills J. was addressing a different issue. That issue was whether the bond in respect of the lien claim should be reduced. She was not addressing the issue of Westport's competing claim, security interest, and trust claim, which Brownstone J. directed should be addressed at this hearing.

[65] In my view, the effect of the policy underlying these provisions of the *Construction Act* does not mean that a subcontractor who is awarded amounts does not need to comply with an indemnity agreement that the subcontractor entered into in order to obtain a bond and be awarded the subcontract.

[66] It is important to note that s. 13.5(2) set out above, specifically notes that the parties who may proceed and obtain a determination are parties to a subcontract. This part of the *Construction Act* does not purport to apply to sureties and does not even mention them. Additionally, the matters that may be referred to an adjudication are listed in s. 13.5(1), set out above, and only include matters as between subcontractors and owners.

[67] Indeed, the *Construction Act* has an entire section, Part XI, entitled Priorities, that makes no reference to surety security interests. Part XI.1, entitled Surety Bonds, requires a contractor to furnish the owner with bonds in public contracts where the contract price exceeds a prescribed amount. In this case, the Project was a public project that required bonding.

[68] Neither of these parts of the legislation give a contractor priority over a surety's security interest where there is a determination in the subcontractor's favour.

[69] Had the legislature intended to give a subcontractor priority over a surety's security interest with respect to determinations, in my view, this would have been set out clearly in the *Construction Act*.

[70] Furthermore, the policy of the *Construction Act* of prompt payment and adjudication, to ensure that funds flow down the construction pyramid, is not defeated by upholding a surety's security interest as set out in an indemnity agreement freely negotiated by a subcontractor.

[71] As noted, after the ODACC Determination, Westport indicated that it was evaluating the claims of various union workers to funds awarded pursuant to the ODACC Determination. Ultimately, all parties agreed to release a portion of the award such that BDA's counsel is holding the remainder, a total of $155,882, in trust, as the Disputed Funds.

[72] Thus, the Disputed Funds have already flowed down the chain to union members and there is no evidence before me that High Tech owed any other subcontractors or employees funds related to the Project. Westport, as surety, has ensured that the funds have already flowed downstream and there is no evidence of the Project being held up. The only remaining issue with respect to this money is the competing claim between Westport and High Tech.

[73] As well, there are important policy considerations to take into account.

[74] Bonding has become an integral part of awarding construction projects. As set out above, Part XI.1, and in particular s. 85.1, requires bonding for public projects such as this one.

[75] Indemnity agreements are often required by sureties in a bonding relationship. In this case, the surety agreed to act as surety, but only on the basis that there was an indemnity agreement and security. In this way, the risk entailed in providing a bond was allocated to the principal, High Tech: *Zurich Insurance Co v. Modern Marine Industries et al*. (1993), 111 Nfld. & P.E.I.R. 181 (Nfl. S.C. Trial Div.) ["*Zurich Insurance Co.*], at p. 49.

[76] Westport, as surety, is part of the regime that makes sure that progress continues on construction projects, and that downstream subcontractors and workers are paid. It is the indemnities they receive that enable them to assume that risk.

[77] Without indemnity agreements, bonding facilities could avoid the risk of providing large monetary bonds (often, millions of dollars) or request large upfront cash collateral payments that many small to medium contractors cannot afford. Without surety bonds, contractors such as High Tech might not be afforded the opportunity to enter into large commercial contracts and subcontracts in the construction industry.

[78] If contractors are able to gain the benefit and protection of surety bonds to secure public contracts but are then permitted to circumvent their indemnity obligations when a claim is made, there could be a chilling effect on the willingness of bonding companies to provide surety bonds. The cost of these bonds could also become very expensive and affect the ability of small to medium size contractors to be awarded construction contracts.

[79] Notably, Section 9(a) of the Indemnity Agreement states that upon demand, High Tech must give Westport an irrevocable letter of credit or collateral security if Westport received a Notice of an Event of Default, claim, or lawsuit asserting liability.

[80] On August 17, 2022, Westport wrote to High Tech and Mr. Mehraban to demand cash collateral as security in the amount of $1,457,385.01 pursuant to section 9(a) of the Indemnity Agreement. Westport referred to High Tech's defaults on the Project as alleged by BDA, BDA's notices to Westport, and the trade union's garnishments and construction liens as the basis for its demand of the cash collateral security.

