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Manual of Construction Law

This publication provides a practical step-by-step explanatory approach through every phase of a construction project, from the preparatory stages to the completion of the project. A complete set of forms and precedents for use in construction projects is also included.

Release 2019-6 keeps you current with the addition of new case digests and adds valuable case law and commentary to Chapters 1 (The Construction Team), 2 (The Tendering Process), 3 (Contracts), 4 (Dispute Resolution), and 5 (Construction Liens).

Case Law Highlights

Tendering Process — Prohibiting Bids from Contractors Having Legal Proceedings with Town — Whether Charter of Rights and Freedoms Breached — Where a clause in the city's tender materials indicated that tenders would not be accepted from any party if that party had engaged in legal proceedings against the city in the prior two years, such clause did not infringe the *Charter*-protected right of reasonable access to the courts, and did not infringe any common law right of access to the courts. In this case, in 2013, a dispute arose between the contractor and

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the city over a hidden defect relating to the collapse of a retaining wall, which caused the death of one of the contractor's workers while it was carrying out a contract for sewers and services connections. Two months after the contractor commenced an action against the city in respect of this dispute, the city added a new clause to its invitation to tender, indicating that tenders would not be accepted from any party if that party had engaged in legal proceedings against the city in the prior two years. By virtue of the impugned clause and the contractor's action, the plaintiff was no longer permitted to bid on work for the city. In 2017, the city removed the impugned clause. The contractor deposed there were nine contracts tendered by the city that it would have bid on but for the impugned clause. The contractor's action for damages under s. 24(1) of the *Charter* and for a declaration that such clause was of no force and effect was dismissed.

There was a constitutional right of access to the courts by application of the rule of law and the *Constitution Act*, but that right was subject to permissible limits. The party freely entered into a contract that contained a provision restricting access to the courts. The impugned clause did not infringe a *Charter*-protected right of reasonable access to the courts. Because the contractor's argument was not anchored on a particular section of the *Charter*, there was no constitutional remedy available. The rule of law, as an unwritten constitutional principle, could not, on its own, serve as a basis for invalidating the impugned clause. The contractor, in arguing that the restriction imposed denied access to justice, must prove undue hardship, which the contractor failed to do. Public policy did not invalidate the clause, nor did the *Charter* or s. 96 of the *Constitution Act, 1867* render the contractual provision invalid: *J. Cote & Son Excavating Ltd. v. City of Burnaby*, 2018 CarswellBC 2356, 84 C.L.R. (4th) 334 (B.C. S.C.).

Dispute Resolution — Arbitration Clause — Right of Appeal from Arbitrator's Decision — Where the homeowners entered into a purchase agreement with a builder, which agreement had an arbitration clause, and their dispute was referred to an arbitrator for a decision which favoured the builder, the homeowners did not have a right of appeal, but were required to seek permission to appeal on a question of law. In this case, the homeowners contracted with a builder to build a home, but the construction stopped due to a dispute over the change orders. The builder claimed payment of $280,568 for upgrades and change orders. The homeowners relied on a prepayment clause in the purchase agreement, which stated that a payment of $1.06 million had been made to the builder. The purchase agreement specified that disputes were to be settled through arbitration. The matter proceeded to arbitration, and an arbitrator found in favour of the builder that the homeowners had breached the agreement by not paying for change orders. The homeowners filed a notice of appeal under the *Arbitration Act*, R.S.A. 2000, c. A-43, and also pursued a special chambers application to have decided the legal effect of the wording in the prepayment clause in the agreement. The special chambers judge ruled that the homeowners could not appeal without first having made an

application for permission to appeal on a question of law, and as they had not done so, the appeal was dismissed. As to the issue of the legal effect of the wording of the prepayment clause, the special chambers judge converted the homeowners' summary judgment application to an application for permission to appeal, but denied the application on the basis that the homeowners did not have an arguable issue. The homeowners then brought an application for permission to appeal the special chambers judge's decision. Their application was dismissed.

