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GUEST ARTICLE

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The key to understanding concurrent delay is the ability to break the overall delay into its component parts and apportion time, responsibility and costs.

With the assistance of Jennifer Bond and Calie Adamson.

EVALUATING CONCURRENT DELAY: UNSCRAMBLING THE EGG

This is an updated and abbreviated version of an article by the same name which appeared at (2006) 53 C.L.R. (3d) 46.

Introduction

While it is not uncommon for an owner or for a contractor to assert a delay claim with respect to a given construction project, this article reviews situations where there are two or more sources of delay. We will then examine the approaches that are taken by courts in dealing with such situations of concurrent delay.

The task faced by the parties and the court is to unscramble the overall project delay into its component parts, determine the impact of those discrete parts, determine which litigant or third party was responsible and calculate the resultant damages. A good starting point is to ensure there is an understanding of the lexicon of "delay" in isolation, before adding the complexity of concurrency.

Types of Delay

There are two main categories of delay:

(a) *Excusable Delay* — delay for which there is entitlement by the claimant to time extensions, compensation, or both; and

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(b) Non-excusable Delay — delay for which a party assumes the risk of cost consequences, not only for itself but possibly for the other parties as well.[1]

Excusable delays can further be classified as either compensable or non-compensable. Where the excusable delay is non-compensable, there is an entitlement to a time extension, but no entitlement to additional money. Where an excusable delay is compensable, a party will be entitled to a time extension as well as additional money for the impact of the delay.[2] Generally speaking, "a delay that could have been avoided by due care of one party is compensable to the innocent party suffering injury or damage as a result of the delay's impact."[3] However, one must always return to the contract between the parties to see if and how the risk of the particular delay was anticipated or allocated.

Concurrent Delay

A. Defining Concurrent Delay

To put it simply, concurrent delay occurs when there are two or more causes of delay operating at the same time. Multiple independent delays which are the responsibility of a single party (by convention, by contract or factually) do not cause the concurrency problem with which we are concerned because there is no need to apportion the various causes of delay. Apportionment becomes necessary when different parties are responsible for different concurrent delays, or a third party delay runs concurrently with delay caused by one of the parties. *Kor-Ban Inc. v. Pigott Construction Ltd.*[4] provides an example of such a scenario:

> *Delays resulted from a variety of causes, including, but by no means limited to, subcontractors not carrying our their work in accordance with the schedule …changes ordered in the work by the owner or architect and strikes by various trades.*[5]

Although concurrent delay is difficult to evaluate because of the simultaneity of delays, the basic principles of delay still apply. Before any type of extension and/or compensation can be allowed, the delay must be shown to be excusable and/or excusable and compensable from the perspective of the claimant. However, evaluating how each event delayed the completion of a project makes concurrent delay a much more involved and speculative process compared to an isolated or singular cause of delay.

It is not necessary for the independent causes of delay to occur at exactly the same time for them to be considered "concurrent". Indeed, it is rare that concurrent delays start and end at the same time. Concurrent delays are more commonly experienced as overlapping events. Indeed, delays may appear consecutive or sequential but still be treated as "concurrent" if they relate to the same circumstances. For example, in *Raymond Constructors of Africa Ltd. v. United States*,[6] there were three apparently sequential delays, all related to the supply of equipment for the construction of a road for the Sudanese government by the U.S. Government. The project

was delayed by a total of 142 days. The court found at least three causes of delay, namely: the U.S. Government's delay in procuring the construction equipment and delivering same to Sudan; the Sudanese Government's delay in shipping the equipment overland to the site; and delay caused by the contractor's Sudanese subcontractor which was inexperienced, inefficient and failed to use the available equipment to its maximum advantage. These delays appeared largely sequential, but there was some overlap. For example, the (inefficient) subcontractor was working throughout the period of (late) equipment delivery which occurred over a ten-month period.

In the result, the court held that there was insufficient evidence to make a precise allocation of responsibility between the various causes of delay. Thus, the court simply split the responsibility for the overall delay three ways and awarded the contractor 1/3 of the costs incurred for the delay as against the U.S. Government.

As with the *Raymond Constructors* case, one generally finds that the courts are not overly concerned with matching causes of delay temporally in order to consider the causes concurrent.

B. General Principles in Evaluating Concurrent Delay

It is interesting to note what the courts *do not* appear to do in dealing with concurrent delay. Canadian courts do not appear to "let sleeping dogs lie" or let losses remain as they were incurred if the two litigants are each responsible for delay. An examination of contemporary cases reveals the courts conduct an exercise of apportionment with respect to the causes and impacts of the concurrent delays, very similar to an exercise in allocating responsibility amongst joint tortfeasors. The task of the competing parties in concurrent delay litigation becomes providing the court with the better evidence and theory as to the distinct causes, costs, and duration of delay.