[81] They did not provide the cash collateral security as required by the Indemnity Agreement.

[82] Additionally, Westport may be entitled to subrogate High Tech's right to the Disputed Funds, if any: *Mutual Trust Co v. Creditview Estate Homes Ltd*. (1997), 34 O.R. (3d) 583 (Ont. C.A.); *Glynn v. Scottish Union & National Insurance Co. Ltd*. (1963), [1963] 2 O.R. 705 (Ont. C.A.); *Midland Mortgage Corp v. 784401 Ontario Ltd*. (1997), 34 O.R. (3d) 594 (Ont. C.A.); *Armatage Motors Ltd. v. Royal Trust Corp of Canada* (1997), 34 O.R. (3d) 599 (Ont. C.A.); and *Elias Markets Ltd., Re*. (2006), 274 D.L.R. (4th) 166 (Ont. C.A.), at paras. 53-54.

[83] I also reject the argument that this results in a stay of the ODACC Determination. The ODACC Determination occurred, and there is a court order enforcing it. The moneys have flowed to counsel who have paid them down the chain, but then kept the balance in trust because of competing claims. And as I have said, I am satisfied that Westport has established, at the least, a security interest in the Disputed Funds.

[84] Thus, since Westport has a registered security interest, this stands in priority to the judgment in favour of High Tech awarding it the Disputed Funds because the ODACC Determination results in an unsecured award in favour of High Tech.

Issue 5: Has Westport proven an Indemnity Loss such that Westport is entitled to payment of the Disputed Funds immediately as a final order?

[85] I reject Westport's argument that it is entitled to payment of the funds immediately on a final basis to cover its alleged losses.

[86] As noted, s. 2 of the Indemnity Agreement requires High Tech to indemnify Westport for any and all losses, damages, charges, expenses, claims, judgments, demands, and liabilities which Westport may sustain or incur (the "Indemnity Losses").

[87] Section 10 of the Indemnity Agreement gives Westport:

> [The] sole right to pay, settle or compromise, without any prior obligation to notify the Indemnitors, any charge, expense, cost, claim, demand, suit, judgment or liability under [the Bonds], and any such payment, settlement or compromise shall be binding upon the Indemnitors and included as an Indemnity Loss.

[88] Section 11 provides that any **Advance** payments made by Westport are expressly included as an Indemnity Loss.

[89] Thus, Westport says that it is entitled to the Disputed Funds to compensate it for the following Indemnity Losses: the Advance made by Westport to BDA in the amount of $341,283.84; and consultant and legal fees incurred by Westport.

[90] However, there is ongoing litigation among the parties which may impact both Westport's claim pursuant to the Indemnity Agreement as well as the quantum.

[91] While the parties have sought to have this court resolve these issues in this interpleader motion, it is not desirable for this court to do so. The issues are complex, and the materials before me are insufficient to resolve the issues, which should be resolved in the proceeding described below.

Westport Action[i]

[92] Westport has brought an action against BDA, High Tech, and Mr. Mehraban in which it seeks to recover amounts it paid to BDA with respect to the Bond claim, and where it seeks to secure payment from High Tech with respect to the Indemnity Agreement and Bonds (the "Westport Action").

[93] BDA counterclaimed against Westport for $1,203,375.92, representing alleged damages suffered as a result of High Tech's defaults at the Project and Westport's alleged breach of the Bonds and Mitigation Agreement.

[94] There are also crossclaims between BDA and High Tech. In High Tech's crossclaim, it pleads that Westport failed to act in good faith and failed to properly evaluate BDA's claim against High Tech such that it was entitled to refuse to make any payment, and/or that it should not have entered into the Mitigation Agreement. High Tech relies upon well-established caselaw that holds that parties to a contract have a duty to exercise contractual discretionary powers in good faith, which they cannot contract out of: *Wastech Services Ltd. v. Greater Vancouver Serwerage and Drainage District*, 2021 SCC 7, [2021] 1 S.C.R. 32, at paras. 7, 58, 94.

