

CITATION: Hannan Custom Building Ltd. v. Irwin, 2024 ONSC 7230
COURT FILE NO.: CV-22-678548
DATE: 2024 12 23

**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 :)
)
HANNAN CUSTOM BUILDING LTD.) *S. Sam, for the plaintiff*
)
Plaintiff)
- and -)
)
TIFFANY IRWIN, WILLIAM PATRICK) *G. Hemsworth, for the defendants, Tiffany*
LYNCH, and THE TORONTO-DOMINION) *Irwin and William Patrick Lynch*
BANK)
Defendants)
)
) **HEARD:** April 16-19 and 25, 2024

2024 ONSC 7230 (CanLII)

REASONS FOR JUDGMENT

Robinson A.J.

[1] This lien action concerns a substantial home renovation project at a townhouse property in Toronto owned by Tiffany Irwin and William (Bill) Lynch (together, the “Owners”). Hannan Custom Building Ltd. (“Hannan Building”) is the contractor who performed substantially all the renovation work. The action has been discontinued against the mortgagee, The Toronto-Dominion Bank. The only remaining parties are Hannan Building and the Owners.

[2] At the time the parties first became involved with one another, the Owners did not yet own the property. In November 2020, the Owners had become interested in purchasing the townhouse, but felt that it was dated and required substantial renovations to update it and to meet their needs. Tiffany Irwin reached out to Doug Campbell, the principal of D.C. Builders Ltd. (“DC Builders”), with whom the Owners had dealt with on several prior construction and renovation projects. Mr. Campbell attended a site walkthrough, discussed the Owners’ plans, and ultimately prepared and provide a budget estimate to the Owners.

[3] Doug Campbell subsequently introduced the Owners to Abe Hannan, the principal of Hannan Building. Mr. Campbell and Mr. Hannan had a long-standing prior working relationship.

There is a dispute about what precisely was discussed about Mr. Hannan's involvement, but there is no dispute that Mr. Campbell relayed that he was planning to scale back his business and that was why he proposed that Mr. Hannan be involved.

[4] The Owners successfully negotiated their purchase of the property, which closed in late February 2021. Demolition work commenced in the first week of March 2021. Work thereafter proceeded until fall 2021, by which time the Owners were concerned that total billing on the project had exceeded the prior budget/estimate they had received from DC Builders. Discussions followed between Abe Hannan and the Owners about billing backup documentation and deficiency items. Ultimately, Hannan Building registered a claim for lien and the Owners did not permit Mr. Hannan to return to site. Doug Campbell ultimately coordinated and completed certain deficiency rectification work at no charge to the Owners.

[5] Hannan Building claims for unpaid services and materials, including extras, representing its last two unpaid invoices and a modest additional amount that was not billed do to a "clerical error" (the amount of a second claim for lien). After noting discrepancies in its accounting, Hannan Building revised its claim quantification prior to trial and pursues judgment for \$114,027.27, which is reduced from the previously claimed amount of \$124,646.10. The Owners deny that they have any contract with Hannan Building, but assert a modest set-off for incomplete work and deficiency rectification. They admit liability only to the extent of the 10% holdback that they were required to retain under the *Construction Act*, RSO 1990, c C.30.

[6] I find that there was no contract formed between Hannan Building and either of the Owners, but that there was a contract formed between the Owners and DC Builders. In that result, the parties agree that Hannan Building is a subcontractor to DC Builders, which limits its claim against the Owners to required holdbacks under the *Construction Act*. I find that Hannan Building has proven a lien for \$100,874.05, but that the Owners have proven sufficient set-offs to limit their holdback liability to the basic 10% holdback amount under the *Construction Act*. I am granting judgment in favour of Hannan Building against the Owners, but only to the extent of their holdback obligation of \$46,854.89, including HST.

ISSUES

[7] Several issues are in dispute in this action, namely:

- (a) What were the contractual relationships, if any, between the Owners, Hannan Building, and DC Builders?
- (b) If a contract was formed between Hannan Building and the Owners, then who breached the contract?
- (c) If there was no contract formed between Hannan Building and the Owners, then is Hannan Building entitled to recover directly from the Owners in *quantum meruit*?
- (d) Has Hannan proven the quantum, lienability, and timeliness of its lien?
- (e) If a contract was formed between DC Builders and the Owners, what is the Owner's holdback obligation?

- (f) Are the Owners entitled to set-off against any amounts proven by Hannan for allegedly incomplete and deficient work?

ANALYSIS

Issue 1: What were the contractual relationships, if any, between the Owners, Hannan Building, and DC Builders?

[8] Hannan Building has the evidentiary burden of proving that, on a balance of probabilities, it contracted directly with the Owners for the renovation work.

[9] Hannan Building alleges that Mr. Hannan and the Owners agreed that Hannan Building would perform all work on a costs-plus basis, with 5% charged for overhead and an additional 10% for profit. The Owners' primary position is that they had a contract with DC Builders, and that DC Builders engaged Mr. Hannan or Hannan Building to perform DC Builder's scope of work under the contract. Alternatively, the Owners' position is that, if a contract was formed directly with Hannan Building, then it was not a costs-plus contract, but rather a fixed price contract or there was no contract and the claim must be proven on a *quantum meruit* basis.

[10] I accept the evidence of Abe Hannan that he believed he had an agreement directly with the Owners for the work. I also accept the evidence of Tiffany Irwin and Bill Lynch that they believed they had an agreement with DC Builders through Doug Campbell. I further accept Doug Campbell's evidence that he did not believe he had a contract with the Owners and was a subcontractor to Hannan Building. However, since contract formation is assessed objectively, none of their subjective understandings and beliefs are dispositive.

[11] Both sides point to my decision in *Bellsam Contracting Limited v. Torgerson*, 2023 ONSC 468 with respect to the relevant law on contract formation. In that case, at paras. 35-38, I reviewed and summarized the law as set out in various prior cases. The salient points are as follows:

- (a) An enforceable contract between parties has five elements: offer, acceptance, consideration, certainty of essential terms, and an intention to create a legal relationship. A contract will be found 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) 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.
- (c) For there to be a binding contract, there must also be a meeting of the minds or *consensus ad idem* on all essential terms of what that relationship will be. The essential terms of a construction contract are generally viewed as price, scope of work, and a schedule or completion date.
- (d) Assessing whether the parties intended to create legal relations does not turn on their subjective views or understanding. It does not matter that one party may have

had no intention to enter a legally binding contract. Rather, what matters is whether their conduct was such that a reasonable person would conclude that they intended to be bound.

