

CITATION: 9357-1578 Quebec Inc. v. Bondfield Construction Company Limited, 2025 ONSC 1892

COURT FILE NO.: CV-18-595430

DATE: 20250501

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 9357-1578 Quebec Inc., Plaintiff

AND:

Bondfield Construction Company Limited, Zurich Insurance Company Ltd. And Travelers Guarantee Company of Canada also known as Travelers Insurance Company of Canada, Defendants

BEFORE: Cavanagh J.

COUNSEL: *Adam Wainstock*, for the Plaintiff

Rebecca Torrance and Denise Bambrough for the Defendant Zurich Insurance Company Ltd.

Evan Cobb for Ernst & Young Inc. as Court-appointed Monitor of Bondfield Construction Company Limited

HEARD: January 13, 2025

ENDORSEMENT

Introduction

[1] Zurich Insurance Company Ltd. ("Zurich") moves for:

- (a) A declaration that an agreement described as an Assignment Agreement is null and void, on the basis that consent for Mometal Structures Inc. ("Mometal") to assign to 9357-1578 Quebec Inc. ("9357") certain claims (the "Delay Claims") flowing from a subcontract was neither sought nor received from Bondfield Construction Company Limited ("Bondfield") in accordance with the subcontract prior to the purported assignment;
- (b) An order pursuant to Rule 21.03(3)(d) of the *Rules of Civil Procedure* dismissing three related actions against the defendants on the grounds that they are an abuse of the process of the Court, as the assignment agreement purporting to give 9357 the right to advance the Delay Claims in the three related actions is null and void and/or due to 9357's failure to immediately disclose the assignment agreement in accordance with the law;

- (c) In the alternative, an order that in the related actions, Zurich and Bondfield are entitled to set off their claims for damages as a result of Mometal's insolvency, as against 9357.

[2] For the following reasons, Zurich's motion is dismissed.

Factual background

[3] In 2011 Bondfield entered into a contract with the TTC (the "Prime Contract") for the construction of the TTC Finch West Subway Station (the "Project"). Mometal, a structural and miscellaneous metals trade, was a subcontractor to Bondfield on the Project as well as other TTC projects.

[4] Zurich and Travelers Guarantee Company of Canada ("Travelers") are the named sureties in the Labour and Materials Bond which was posted by Bondfield in connection with the Project.

[5] 9357 is a Quebec corporation and, pursuant to the Assignment Agreement at issue on this motion, is the assignee of certain claims of Mometal, including a claim for project extension costs incurred by Mometal on the Project. These claims are the "Delay Claims".

9357 Actions

[6] On February 22, 2018, Mometal delivered a claim for lien for the amount of \$3,839,731.13 (the "Given Lien").

[7] The Given Lien was perfected on March 23, 2018 when a statement of claim was issued.

[8] The Given Lien was "bonded off" by Bondfield on March 29, 2018 when Bondfield posted security into court by way of a Zurich lien bond in the amount of \$3,889,731.13 (being the amount of the claim for lien plus \$50,000 as security for costs) (the "Lien Security") pursuant to section 44 of the *Construction Lien Act*.

[9] Also on March 29, 2018, Mometal registered a construction lien in the same amount on title to the Project lands (the "Registered Lien"). The Registered Lien was perfected upon an action being commenced by Mometal on April 16, 2018

[10] On April 9, 2018, Mometal commenced this action naming Zurich, Travelers and Bondfield as defendants, making a claim for unpaid contract amounts and a Delay Claim under the Labour & Materials Bond (the "Surety Action").

[11] In these three actions, Mometal seeks payment for the same amounts on the same basis.

[12] In June 2018 Bondfield defended all three actions and counterclaimed against Mometal. Mometal defended the counterclaims.

[13] Zurich has defended the Surety Action and counterclaimed for losses suffered as a result of Mometal's insolvency.

Sale of Mometal and the Assignment Agreement

[14] Leading up to September 2017, Joseph Cicarelli ("Cicarelli") was the sole shareholder of Mometal's shares. In September 2017 Cicarelli transferred all of the shares of Mometal to 9357. 9357 then sold a majority interest in Mometal (with 9357 retaining a minority interest, while Cicarelli remains the sole shareholder of 9357).

[15] At the time of the sale, a number of claims of Mometal were excluded from the sale and retained by 9357 (the "Excluded Claims"). The Finch West Project Extension Claim was one such claim.

[16] Under the terms of the sale, while Mometal agreed to pursue the Excluded Claims, they were transferable by Mometal to 9357 upon request.

[17] On August 22, 2018, Mometal and 9357 signed an agreement to formally assign the Delay Claims to 9357 (the "Assignment Agreement").