As one may expect, there is a proportionately larger U.S. experience in these types of cases and a review of such experience is instructive. A summary of the broad principles applied by U.S. courts to concurrent delay can be found in Bramble and Callahan's treatise on *Construction Delay Claims* (*3rd*)[7] which has been abbreviated and summarized below:

(a) the parties must be able to satisfactorily demonstrate and apportion both the causes and costs of the concurrent delays. The party seeking to recover delay costs has the burden of demonstrating the allocation;[8]

(b) where, for example, the contractor has experienced concurrent delay caused by third parties (*i.e.* excusable/non-compensable delay) and delay of its own making (*i.e.* non-excusable delay), the older cases have held that the contractor is not entitled to a time extension[9] but the "majority approach"[10] is that a contractor is entitled to a time extension;[11]

(c) where a contractor experiences concurrent excusable delays where one is compensable (extension of time and money) and one is non-compensable (time extension only) the latter will "override"[12] the former and the contractor is entitled to an extension of time only;[13]

(d) where a contractor experiences two concurrent compensable delays (time and money) there will be only one cost recovery and one time extension.[14]

C. Apportioning the Responsibility for Delay

1. Precise Apportionment

In some cases, the courts simply roll up their sleeves, look at the case day by day or week by week and allocate the delay. In *Pacific Coast Construction Co. Ltd. v. Greater Vancouver Regional Hospital*[15] a delay claim by the contractor was made with respect to the construction of the emergency wing of the Shaughnessy Hospital. One of the main issues was the allocation of delay caused when unanticipated soil conditions (excess water) were experienced during the drilling of two caissons for the elevator core.

The court found that it was dealing with several overlapping delays, some of which were caused by the parties and some of which were simply unanticipated. The delay spanned a period from March 21 to July 13. The court allocated the responsibility for the delay as follows:

(a) The delay from March 24 to May 12 was the responsibility of the contractor. A drilling subcontractor had drilled out of position, and was late in returning to site for correction.

The contractor was contractually liable for the subcontractor.

(b) Even though progress depended on the drilling being done correctly, the court held that the soil consultant nevertheless should have begun developing a contingency plan. The court thus attributed the delay from May 22 and June 10 to the owner, which was responsible contractually for the architect and its soils consultant.

(c) From June 10 until July 13, the parties were dealing with the problem of unanticipated subsurface conditions which, according to the court's interpretation of the contract, was neither an owner nor a contractor caused delay. While the contractor was entitled to payment for the extra costs of implementing the remedy to the unanticipated water problem, the contractor was not entitled to claim for any delay impact costs.[16]

Accordingly, the court was able to allocate the delays precisely, even though some of the delays overlapped.

The court in *Kraft Construction Co. v. Martech Electrical Systems Ltd.*[17] allocated responsibility for a six-month delay with a similar degree of precision. The court considered each party's responsibility for the various delay periods on a week-by-week basis. The court determined that Kraft was responsible for 12-14 weeks of delay, Martech for six-eight weeks, and other parties for five-six weeks, for a combined total of 23-28 weeks of delay. The project's actual delay period was 16 weeks, and the difference was attributed to overlapping, concurrent delays. The court then proceeded to allocate responsibility for the 16-week delay in accordance with the weekly breakdown, which resulted in roughly a 50% allocation to Kraft, a 25% allocation to Martech, and 25% to others.[18]

2. Rough Justice

The ability to allocate the delay with the precision of *Pacific Coast* or *Kraft Construction* is not a prerequisite to apportioning responsibility. In many cases the courts, after reviewing the various causes of concurrent delay, find they are unable to apportion with precision. Thus, the court does its best to estimate responsibility based upon the best evidence available, allocating responsibility on a 50-50, 75-25 or some such similar basis. Courts have repeatedly acknowledged that the apportionment of liability is difficult if not impossible to do as a precise calculation.[19] Rarely do the courts simply throw up their hands and refuse to make an allocation at all.

The case of *Evergreen Building Ltd. v. H. Haebler Co. Ltd.*[20] concerned a 95-day delay in completing the construction of a ten-storey commercial and residential complex in downtown Vancouver. Problems arose with respect to the site purchase, zoning, permits, financing, the engagement and performance of subcontractors and design changes, but the overriding problem was the inability of the two principal participants to get along.[21] The trial judge declined to perform a day by day analysis and instead, explained the exercise as follows:

> *It is unnecessary to tell the story as it unfolded day by day, event by event, so I will deal with separate topics and cluster around each topic some events only relevant to it. I am aware that such a segmentation distorts reality because many things went wrong at the same time and separate disputes on different aspects of the work were interconnected and were raging at the same time.*[22]

The trial judge apportioned two-thirds of the blame against one party and one-third against the other, as both parties' actions would have resulted in the same period of delay: "[t]he fault was unequal but they both contributed to it."[23]

Concurrent delay as a defence

Another perspective in reviewing cases on concurrent delay is to observe that it is frequently used as a defence to a delay claim.