- (e) In assessing contract formation, it is appropriate to examine the factual matrix between the parties at the time, including the nature of the relationship between the parties and the interests at stake.

[12] Before turning to the evidence relevant to contract formation, Hannan Building has challenged the weight that I should give the Owners' trial affidavit evidence. Bill Lynch's affidavit was put forward as the primary affidavit. Tiffany Irwin's affidavit confirms agreement with the comments and statements in Mr. Lynch's affidavit and adds eleven paragraphs of additional evidence. However, most of Mr. Lynch's affidavit evidence is hearsay obtained from Ms. Irwin and outlines events and communications that did not involve him.

[13] The distinction between trial affidavits in a summary trial and affidavits for other purposes has been discussed in other cases. Trial affidavits are used in place of oral testimony given in direct examination at trial. The laws of evidence must thereby be strictly complied with, including the prohibition against hearsay. There are specific rules in the *Rules of Civil Procedure*, RRO 1990, Reg 194 that permit evidence that would otherwise be inadmissible to be included in affidavits tendered on a motion or an application. However, the same evidence is generally only admissible at a trial if it complies with the laws of evidence, regardless of whether tendered by direct examination or by affidavit: *Lumberjacks Tree Service v. 407 East Construction General Partnership*, 2024 ONSC 1744 at para. 5; *Schindler Elevator Corporation v. Walsh Construction Company of Canada*, 2020 ONSC 433, paras. 5-6.

[14] The practice of having one witness adopt or agree with another witnesses' affidavit evidence, including statements and comments that violate the laws of evidence, is problematic. Witnesses are expected to give first-hand evidence on their own involvement in disputed matters, including their own communications, interactions, observations, and recollections. It runs contrary to that standard to have one witness put forward another witness' account of events, and then have the second witness adopt the first witness' account.

[15] In this case, though, Tiffany Irwin's cross-examination was quite involved. Her personal observations and recollections of events were tested and relayed. In the particular circumstances of how Ms. Irwin's cross-examination unfolded, I am satisfied that agreeing with Mr. Lynch's hearsay evidence does not materially impact the weight of her evidence. I have, however, given no weight to Mr. Lynch's evidence on communications and interactions in which he was not personally involved.

[16] Turning to the trial evidence, the following evidence was tendered on the factual circumstances known to the parties during the period of alleged contract formation:

- (a) Prior to this project, Tiffany Irwin and Doug Campbell / DC Builders had a long-standing relationship for some twenty years, over the course of which DC Builders had done several projects for the Owners. Doug Campbell testified in cross-examination to having done two larger projects and some smaller projects as well.

The evidence of both Ms. Irwin and Mr. Campbell is consistent that they had a good relationship. Ms. Irwin testified that she trusted him and “had absolute faith and confidence in Doug, his integrity and his ability to perform the work.” Mr. Campbell confirmed that he considers Ms. Irwin to be a friend.

- (b) In prior dealings with DC Builders, Doug Campbell had provided the Owners with a handwritten budget outlining a breakdown of the scope of work and pricing. Total invoicing on the last project had been for the same amount as the original budget.
- (c) Mr. Hannan gave evidence that he had previously worked for DC Builders (whether as an employee or subcontractor) on the Owners’ last renovation project, which is when he first met Tiffany Irwin.
- (d) Tiffany Irwin contacted Doug Campbell about this project, identifying the proposed renovations and requesting a budget so that the Owners could price the renovation into their offer to purchase the property. Ms. Irwin and Mr. Campbell conducted a walkthrough of the property together to discuss the Owners’ plans.
- (e) On November 3, 2020, Doug Campbell provided a signed budget estimate for the project by email to Tiffany Irwin. The estimate identified particular work items, with values, totalling \$524,000, on which 5% overhead and 10% profit were added, for a total estimate of \$605,000, plus HST. In his covering email, Mr. Campbell noted with respect to the amounts, “Some will be too high and some will be too low but I find it averages out to a somewhat realistic number.”
- (f) On November 8, 2020, the Owners subsequently had a telephone call with Doug Campbell to discuss the budget. Although the substance and outcome of that call is somewhat disputed, it is undisputed that Abe Hannan did not participate in it.
- (g) Both Doug Campbell and Tiffany Irwin gave evidence that Mr. Campbell told the Owners during their discussions that Mr. Campbell was winding down his business and would need someone else to act as “quarterback” for the project. Ms. Irwin’s evidence is that Abe Hannan was specifically discussed as the person who would “carry the clipboard”.
- (h) The Owners proceed to negotiate a purchase of the property in mid-November, with a closing date in February 2021. Per the evidence at trial, by this point in November 2020, neither Ms. Irwin nor Mr. Lynch had communicated with Abe Hannan about the project.
- (i) On November 26, 2020, Doug Campbell asked to have a site visit for later in the first week of January, which was to include “the heating man and electrician” for the stated purpose of “start[ing] to firm up some of the numbers.” Although not stated in the email, Doug Campbell gave evidence that he intended this email to refer to Abe Hannan firming up the numbers and intending that Mr. Hannan would be present at the site visit.
- (j) Evidence is not clear on specifically when and how Abe Hannan was introduced to the Owners after that, but Mr. Hannan’s own affidavit evidence is that he had

discussions with Doug Campbell about the project, was provided with DC Builders' estimate, and arranged the site visit directly with Tiffany Irwin.

- (k) In January 2021, Abe Hannan met Tiffany Irwin at the property to complete a short walkthrough. Their evidence is consistent that they discussed the Owners' plans for the property. Neither of them testified on specifically discussing Mr. Hannan's role on the project. Mr. Hannan's testimony is that he discussed modelling his business after Doug Campbell. That is not disputed by Ms. Irwin.
- (l) Demolition work started on March 1, 2021. Doug Campbell was present, with other workers, throughout demolition.
- (m) On March 16, 2021, approximately two weeks into the work, Abe Hannan emailed Tiffany Irwin "some numbers", attaching an HVAC estimate from Mancini Heating & Air Conditioning Ltd., an estimate from Erik Giles Electrical, and a budget spreadsheet prepared by Mr. Hannan, described as being "subject to change" and "missing numbers and rows". There is no evidence of any discussion about Hannan Building's budget estimate nor any follow-up by Hannan Building to confirm it.

