COURT FILE NUMBER	2101 15526
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	Calgary
PLAINTIFF	Custom Electric Ltd.
DEFENDANT	Sofina Foods Inc./Aliments Sofina Inc. and Stuart Olson Construction Ltd.
DOCUMENT	**CHAMBERS ENDORSEMENT**

☒ **Order Granted**

☐ **Information Required**

☐ **Order Rejected**

☐ **Unable to Complete – see Comments/Reasons for further information**

Comments/Reasons:
Beginning on April 17, 2023, and continuing to April 19, 2023, I heard special chambers applications dealing with approximately 20 summary judgement applications in a builders lien matter on a large construction project.

Most of the summary judgement applications were allowed, and the liens declared valid. Several were unsuccessful. Costs have been dealt with on the latter ones.

On January 25, 2024 I heard submissions on costs and interest as directed by my order of June 6, 2023. These reasons deal primarily with costs claims of the successful lien claimants, and in one case, the interest claim of a party that was successful in having its lien declared valid.

Clause 11.2 of the applicable subcontracts provides as follows:

> 11.2 Stuart Olson shall, to the extent caused by its own breach or negligence, indemnify, defend and hold harmless the Subcontractor, and each of its officers, directors, shareholders and employees from and against all Claims whether in respect of losses suffered by them directly or as a result of claims by third parties on account of:
> 1 damage to property, injuries to persons including death, and from any other Claims on account of any negligent act or omission of Stuart Olson, or any of its directors, officers or employees; and
> 2 ***any breach by Stuart Olson of any of its obligations under this Agreement.***
> (Emphasis added)

On its face, the clause appears to apply to any breach by Stuart Olson of the Subcontractor Agreement and non-payment would be a breach.

Clause 11.3(2) says the indemnity obligation:

> 2 include the obligation to indemnify the other Party or such other person or entity from and against all costs, expenses and fees, including legal fees and disbursements on a solicitor-client basis.

The indemnity obligation appears clear, but it is argued that it does not apply to direct contractual claims. On that issue, clause 11.4 of the Subcontractor Agreement(s) provides:

> 11.4 The right to claim indemnity pursuant to Section 11.2 of this Agreement, and the Subcontractor's rights under applicable lien legislation shall be the ***sole and exclusive remedies of the Subcontractor against Stuart Olson in connection with the Work whether in contract, tort or otherwise***.
> (Emphasis added)

In my view, the indemnification obligations apply to direct contractual claims against Stuart Olson such as those here based upon the clear wording of the applicable clauses of the contracts.

While there is a solicitor-client legal fees and disbursements clause in relation to breaches by Stuart Olson, and non-payment breaches have been found in the sense that judgement has been awarded against Stuart Olson on the various lien claims, the cases still do recognize a residual discretion of the Court to not grant solicitor-client costs.

Rule 10.33 of the ***Rules of Court*** provides:

> 10.33**(1)** In making a costs award, the Court may consider all or any of the

following:

(a) the result of the action and the degree of success of each party;
(b) the amount claimed and the amount recovered;
(c) the importance of the issues;
(d) the complexity of the action;
(e) the apportionment of liability;
(f) the conduct of a party that tended to shorten the action;
(g) any other matter related to the question of reasonable and proper costs that the Court considers appropriate.

(2) In deciding whether to impose, deny or vary an amount in a costs award, the Court may consider all or any of the following:

(a) the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action;
(b) a party's denial of or refusal to admit anything that should have been admitted;
(c) whether a party started separate actions for claims that should have been filed in one action or whether a party unnecessarily separated that party's defence from that of another party;
(d) whether any application, proceeding or step in an action was unnecessary, improper or a mistake;
(e) an irregularity in a commencement document, pleading, affidavit, notice, prescribed form or document;
(f) a contravention of or non-compliance with these rules or an order;
(g) whether a party has engaged in misconduct;
(h) any offer of settlement made, regardless of whether or not the offer of settlement complies with Part 4, Division 5.

Many of these factors have some application here. The lien claimants were largely successful. The amounts at stake in some cases were large, and in the relation to the procedure generally they were large. The issues were important to all of the parties. The sheer number of lien claims made the action complex. In some cases, parties took steps which tended to shorten the action. In other cases, they did not.