Mometal Minutes of Settlement

[18] In October 2018, Mometal, Bondfield and Zürich entered into Minutes of Settlement whereby a number of claims which Mometal had against Bondfield settled, including Mometal's contract claim of \$791,000 on the Project. Mometal agreed to complete a number of projects that were ongoing for Bondfield. The Minutes of Settlement included a carve out for the Delay Claims in favour of Mometal.

[19] 9357 was not a party to the settlement. The Assignment Agreement was not disclosed to Zurich and was not known by Zurich or Bondfield at this time.

Receivership of Mometal

[20] On May 8, 2019, Deloitte Restructuring Inc. was appointed by Order of this Court as receiver of the property and assets of Mometal under s. 243 of the *Bankruptcy and Insolvency Act*.

Notice of Assignment Agreement

[21] Notice of the Assignment Agreement was delivered to Bondfield on November 28, 2018.

[22] On June 17, 2019, 9357 obtained Orders to Continue in the three actions which refer to the assignment by Mometal of certain claims to 9357. These Orders to Continue were served on Zurich.

Pleadings in Surety Action

[23] On December 6, 2023, Zurich served a Statement of Defence and Counterclaim in the Surety Action.

[24] On July 18, 2024, 9357 served a Statement of Defence to Zurich's Counterclaim in the Surety Action.

Analysis

[25] Zurich submits that an order should be granted pursuant to rule 21.03(3)(d) of the *Rules of Civil Procedure* staying or dismissing the three related actions.

[26] Zurich submits that it would be an abuse of the process of the Court to allow the related actions to proceed due to (i) the ineffectiveness of the Assignment Agreement, and (ii) 9357's failure to immediately disclose the Assignment Agreement which, it submits, significantly altered the adversarial litigation landscape.

Is Zurich entitled to seek relief in the lien actions to which it is not a party?

[27] Zurich brings this motion (by way of cross-motion) in this action to which it is a party.

[28] Zurich is not entitled to seek relief on this motion in the two lien actions to which it is not a party.

Is the Assignment Agreement null and void?

[29] Zurich relies on the principle that where, by contract, restrictions are placed upon the right of a party to assign its rights under the contract, an assignment in violation of those restrictions provides no right to enforce the assignor's rights under the contract. See *Arbutus Garden Homes Ltd. v. Arbutus Gardens Apartments Corp.*, 1996 CarswellBC 445, at para. 108.

[30] Section 1.2.1 of the Subcontract provides that "[n]either party to the Subcontract shall assign the Subcontract or a portion thereof without the written consent of the other, which consent shall not be unreasonably withheld".

[31] Bondfield's consent to the assignment of the Delay Claims was not sought or received.

[32] Zurich submits that, as such, 9357 should not be permitted to advance the Delay Claims as they were not properly assigned and that to allow it to do so would be manifestly unfair to the defendants and amount to an abuse of process.

[33] Where reliance is placed on a contractual restriction on or prohibition against assignment, the wording of the contractual restriction or prohibition must be analyzed. See *Brio Beverages (B.C.) Inc. v. Koala Beverages Ltd.*, 1998 CanLII 6495 (BCCA), at paras. 5-7.

[34] In the Subcontract, the term "Subcontract" is defined as follows:

The Subcontract is the undertaking by the Contractor and the Subcontractor to perform their respective duties, responsibilities, and obligations as prescribed in the Subcontract Documents and represents the entire agreement between the Contractor and the Subcontractor.

[35] The Assignment Agreement provides that the Assignor and the Assignee agree:

1. The Assignor hereby assigns to the Assignee all of the Assignor's rights, title and interest in the claim related to its contract number 1456 with BONDFIELD CONSTRUCTION COMPANY LIMITED for the TORONTO YORK SPADINA SUBWAY EXTENSION - FINCH WEST STATION project which arose prior to September 1st, 2017 ("Claim").

[36] By the time of the Assignment Agreement, the project was completed. Mometal had already performed its duties, responsibilities, and obligations as prescribed in the Subcontract Documents. The Assignment Agreement does not provide for an assignment of the undertaking by Mometal to perform its duties, responsibilities, and obligations as prescribed in the Subcontract Documents. The Assignment Agreement provides for assignment of a claim. Such an assignment is not precluded by the subcontract.

[37] I conclude that Zurich has failed to show that under the Subcontract, Bondfield's consent to the assignment of the Delay Claims was required.

Is the Assignment Agreement null and void because it purports to assign a bare cause of action which is not assignable?

[38] Zurich submits that the Assignment Agreement purports to assign a bare cause of action and that the proposed assignment does not fall into one of the exceptions to the general prohibition against assignment of a bare cause of action. In support of this submission, Zurich relies on *Frederickson v. Insurance Corp of British Columbia*, 1986 CarswellBC 131 (BCCA), aff'd 1988 CanLII 38 (SCC).