In *Alberta Engineering Co. v. Blow*[24] a contractor brought an action for the balance of the contract. The owner counterclaimed for delay. The contractor *did not* assert a delay claim for its own damages, but *did* assert that the owner was responsible for some concurrent delay. In the result, the court attributed just over one-quarter of the concurrent delay to the owner, and thus limited the owner's delay claim for rent to just three months, rather then the full 4.5 extra months the project took to complete.

More recently, in *Bianchi Grading Ltd. v. University of Guelph,*[25] the plaintiff was hired by the University to perform certain excavation services as part of a larger student residential development project. Bianchi claimed unpaid fees and costs associated with an extra nine months on site due to delay. The University counterclaimed for the cost of completing and/or repairing the company's services.

Bianchi argued that poor planning by the University was to blame for the multiple causes of delay, including changes to the site plans, winter working conditions, insufficient road access, and waiting time for permits and approvals. The University defended the delay claim by suggesting that Bianchi was in fact responsible for the delay because it made unnecessarily slow progress and failed, at least initially, to recognize and plan for certain major elements of the construction process.

The court determined that both parties were responsible for the delay, and divided the responsibility equally.[26] The defendant therefore successfully responded to an initial delay claim with its own delay claim to reduce the quantum of damages.

If a defending party can successfully assert a concurrent delay such that the court apportions the concurrent delay in the manner seen in many of the cases cited above, then that defending party is able to reduce the delay claim, dollar for dollar, by the percentage of *concurrent* delay for which the claimant is responsible. In the alternative, if one can demonstrate that an excusable but non-compensable delay ran concurrently with the compensable delay, one can try to defeat the delay claim entirely arguing that the non-compensable delay overrides the compensable delay such that an extension of time only is permitted.[27]

The authors of the *Canadian Encyclopedic Digest*, citing the decision of the British Columbia Supreme Court in *East Kootenay Community College v. Nixon & Browning*[28] state the same concepts slightly differently in the sense of an evidentiary burden of proof:

> *In an action for damages for delay under a construction contract, the property owner bears the onus of proving that there was a delay for which the contractor was responsible. Once this is established, the onus then shifts to the contractor to show that the project would have been delayed in any event beyond the specified completion date for reasons unrelated to the contractor's default.*[29]

Another defensive case is *Earl Thompson*.[30] This was a case by a subcontractor seeking payment of the (sub)contract balance. The general contractor counterclaimed alleging delay by the subcontractor. The subcontractor admitted that it was responsible for a large portion of the delay caused by a lack of equipment, equipment breakdown and inadequate supervision. However, the subcontractor asserted, and the court found, that that the general contractor contributed to the delay (*i.e.* caused concurrent delay) due to a strike by carpenters, a fire, and late deliveries, all of which delayed the subcontractor.

The court first calculated the amount of delay damages as if the general contractor was not responsible for any delay. The court then determined what part of the delay was attributable to the general contractor.[31] In the end, the court found that the general contractor was responsible for eight of the 31 weeks of delay it had claimed as against the subcontractor, and reduced the general contractor's delay claim against the subcontractor by this amount. The subcontractor did not assert a delay claim of its own; it simply asserted concurrent delay(s) as a defence to the general contractor's delay claim. It successfully reduced its own admitted responsibility for delay by one-third.

An example of a concurrent delay defence completely shielding a contractor from the owner's delay claim is *Vanir Construction Services Ltd. (Receiver of) v. Field Aviation Co.*[32] The contractor undertook the design-build of an aircraft hangar which was delivered approximately three months late, and for which the owner sought delay damages of several hundred thousand dollars. The contractor designed and priced the facility with non-explosion proof lighting fixtures. The contractor then sought a ruling from the Chief Electrical Inspector as to the acceptability of the non-explosive proof fixtures, but the Inspector refused to make a ruling. The contractor sought instructions from the owner as to whether it wanted to install the more expensive explosion-proof fixtures, or install the less expensive fixtures and risk the possibility that an occupancy permit may subsequently be refused. The owner left the decision with the contractor. The contractor ordered the more expensive fixtures and the building was finished, albeit late.