[17] Hannan Building argues that a contract was formed within the first two weeks of Hannan Building's work on site following a purported discussion between Abe Hannan and Tiffany Irwin about pricing and Hannan Building's budget estimate being provided. However, I am unable to find a contract was formed between Hannan Building and the Owners. The requisite elements of contract formation have not been established on a balance of probabilities. I say this for several reasons.

[18] First, there is no evidence of a clear offer made by Hannan Building that was capable of being accepted. There is similarly no evidence of any offer by the Owners to Abe Hannan. Based on Mr. Hannan's own evidence, work had commenced and was already ongoing before he had any discussion with Tiffany Irwin about pricing. He sent his own budget estimate, but it had several caveats. There is no evidence of any response by Ms. Irwin and no evidence that Mr. Hannan sought to have his budget or understanding of their working relationship confirmed.

[19] Second, even if I am wrong that there was no offer, there is no evidence supporting, on a balance of probabilities, that Ms. Irwin accepted any offer made by Hannan Building. Abe Hannan's affidavit evidence and cross-examination testimony is that he "believe[s] that at some point during the first two weeks" he discussed his practice of billing material and labour plus 5% overhead and 10% profit. He did not testify in either his affidavit or cross-examination that Ms. Irwin agreed to it. His affidavit states only that Ms. Irwin discussed parking and agreed that Hannan Building could charge for parking once the City of Toronto started parking enforcement again. There is some evidence supporting that Mr. Irwin did pay for some parking tickets. However, agreeing to reimburse parking costs is not the same as agreeing to have all work on the project performed on a costs-plus basis.

[20] Third, there was no certainty on essential terms. In my view, the evidence before me does not support a finding that the parties agreed to a cost-plus arrangement as argued by Hannan

Building. The lack of an express agreement to a fixed price contract is not evidence of agreeing to a cost-plus arrangement.

[21] I am also not convinced by Hannan Building's submission that the evidence supports an agreement on scope. Hannan Building relies on my decision in *Sjostrom Sheet Metal Ltd. v. Geo A. Kelson Company Limited*, 2023 ONSC 495, at para. 26, where I held that an agreement to complete all remaining sheet metal installation work was sufficient scope for the costs-plus contract found in that case. Hannan Building submits that the agreed scope here was the full interior renovation.

[22] *Sjostrom* turned on its facts, which are quite different than this case. In *Sjostrom*, there was a clear scope of sheet metal work remaining to be performed that was known to both the subcontractor and sub-subcontractor. In this case, there is no equivalent defined scope of work. Notably, Hannan Building relies on a budget estimate that includes specific line items of work. There is no clear evidence before me that these items comprise renovation of the entire interior space of the property. Hannan Building also pointed out repeatedly at trial that its budget estimate included different line items than DC Builder's budget estimate, such as DC Builder's budget estimate omitting an express item for plumbing. Highlighting those discrepancies seems inconsistent with the position that there was a clearly known and agreed scope for the project.

[23] Fifth, I find no objective evidence of any intention to create a legal relationship. I accept that Tiffany Irwin had an evinced objective intention to have the work completed, but I am not convinced that her knowledge that Abe Hannan was "carrying the clipboard" rises to the level of an objective intention to create a legal relationship with him or Hannan Building. Ms. Irwin had limited interactions with Mr. Hannan before work commenced in the first week of March 2021. The material discussions and exchanges relied upon by Hannan Building all occurred after the project was already underway.

[24] In addition, I find no basis for objective intention for Abe Hannan and Bill Lynch to enter into any legal relationship. Abe Hannan had no dealings with Bill Lynch until the project was well underway. The fact that Mr. Lynch had a discussion with Mr. Hannan about the rooftop deck and later became involved in pressing Hannan Building for backup documentation is not evidence supporting that Mr. Lynch was a party to a contract with Hannan Building. The evidentiary record before me does not support a finding that Tiffany Irwin was acting as Mr. Lynch's agent in dealing with Mr. Hannan at and around the time that Hannan Building alleges the contract was formed.

[25] Hannan Building argues that I should also consider subsequent conduct. It submits that a binding contract will be found if the parties acted as if they thought they had one, and subsequent conduct may be relied upon where it reinforces the conclusion that there was a binding contract: *Garrett v. Niagara-on-the-Lake Sailing Club*, 2023 ONSC 289 at para. 49.

[26] Specifically, Hannan Building points to the fact that over \$500,000 was directly invoiced to Tiffany Irwin by Hannan Building (not DC Builders) and that payments totalling \$417,832.51 were made to Hannan Building (not DC Builders). DC Builders did not invoice the Owners at all during Hannan Building's period on site. Also, a certificate of insurance was provided by Hannan Building on March 5, 2021, without any inquiry or concern being raised by Ms. Irwin as to why it

was not from DC Builders. Hannan Building argues that Ms. Irwin's lack of reaction suggests a recognition of Hannan Building's role during project. I disagree.

[27] In my view, these examples are circumstantial evidence that do not support a finding that Tiffany Irwin (or the Owners) acted as though they had a contract with Hannan Building. I acknowledge that, as noted above, DC Builders did not issue any invoices to the Owners. All invoices sent to the Owners were issued by Hannan Building. I agree with Hannan Building that sending its own budget estimate, directly invoicing Tiffany Irwin, and ongoing payments being made to Hannan Building are all indicia of a direct contractual relationship. However, they are not dispositive. It is not uncommon for an owner to make direct payments to subcontractors with prior approval or notice to the contractor. Such payments are expressly contemplated by s. 28 of the *Construction Act*, which deems a direct payment by an owner to a subcontractor to be a payment by the contractor.