The special chambers judge held the purchase agreement constituted the entirety of the agreement to arbitrate. While the Program Arbitration Rules defined how the arbitration was to be conducted, they were not part of the agreement. As the parties had not specified in the agreement the types of issues that could be raised on appeal, the chambers judge found s. 44(2) of the *Arbitration Act* applied. The provision specified that in the absence of a contractual provision to the contrary, only legal errors could be the subject of an appeal, and that a party who wished to appeal had to first seek, and be granted, permission to appeal. Having failed to seek permission to appeal as required, the notice of appeal was struck and there was no reviewable error in this decision. The proposed appeal on the effects of the wording of the prepayment clause was without merit as the payment schedules were not provided to the court, and the evidence before the arbitrator revealed only three sums paid to the builder: *Rusnak v. Canyon Spring Master Builder Inc.*, 2018 CarswellAlta 2, 85 C.L.R. (4th) 194 (Alta. C.A.).

Construction Lien Claim and Breach of Trust Action — Lien Bond Reduced by Amount of Trust Claim — Subcontractor Not Entitled to Double Recovery — Where subcontractor filed a lien claim and pursued a breach of trust claim, and the contractor posted a lien bond to discharge the lien and paid monies into court to secure the breach of trust claim, the contractor was able to reduce the lien bond by the amount of the breach of trust action as the subcontractor was only entitled to one recovery in regard to the breach of trust portion of its claim. In this case, the dispute related to the construction of a stadium. SODC was the construction manager on the project. SODC entered into a subcontract with Structal with respect to components of the stadium project. The subcontractor filed a builders' lien against the stadium in the amount of $15,570,974. SODC brought a main action against the subcontractor for damages arising from an alleged delay in the completion of the subcontractor's work. The subcontractor filed a counterclaim against SODC for the amount of $15,570,974 for the amount owing, and sought a declaration that the lien was valid and enforceable. SODC filed a lien bond application to facilitate the discharge of the lien, which was done upon the purchase of a lien bond by SODC. In the Supreme Court of Canada decision in *Stuart Olson Dominion Construction Ltd. v. Structal Heavy Steel*, 2015 SCC 43, 44 C.L.R. (4th) 1 (S.C.C.), it was determined that the purchase of the lien bond did not extinguish any trust claim against SODC. The subcontractor then filed a breach of trust action against SODC, the property owner and the directors of the owner for damages of $4,171,915.

SODC was subsequently ordered to pay $4,171,915 into court as trust funds for the benefit of the subcontractor. SODC brought a motion in the lien bond application to reduce the amount of the lien bond from $15,570,974 to $11,399,059, to reflect that $4,171,915 was paid into court. The main action and the lien bond application were consolidated. SODC submitted that if the amount of the lien bond was not reduced, it would have provided double security for the same funds, totalling over $19 million. SODC and the other defendants sought to stay the breach of trust action, claiming that the outcome of that action depended on the outcome of the main action. SODC's motion to reduce the amount of the lien bond was allowed; the lien bond was reduced by the amount paid into court as trust funds. The motion for a stay of the breach of trust action was dismissed.

There were many genuine issues to be resolved at trial, both in the main action and the breach of trust action. However, in regard to the amount of $4,171,915, the fact remained that the subcontractor had one claim. It pursued that claim under both the lien provisions and the trust provisions of the *Builders' Lien Act*, C.C.S.M., c. B91, but in no scenario would the subcontractor be entitled to double payment of that principal amount. While additional damages may flow to the subcontractor for other items in the breach of trust action, if it was successful, it would receive payment of the $4,171,915 only once. The subcontractor would not suffer prejudice as a result of a reduction in the amount of the lien bond. SODC and the other defendants to the breach of trust action did not meet the test for a stay. There was no abuse of process as the subcontractor was entitled to seek payment via multiple avenues concurrently. However, the main action and the breach of trust action should be heard together. The allegations in the breach of trust action arose from the same transaction and facts on which the main action was based. Both proceedings involved several of the same parties who were represented by the same counsel. Another area of overlap arose from the subcontractor's argument that SODC's breach of trust disentitled it to a set-off in the main action. To maintain two separate proceedings would be both illogical and inefficient, and would cause increased costs at trial: *Stuart Olson Dominion Construction Ltd. v. Structal Heavy Steel*, 2018 CarswellMan 102, 85 C.L.R. (4th) 94 (Man. Q.B.).