In the action in which a contractor sought the balance of a contract price and the extra cost of supplying more expensive explosion-proof fixtures, the owner counterclaimed for delay. The contractor countered that (concurrently) numerous changes by the owner delayed the project. The court held that the numerous changes made by the owner were to blame for the delay in the completion of the project, and the owner was therefore responsible for any damages flowing from the delay.[33]

In *Morrell v. Cserzy*[34] a contractor claimed unpaid amounts for a home renovation project from which the contractor had been removed. The owner defended on the basis that the contractor breached the contract by failing to meet certain completion milestones and that termination of the contract was justified for such breach. While the court did find that there was delay by the contractor caused by its inability to secure enough trades people for the job, the court also accepted the contractor's assertion that the owner concurrently delayed the job by ordering numerous changes. The job was further concurrently delayed by pre-existing conditions in the building that were not discovered until exposed during the renovation. The court attributed the reasons for delay equally between the parties and as a result, could not find that the contractor had breached the contract by failing to meet the construction milestones. The owner's defence to the action on the contract based upon the delay was denied. The contractor successfully used allegations of concurrent delay (both owner-caused and those caused by other factors) to shield itself from the consequences of its own delay.

Summary and Conclusion

The key to understanding concurrent delay is the ability to break the overall delay into its component parts and apportion time, responsibility and costs. One must always refer to the contract provisions to ascertain if the parties considered and allocated the risk of particular types of delay and if so, the consequences in terms of damages, time extensions or both. Precision in apportioning responsibility for concurrent delay may be possible, but is not required. Courts will often "do the best they can" and apportion responsibility on an estimated basis. When facing a delay claim, one should not lose sight of the fact that proving a concurrent delay may reduce or defeat the delay claim, even if the defending party is not asserting a delay claim themselves.

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1 Barry M. Bramble and Michael T. Callahan, Construction Delay Claims, 3rd ed. (New York: Aspen Publishers, 2000) (WL).

2 See *Bemar Construction (Ontario) Inc. v. Mississauga (City)*, [2004] O.J. No. 235, 30 C.L.R. (3d) 169 (Ont. S.C.J.) citing with approval an article by Christopher J. O'Connor (*Delay and Acceleration,* Insight Conferences, March 29-30, 1993) for examples of the foregoing types of delay.

3 *Supra* note 1.

4 [1993] O.J. No. 1414, 11 C.L.R. (2d) 160.

5 *Ibid*. at para. 18.

6 188 Ct. Cl. 147, 411 F.2d 1227 (U.S. Cl. Ct., 1969).

7 *Supra* note 1.

8 *Ibid.*

9 The references cited by Bramble and Callahan have been reproduced herein for the utility of the reader: *Aerokits, Inc*., ASBCA No. 12324, 68-2 B.C.A. (CCH) para. 7,088 (1968); *Mann Chem. Laboratories, Inc. v. United States*, 182 F. Supp. 40 (D. Mass. 1960).

10 *Supra* note 1.

11 *Ibid.,* citing *Fieser Servs., Inc. v. Saline Sever Co.*, 643 S.W.2d 92 (Mo. Ct. App. 1982); *Robert P. Jones Co.*, AGBCA No. 391, 76-1 B.C.A. (CCH) para. 11,824 (1976); *Titan Pac. Constr. Corp*., ASBCA No. 24148, 87-1 B.C.A. (CCH) para. 19,626 (1987).

12 *Ibid.*

13 *Ibid*., citing *Welch Constr., Inc*., GSBCA No. 6391, 83-2 B.C.A. (CCH) para. 16,742 (1983); *Beckman Constr. Co*., ASBCA No. 24725, 83-1 B.C.A. (CCH) 16,326 (1983), *B.D. Collins Constr. Co.*, ASBCA No. 42,662, 92-1 B.C.A. (CCH) para. 24,659 (1992). Thus, the legal impact of any owner-caused, compensable delays will cease upon the occurrence of equally critical, excusable delays. *Harvey Honore Construction Co.,* ASBCA No. 47087, 94-3 B.C.A. (CCH) para. 27,190 (1994).

14 *Ibid*., citing *James Munro*, IBCA No. 486-3-65, 67-2 B.C.A. (CCH) para. 6,559 (1967).

15 (1986) 23 C.L.R. 35 (B.C.S.C.).

16 The natural question is whether the contractor would thus be entitled to an extension of the contract time for this *four-week* period of time commencing June 10. It appears that the contractor did not seek same and may have been defeated in any event, by a lack of proper notice. The owner raised a lack of proper notice with respect to the *three-week* period commencing May 22 which was awarded, citing the notice provisions of the contract. The court held that the said notice provisions only dealt with extensions of time and not delay damages. Thus, the answer may be that no extension of time was sought or given with respect to the *four-week* period of time commencing June 10 because of a lack of proper notice, but the case does not make this clear.