[28] In this case, Abe Hannan was "carrying the clipboard" for Doug Campbell. I accept the Owners' evidence that they understood Mr. Hannan to be handling the administration of the contract for Doug Campbell. The evidentiary record contains no clear discussions about Abe Hannan being the general contractor and Doug Campbell acting solely as a subcontractor. I accept the Owners' evidence that Hannan Building's budget estimate was, on its face, essentially in line with DC Builder's budget estimate, so they thought nothing about it. Similarly, the fact that the Owners did not think anything about the insurance certificate being from Hannan Building makes sense in context of their understanding that Abe Hannan would be managing the project for Doug Campbell.

[29] I note also that trial evidence supports that communications between Doug Campbell and Tiffany Irwin were ongoing throughout the course of the project, at least until Mr. Campbell's wife fell ill. In that context, the fact that invoices were sent by Hannan Building and payments were made to it is not itself sufficient to find a contract. More is required.

[30] Even if I were to accept Hannan Building's argument that the direct invoicing by Hannan Building and direct payments to it support a direct contract, those facts do not overwhelm the other objective evidence. The fact that Mr. Campbell involved Mr. Hannan does not change my view of the totality of that evidence. Mr. Hannan's own evidence was that he had worked *for* DC Builders on a prior project (*i.e.*, not as the general contractor). The Owners had already dealt with DC Builders on multiple prior jobs. Mr. Hannan's budget estimate was substantially the same as that provided by DC Builders. Doug Campbell never expressly stated that he would not be contracting with the Owners, and remained involved throughout the project, including attending on the first day and throughout the first stage of work for demolition. None of the contemporaneous emails or documents indicate that Doug Campbell or Abe Hannan expressed that they were expecting Hannan Building to operate as the general contractor on the job, and not DC Builders.

[31] Objectively, I find that the facts support it was reasonable for the Owners to believe that Abe Hannan was being involved by Doug Campbell solely for DC Builder's benefit. I am not convinced that, on a balance of probabilities, it would appear to a reasonably informed individual

in the circumstances of the parties that Mr. Hannan was being brought in to contract directly with the Owners in place of DC Builders.

[32] Tiffany Irwin testified that Doug Campbell “transitioned out” of the project due to his wife’s illness. After that point, Ms. Irwin was dealing exclusively with Abe Hannan. However, I accept and agree with the Owners’ submission that Mr. Hannan formally assuming lead on the project from Ms. Irwin’s perspective does not amount to there being a contract with Hannan Building or any assignment of the contract with DC Builders. On the evidence before me, I accept that Ms. Irwin transitioned the person with whom she was dealing to give Doug Campbell space to deal with his wife’s condition.

[33] In my view, the contemporaneous evidence overall supports that, objectively, DC Builders made an offer to perform the work identified in DC Builders’ estimate for the fixed price of \$605,000, plus HST. I accept that Mr. Campbell and the Owners then discussed revisions the bathroom scope of work and pricing and agreed to delete a new second floor bathroom and for DC Builders to complete only preparation work for the existing five bathrooms.

[34] The Owners’ evidence is that Doug Campbell agreed to perform bathroom preparation work only for a cost of \$5,000 per bathroom. Mr. Campbell’s affidavit evidence is that he was told by the Owners that they planned to supply and pay for bathroom fixtures themselves, which he told them would reduce the cost and that the cost of a contractor doing only preparation work “might be closer to something like \$5,000 per bathroom.” In cross-examination, Mr. Campbell clarified that he was referring to a powder room or small bathroom where the plumbing, lighting, and walls were not being moved, but that the \$5,000 figure could not be extrapolated to all bathrooms. However, Mr. Campbell acknowledged that his budget estimate of \$30,000 per bathroom included all millwork and fixtures.

[35] The Owners correctly point out that DC Builders’ prior estimate of \$30,000 per bathroom for completed bathrooms made no distinction between a main ensuite bathroom, a 5-piece bathroom, 4-piece bathroom, or a powder room. The five bathrooms were pre-existing and would reasonably have been seen by Mr. Campbell during the pre-estimate walkthrough. The Owners further point out that Mr. Campbell’s testimony was that he could not prepare the main ensuite bathroom for \$5,000, not that he was unable to prepare all five bathrooms for an average of \$5,000 per bathroom. I note also that the handwritten revisions made by Bill Lynch on DC Builders’ estimate were made contemporaneously with the telephone call between the Owners and Mr. Campbell. It is the only contemporaneous record from that discussion. Given the totality of the evidence before me, I accept and find that, on a balance of probabilities, Mr. Campbell objectively agreed that preparation of the five bathrooms could be completed for an average cost of \$5,000 per bathroom.

[36] Bill Lynch’s handwritten revisions to DC Builders’ estimate were not provided to DC Builders (nor to Hannan Building). However, that does not matter. I accept and find that Doug Campbell and the Owners agreed that DC Builders would do preparation of the five existing bathrooms for a total cost of \$25,000, and that Mr. Campbell and the Owners agreed to delete the new second floor bathroom. It follows that DC Builder’s prior \$524,000 base estimate would be reduced by \$165,000 (deleting \$150,000 for the five bathrooms and \$40,000 for the new bathroom,

then adding back \$25,000 for bathroom preparation). The result is a base price of \$359,000, plus overhead and profit, for a total of \$414,645, plus HST.

[37] I accordingly find that, during the call on November 8, 2020, the objective evidence supports that a legally enforceable contract was formed, conditional on the Owners acquiring title to the property. All material terms had been agreed. Both DC Builders and the Owners had evinced an objective intention to contract. There had been an offer and acceptance with agreement on a fixed price (\$414,645 plus HST) and a scope of work, which included \$20,000 for “miscellaneous projects” and \$40,000 for contingencies.

[38] Although a schedule had not been specifically agreed, I agree with the Owners that it is reasonably inferred to be as quickly as reasonably possible after closing of the property purchase, since the Owners were living in rental accommodations. Even if I am wrong in the foregoing, failing to agree on a schedule is not fatal to forming a legally enforceable construction contract. Agreement on a precise schedule of work, with specific project milestones, is not required. If an agreement is silent on a completion date, then a completion date can be fixed on reasonable notice to the contractor or, if it is not, then the contractor is still entitled to a reasonable time to complete the work: *Bellsam, supra* at paras. 97-98 (citing *Gilbank v. Cooper and English*, 2021 ONSC 4125 at para. 123; *Aylward v. Rebuild Response Group Inc.*, 2018 ONSC 4800 at para. 33; *Goulimis Construction Ltd. v. Smith*, 2014 ONSC 1239 at para. 20).