[95] In addition, in the context of indemnity agreements, the surety, despite not being obliged to keep the indemnitors advised and involved in the processing of claims, must deal with claims in good faith. In *Zurich Insurance Company v. Paveco Road Builders Corp*. (2009), 57 BLR (4th) 174, at paras. 47-48, the court stated:

> The surety knows, through the indemnity agreement, it will be paid the value of the settlements it makes. This does not entitle it to too easily resolve claims because it is protected. To the contrary, it must work, in good faith, to obtain the lowest settlements. This is in recognition of its responsibility to the indemnitor. The contractual obligation that disbursements are to be made in good faith may be governed by a determination of whether the surety had and considered all available information. This is another example of an objective consideration being brought to bear on the presence or absence of good faith. The decision in *Zurich Insurance Co. v. Modern Marine Industries Ltd., supra*, is an example of a failure in this regard. The adjuster (the agent of the surety) did not understand the contractor's side of the issue. It acted with an absence of good faith when it settled the claim for extras without speaking to the contractor even though there was no contractual requirement that the adjuster (or surety) do so. In proceeding in this way, the surety did not demonstrate the requisite intention to preserve the assets of the indemnitor. Rather, they were motivated by a desire to get the job done.
>
> The subjective nature of the question underscores the care that needs to be taken in deciding that there is no genuine issue for trial. By its nature, a subjective question is not as easily determinable as a purely objective consideration. A subjective question relies on subjective analysis and response to the evidence. In such circumstances, it is much more difficult to be certain in the absence of viva voce evidence and the testing environment of a trial.

[96] Ultimately in *Zurich v. Paveco*, the court found that, despite six days of arguments, twenty-six volumes of material, cross-examinations, and responses to undertakings made in the course of those examinations, there was a genuine issue for trial, which was whether or not the surety acted in the absence of good faith contrary to the responsibilities placed on it by the indemnity agreement.

[97] In my view, in the case before the court, there are triable issues as to whether or not Westport, as surety, acted with an absence of good faith in processing claims made when a decision was made on the Bonds, based on the following arguments and evidence referenced by High Tech:

- There are photographs supporting High Tech's position that the demolition work had been completed at the time that BDA alleged the demolition work had not been done.

- The parties attended at the site on August 12, 2022. High Tech's evidence is that the consultant that Westport hired to assist with evaluating BDA's claim, Mr. Spinelli, allegedly pulled Mr. Mehraban aside and told him that he was of the view that High Tech was not in default under the Subcontract. Westport did not call Mr. Spinelli as a witness and as such, High Tech's evidence on Mr. Spinelli's evaluation on behalf of Westport before Westport made the payment is uncontradicted.

- On August 16, 2022, High Tech's counsel wrote to Westport advising that it understood from the site inspection that BDA acknowledged that High Tech had completed the demolition work. They also advised that they understood that BDA's notice of claim acknowledged that the value of the work to date under the Subcontract was $316,960 and that it had not paid High Tech for any of these invoices. The letter advised of High Tech's position that Westport had no obligation under the Bonds because of BDA's failure to pay the invoices.

- High Tech also provided copies of all the invoices to Westport.

- Nevertheless, Westport entered into the Mitigation Agreement on August 22, 2022, pursuant to which it made an advance payment in the amount of approximately $340,000.

- High Tech says that the Adjudicator in the ODACC Determination had the same information that Westport had, and as noted, upon learning of the ODACC Determination, Westport took the position that it had no liability pursuant to the Bonds and requested that BDA reimburse the Advance.

- Arguably, the elements of reasonableness and good faith include a thorough investigation into the facts and relevant legalities which High Tech says Westport failed to do for the reasons above: *Stratton Electric Ltd. v. Guarantee Company of North America* (2006), 55 C.L.R. (3d) 12, at para. 41. In that regard, if Mr. Spinelli

indeed made the statements attributed to him on behalf of Westport, there is a triable issue as to whether or not Westport had an honest belief that BDA's claim was legitimate. There is also a triable issue as to whether or not Westport acted capriciously or arbitrarily in entering into the Mitigation Agreement and making the Advances: *Wastech*, at para. 62.

- Westport's reference to *Zurich Insurance Co*. does not assist Westport on this interpleader motion. This was a trial decision in which a court was able to make a final decision after taking into account a significant volume of *viva voce* evidence in order to consider whether the surety had acted with an absence of good faith in making payment under performance bonds. Here, there were no cross-examinations and the record (although voluminous) is simply insufficient to consider the matters on a final basis.

- I agree that while there may not be any issue as to the validity of the Bonds or the Indemnity Agreement, the allegations of breach of duty of good faith in contractual obligations is a complex issue that cannot be resolved absent trial, and certainly not on the basis of the record before me.