17 [2004] B.C.J. No. 1063, 2004 BCSC 703, 36 C.L.R. (3d) 163 (B.C.S.C.).

18 *Ibid.* at para. 352.

19 See *Earl Thompson Road Construction Co. v. Peter Leitch Construction Ltd*., [1989] S.J. No. 363, 35 C.L.R. 83 (Sask. Q.B.) at para. 32; *Prince Albert Pulp Co. v. Foundation Co.*, [1976] S.C.J. No. 21, [1977] 1 S.C.R. 200, [1976] 4 W.W.R. 586, 1 C.P.C. 74, 8 N.R. 181, 68 D.L.R. (3d) 283; and *Convert-A-Wall Ltd. v. Brampton Hydro-Electric Commission*, [1988] O.J. No. 1444, 32 C.L.R. 289 (Ont. S.C.J.) at para. 32.

20 [1983] B.C.J. No. 435, 5 C.L.R. 70 (B.C.S.C.).

21 *Ibid*. at para. 2.

22 *Ibid.* at para. 26.

23 *Ibid.* at para. 107.

24 28 W.L.R. 391, 17 D.L.R. 497 (Alta. T.D.).

25 [2007] O.J. No. 1441, 61 C.L.R. (3d) 199 (ON S.C.J).

26 *Ibid*. at para. 210.

27 *Supra* notes 12 and 13.

28 [1985] B.C.J. No. 766, affirmed on appeal at [1988] B.C.J. No. 313, 28 C.L.R. 189 (B.C.C.A.).

29 C.E.D. (Ontario) (3rd), Vol. 3, Title 20 "*Building Contracts*"§303 (Thomson Carswell, 2003).
See also *Twin Cities Mechanical & Electrical Inc. v. Progress Homes Inc.* [2005] N.J. 254 (Nfld & Lab. S.C.) which cites both the C.E.D. passage and the principal suggested by the trial judge in *East Kootenay Community* at paras. 109-110 and paras. 151-153.

30 *Supra* note 19.

31 *Ibid*. at para. 23.

32 [1988] A.J. No. 417, 30 C.L.R. 38 (Alta Q.B.) reversed in part [1992] A.J. No. 36, 48 C.L.R. 97 (Alta. C.A.).

33 *Ibid.* at paras. 67, 68.

34 [2002] O.J. No. 698, 14 C.L.R. (3d) 94 (S.C.J.).

CASE SUMMARY

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CONTRACTOR ACCEPTS OWNER'S REPUDIATION OF CONTRACT

By Paul Sandori

Delcor Painting & Flooring Ltd. v. 20/20 Properties Inc.

In August 2003, Delcor Painting & Flooring Ltd. entered into a contract for renovation work on a condominium complex of 178 units owned by 20/20 Properties Inc. (the Owner).

The Contract provided that Delcor was to perform specific work on all 178 units, at $14,496 per unit, in accordance with Schedule A of the Contract. The total amounted to $2,580,029 plus an allowance for drywall repairs of $400 per condo unit, if required.

Delcor only worked on specified units when the Owner indicated that the units were ready and whether any extras to the Contract were required. The Owner hired Streamline Restoration as its representative in overseeing the renovation work.

In April 2004, Delcor became aware that Streamline would itself be renovating five condo units. Delcor wrote to the Owner reminding the Owner that Delcor had a signed contract to renovate the entire Project.

In June 2005, after receiving payment for all work that had been performed, Delcor found out from its suppliers and trades that another party was finishing off the 54 units on which Delcor had not yet worked.

On July 18, Delcor informed the Owner in writing that it considered this conduct a repudiation of the Contract, and that it accepted such repudiation. It claimed that, as a result of the repudiation, it had suffered loss, and was seeking compensation.

Eventually, Delcor sued the Owner claiming **special damages** in the amount of $242,082 and interest. The Owner denied Delcor's claim and counterclaimed for increased costs and expenses for the completion of the work, as well as for loss of rental income. The total amount of the counterclaim was $316,000.

Repudiation of Contract

Justice Manderscheid of the Court of Queen's Bench of Alberta summarized the legal doctrine of repudiation as follows:

> *A repudiation of contract may be found, depending on the circumstances, where one party to a contract, either by express words or conduct, indicates to the other contracting party that he no longer wishes to be bound by the obligations under the contract. In such cases, the innocent party may elect to accept or reject the repudiation. If the repudiation is not accepted, the contract continues for the benefit of the contracting parties. Conversely, if the innocent party accepts the repudiation, the contract may be treated as though it has been terminated and the innocent party may immediately bring a suit for damages.*

The question before the Court was whether the Owner's conduct in retaining another contractor to complete the remaining 54 units in the Project amounted to a repudiation, as claimed by Delcor.