[39] Hannan Building submitted that, if I found a contract between DC Builders and the Owners (as I have), then Hannan Building would be a subcontractor to DC Builders. I agree.

[40] Viewing the circumstances under which Abe Hannan (and thereby Hannan Building) became involved in the project, I find that, objectively, Hannan Building was subcontracted by DC Builders to assist on the project. In making that finding, I have considered the testimony of Tiffany Irwin and Doug Campbell on their discussions about bringing in Abe Hannan, which followed Mr. Campbell preparing and providing a budget or estimate for the work and discussions about it without Mr. Hannan’s involvement. I have also considered Abe Hannan’s own evidence on becoming involved.

[41] In my view, the objective evidence supports that all elements necessary to form a subcontract between DC Builders and Hannan Building were present. Doug Campbell made an offer to Abe Hannan / Hannan Building to complete the project scope. Abe Hannan discussed that scope with Doug Campbell and Tiffany Irwin, and he told Mr. Campbell that he would complete the work. Although there is no evidence on what, if anything, was discussed between Mr. Hannan and Mr. Campbell about how Hannan Building would be billing the project (which is consistent with neither of them subjectively believing that Hannan Building would be a subcontractor to DC Builders), I am satisfied that, objectively, Mr. Hannan never agreed to a fixed price for Hannan Building’s supply of services and materials.

[42] I appreciate that this result is somewhat of a legal fiction that does not accord with what Mr. Hannan and Mr. Campbell subjectively understood their relationship to be. However, applying an objective standard to subjective dealings can have that effect. The result, though, is not an unfamiliar relationship in the construction industry. Although not cited by the parties, I have

previously discussed a situation where one general contractor subcontracts with another general contractor to complete the first contractor's full scope of work. In *Infinite Construction Development Ltd. v. Chen*, 2022 ONSC 3929, at para. 60, I observed as follows:

Nothing in the *Construction Act* prevents a general contractor, who has been contracted by the owner, from subcontracting with a second general contractor to perform the full scope of the first general contractor's work. Practically, the first general contractor would cease to have any "boots on the ground" role on the project, since the second general contractor would be doing all of the work. That functional role of the second general contractor would demonstrate all the indicia of a typical general contractor, and it could even be the "constructor" with the Ministry of Labour for the purposes of the *Occupational Health and Safety Act*, RSO 1990, c O.1. Legally, though, absent a contract with the owner (or an agent of the owner), the second general contractor would still fall within the definition of a "subcontractor" under the *Construction Act*. Its services and materials would be supplied under an agreement with the first general contractor.

[43] In my view, the objective evidence supports a similar situation here. I find that, on a balance of probabilities, the objective evidence supports that there was no contract between Hannan Building and the Owners. DC Builders was contracted by the Owners to perform the work. Hannan Building was thereafter subcontracted by DC Builders to "carry the clipboard" on DC Builder's behalf and perform its scope of work. Doug Campbell remain involved to perform portions of the work through DC Builders.

Issue 2: *If a contract was formed between Hannan Building and the Owners, then who breached the contract?*

[44] Given my finding that there was no contract formed between Hannan and the Owners, I need not address the evidence and argument at trial on breach of contract.

Issue 3: *Absent a contract, is Hannan Building entitled to recover directly from the Owners in quantum meruit?*

[45] Hannan Building concedes that, if the contract was with DC Builders, then Hannan Building would have no claim in unjust enrichment directly against the Owners. Without a direct contract, Hannan Building's ability to recover judgment against the Owners is limited to the rights afforded to it by the *Construction Act*, specifically the rights of a "subcontractor". Both the Court of Appeal and Divisional Court have held that the comprehensive scheme of rights and obligations under the *Construction Act* ousts certain equitable rights and is the juristic reason for precluding claims for unjust enrichment by subcontractors against owners: *Urban Mechanical Contracting Ltd. v. Zurich*, 2022 ONCA 589 at para. 46; *Tremblar Building Supplies Ltd. v. 1839563 Ontario Limited*, 2020 ONSC 6302 (Div Ct) at para. 18.

[46] "Contractor" and "subcontractor" are both defined terms in the *Construction Act*. "Contractor" is defined as "a person contracting with or employed directly by the owner or an agent of the owner to supply services or materials to an improvement". "Subcontractor" is defined as "a person not contracting with or employed directly by the owner or an agent of the owner but

who supplies services or materials to the improvement under an agreement with the contractor or under the contractor with another subcontractor”: *Construction Act*, s. 1(1).

[47] Put more simply, a “contractor” has a direct contractual relationship with the owner whereas a “subcontractor” has only a direct contractual relationship with the contractor or another subcontractor. Given my findings above, Hannan Building is a “subcontractor” under the *Construction Act*.

[48] The only direct liability of an “owner” to a “subcontractor” under the *Construction Act* arises from s. 23 of the *Construction Act*. It provides that an owner has direct liability to lien claimants who have valid liens against the owner’s interest in the premises. That statutory liability exists despite there being no privity of contract between the owner and subcontractor. However, the liability is limited to the extent of holdbacks that the owner is required to retain: *Construction Act*, s. 23(1)-(2). Accordingly, if Hannan Building has a valid lien, then the Owners are liable to Hannan Building to the extent of holdbacks that they were required to retain.

Issue 4: *Has Hannan proven the quantum, lienability, and timeliness of its lien?*

[49] The Owners concede that Hannan Building’s lien is timely. I am also satisfied that the services and materials supplied and invoiced by Hannan Building are properly lienable, with two exceptions. I find that a vacation pay markup on labour and labour charges for statutory holidays on which no work occurred are not lienable amounts. Hannan Building’s labourers were all confirmed in trial evidence to be independent contractors. I am not satisfied that Hannan Building had any statutory or other legal obligation to provide vacation or statutory holiday pay to them that supports viewing such charges as being properly lienable in this case.

[50] In my view, the trial evidence of Abe Hannan, Ray Renwick, Luke Alford, Kevin Luimes, Lambert (Bert) Spignesi, Venanzio (Joe) Mancini, and Doug Campbell all support a finding that, on a balance of probabilities, Hannan Building has proved that the work it claims to have performed was, in fact, performed. I also accept that the hours charged in Hannan Building’s invoices were for actual work performed.

