CITATION: Sjostrom Sheet Metal Ltd. v. Geo A. Kelson Company Limited, 2025 ONSC 2610
COURT FILE NOS.: CV-19-00616159-0000
CV-20-00643699-0000
DATE: 20250429

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Sjostrom Sheet Metal Ltd.	Robert Lepore, for the moving party
Plaintiff (Moving Party)	
– and –	
Geo A. Kelson Company Limited	Leona Kung, for the responding party
Defendant (Responding Party)	

AND BETWEEN:	
A. Amar and Associates Ltd.	Kevin L. MacDonald and Jason R. Allingham, for the responding party
Plaintiff (Responding Party)	
– and –	
Geo A. Kelson Company Limited	
Defendant (Moving Party)	Leona Kung, for the moving party
	HEARD: April 16, 2025

ROBERT CENTA J.

[1] I heard two motions to oppose the confirmation of a report of Associate Justice Robinson.[1] For the reasons that follow, I dismiss the motions and confirm the report.

[1] Reasons for decision reported at *Sjostrom Sheet Metal Ltd. v. Geo A. Kelson Company Limited*, 2023 ONSC 4959.

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1. Background

[2] The University Health Network built its Centre for Cell & Vector Production in a building located on University Avenue in Toronto. UHN contracted Canadian Turner Construction Company Ltd. as the general contractor for the project. Turner subcontracted with Geo. A. Kelson Company Limited to perform required mechanical work.

[3] In January 2018, Kelson sub-subcontracted A. Amar and Associates Ltd. to perform all sheet metal work for a fixed price of $782,000 plus HST. In turn, Amar engaged Sjostrom Sheet Metal Ltd. to provide sheet metal workers to work on the site.

[4] In July 2018, Sjostrom walked off the job because Amar was not paying it for work performed. Kelson contracted with Sjostrom to return to work at the site if it was paid directly by Kelson going forward. On July 24, 2018, Kelson issued a "Sub-Contract Change Order" to Amar.

[5] The project experienced several delays but reached the point of substantial completion in April 2019.

[6] Amar commenced a non-lien action against Kelson for $209,737.88 in unpaid invoices under its fixed price contract. Sjostrom preserved a construction lien in the sum of $162,840 and commenced an action against Kelson shortly thereafter for its own unpaid invoices. The two actions were heard together before Associate Justice Robinson in October 2022. The associate judge framed the issues as follows:

> [4] The core disputes in these actions are whether Kelson entered into a direct subcontract with Sjostrom to supply the remaining sheet metal labour and whether the change order removed all remaining sheet metal labour from Amar's scope of work. The character of Kelson's payments to Sjostrom hinges on those determinations, namely whether the payments were made under a direct subcontract with Sjostrom or made to Sjostrom as Amar's sub-subcontractor in accordance with a direct payment provision of the… *Construction Act*, R.S.O. 1990, c C.30.
>
> [5] In its non-lien action, Amar claims against Kelson for unpaid services and materials supplied under its sub-subcontract totalling $209,737.88. Amar's position is that it ceased to have any responsibility for sheet metal labour after the change order was issued and that Sjostrom's work after that point was under a separate, direct sub-subcontract between Kelson and Sjostrom. Sjostrom takes the same position. After completing its work, Sjostrom preserved and perfected a lien for $162,840.68 (reduced to $161,585.76 at trial, being the amount of Sjostrom's unpaid invoices sent to Kelson). In its lien action, Sjostrom claims against Kelson both for its lien and in breach of contract.

> [6] Kelson argues that it is caught in the middle of what should be viewed as a dispute between Amar or Sjostrom over who is entitled to payment of the earned and unpaid balance of Amar's sub-subcontract. Kelson acknowledges the amount of $172,490.72, inclusive of HST, remains unpaid. Kelson's position is that it cannot pay the sum to either Amar or Sjostrom until Sjostrom's lien has been decided given Kelson's statutory holdback obligations. Kelson further argues that, since it had no direct contract with Sjostrom, it has no liability in contract for Sjostrom's claim and that Amar is responsible to pay any amounts proven by Sjostrom. Kelson has counterclaimed in Amar's action for both damages and contribution and indemnity for any amounts for which Kelson is found liable to Sjostrom.

