

October 2006

INEXPLICABLE

Occasionally, but not often, we see cases and situations arise that we simply cannot explain or understand. One of these arose in 310 Waste Ltd. v. Casbro Industries Ltd., a 2006 decision of the Ontario Divisional Court. If the case name sounds familiar, it should. We discussed another iteration of it in our newsletter of July 2006.

History

This case has a long and unusual history.

A contractor claimed payment against an owner for cleaning up and removing hundreds of thousands of tires stored on the owner's lands. The owner paid \$20,000 of \$1.6 million owed. After the owner refused to pay, the contractor liened the land.

On October 10, 2003, the contractor commenced an action to enforce the lien. The owner defended the action and counterclaimed. One year later, the owner moved to have the lien discharged, arguing that the work done was not lienable. The motions judge dismissed the owner's motion. The owner appealed. The Divisional Court heard that appeal on June 30, 2005. The Divisional Court then reserved its decision.

Time passed. On November 7, 2005, while the Divisional Court's decision was still reserved, the owner moved to discharge the lien on grounds that the contractor had not set the matter down for trial within the

two years mandated under section 46 of the Construction Lien Act (i.e. two years from the issuance of the statement of claim on October 10, 2003). The owner had tried to get an order discharging the lien without giving notice of its motion, but the motions judge required the owner to give notice to the contractor. The owner did so on November 16, 2005.

In the meantime, on November 14, 2005, the Divisional Court handed down its decision on the appeal of the first motion, dismissing the owner's appeal and upholding the validity of the lien. It was this decision upon which our July 2006 newsletter commented.

The motions judge in the new motion granted the owner's motion because, regardless of the motion and the appeal dealing with the validity of the contractor's lien, the contractor had not set down the matter for trial by October 10, 2005.

The contractor appealed that decision to the Divisional Court.

Finding

The contractor argued that it would have been improper to set the matter down for trial while the lienability issue was before the courts. The contractor led no evidence that it would have been impossible to set the matter down or that it had tried to do so and was refused by court officials.

The court held that setting down the matter for trial

would not have shown contempt for the court process; further, it noted that there was no evidence to suggest that the contractor's solicitor had even contemplated this issue at the relevant time.

Accordingly, the court dismissed the contractor's appeal. The irony of the decision is that the judge who wrote the majority decision a year earlier, holding that the lien was valid, was the judge who wrote the decision for the unanimous panel dismissing the second appeal and, therefore, discharging the lien and the contractor's action with costs. What a waste of time and money.

More

We neglected to inform you that the owner had appealed the first decision regarding lienability and the contractor had appealed the discharge of its lien on the second motion, in each case from the Divisional Court to the Ontario Court of Appeal. This was a hard fought battle. The Court of Appeal dismissed the contractor's appeal in the second motion, essentially for the same reasons as the Divisional Court. Since the contractor's action had been dismissed, the court refused to rule on the owner's appeal in the first motion; the issue was moot.

Explain

The most plausible explanation that we have for the ultimate result is that the contractor's lawyer simply forgot about the necessity, under section 46 of the Act, to set the action down for trial within two years of its commencement. Different counsel represented the

contractor on the second motion than on the first motion, including all of the appeals. We suspect that the insurers of the lawyer acting for the contractor might have provided counsel on the second motion and the two appeals from the decision in it.

Actually, all is not lost for the contractor. Although its action was dismissed, that dismissal is without prejudice to the contractor re-commencing its action under the normal Rules, rather than under the Act. Since the limitation period was, at that time, 6 years, the contractor is still able to do so. If the same situation arose today, with its prevailing 2-year limitation period, the contractor would have lost its entire cause of action and the solicitor and his insurers would have been in big trouble.

CERTIFICATE

In our newsletters of November 2003 and January 2006, we discussed the case of Del Ridge Construction Inc. v. General Accident Assurance Co. of Canada, a 2005 decision of the Ontario Court of Appeal. In that case, the motions judge had determined that an architect could withdraw and replace any certificate it had issued. The Court of Appeal had overturned the decision on procedural grounds, but made no comments on its merits; the reasons for decision on the merits, died along with the decision.

This issue has been dealt with again in Demcon Construction Inc. v. Lee, a 2006 decision of the Ontario Superior Court of Justice.

Issue

The owner and the general parted ways before a con-

tract was completed. They had the usual disputes: extras, percentage completed, deficiencies etc. The general relied on the architect's certificate as being dispositive of the work that it had actually performed – and for which it should be paid. The owner argued that the certificates were incorrect and therefore the general could not rely upon them.

The judge held that there was nothing in the CCDC contract (probably CCDC 2) disallowing either party from contesting the validity or accuracy of a certificate. Accordingly, the judge held that a certificate is not conclusive as to the value or the percentage of work completed at any particular time during construction. Rather, the certificate was merely another matter of evidence for the judge's consideration in resolving the financial issues.

Ultimately, the judge

determined a value that was different from the certificate upon which the general relied.

Conclusion

Based on the Lee and Del Ridge decisions, we feel that the courts will not view an architect's certificate as sacrosanct unless there is something in the contract that explicitly makes it so.

End of Line

We discussed the decision in Toronto Transit Commission v. Gottardo in our newsletters of September 2004 and November 2005. Gottardo had applied for leave to appeal the Ontario Court of Appeal's decision. The Supreme Court of Canada denied that leave to appeal. Accordingly, the decision of the Court of Appeal stands.

Speigel Nichols Fox LLP
44 Peel Centre Dr., Suite 400
Brampton, Ontario L6T 4B5
Tel: 905-791-6262
Fax: 905-791-6446
www.ontlaw.com

Jonathan Speigel*+
Brian Nichols
Irving Fox
Ian Latimer*
Robert McIntyre
Susanne Balpataky*
Michael Ballantyne
Carrie Kennedy
Paul Roth*

* members of construction litigation group
+ certified by Law Society as a specialist
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