Rule 10.33 also permits the Court to consider other factors.

One of the important factors is the existence of the solicitor-client legal expense clause. Another factor is that it is important to attempt to achieve some measure of consistency between treatment of the various lien claimants while achieving fairness to the party that is responsible to pay the bulk of the costs to be awarded (Stuart Olson).

I am not prepared to find misconduct as has been alleged against Stuart Olson in some of the submissions. Large sums of money were at stake and Stuart Olson was in the

midst of a dispute with the owner Sofina over the construction project.

While the subcontracts had a solicitor-client costs clause, the overall costs for which Stuart Olson is responsible must still be reasonable. Having said that, these are business contracts between business people. In general terms, the bargain of the parties ought to be enforced.

While arising in a foreclosure setting, I have found the decisions of ACJ Nielsen in ***RBC Royal Bank of Canada v Learmonth***, 2014 ABQB 756 and ***CIBC Mortgages Inc (Firstline Mortgages) v Tuchsen***, 2015 ABQB 241 to be helpful in explaining the various types of solicitor-client costs and the treatment of contractual rights to those costs.

The highest level of indemnity is full indemnity costs. The wording of the contracts here does not support a full indemnity costs claim.

A more typical grant of solicitor-client costs, and that which I find to be potentially applicable here, is that of traditional solicitor-client costs which is indeed how the contracts are worded.

This approach is also consistent with the recent Court of Appeal decision in ***Barkwell v McDonald***, 2023 ABCA 87. While not a contractual solicitor-client costs case, the Court of Appeal held at paragraph 56:

> [56] The starting point is to recognize the important distinction between solicitor and own client costs, and solicitor and client costs. Solicitor and own client costs are those costs that counsel can charge to the winning party, and that the winning party is required to pay as a matter of contract. Solicitor and client costs represent the costs that a reasonable client might be required to pay for the services rendered. It is rarely appropriate to award solicitor and own client costs as a costs award in litigation: ***Luft v Taylor, Zinkhofer & Conway***, 2017 ABCA 228 at paras 77-78, 53 Alta LR (6th) 44.

I find that is what the successful subcontractors are entitled to recover here. They have a solicitor-client costs clause in their contracts as opposed to solicitor and own client costs. Reasonableness is still part of the discussion. I do not find any reason for the lien claimants to not be allowed to rely upon the clauses in their contracts. While the results are potentially burdensome to Stuart Olson, the claims were resisted (in some cases much more vigorously than in others) and all of the parties were required to go through the same general hearing process to pursue their claims. The solicitor-client costs to a large measure will likely reflect the vigour of the defence on the various claims and to that extent the circumstances of individual cases can properly be considered.

I am not in the best position to conduct the dollars and cents assessment of the costs for at least two reasons. One is that in most cases, with the exception of the Con-Site Construction Limited matter which provided fulsome information for review, the

materials do not rise to the level that one would normally see on a review and assessment of solicitor-client costs. That will need to be provided in the assessments in the normal and expected way for a party seeking solicitor-client costs. The other reason is that the specialized office of the review officer is much more well equipped with greater expertise than I have to conduct an assessment. For example, familiarity with hourly rates, disbursements, assignment of appropriate counsel for the particular task, and the materials normally submitted on a solicitor-client cost review, are all much more familiar to the expertise of the review officer. That is indeed one of the roles of the review officer. In my view, that is the appropriate way to proceed. As the matter will involve considerations of lawyer's charges, the assessments should be done by the review officer rather than by an assessment officer.

I was urged by Stuart Olson to use Schedule C in awarding costs. In my view, there are some issues with using Schedule C in the circumstances here. One of them is the different quantum between the various lien claims. While the quanta are different, all of the lien claimants were bound to participate in the same procedure, and there is no sound reason for counsel to be entitled to recovery for more or less (for example for sitting in the hearings) based solely upon the quantum of the individual claims (i.e the appropriate column). Counsel who participated were all bound to participate in the same procedure. As a check and balance, even if the review officer finds that all of the solicitor client-costs claimed are recoverable in full as claimed, that represents approximately seven percent (7%) of the total judgements awarded so the potential amounts claimed that may be awarded do not appear to be obviously untoward on their face.