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[7] Over the course of the eight-day trial, the associate judge heard evidence from eight witnesses and reviewed hundreds of documents. The associate judge delivered detailed 29-page reasons for decision in which he carefully analyzed the evidence before him, made credibility findings, and interpreted the contract documents that governed the relationship among the parties.

[8] Associate Justice Robinson concluded that Kelson breached its sub-contract with Amar and ordered Kelson to pay $209,737.88 to Amar as damages. Associate Justice Robinson also found that Sjostrom failed to prove its claimed damages, so he dismissed Sjostrom's claim and discharged its lien.

[9] Kelson and Sjostrom each moved for an order opposing confirmation of Associate Justice Robinson's report. I dismiss both motions. Ultimately, the moving parties invite me to retry the actions, to re-weigh the evidence, and to disturb the findings of fact and mixed fact and law reached by Associate Justice Robinson. In my view, the moving parties have not demonstrated that Associate Justice Robinson erred in law or committed a palpable and overriding error.

[10] I dismiss the motions and confirm the report of the associate judge.

2. Standard of review

[11] Kelson and Sjostrom each move under rule 54.09 of the *Rules of Civil Procedure*.[2] Under rule 54.09(5), I may confirm the report of the associate judge in whole, in part, or make such other order as is just.

[12] I am to give the decision below considerable deference. This is particularly the case where, as here, the associate judge heard live evidence. I should confirm the report unless Associate Justice Robinson made an error in principle, exceeded his jurisdiction, patently

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[2] R.R.O. 1990, Reg. 194.

misapprehended the evidence, or if I find the award to be unsatisfactory on all the evidence.[3]

[13] The standard of review on this motion is that of a true appeal: correctness on questions of law; palpable and overriding error on questions of fact.[4] Justice Carole J. Brown described the role of the judge on this type of motion as follows:

> It is not the role of an appellate court to interfere with a conclusion based on an inference drawn from the evidence presented before the trial judge, reassess the weight to be assigned to underlying facts presented at trial, or to interfere with findings of credibility that are based on observation of the witnesses and their evidence. Where evidence exists that supports a conclusion, interference with the conclusion entails interference with the weight assigned by the trial judge to the various pieces of evidence adduced. Where there is no palpable and overriding error with respect to the underlying facts relied on by the trial judge in drawing an inference, it is only where the inference drawing process itself is palpable in error that an appellate court could interfere with the factual conclusion. It is not the role of the appellate court to interfere with factual conclusions with which it may have a difference of opinion regarding the weight to be assigned to the evidence and underlying facts: *Housen v. Nikolaisen*, *supra*, at paras. 21-25.[5]

[14] Associate Justice Robinson heard a lot of highly technical and detailed evidence. He made a series of interconnected findings based on his review of that evidence. These findings required him to consider somewhat cryptic text and email messages along with days of live evidence. Even where I might have assigned different weight to the evidence and the underlying facts, that is not a sufficient basis to interfere with the associate judge's factual conclusions.[6]

3. The Sjostrom action

[15] The associate judge found that Sjostrom and Kelson entered into a sub-subcontract pursuant to which Sjostrom would supply all remaining sheet metal installation labour. Sjostrom was to bill Kelson for the actual hours worked at the agreed rate of $69.50 per

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[3] *Demir v. Kilic*, 2018 ONSC 7279, 97 C.L.R. (4th) 191 (Div. Ct.), at para. 24; *Scott, Pichelli & Easter Ltd. et al. v. Dupont Developments Ltd. et al*., 2019 ONSC 4555, 90 C.L.R. (4th) 191, at paras. 22-24, rev'd on other grounds, 2021 ONSC 6579, 157 O.R. (3d) 772 (Div. Ct.); *R.P. International Forest v. DiFlorio*, 2010 ONSC 4648; *RSG Mechanical Incorporated v. 1398796 Ontario Inc*., 2014 ONSC 3936, 38 C.L.R. (4th) 236; and *Jordan v. McKenzie* (1987), 26 C.P.C. (2d) 193 (Ont. S.C., H.C.), aff'd 39 C.P.C. (2d) 217 (Ont. S.C., C.A.).