[51] With respect to its claim for statutory holiday hours and vacation pay, Hannan Building points to the decision in *HG Bliss Projects Inc. v Taylor*, 2018 BCSC 1581. In that case, at para. 42-43, the court held that it would be unfair to require an employer to bear costs such as holiday pay and employer contributions to CPP and EI and WCB premiums in a “cost plus” contract. However, that case dealt with a labour rate charged for employees for whom it appears the employer would reasonably have had statutory requirements for holiday pay and employer contributions. The facts of this case are not the same.

[52] Labour was supplied on behalf of Hannan Building by seven workers: Abe Hannan himself, Patrick Angus, Kevin Luimes, Luke Alford, Scott Sinclair, Chris Hoffman, and Colin Sinclair. Abe Hannan’s affidavit evidence is that each of the labourers were independent contractors, but that Hannan Building had agreements with each of them to provide full-time hours. Mr. Hannan gave evidence that, as part of his agreement with all labourers (except Scott Sinclair), he paid them for statutory holidays and provided them with two-weeks paid vacation each year.

His evidence is that he did not charge for his own statutory holiday time, but would add a 4% charge on labour costs to all of Hannan Building's projects to cover the cost of the two-week vacation for all labourers, including himself. Mr. Hannan's evidence is that he paid vacation pay to each of Patrick Angus, Kevin Luimes, Luke Alford, Chris Hoffman, and Colin Sinclair, and took vacation himself in 2021.

[53] The excel spreadsheets prepared by Abe Hannan and provided to the Owners in support of the amounts billed include a charge for vacation pay at a rate of 4% on top of the labour hours for all workers. That includes Abe Hannan's own labour charges. The spreadsheets also disclose labour charges on statutory holidays on which no work occurred.

[54] Although vacation pay was charged for Scott Sinclair, Mr. Hannan acknowledged in his affidavit evidence that it was in error since Scott Sinclair was not entitled to vacation. That admitted overcharge has been adjusted and deducted in Mr. Hannan's revised claim calculation prepared before trial.

[55] Importantly, three of the labourers operated through corporations or businesses. They each invoiced Hannan Building through those businesses. Patrick Angus operated through ADP Builders Inc., Kevin Luimes operated through Luimes Construction, and Luke Alford operated through Meta Design Build. Invoices in evidence from each of those business include HST charges on the amounts billed. During cross-examination, Abe Hannan confirmed that he paid the HST. He also confirmed that Hannan Building itself charged 5% overhead, 10% profit, and HST on the vacation pay amounts. That is reflected in the excel spreadsheets submitted at trial.

[56] In closing submissions, I was directed to no statutory or legal obligation on Hannan Building to provide paid vacation to its independent contractor labourers or to pay them for statutory holidays. Regardless, no convincing argument was advanced at trial for why vacation pay and statutory holiday pay that are voluntarily paid to independent contractors are properly lienable amounts. I also find no basis on which Hannan Building would be entitled to lien for vacation pay that its principal elected to pay himself. It follows that overhead, profit, and HST on those amounts is also not lienable.

[57] Per Hannan Building's re-calculation of its claim, appended as Exhibit 28 to Abe Hannan's affidavit, the aggregate base claim for vacation pay is \$5,550.90. With overhead, profit and HST, the total claim is \$7,244.77. I accept Bill Lynch's calculation evidence at paragraph 53 of his affidavit, and the related exhibit of Hannan Building's invoices, that the total amount claimed by Hannan Building for statutory holiday pay is \$5,053.57. That was not disputed by Hannan Building at trial.

[58] The Owners argue an additional reduction for statutory holiday billing on July 2, 2021, since Abe Hannan confirmed during cross-examination that July 2, 2021 was taken as the statutory holiday with work occurring on July 1, 2021. The owners submit that represents an additional amount of \$851.17, including 5% overhead, plus 10% profit, plus HST. I do not follow that calculation. A total of \$1,096 was charged for statutory holiday pay on July 2, 2021. A total of \$441 was charged for work on July 1, 2021. I agree that the difference of \$655, plus profit,

overhead, and HST is similarly not lienable. That totals an additional \$854.88, for a total statutory holiday amount of \$5,908.45.

[59] The Owners' primary challenges to Hannan Building's lien are the charges for statutory holidays and vacation pay, as well as the Owners' claim for deficiencies and incomplete work. Otherwise, the Owners have challenged certain discrepancies in the labour charges, taken the position that invoicing by Erik Giles Electrical is inconsistent with the amounts claimed, and raised concerns with more minor charges for certain tools, water, and parking.

[60] Evidence on Erik Giles Electrical's billing is less clear than I would like, but appears to be explained in Abe Hannan's revised claim calculations spreadsheet, which Mr. Hannan adopts into his evidence. I agree that the tools, water, and parking charges have not been proven to be a lienable supply of services or materials, but they have not been clearly totalled in the evidence. There also appear to be some discrepancies between how labour amounts are tracked in the spreadsheet as compared to supporting invoices. However, no impact on the overall claimed value of work has been articulated.

[61] Ultimately, given my findings below on the limit of the Owners' liability to statutory holdback, reviewing the invoices to identify and calculate tools, water, and parking charges or more closely review the discrepancies raised by the Owners is an inefficient use of judicial resources. It would only assist in reaching a finding that would be legally moot in the result. I accordingly find that Hannan Building has sufficiently met its onus, on a balance of probabilities, of proving a lien in the amount of \$100,874.05, representing the re-calculated amount of \$114,027.27, less the amounts I have found are not lienable for vacation pay (\$7,244.77) and paid statutory holidays (\$5,908.45).

Issue 5: What is the Owner's holdback obligation?

[62] Since I have found that there was no contract between Hannan Building and the Owners, the Owners' liability to Hannan Building is limited to the holdback that the Owners were required to retain under the *Construction Act*.

[63] There is no dispute that the full scope of work was completed, subject to modest deficient and incomplete work asserted by the Owners by way of set-off. There is also no dispute that a total of \$417,832.51 was paid to Hannan Building. Given my findings on the contractual relationships between DC Builders, Hannan Building, and the Owners and the language of s. 28 of the *Construction Act*, those payments are properly deemed payments to DC Builders under its contract. Since I have found that the base contract price was \$468,548.85 (\$414,645 plus HST), that leaves an unpaid balance of the base contract price of \$50,716.34, including HST.