In order to ascertain whether the Owner in fact repudiated the Contract, the Court had to look to both the terms of the Contract and the manner in which Delcor performed the work under it.

Where there is no express and absolute refusal by one party to perform its obligations under a contract, the test of repudiation is to determine whether the defaulting party's actions could lead a reasonable person to conclude he no longer intends to be bound by the provisions of the contract.

This was the case here. No evidence was presented to the Court, which would justify under the terms of the Contract the hiring of another party to complete the work. This was done without cause or notice to Delcor. Accordingly, the Owner's conduct precluded Delcor from performing its obligations under the Contract.

Waiver of Rights

The Court also had to consider whether Delcor had waived its right to insist on the Owner's

performance of the Contract given that the Owner had previously acted in a similar manner when it hired Streamline to renovate five units in the Project. The test to be applied in determining whether there has been a valid waiver of rights is twofold, said Justice Manderscheid:

1. Did Delcor have full knowledge that permitting Streamline to renovate the five units would amount to a waiver of its rights under the Contract to complete the renovation work?
2. Did Delcor unequivocally and consciously intend to abandon its rights under the Contract?

The evidence before the Court did not satisfy this test. There was no evidence that, when Delcor agreed to Streamline renovating the five units, it did so with full knowledge that by such action it had waived its rights under the Contract. Delcor ultimately completed the work on the five units which had been started by Streamline Restoration. After that, the parties continued to negotiate for the completion of renovation work on other units in the Project.

The second consideration in the two-part test is particularly clear given the letter written by Delcor reminding the Owner that Delcor was to renovate the whole Project. Justice Manderscheid concluded that Delcor, in permitting Streamline to perform some renovation work, did not waive its rights to insist on performance by the Owner of its obligations under the Contract.

Acceptance of Repudiation

The repudiation of a contract, however, does not in and of itself end a contract. It is critical for the party that did nothing wrong, the "innocent party", to communicate to the other party that it accepts the other party's breach or repudiation. Only then can the contract be considered ended.

Delcor's letter of July 18, 2005 indeed expressly advised the Owner that it had accepted the Owner's repudiation of the Contract — caused by hiring another party to perform the work on the 54 remaining units in the Project — and that it had decided to sue for damages, interest and costs. Accordingly, the Court concluded that Delcor had elected to treat the Contract as at an end.

Entitlement to Damages

In the lawsuit, Delcor alleged that the Owner's repudiation caused it to lose the benefit of the Contract and the revenue it otherwise would have received under it, and claimed "special damages" of $242,082 plus interest and costs.

The rule regarding damages goes back more than 150 years, to a decision of the House of Lords in *Hadley v. Baxendale*. Damages can be special, general, or both.

Special damages arise where the loss was "in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it" or "if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties" at the time the contract was made.

The amount of special damages is what would "ordinarily follow from a breach of contract under these special circumstances so known and communicated."

But, on the other hand, "if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract."

These are **general damages**, losses which a reasonable person would assume flow from the breach.

Given the fact the Contract specifically stated that 178 units in the Project were to be renovated by Delcor at a cost of $14,496 per unit, plus any extras, there is no doubt that reasonable persons in the position of the parties would have contemplated that Delcor would incur a loss of profit should the Owner repudiate the Contract.

"With respect to entitlement, the fundamental principle of law is that the innocent party is to be placed in as good a position, financially speaking, as it would have been had the contract been performed," said Justice Manderscheid. "There is no reason to believe that Delcor could not have completed the remaining work

had it been given the opportunity to do so. As such, it is my view that Delcor is entitled to be compensated by the Owner for its loss of profits."

Quantum of Damages

The principal of Delcor testified that the loss of profits to be attributed to each of the remaining 54 units in the Project was the sum of approximately $4,470 for each unit.

However, the Court took into account the fact the five units were started by Streamline but completed by Delcor when Streamline could not perform the required work. Delcor testified that it had received all monies owed to it for the portion of the work it had completed on the five units.

Therefore, the quantum of Delcor's damages would be $4,470 times 49, *i.e.* the remaining 54 units less the five units for which Delcor had already been paid, for a total of just over $219,000.

Mitigation

Before ruling on the quantum of Delcor's damages, the Court first had to consider whether Delcor satisfied its obligation to mitigate damages.