[4] *Conrad v. Feldbar Construction Co.* (2004), 70 O.R. (3d) 298 (S.C.J.); *Parma General Contractors Inc. v. Aloe et al.*, 2015 ONSC 6229, 55 C.L.R. (4th) 316, at paras. 10-19, applying *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[5] *Parma General Contractors*, at para. 19.

[6] *Luxterior Design Corp. v. Gelfand*, 2020 ONSC 446, 10 C.L.R. (5th) 310 (Div. Ct.).

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hour for each labourer, plus overtime as required. The associate judge also found as a fact that the parties agreed that the work would be completed by the end of July 2018, and would require the estimated number of hours to complete as outlined in an email from Josh Kelson, dated July 9, 2018.

[16] Sjostrom sent Kelson three invoices on August 11, November 1, and December 21, 2018. Kelson paid the first invoice but refused to pay the next two invoices. Sjostrom had invoiced Kelson for 3,425 hours, which was far in excess of the estimated amounts. Sjostrom claimed $161,585.76 in damages. The associate judge denied recovery to Sjostrom because he concluded that Sjostrom did not prove the number of labour hours actually worked by Sjostrom's labourers.

[17] The only documents tendered by Sjostrom to support these invoices were weekly time summaries prepared by Bill Preston of Sjostrom. Mr. Preston did not send the time summaries to Kelson on a rolling basis. Instead, he only sent them with the invoices, which might have been three months after the hours were supposedly worked.

[18] Importantly, Mr. Preston admitted that he had no first-hand knowledge of the time he included in the summary sheets. He simply recorded what Jeff Preston of Sjostrom told him on the telephone, in text messages, or in meetings. Sjostrom did not produce those text messages or email messages to corroborate the information in the time sheets. Moreover, the workers on the job site did not prepare or sign time sheets that contemporaneously recorded the number of hours worked on a particular day or described the tasks performed.

[19] Associate Justice Robinson concluded that Sjostrom tendered insufficient evidence to prove that the hours claimed were actually spent on the job. The associate judge concluded that Sjostrom was entitled to claim only the hours that Kelson had accepted by paying the first invoice.

[20] Sjostrom submits that I should refuse to confirm the report for two reasons. First, Sjostrom submits that the associate judge applied the incorrect standard of proof. Second, Sjostrom submits that the associate judge failed to consider the totality of the evidence or ignored or misapprehended certain evidence. I do not accept these submissions.

A. The standard of proof

[21] Sjostrom submits that the associate judge applied an incorrect standard of proof. Sjostrom submits that the associate judge applied a test of "strict proof" which it submits is a higher standard of proof than "balance of probabilities." I find that the associate judge applied the correct standard of proof.

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[22] First, an associate judge is presumed to know the law with which they work day in and day out.[7] Associate judges are very busy, and they are not required to demonstrate knowledge of basic civil law principles. I start my analysis with the strong presumption that Associate Justice Robinson was fully aware that Sjostrom needed to prove its damages on the balance of probabilities.

[23] Second, and relatedly, I must read the lengthy and detailed reasons for decision functionally, contextually, and with this presumption in mind.[8] Adopting this approach, I have no doubt that Associate Justice Robinson applied the correct standard of proof. Indeed, he expressly stated the correct standard of proof at the beginning of his reasons for decision:

> [47] In my view, Sjostrom has failed to tender sufficient evidence to prove, on a balance of probabilities, that the time summaries accurately reflect the hours actually spent by Sjostrom on the project. I thereby cannot find that Sjostrom has a valid claim for any payment above the amount already paid by Kelson.