[64] Pursuant to s. 22(1) of the *Construction Act*, an owner has an obligation to retain basic holdback equal to 10% of the price of the services or materials actually supplied under a contract until all liens have expired or been satisfied, discharged or otherwise provided for under the *Construction Act*. The Owners concede that their basic holdback obligation is \$46,854.89, representing 10% of the total base contract price. They further concede that amount would be recoverable from them by Hannan Building as DC Builder's subcontractor.

[65] There is also a second holdback obligation, which is found in s. 24 of the *Construction Act*. In addition to the basic holdback obligation, a payer has an obligation, upon receipt of a written notice of lien, to retain an amount sufficient to satisfy the lien before further payments on a contract or subcontract are made. A “payer” is the owner, contractor, or subcontractor who is liable to pay for the services or materials supplied to an improvement under a contract or subcontract (s. 1(1)). In this case, the Owners are a “payer”.

[66] A “written notice of lien” is a prescribed form under the *Construction Act*. There is no evidence before me that a written notice of lien in the prescribed form was given to the Owners. It appears that Hannan Building only provided the Owners with copies of its two claims for lien. Under the former *Construction Lien Act*, “written notice of lien” was defined to include a claim for lien, but that aspect of the definition was repealed with the 2018 amendments. There is now a pending amendment to re-add a given or registered claim for lien to the definition. No case law has been put before me on whether providing a claim for lien, without the prescribed written notice of lien, continues to trigger the notice holdback obligation under the current language of the *Construction Act*.

[67] The effect of the two holdback obligations is that the Owners are liable to Hannan Building for the basic holdback, against which an owner is not entitled to set-off, and potentially liable for any additional amount remaining unpaid under the contract with DC Builders. As conceded by Hannan Building, an owner is entitled to set-off against amounts above the basic holdback, which are contract funds. The prohibition in s. 24 is only against payment to a contractor after receiving a written notice of lien.

[68] There are several disputes over work that Hannan Building claims were changed from the original scope of work in the course of the project. The Owners do not dispute that the work performed by Hannan Building had to be performed and there is no dispute that Hannan Building performed it. Whether or not such work was or was not within the base contract scope of work is relevant to determining the Owners’ holdback liability.

[69] The only asserted change of any substance was a rooftop deck. A rooftop deck was always contemplated. However, Abe Hannan’s evidence is that he understood it would only cover a portion of the rooftop area and would be simple wood, but that he was ultimately instructed that the deck should cover the entire flat roof space with planters and a partition wall built to hide the mechanical units from view. Although much was made about the admissibility of a rooftop deck drawing tendered in Tiffany Irwin’s affidavit, which Hannan Building argued had not been authenticated in evidence, that issue is moot for two reasons.

[70] First, during cross-examination, Ms. Irwin was asked a series of questions about the document, in response to which she provided a detailed description of how and when it was prepared, how and when it was shown to Abe Hannan (namely while standing with him on the rooftop deck), and what specifically was discussed about it at that time. The document was authenticated through that testimony, which was elicited directly by Hannan Building’s cross-examination on the document. Hannan Building did not seek to recall Mr. Hannan for reply evidence.

[71] Second, Tiffany Irwin's evidence is that her discussion with Abe Hannan on the scope of the rooftop deck occurred in April 2021. That is after DC Builders' budget estimate was provided and the contract, as I have found it, was formed. It is also after Hannan Building commenced work and provided its own estimate in March 2021. Although both DC Builders' and Hannan Building's budget estimates contemplate \$20,000 for the rooftop deck, the evidence before me does not support a finding that a full rooftop deck was contemplated prior to April 2021. I accept Abe Hannan's evidence that he did not understand the rooftop deck to cover the full rooftop. In my view, the scope of rooftop deck work discussed in April 2021 is a change directed by Tiffany Irwin. I find accordingly.

[72] Hannan Building has not totalled the amounts it incurred and invoiced for the rooftop deck. From its invoices, the total invoiced cost appears to be \$24,753, plus HST: \$4,464.03 invoiced on September 12, 2021, and a further \$20,288.97 invoiced on November 29, 2021. I accept that there were other changes, but they too have not been clearly quantified in evidence.

[73] I have found that DC Builder's budget estimate formed the basis of the contract with the Owners. That budget estimate included amounts for miscellaneous projects and contingency totalling an aggregate of \$60,000.00. In my view, trial evidence does not support a finding that the aggregate of the extras exceeds the miscellaneous projects and contingency amounts. No convincing argument has been made to view the changes as falling outside those two budget categories. I thereby need not address the changes further.

[74] I find that the record does not support any changes to the contract exceeding the miscellaneous projects and contingency amounts. I further find that none of the changes have been proven to be properly viewed as falling outside of either of those categories and, accordingly, to be extras to the contract that increased the total contract price.

Issue 6: *Are the Owners entitled to set-off for deficiency rectification and completion costs?*

[75] Given my findings above, there remains a total unpaid contract amount of \$50,716.34. Hannan Building argues that its lien attaches to that full unpaid amount. The total unpaid balance exceeds the admitted basic holdback amount by a modest amount of only \$3,861.45. Although the Owners are not entitled to set-off against basic holdback, they are entitled to set-off against any excess unpaid contract funds. I must accordingly consider the Owners' set-off claims.

[76] The Owners assert a set-off for ten items of alleged deficiencies and incomplete work. These items were outlined in a Scott Schedule exchanged by the parties. Two items were resolved and withdrawn prior to trial. The remaining eight, which remain in dispute, are as follows:

- (a) replacement of two elevator panel covers (\$904);
- (b) replacement of a damaged elevator door (\$1,921);
- (c) improperly working front door lock, which was repaired by a locksmith (\$363.86);
- (d) incomplete second furnace cleaning and system balancing (\$1,082.47);
- (e) defective infloor heating system installation (\$6,017.25);

- (f) missing electrical cover plates (\$50);
- (g) defective installation/insulation of rain shower head and pipes in main bedroom ensuite bathroom (\$4,520); and
- (h) incomplete and deficient installation of dry wall end caps (\$8,023).