I would observe that much litigation lies ahead. Stuart Olson may well have the ability to claim some costs as damages in its litigation with the owner Sofina if it is successful in its position but that is for another day in the action between the general contractor and the owner. As in any action, the result depends largely on the merits of the dispute.

My direction is that I award legal fees and disbursements on a solicitor-client basis to the successful lien claimants and carriage counsel, all to be assessed. Consistent with ***Barkwell***, they are to be the legal costs and disbursements reasonably necessary to deal with the matter. I include in the costs to be assessed the costs of carriage counsel claimed for two reasons. First, they ought to be subject to the same assessment process as other costs. Second, I believe that it would be helpful for the review officer to have that information available in considering the overall relationship between the role undertaken by carriage counsel and the roles of counsel for the individual claimants.

While ultimately the review officer will consider the logistics of the hearings as deemed appropriate by the review officer, I would respectfully suggest that consideration be given to sequencing the review of carriage counsel costs first in order to set a stage for the relationship between carriage counsel and remaining counsel for the assessments.

Out of an abundance of caution, I can advise that I made a very brief informal inquiry as to the capacity of the office of the review officer to logistically deal with approximately 20

reviews. I was advised that the quantity did not present any issues other than they should be booked over the course of several consecutive days to ensure continuity, so I would ask and direct that the parties proceed in that fashion.

Finally, I deal with the interest claim of Con-Site Construction Limited. Con-Site filed evidence in support of its interest claim. The Subcontractor Agreement does not provide for a contractual rate of interest. While there is no doubt that Con-Site was put through complications with respect to changes to the method of its work arising from working under winter conditions, I am not prepared to grant the interest claim, as sought.

While there are cases such as ***NEP Canada ULC v. MEC OP LLC***, 2021 ABQB 180 which support the granting of interest as damages, this is a builders lien setting. The parties are recovering their legal costs on a solicitor-client basis because of the wording of the contract. In the absence of a contractual agreement as to interest, I am reluctant to import one into the contract.

In addition, there are some other factors. While the “pay when paid” clause in the contracts was ultimately not a barrier to the final judgements granted for reasons which I gave, it may have led to some justification for initial delays, at least with respect to interim progress draws. In addition, I have endeavoured to find a process between the various lien claimants that is fair and that treats the various lien claimants on a roughly equal footing. All of the lien claimants were delayed in receiving their payments because they were all on the same hearing track. I am reluctant to award interest damages to one party and not others. If the enhanced interest was included in the Con-Site lien claim that would be potentially unfair because it would interfere with pro-rata distributions. Even if it is claimed as damages outside of the lien claim, I am not sure that is fair either. Stuart Olson had approximately 20 trades to manage in the face of an ongoing dispute with Sofina. Ultimately, I found that the “pay when paid” clause did not allocate the risk of nonpayment to the subtrades, but the situation was moving, and it was complex. I do not grant the enhanced interest claim, but Con-Site is entitled to ***Judgment Interest Act***, RSA 2000, c J-1 interest in the same way as the other claimants. Con-Site is not entitled to any costs (solicitor-client or otherwise) for matters relating to the enhanced interest claim.

Finally, I deal with the costs of this costs hearing. The costs issues needed to be settled. While all parties bore costs in relation to the January 25, 2024 hearing, I direct that all parties bear their own costs in relation to the costs and interest hearing and the matters which I have dealt with in this endorsement. The costs procedure needed to be resolved and the submissions of all parties were reasonable. It is not reasonable or fair to allocate them to the party responsible for paying the costs (Stuart Olson). The sheer number of participants required a forum that could deal with all of the claims. The review officer will be able to deal with costs of the reviews on an individual basis when they are heard.

Nothing in these reasons is intended to discourage the parties from settling individual claims prior to their review.

Thank you very much to counsel for the quality and organization of their presentations for the hearing which allowed the matters to be heard in one extended afternoon session.

DATE OF DECISION: 2024-01-31

Signed: _____

APPLICATIONS JUDGE J. R. FARRINGTON