[24] Against this, Sjostrom points out two places in the reasons for decision where the associate judge cited earlier cases for the proposition that the records for the time spent by workers must be "strictly proved."[9] However, read in context, there is no doubt that the associate judge determined the case on the correct standard of proof:

> [74] As noted above, time spent by labourers on a project must be strictly proved given the difficulty in verifying it after the fact: *Infinity Construction Inc., supra* at para. 114. In my view, the time summaries and testimony of Bill Preston and Jeff Preston are insufficient to meet Sjostrom's evidentiary onus to demonstrate what actual hours were incurred, how the hours were incurred, why they were so significantly higher than Josh Kelson's unchallenged expectations as set out in his email of July 9, 2018 and Jeff Preston's subsequent minimum estimate of August 2, 2018, and why Sjostrom provided no notice to Kelson that actual labour hours were greatly exceeding those figures until Sjostrom rendered its invoices.

[7] *Heliotrope Investment Corporation v. 1073650 Ontario Inc.*, 2024 ONCA 767, at para 11; *Kikites v. York Condominium Corporation No. 382*, 2024 ONCA 34, at para 33; *1346134 Ontario Ltd. v. Wright*, 2023 ONCA 307, 166 O.R. (3d) 250, at paras. 56-57; and *Farej v. Fellows*, 2022 ONCA 254, at paras. 46-47, leave to appeal refused, [2022] S.C.C.A. No. 180.
[8] *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at paras. 5, 69, and 74; *Levac v. James*, 2023 ONCA 73, 89 C.C.L.T. (4th) 27, at para. 76.
[9] *Infinity Construction Inc. v. Skyline Executive Acquisitions Inc.*, 2020 ONSC 77, 6 C.L.R. (5th) 110, at para. 114, citing *G.T. Parmenter Construction Ltd. v. Sanders*, 1947 CarswellOnt 248, at para. 10.

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> [75] On a balance of probabilities, I cannot find in Sjostrom's favour. It has tendered insufficient evidence to support a finding that the hours claimed were, in fact, spent. I thereby find that Sjostrom has failed to prove its claimed supply of services, at least in excess of the amounts already paid by Kelson. This finding is dispositive of Sjostrom's lien and contract claims. [Emphasis added.]

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[25] Simply referring to the need for strict proof is not, in and of itself, enough to demonstrate legal error. I do not see my role on this motion as being to hold the reasons for decision up to a standard of perfection or to conduct a line-by-line treasure hunt for error.[10] The phrase "strict proof" continues to appear in reasons for decision without raising any concern that the judge misapprehended the civil standard of proof.[11] Read in context of the rest of the reasons for decision, I have no doubt that the associate judge applied the correct standard of proof.

B. The consideration of the evidence

[26] Sjostrom submits that the associate judge failed to consider the totality of the evidence or ignored or misapprehended the evidence.

[27] It is important to note that the associate judge was not obliged to refer to each piece of evidence in his reasons.[12] A judge is only required to refer to evidence that is material to the issues to be determined and I may not disturb the associate judge's findings simply because he failed to refer to some of the evidence.[13] It is not my function to second-guess how the associate judge weighed this evidence. I do not accept Sjostrom's submission that the associate judge committed a palpable and overriding error by failing to consider the totality of the evidence or misapprehending the evidence.

[28] Sjostrom submits that the time summaries submitted by Sjostrom to prove its damages needed to be considered "in the context of the evidence as a whole." In my view the