In determining this obligation, the Court checked what steps should have been taken by Delcor as a result of the Owner's repudiation, and whether such steps would be considered reasonable and prudent. All the facts of the case had to be considered in making this determination, particularly, given all the circumstances, whether it was more likely than not that Delcor would have obtained new contracts for work similar to that on the Project.

Delcor's principal testified that when it became clear that the Owner's conduct amounted to a repudiation of the Contract, Delcor took steps to deploy its employees on other projects, where possible, and to terminate the services of all non-required subcontractors. Justice Manderscheid concluded that, in that case Delcor was most likely not in a position to retain or acquire the personnel required to complete any new contracted work. Delcor's actions were reasonable and prudent and it had therefore discharged its obligation to mitigate.

Accordingly, the Court decided that Delcor was entitled to the full amount of damages. The Owner's counterclaim was dismissed.

Alberta Court of Queen's Bench
Manderscheid, J.
November 17, 2009

OWNER PERFORMS NO SOIL TESTS — CONTRACTOR PAYS FOR ADVERSE SOIL CONDITIONS

By Paul Sandori

Welcon (1976) Ltd. v. South River (Town)

On April 8, 2010, the Supreme Court of Canada dismissed the application for leave to appeal from the judgment of the Newfoundland and Labrador Court of Appeal in the lawsuit initiated by Welcon (1996) Limited against the Town of South River and NewLab Engineering Limited. Welcon was the contractor, the Town the owner, and NewLab the Town's engineering consultant on a municipal water and sewer project in South River.

The contract was a unit price contract that provided standard pay widths for trench excavation, and allowed for 800 cubic meters of backfill. The total linear measurement of the project was 1,442 meters.

Welcon submitted a bid of approximately $350,000 for the project and was awarded the contract. The seven other bids ranged from $384,000 to $524,000.

In accordance with common practice for projects of this magnitude, the Town performed no soils tests prior to tender. Instead, the Instructions to Bidders stated "tenderers shall carefully examine the contract Documents and the site of the proposed work and fully inform themselves of the existing conditions and limitations ..."

Shortly after work started Welcon notified Newlab that it had encountered unanticipated adverse soil conditions that required greatly increased excavation quantities and limited the reuse of the excavated material for backfill. Newlab refused to issue a change

order beyond what was specified in the bid documents so Welcon was obliged to use imported backfill.

Welcon's claim for compensation was first presented to a dispute resolution board, a procedure established by the provincial government. The board refrained from finalizing its deliberations when Welcon initiated a lawsuit.

In its lawsuit, Welcon alleged breach of contract by the Town. It also sued Newlab, claiming that the engineer had failed to disclose the soil conditions and to properly deal with Welcon's claims.

Trial and Appeal Decisions

The trial occupied 50 days and heard evidence from 29 witnesses.

The trial judge found that the contractor could only recover damages if the soil conditions encountered were materially different from what could reasonably have been anticipated, and that it was up to the contractor to prove that this was so. In short:

- the specifications required that all bidders must ascertain for themselves the nature of the soil conditions;
- the risk of adverse soil conditions was with the contractor and, having failed to investigate and rectify the problems, it must take the responsibility;
- Newlab did not hold itself out to the bidders as someone they could rely on regarding soil conditions;
- neither Welcon nor any of the bidders relied on information regarding soil conditions on advice given by Newlab.

The trial judge dismissed virtually the whole of Welcon's claim for breach of contract against the Town as well as the claim for negligence against Newlab.

Welcon appealed. The majority of the Court of Appeal agreed with the trial judge, and dismissed the appeal, with costs.

Dissenting Opinion

Justice Wells wrote a lengthy dissenting opinion which may be of interest to the construction industry and construction lawyers even though it was not shared by the majority of the Court. Only some of the key points of his reasons will be summarized here.

Justice Wells quoted from the decision of the trial judge:

> *... Government recognizes small contractors cannot possibly carry out a full investigation before making their bids. Obviously, to carry out a full investigation before tendering would make the costs exorbitant in relation to the size of the contract ...*

Yet the trial judge concluded that:

> *... Government specifications require that all bidders must ascertain for themselves the nature of the conditions and the engineer is not expected, nor can he guarantee, anything concerning the soil conditions.*

Either conclusion precludes the other, commented Justice Wells, and continued:

> *If small contractors "cannot possibly carry out a full investigation before making their bids" on government related projects, government specifications cannot rationally be construed as requiring that "all bidders must ascertain for themselves the nature of the [subsurface] conditions".*

Clearly, drawing both conclusions results in an incongruity yet the trial judge dismissed Welcon's claims based on the second conclusion. Added Justice Wells:

> *In the ordinary course an owner must expect to have responsibility for the cost of dealing with whatever the subsurface nature of the owner's property may be. Unquestionably, that is the result when an owner carries out pre-bid subsurface investigation and, as an owner must, makes the result available to bidders.*
>
> *If, on the other hand, an owner chooses to avoid the cost of expensive pre-bid investigation, interpreting the contract in such a manner as to offload the risk and cost of dealing with previously unknown adverse subsurface soil conditions onto the contractor where, as the trial judge found "[the owner] recognizes small contractors cannot possibly carry out a full investigation before the making of their bids", results in **unjustly enriching the owner** by both the avoided cost of pre-bid investigation and, at the expense of the contractor, the cost of dealing with later discovered adverse subsurface soil conditions.* [Emphasis added]

That appearance of unjust enrichment exists in this appeal, decided the judge.

The Contract

A written contract must be construed as a whole and, as a rule, by looking at nothing other than the

document itself. On its face, the bid documents, in **general** terms, required Welcon to carefully examine the site and "all conditions" affecting the work.

However, Justice Wells found that a **specific** provision of the Contract between Welcon and the Town conflicted with that general interpretation. GC 35 *Subsurface Conditions* provided that, when a contractor encounters subsurface conditions that, in his opinion, "differ materially" from those indicated in the Contract, a specific course of action had to be taken. First, the contractor was to "promptly notify the Engineer" in writing. Second, the Engineer had to promptly investigate and, properly performing his duties as Engineer, determine whether conditions were materially different.

If the Engineer determined that the conditions did differ materially, GC 35.2 required the Engineer to issue appropriate instructions for changes as provided for in GC 18 and GC 19.

If the Engineer's determination was that the materials did not differ materially, and if the Contractor disagreed, GC 7 mandated that the Engineer **shall** decide questions arising under the Contract, and that any such decision **shall** be in writing. Any dispute regarding a change in Contract Price and/or extension of Contract Time would have to be decided as provided in GC 16 *Settlement of Disputes*.

Justice Wells cited the decisions of the Supreme Court of Canada in *Corpex (1977) Inc. v. Canada* and *BG Checo International Ltd. v. BC Hydro & Power Authority* in support of his view that any apparent conflict between the general undertaking by the bidder to carefully examine all soils conditions and GC 35 type clauses, making specific provision for additional compensation where changes are necessary due to materially different subsurface conditions, is to be resolved by applying the specific provisions of the GC 35 type clause.

"That interpretation applies in the circumstances of this case," decided Justice Wells and concluded that it was **not** the intention of the parties that the risk of adverse, materially different subsurface soils condition was to be borne by the contractor. But **materially different from what?** What was a bidder justified in assuming as to subsurface soils conditions in circumstances where, as the trial judge found, "small contractors cannot possibly carry out a full investigation before making their bids".

Justice Wells relied on evidence regarding industry practice to resolve that uncertainty. In the absence of express description of the soils conditions in the Contract, and the Town and the Engineer making no specific representation on the matter, the answer must be "subsurface soils that, normally, can be worked upon employing normal construction procedures, without involving procedures or material additional to those specified in the Contract".

He concluded: "The owner is not entitled to a windfall of having a contractor pay the extra cost the owner would have had to pay had there been a subsurface soils investigation and the results made known before the bidding. Still less should the owner be entitled to a windfall because the owner did not wish to incur the expense of a pre-bid soils investigation."

Duty of Engineer

In effect, the Contract appointed NewLab as adjudicator to determine, when there was a claim, whether the circumstances warranted the Contractor being paid extra, and the extent of the extra work necessary to cope with the alleged materially different soil conditions.

Welcon was entitled to a written decision from the Engineer, and entitled to be compensated for having to supply materials or execute construction procedures not required by the Contract.

It was the Engineer's responsibility to specify in writing how the unsuitable material was to be handled and ensure a means of determining the compensation to be paid to Welcon for additional construction procedures or material required.

Newfoundland and Labrador Court of Appeal

C.K. Wells, B.G. Welsh, K.J. Mercer JJ.A.
October 21, 2009

Supreme Court of Canada (application for leave to appeal)

Cromwell J., Deschamps J., LeBel J.
April 8, 2010

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Bemar Construction (Ontario) Inc. v. Mississauga (City), [2004] O.J. No. 235, 30 C.L.R. (3d) 169 (Ont. S.C.J.)

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Convert-A-Wall Ltd. v. Brampton Hydro-Electric Commission, [1988] O.J. No. 1444, 32 C.L.R. 289 (Ont. S.C.J.).

Corpex (1977) Inc. v. Canada, [1982] S.C.J. No. 91, [1982] 2 S.C.R. 643 (S.C.C.).

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