[39] In *Frederickson*, at paras. 43-44, McLachlin J.A. (as she then was) noted that our courts uphold assignments which the English Courts of Equity would have previously enforced. McLachlin J.A. listed six categories which are considered unassignable. One of these is "[m]ere rights of action (assignments savouring of maintenance and champerty)". With respect to this category, McLachlin J.A. held:

The rule precluding the assignment of mere rights of action in contract is based on the rule against maintenance and champerty. As in the case of causes of action in tort, where the assignee possesses a sufficient pre-existing interest in the cause of action assigned, the suggestion of maintenance is negated and the assignment is valid: *Trendtex Trading Co. v. Crédit Suisse*, supra. In considering the assignability of the cause of action in tort, I have concluded that the assignee in this case had a genuine pre-existing financial interest in the cause of action assigned and that the

assignment did not savour of maintenance or champerty. The same conclusion applies to the cause of action in contract.

[40] In *Rodaro v. Royal Bank of Canada*, 2002 CanLII 41834 (ON CA), the Court of Appeal for Ontario, at para. 33, addressed the principles that apply when the question is whether a party to a contract may assign the party's rights under a contract:

Aside from limitations imposed by statute, public policy or the terms of a specific contract, a party to an agreement may assign its rights, but not its obligations under that agreement, to a third party without the consent of the other party to the contract. A party will not, however, be allowed to assign its rights under a contract if that assignment increases the burden on the other party to the agreement, or if the agreement is based on confidences, skills or special personal characteristics such as to implicitly limit the agreement to the original parties: *Tolhurst v. Associated Portland Cement Mfrs. (1900) Ltd.*, [1902] 2 K.B. 660 at p. 668, 71 L.J.K.B. 949 (C.A.), affd [1903] A.C. 414, [1900-3] All E.R. Rep. 386 (H.L.); *Tru-Wall Group Ltd. v. Stadium Corp. of Ontario Ltd.*, [1995] O.J. No. 2610 at paras. 10-14 (Gen. Div.); and P.S. Atiyah, *An Introduction to the Law of Contract*, 4th ed. (Oxford: Clarendon Press, 1989) at pp. 378-79.

[41] In response to this motion, 9357 relies on the affidavit of Mr. Cicarelli sworn November 8, 2024. In this affidavit, Mr. Cicarelli deposes that in September 2017, 9357 sold a majority interest in Mometal (retaining a minority stake until Mometal's insolvency). He deposes that as part of that sale, certain claims (including but not limited to the project extension claim on Finch West) were excluded from the sale as the value of them could not be agreed upon at that time. Mr. Cicarelli deposes that those claims were to continue to be pursued by Mometal, but it was agreed that they would be transferable to 9357 by Mometal upon request, as part of the mechanics of the sale. He deposes that the selling price of Mometal was lower as a result of the excluded claims. As such, in August 2018, Mometal assigned the project extension claim on Finch West to 9357 pursuant to that agreement.

[42] With this context explaining the reason for the Assignment Agreement, I conclude that this assignment is not a bare assignment savouring of champerty and maintenance that is not assignable.

Was 9357 required to immediately disclose the Assignment Agreement?

[43] In the Amended Notice of Motion, Zurich pleads that the Assignment Agreement changed the adversarial landscape of the litigation. Zurich pleads that 9357 was required by law to immediately disclose the Assignment Agreement and failed to do so. Zurich pleads that this failure constitutes an abuse of the process of this Court.

[44] In support of Zurich's submissions, it relies upon *CHU de Québec-Université Laval v. Tree of Knowledge International Corp.*, 2022 ONCA 467.

[45] In *CHU*, at para. 55, the Court of Appeal set out the principles on the abuse of process that arises from a failure to immediately disclose an agreement which changes the litigation landscape:

The following principles can be drawn from this court's decisions on the abuse of process that arises from a failure to immediately disclose an agreement which changes the litigation landscape:

- a) There is a "clear and unequivocal" obligation of immediate disclosure of agreements that "change entirely the landscape of the litigation". They must be produced immediately upon their completion: *Handley Estate*, at para. 45, citing *Aecon Buildings v. Stephenson Engineering Limited*, 2010 ONCA 898, 328 D.L.R. (4th) 488 ("Aecon Judgment"), at paras. 13 and 16, leave to appeal refused, [2011] S.C.C.A. No. 84; see also *Waxman*, at para. 24;
- b) The disclosure obligation is not limited to pure Mary Carter or Pierringer agreements. The obligation extends to any agreement between or amongst the parties "that has the effect of changing the adversarial position of the parties into a co-operative one" and thus changes the litigation landscape: *Handley Estate*, at paras. 39, 41; see also *Tallman*, at para. 23; *Waxman*, at paras. 24, 37; *Poirier*, at para. 47;
- c) The obligation is to immediately disclose information about the agreement, not simply to provide notice of the agreement, or "functional disclosure": *Tallman*, at paras. 18-20; *Waxman*, at para. 39;
- d) Both the existence of the settlement and the terms of the settlement that change the adversarial orientation of the proceeding must be disclosed: *Poirier*, at paras. 26, 28, 73;
- e) Confidentiality clauses in the agreements in no way derogate from the requirement of immediate disclosure: *Waxman*, at para. 35;
- f) The standard is "immediate", not "eventually" or "when it is convenient": *Tallman*, at para. 26;
- g) The absence of prejudice does not excuse a breach of the obligation of immediate disclosure: *Handley Estate*, at para. 45; *Waxman*, at para. 24; and
- h) Any failure to comply with the obligation of immediate disclosure amounts to an abuse of process and must result in serious consequences: *Handley Estate*, at para. 45; *Waxman*, at para. 24; *Poirier*, at para. 38. The only remedy to redress the abuse of process is to stay the claim brought by the defaulting, non-disclosing party. This remedy is necessary to ensure the court is able to enforce and control its own processes and ensure justice is done between the parties: *Handley Estate*, at para. 45; *Tallman*, at para. 28; *Waxman*, at paras. 24, 45-47; *Poirier*, at paras. 38-42.

[46] At the time of the Assignment Agreement, 9357 was not a party to the litigation. It did not become a party until Orders to Continue were obtained in June 2019 which were served on Zurich. The Assignment Agreement did not change the adversarial position of the parties to the litigation or change the litigation landscape.

[47] Zurich has not shown that the Assignment Agreement changed the landscape of the litigation. 9357, a non-party, was not under an obligation pursuant to the principles in *CHU* to immediately disclose and produce the Assignment Agreement.

Is the failure by 9357 to disclose the Assignment Agreement at the time of the settlement conference that led to a settlement agreement an abuse of process?

[48] Zurich submits that, apart from the principles in *CHU*, 9357 engaged in an abuse of process when its counsel attended a settlement conference and did not disclose the Assignment Agreement. Zurich contends that had the Assignment Agreement been disclosed to it and Bondfield before the Mometal settlement was made, Zurich and Bondfield would have engaged 9357 in the settlement discussions and included 9357 in the terms and provisions of the Minutes of Settlement.

[49] Zurich points to the Statement of Defence of 9357 to the Counterclaim of Zurich where 9357 pleads that "neither Zurich nor Bondfield is entitled to set-off alleged claims they may have against Mometal from the amounts owing to 9357 on account of the Project and furthermore, even if it were somehow able to set off against claims made by 9357 (as assignee), such allegations are not available to be made by Zurich on Bondfield's behalf."

[50] Zurich submits that it is prejudiced by the position taken by 9357, as pleaded, because as a result of the Assignment Agreement, it is confronted with a defence to its Counterclaim by 9357 that it would not be required to address if there were no assignment of the Delay Claims by Mometal to 9357.

[51] In *Holt v. Telford*, 1987 CanLII 18 (SCC) 9357, the Supreme Court of Canada explained that equitable set-off may be available where there has been an assignment, with no requirement of mutuality:

Equitable set-off is available where there is a claim for a money sum whether liquidated or unliquidated: see *Aboussafy v. Abacus Cities Ltd.*, 1981 ABCA 136 (CanLII), [1981] 4 W.W.R. 660 (Alta. C.A.), at p. 666. More importantly in the context of this case, it is available where there has been an assignment. There is no requirement of mutuality. The authorities to be reviewed indicate that courts of equity had two rules regarding the effect of a notice of assignment on the right to set-off. First, an individual may set-off against the assignee a money sum which accrued and became due prior to the notice of assignment. And second, an individual may set-off against the assignee a money sum which arose out of the same contract or series of events which gave rise to the assigned money sum or was closely connected with that contract or series of events.

[52] 9357 submits that the legal principles in *Telford* apply to the right of Bondfield and Zurich to assert equitable set-off against 9357, and, although it does not concede that Zurich has such a right, it does not rely on the Assignment Agreement as changing the litigation landscape *vis-à-vis* Zurich with the effect of eliminating Zurich's right of set off.

[53] In these circumstances, given the legal principles in *Telford* and the position taken by 9357, it cannot be said that the Assignment Agreement has the effect of increasing the burden on Zurich.

[54] Zurich has not shown that 9357 engaged in an abuse of process by not disclosing to Zurich the Assignment Agreement until after Orders to Continue were served on Zurich.

Disposition

[55] For these reasons, Zurich's motion in the within action is dismissed.

[56] If the parties are unable to resolve costs, they may make written submissions in accordance with a timetable to be agreed upon by counsel (with reasonable page limits) and approved by me.

Cavanagh J.

Date: May 1, 2025