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[10] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 102.
[11] See, for example, *McCabe v. Roman Catholic Episcopal Corporation*, 2019 ONCA 213, 146 O.R. (3d) 607, at para. 72 ("A defendant is under no obligation to admit liability and, subject to attracting the elevated costs consequences I refer to below, may put the plaintiff to the strict proof of his or her allegations, no matter how painful the litigation process proves to be for the plaintiff, without fear of invoking a punitive damages award."); *Cadieux v. Cloutier*, 2018 ONCA 903, 143 O.R. (3d) 545, at para. 92 ("With respect to the assignment and trust provisions of the statute, as more fully explained in our reasons in *Carroll*, we see no principled basis on which to apply different approaches to SABs received before and after trial. The statutory assignment and trust provisions make it unnecessary to require strict proof of entitlement to future benefits."); and *Cobb v. Long Estate*, 2017 ONCA 717, 416 D.L.R. (4th) 222, at para. 154, ("The trial judge's assessment of costs, in any event, at approximately $409,000 on a judgment of $22,136.60, (or $34,000, as the trial judge found) is out of all proportion and cannot stand. This was a chronic pain case. These sorts of cases are never a sure thing from the plaintiff's perspective. The defence will, as here, put the plaintiff to the strict proof of his case. There was nothing "wrong" with the defence expert giving evidence that he found signs suggestive of malingering in the plaintiff's test scores.").
[12] *Kassabian v. Marcarian*, 2025 ONCA 239, at para 44.
[13] *Canada Forgings Inc. v. Atomic Energy of Canada Limited*, 2024 ONCA 677, at para. 26.

associate judge committed no palpable and overriding error in his consideration of the evidence.

[29] First, Sjostrom submits that the associate judge failed to consider the evidence of Eric Rautanen, Chris Ulyette, and Gary Caldwell with respect to how the complexity of the project and job site conditions affected installation efficiencies and time estimates. However, the associate judge explicitly referred to and considered this evidence in paragraph 61 of his reasons for decision.

[30] Second, Sjostrom submits that the associate judge failed to consider the evidence of Alain Amar, Eric Rautanen, Chris Ulyette, and Gary Caldwell regarding the delivery of materials. However, the associate judge explicitly referred to and considered this evidence in paragraph 61 of his reasons for decision.

[31] Third, Sjostrom submits that the associate judge failed to consider the work orders submitted by Sjostrom to Amar for materials. I disagree. As noted above, the associate judge was not obliged to refer to each piece of evidence in his reasons. The work orders are not material to the question before the associate judge. The associate judge was to determine whether Sjostrom proved that the hours claimed were actually incurred by Sjostrom's labourers, were required, and were spent completing its contractual scope of work. There is nothing on the face of the work orders, considered separately or together, that is relevant to the question of whether a particular worker worked the number of hours Sjostrom claimed on a particular day.

[32] There is no evidence that the associate judge ignored or misapprehended the evidence in the record. Indeed, Associate Justice Robinson's detailed and thorough reasons suggest he was fully alive to the record generated during the eight-day trial. It was for him to weigh and evaluate the evidence.

[33] Sjostrom has not satisfied me that the associate judge committed any errors, much less a palpable and overriding error in his consideration of the evidence.

C. Conclusion

[34] Sjostrom has not demonstrated that Associate Justice Robinson committed an error that would justify an order denying confirmation of his report dated June 11, 2024. The motion is dismissed, and the report is confirmed.

4. The Amar action

[35] As noted above, the associate judge found that Sjostrom and Kelson entered into a separate sub-subcontract under which Sjostrom would perform all sheet metal labour. This finding by the associate judge informed but did not determine whether Amar was required to complete the same scope of work under its existing subcontract with Kelson. The answer to this question turned in large part on the meaning to be given to the "Sub-Contract Change Order" order that Kelson delivered to Amar on July 24, 2018. It read as follows:

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> Work performed by others -$61,924.50
>
> This subcontract revision is subject to all terms and general conditions of the original subcontract.

[36] Amar and Kelson agreed that the reference in the change order to “work performed by others” refers to work performed by Sjostrom. However, Amar and Kelson disagreed on the impact of the change order on the subcontract. At trial, Amar took the position that the change order fully removed sheet metal labour from its scope of work and that Kelson was therefore required to pay the balance of its fixed price contract without further deduction. On the other hand, Kelson took the position that the change order merely credited the amount noted on the change order ($61,924.50) against the sub-subcontract price but did not remove the sheet metal labour scope of work.