[77] As a preliminary matter, Hannan Building's position is that it was denied the opportunity to repair alleged deficiencies. Case law provides that an owner who fails to provide the contractor with a reasonable opportunity to correct deficiencies in its work, which do not constitute a fundamental breach of the contract and where there is no urgency, is not entitled to claim damages based on the cost to have the deficiencies repaired by a third party contractor: *IDH Build Group Ltd. v. Fitzsimmons*, 2021 ONSC 5188, at paras. 104-106; *D & M Steel Ltd. v. 51 Construction Ltd.*, 2018 ONSC 2171, at para. 52. However, that is not the case here.

[78] I have found that DC Builders, not Hannan Building, was the contractor. DC Builders was afforded an opportunity to remedy deficiencies and did, in fact, re-attend. Doug Campbell himself re-attended to correct deficiencies and arranged for other trades to return as well, including Mancini Heating & Air Conditioning Ltd. with respect to the defective in-floor heating.

[79] I accept that the Owners have tendered insufficient evidence to establish their set-off claims for the lost elevator panel covers, damage to the elevator door, door lock, cover plates, and furnace cleaning and HVAC balancing. However, the remaining three set-offs have been proven. The Owners are entitled to set-off against the remaining contract balance above the basic holdback amount.

[80] Abe Hannan conceded in his affidavit evidence and cross-examination testimony that the dry wall end caps were incomplete work, although takes the position that Hannan Building was denied the opportunity to complete them. Since I have found that the Owners' contract was with DC Builders, it bore the obligation of completing the work. It remains incomplete. Although Doug Campbell challenges the Owners' estimated cost of rectification and completion, he conceded in cross-examination that there would be a cost. He felt it would be only \$1,000, which I question given the amount of scaffolding that would appear to be required.

[81] Doug Campbell acknowledged a deficiency in installation of the rain shower head and pipes in main bedroom. Mr. Campbell attended in 2023 to address the rain shower head deficiency, removed old insulation, put in new insulation, and repaired a roof drain. The evidence of the Owners, which was not upset during cross-examination, is that the issue persists. I accept the Owners' evidence and find, on a balance of probabilities, that the deficiency has not been fully remediated. Mr. Campbell conceded during his cross-examination that, if the issue persists, then it is his responsibility to fix it.

[82] I am also satisfied from the evidence and find that the in-floor heating system was defective and, despite repeated efforts to fix it, has not been corrected. Heated flooring was expressly contemplated in DC Builder's budget estimate and, accordingly, the contract. There is no dispute as to the scope of work required, which was an in-floor heating system with distinct controllable zones. Separate thermostats were installed to control each zone. The separate zones did not work.

The electrical contractor, Mancini Heating & Air Conditioning Ltd., ultimately returned to attempt repairs, but was unable to do so. Venanzio (Joe) Mancini testified to quoting the cost of adding a single zone at \$2,500 plus HST. I accept that the cost to remove and replace the flooring or otherwise remedy it will be higher. The Owners did not receive what they contracted for. They are entitled to set-off for the cost of rectification or to compensation for the breach.

[83] I need not determine the precise amounts of set-offs for the dry wall end caps, the rain shower head freezing deficiency, and the in-floor heating defect. There is no claim against DC Builders, so the relevance of the set-offs is limited to determining the Owners' precise holdback liability. I am satisfied that the evidentiary record before me supports that the aggregate cost of correcting or compensating for all three items clearly exceeds \$3,861.45. I accordingly find that the Owners are entitled to set-off their costs of these items against the entire unpaid balance of the contract with DC Builders exceeding the basic holdback amount.

CONCLUSION

[84] For the above reasons, I find that Hannan Building has failed to prove a direct contract with the Owners. I find that a contract was formed between the Owners and DC Builders, a subcontract was formed between DC Builders and Hannan Building, and that Hannan Building is a "subcontractor" under the *Construction Act*. I further find that Hannan Building has proven a lien in the amount of \$100,874.05, but that the Owners' liability to Hannan Building in respect of that lien is limited to basic holdback under the *Construction Act*, which I find to be the sum of \$46,854.89, including HST.

[85] There being no other liens, Hannan Building shall accordingly have personal judgment against the Owners for the full basic holdback amount of \$46,854.89, including HST, on the usual terms for owner holdback liability as set out in the Form 26 report under the *Construction Act*.

COSTS, INTEREST & REPORT

[86] The parties should make earnest efforts to resolve costs of the action themselves. If they cannot, then written submissions shall be exchanged and filed. Submissions shall not exceed five pages, excluding any attachments such as offers to settle and case law. The parties shall include in their submissions whether holdback liability of an owner is subject to pre-judgment interest and, if so, the calculation of that interest, including a *per diem* rate that may be applied to the date of my report.

[87] Hannan Building shall serve its costs and interest submissions by January 17, 2024. The Owners shall serve responding submissions, including their own claim for costs (if any), by January 31, 2025. Hannan Building shall be entitled to brief reply, if any, not exceeding three pages to be served within seven (7) days of being served with the Owners' responding costs submissions. All written submissions shall be submitted by email to my Assistant Trial Coordinator (ATC), Christine Meditskos, with proof of service.

[88] Both the *Construction Act* and the *Rules of Civil Procedure* require that the results of this trial be embodied in a report. I encourage the parties to discuss an appropriate form of draft report,

using language from Form 26, which shall be filed with my ATC, in Word format, by the deadline for reply costs submissions. If the parties cannot agree on a form of report, then my ATC should be so advised, and each side shall submit the version of the report that they propose. I will then settle the form of report following my decision on costs or convene a hearing or submissions on settling the report.

ASSOCIATE JUSTICE TODD ROBINSON

Released: December 23, 2024

CITATION: Hannan Custom Building Ltd. v. Irwin, 2024 ONSC 7230
COURT FILE NO.: CV-22-678548
DATE: 2023 12 23

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 :

HANNAN CUSTOM BUILDING LTD.

Plaintiff

- and -

TIFFANY IRWIN,
WILLIAM PATRICK LYNCH, and
THE TORONTO-DOMINION BANK

Defendants

REASONS FOR JUDGMENT

Associate Justice Todd Robinson

Released: December 23, 2024