[98] Thus, even though an indemnity agreement is a separate agreement from a bond and does not require liability under a bond as a precondition of liability, if High Tech succeeds in its claim that Westport breached its contractual duty of good faith when it paid the Advances, High Tech may have a defence to Westport's claim pursuant to the Indemnity Agreement: *Zurich Insurance Co.*, at p. 54.

[99] This case is not like *Northbridge General Insurance v. PSA Construction Inc*, 2023 ONSC 6536, because that was a default judgment decision in which the indemnitor did not raise any claim that the surety had breached the indemnity agreement. Indeed, they did not even defend.

[100] This case is also not like *Alexanian Law Firm v. Blair*, 2020 ONSC 1529, where Myers J. summarily determined the competing claims of parties to settlement proceeds. In that case, Mr. Blair had entered into an agreement with Easy Legal Finance to assist him with his litigation. He agreed that the loans would be reimbursed from any settlement proceeds. The amount in issue was $14,075.

[101] The main reason why Mr. Blair took the position that he was not liable on the loans had nothing to do with the lender, Easy Legal Finance. Rather, he argued that his lawyer was liable for the amount owed to Easy Legal Finance because of some wrongdoing on counsel's part, although he had not commenced any claim against his lawyer. As well, Mr. Blair did not adduce evidence to undermine his indebtedness to the lender and raised no triable issue on the notes. Nor did he recognize his liability under the notes; instead, he felt that his former lawyer should pay it. Moreover, the amount of $14,000 was too small to justify further proceedings.

[102] In the case before the court, the amount in issue is significant, there are multiple proceedings related to the claims, and there is evidence before me as to triable issues between Westport and High Tech.

[103] Westport is essentially asking for execution before judgment in this interpleader motion even though complex issues are currently being litigated, the results of which will impact its claim that it suffered losses for which High Tech must indemnify it. Courts do not grant execution before judgment: *Falcon Motor Xpress Ltd. v. Grewal et al*, 2019 ONSC 1529 at para 29; *Aetna Financial Services Ltd. v. Feigelman*, 1985 CanLII 55 (SCC) at para 8.

Conclusion

[104] While Westport has a security interest over the Disputed Funds, as well as priority over High Tech, there is not yet finality in the various proceedings among the parties, which would affect both the entitlement to enforce its security, as well as the quantum of any loss. It is undesirable for this court to consider and finally resolve these various claims; nor do the materials permit this court to do so on a final basis.

[105] Therefore, I direct that the Disputed Funds be paid into court pending the outcome of the various proceedings.

[106] As a final matter, this motion was only scheduled for 90 minutes; however, it took almost four hours, spread out over two days, because there was insufficient time to hear the whole matter on the first day owing to other matters scheduled on the same day. The time estimate was clearly insufficient to argue the matter, as it involved complicated and important issues related to security interests, indemnity agreements, bonds, and the underlying policy of the determination provisions in the *Construction Act*.

[107] Counsel are reminded that the time estimates for a motion are not based on how quickly counsel can fly through the materials, but rather intended to reflect the time it takes to properly address the law and evidence at a reasonable pace.

Papageorgiou J.

Released: October 2, 2024

CITATION: Westport Insurance v. BDA Inc., 2024 ONSC 5450

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

WESTPORT INSURANCE CORPORATION

Plaintiff

– and –

BDA INC., HIGH TECH POWER INC., and BENYAMIN MEHRABAN

Defendants

REASONS FOR JUDGMENT

Papageorgiou J.

Released: October 2, 2024

[i] There are also additional proceedings among the parties.

Garnishment Proceeding

[1] There is a proceeding between BDA and High Tech where High Tech seeks to enforce the Determination by way of garnishment of the Funds held by BDA's counsel in trust (the "Garnishment Proceeding"). BDA's counsel provided a garnishee statement indicating that it could not release the Disputed Funds because it was holding them for "numerous claimants."

High Tech/BDA Action

[2] There is litigation between High Tech and BDA in respect of High Tech's lien claim and unjust enrichment where BDA has counterclaimed for breach of the Subcontract (the "High Tech/BDA action").

[3] High Tech may be found liable to BDA in the litigation between them but it might not.

[4] If High Tech is found in breach of the Subcontract, Westport may have to pay BDA for its losses pursuant to the Bonds in excess of $1 million.