[37] The associate judge concluded that the change order fully removed the sheet metal labour from Amar’s scope of work. The associate judge concluded that Kelson breached the sub-subcontract by failing to pay Amar all amounts withheld by Kelson after it was paid by Turner. The associate judge accepted Amar’s submission that the earned and unpaid amount totaled $209,737.88.

[38] Kelson submitted that it was entitled to set off all amounts it paid to Sjostrom for sheet metal labour against any amounts otherwise owing to Amar. The associate judge rejected this submission, finding that Kelson was entitled to set off (or be indemnified for) sheet metal labour costs under contract, agreement, or implication. Associate Justice Robinson granted judgment in favour of Amar against Kelson in the amount of $209,737.88.

[39] At the oral argument of this motion, Kelson advanced two arguments. Kelson submitted that the associate judge made palpable and overriding errors in finding that:

a. the change order fully removed sheet metal labour from its scope of work; and

b. Kelson was not entitled to an indemnity or set-off by contract, agreement, or implication.

[40] For the reasons that follow, I do not accept Kelson’s submissions.

A. The change order

[41] The parties agreed that Kelson had the rights under the contract to issue a change order that unilaterally amended the scope or price of Amar’s subcontract. Kelson submits that the associate judge committed palpable and overriding errors when he determined that Kelson fully removed sheet metal labour from Amar’s scope of work when it issued the change order on July 24, 2018. I disagree.

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[42] Kelson does not suggest that the associate judge made an error of law. I agree. The associate judge correctly set out the principles of contract interpretation from *Sattva*.[14]

[43] The associate judge noted the cryptic nature of the change order, which he correctly observed "states very little." The associate judge correctly determined that it would be necessary to look at the surrounding circumstances to determine the meaning of the change order. Kelson agrees that it was appropriate for the associate judge to do so.

[44] The associate judge considered the surrounding circumstances in paragraphs 86 to 105 of his reasons for decision. Kelson has not persuaded me that the associate judge committed any palpable or overriding errors in his consideration of the evidence. The associate judge was entitled to weigh the evidence before him and to reach conclusions regarding the meaning of text messages and emails. The associate judge's conclusions are firmly rooted in the record.

[45] The associate judge also concluded that the meaning of the change order was ambiguous and that it was drafted solely by Kelson. Accordingly, it was appropriate for him to consider the conduct of the parties after the change order was issued. He committed no error in proceeding this way. Associate Justice Robinson considered the parties' conduct in detail and set out his findings in paragraphs 105 to 114 of his reasons for decision. In my view, the associate judge did not allow the parties' conduct to overwhelm either the language of the contract or the circumstances known to both parties at the time of the change order.

[46] Stepping back and considering the contract language, the surrounding circumstances, and the conduct of the parties, the associate judge focused on the objective understanding of the contract and concluded that the change order removed the remaining sheet metal work from Amar's scope of work:

> [115] Contractual interpretation is objective, not subjective. Regardless of what Josh Kelson or others at Kelson may have intended when Kelson issued the Revision 1 change order, it is the objective standard that applies with regard to the surrounding circumstances.
>
> [116] In my view, on a balance of probabilities, issuing a change order that deducts an estimate amount for future work to be performed by Sjostrom and paid by Kelson, at rates negotiated by Kelson without input or agreement from Amar, is objectively consistent with removing the scope of work from Amar's sub-subcontract. Josh Kelson's understanding of the Revision 1 change order is at odds with Alain Amar's testimony on his own understanding. Both may be subjectively correct. Their testimony supports, and I find, that there was no clear discussion about

[14] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 47, 50.

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> Kelson's intention to hold Amar responsible for completing the remaining sheet metal installation labour and costs all costs associated with it. There is also no contemporaneous communication or other record supporting any such communication.
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> [117] For these reasons, I find that the change order removed the remaining sheet metal labour from Amar's scope of work in the sub-subcontract between Kelson and Amar.

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[47] Kelson has not demonstrated that the associate judge committed any errors, much less a palpable and overriding error, in reaching this conclusion.

B. The right to set-off or indemnity

[48] At trial, Kelson submitted that Amar was required to indemnify Kelson for the actual costs incurred by Kelson to retain Sjostrom to complete the sheet metal work. The associate judge did not accept these submissions. Kelson submits that the associate judge erred by not finding that Kelson was entitled to an indemnity or set-off by contract, agreement, or implication. I disagree.

[49] At paragraph 141 of his reasons for decision, the associate judge correctly set out the law relating to the right to indemnity under the common law as a direct right to reimbursement.[15] Kelson takes no issue with this statement of the law.

[50] First, Kelson submits that the associate judge erred by not finding that it was entitled to an indemnity pursuant to Article III of the contract between Turner and Kelson, which is incorporated by reference into the contract between Kelson and Amar. Article III provided an indemnity in favour of the contractor for expenses incurred due to the delays of the subcontractor. Kelson submits that the associate judge did not consider this provision. I disagree.

[51] The associate judge referred to and considered Kelson's submissions about Article III. The associate judge noted that Article III was not a prominent feature of Kelson's case, and indeed, Kelson referred to Article III for the first time during the re-examination of Josh Kelson. The associate judge observed that Kelson's submissions on the operation of Article III were not "sufficiently detailed," to persuade him that Article III operated on the facts of this case. The associate judge held that any rights granted to Kelson by Article III were superseded by the operation of Article 1.02 and Article 5.01(i) of the sub-subcontract between Kelson and Amar. Those provisions provide as follows:

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[15] "The right to indemnity under the common law as a direct right to reimbursement arises in three circumstances: (i) by express contract, if provided in the terms of a contract between the parties; (ii) by implied contract, if the parties intended such indemnity; or (iii) by implication, if the circumstances demand a legal or equitable duty to indemnify, by which the law recognizes an assumed promise by a person to do what, under the circumstances, they ought to do: *Addison & Leyen Ltd v. Fraser Milner Casgrain LLP*, 2014 ABCA 230 at para. 22, citing *Birmingham & District Land Co. v. London & North Western Railway* (1886), 34 Ch D 261 (Eng CA)."

> 1.02 The provisions of the Subcontract are incorporated by reference *mutatis mutandis* into this Sub-subcontract so that the Subcontractor shall be substituted in same in place of the Contractor and the Sub-subcontractor shall be substituted in same in place of the Subcontractor. In the event of any conflict or inconsistency between the provisions of this Sub- subcontract and the Subcontract, the provisions of this Sub-subcontract shall govern and prevail.
>
> …
>
> 5.01 Without limitation, the Sub-subcontractor shall be in default if at any time the Sub-subcontractor.
>
> (i) fails, delays, or refuses to perform the Sub-subcontract Work, or any part thereof, including the provision of materials, supplies, products and/or labour of proper quality and quantity in a manner required by this Sub- subcontract;
>
> …
>
> On the occurrence of any such event, the Subcontractor may give the Sub-subcontractor written notice specifying such default and if such default shall continue without the Sub-subcontractor taking reasonable steps to cure the said default, where the default is capable of being cured, for a period of 2 Business Days following the default notice, the Subcontractor, without prejudice to any other rights or remedies it may have, may terminate this Sub-subcontract and/or, may cure such default or make good such deficiencies, or may complete the outstanding Sub-subcontract Work, all at the cost and expense of the Sub-subcontractor. [Emphasis added]

[52] In my view, it was open to the associate judge to interpret the two agreements together and to reach the conclusion that s. 5.01 conflicted with or was inconsistent with the provisions of Article III, such that s. 5.01 prevailed by operation of s. 1.02. On its face, s. 5.01 and Article III both address delays by subcontractors. The associate judge committed no palpable or overriding error in concluding that, reading the two contracts together, s. 5.01 prevailed over Article III because of conflict or inconsistency.

[53] Second, Kelson submits that the associate judge committed a palpable and overriding error when he determined that s. 5.01 was not triggered by the facts of this case. I disagree.

[54] The associate judge interpreted the provisions of s. 5.01 and concluded that Kelson's rights on default flow from Kelson delivering a written notice of default. The associate judge concluded that, because Kelson had not delivered a written notice of default until well after both Amar and Kelson had completed their work, Kelson did not have the contractual right to charge back Amar for Sjostrom's work:

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> [121] I accordingly find that a default notice was a pre-requisite to Amar being formally in default under the sub-subcontract and Kelson being entitled to exercise any rights against Kelson under Article 5 of the sub-subcontract, including directly engaging Sjostrom and back charging Amar for the cost.
>
> [122] No formal notice of default under Amar's sub-subcontract was issued by Kelson at any point prior to the Revision 1 change order. During cross-examination, Josh Kelson expressly confirmed that an intentional decision was made not to issue a notice of default to Amar and acknowledged that Amar was not formally in default under Article 5 in June 2018. No default notice was issued prior to Kelson ceasing payments to Amar. The only potential default notice sent by Kelson to Amar was in February 2020, when Kelson was purporting to back charge Amar for the costs of the bond obtained to vacate Sjostrom's lien. Josh Kelson acknowledged during cross-examination that the notice was issued some seven months after Kelson had completed its subcontract work and after Kelson had received a final payment from Turner.
>
> [123] Since no default notice was issued until well after Amar and even Kelson had completed work on the project, I find that Amar was not formally in breach of the subcontract at any material time. Kelson thereby had no contractual right to back charge Amar for Sjostrom's work beyond the agreed value in the Revision 1 change order.

[55] This interpretation of the contract was available to the associate judge. Kelson has not pointed to any palpable or overriding error in the associate judge's analysis.

[56] Third, Kelson submits that the associate judge erred by not implying an agreement that Amar would indemnify Kelson for costs paid to Sjostrom. I disagree. It was open to the associate judge, who heard eight days of evidence, reviewed hundreds of documents, and considered the sub-subcontracts' entire agreement clause, to conclude that "the totality of evidence does not support any finding that Amar intended to or did agree to an indemnity for actual costs of completing the sheet metal labour when Kelson retained Sjostrom to complete it. Indemnity by implication is not appropriate here."

[57] I see no error, much less a palpable and overriding error, in the reasons of the associate judge.

C. Conclusion

[58] Kelson has not demonstrated that Associate Justice Robinson committed an error that would justify an order denying confirmation of his report dated June 11, 2024. The motion is dismissed, and the report is confirmed.

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5. Costs

[59] For the reasons set out above, I dismiss the motions and confirm the report of Associate Justice Robinson dated June 11, 2024.

[60] I urge the parties to try and resolve the costs of these motions. If they are not able to do so, I set the following timetable for the delivery of costs submissions:

a. for the Sjostrom action:

   i. Kelson may email its costs submission of no more than three double-spaced pages to my judicial assistant on or before May 6, 2025; and

   ii. Sjostrom may email its responding costs submission of no more than three double-spaced pages to my judicial assistant on or before May 13, 2025;

b. for the Amar action:

   i. Amar may email its costs submission of no more than three double-spaced pages to my judicial assistant on or before May 6, 2025; and

   ii. Kelson may email its responding costs submission of no more than three double-spaced pages to my judicial assistant on or before May 13, 2025.

Robert Centa J.

Released: April 29, 2025

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CITATION: Sjostrom Sheet Metal Ltd. v. Geo A. Kelson Company Limited, 2025 ONSC 2610
COURT FILE NOS.: CV-19-00616159-0000
CV-20-00643699-0000
DATE: 20250429

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Sjostrom Sheet Metal Ltd.

Plaintiff (Moving Party)

– and –

Geo A. Kelson Company Limited

Defendant (Responding Party)

AND BETWEEN:

A. Amar and Associates Ltd.

Plaintiff (Responding Party)

– and –

Geo A. Kelson Company Limited

Defendant (Moving Party)

REASONS FOR JUDGMENT

Robert Centa J.

Released: April 29, 2025