CITATION: Elembe (LMB) Mechanical Ltd. v. Two Hundred Inc., 2025 ONSC 4655
COURT FILE NO.: CV-19-632176
DATE: 2025 08 11

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF the *Construction Act*, RSO 1990, c. C.30, as amended

B E T W E E N:	)	
	)	
ELEMBE (LMB) MECHANICAL LTD.	)	W.R. MacDougall and T. Obradovic,
	)	*for the plaintiff / defendant by counterclaim*
	)	
Plaintiff/	)	
Defendant by counterclaim	)	
	)	
- and -	)	
	)	
	)	
TWO HUNDRED INC.	)	H. Niroomand, *for the defendant / plaintiff*
	)	*by counterclaim*
	)	
Defendant/	)	
Plaintiff by counterclaim	)	
	)	
	)	**HEARD:** In writing

REASONS FOR DECISION ON COSTS AND INTEREST

Robinson A.J.

[1] Elembe (LMB) Mechanical Ltd. ("LMB") and Two Hundred Inc. ("200") each seek their costs of the trial in this lien action, in which I held that LMB had proven an earned and unpaid amount owing by 200 of $172,740.47, including HST, but failed to prove a timely lien. I granted judgment in contract to LMB, dismissed 200's counterclaim, declared LMB's lien expired, and ordered the return of lien security.

[2] LMB seeks its costs of the action in the amount of $139,061, including HST and disbursements, on a substantial indemnity basis. LMB argues that it was predominantly successful at trial and made three reasonable offers to settle, none of which were accepted by 200. 200 arges that it should be entitled to partial indemnity costs or, alternatively, that there be no costs.

Analysis on costs

[3] I am afforded broad discretion in deciding costs of this action by s. 86 of the *Construction Act*, RSO 1990, c C.30 as it read on June 29, 2018, *i.e.,* the *Construction Lien Act* (the "*CLA*"), which is applicable in this lien action. Pursuant to s. 67(3) of the *CLA*, both s. 131 of the *Courts of Justice Act*, RSO 1990, c C.43 and subrule 57.01(1) of the *Rules of Civil Procedure*, RRO 1990, Reg 194 (the "*Rules*") also apply in deciding costs, except to the extent of any inconsistency with the *CLA.*

[4] When deciding costs, I am required to focus on the specific facts and circumstances of the case in relation to the factors as set out in subrule 57.01(1) of the *Rules.* I am to be governed by the overriding principle of reasonableness, namely what I view as a reasonable amount that should be paid by the unsuccessful party rather than any exact measure of the actual costs of the successful litigant: *R&G Draper Farms (Keswick) Ltd. v. Nature's Finest Produce Ltd.,* 2016 ONCA 626 at paras. 10-11.

[5] I find no basis to award LMB costs on a substantial indemnity basis. As I expressly set out in para. 180 of my reasons for decision, I made findings against LMB that it had wrongfully suspended work, breached the contract, abandoned the job, and registered a claim for lien after its lien rights had already expired. I agree with 200 that, despite the fact of an adverse monetary judgment against it, 200 did have a measure of success at trial in obtaining those findings. I also expressly acknowledged the inequity in granting judgment in LMB's favour given such findings, which I noted would properly be considered in costs.

[6] I am unconvinced by LMB's arguments that its three offers to settle over the course of litigation support a substantial indemnity award against 200. The two most recent offers were less favourable to 200 than the result. I thereby disagree that failing to accept them was unreasonable and should be held against 200. The first offer, which was made informally by email after mediation in January 2022, would have been more favourable, but required payment within two weeks and was only open for acceptance for one week. I am not satisfied that LMB beating its short-lived offer made years before trial justifies a substantial indemnity award for the entirety of the litigation, particularly given the adverse findings made against LMB at trial.

[7] LMB points to 200's conduct as supporting adverse costs, including failing to consent to a judgment of reference (which led to a costs award that remained unpaid for years), breaching my timetable orders in this reference (leading to various peremptory deadlines being imposed), serving a non-compliant Scott Schedule, and failing to deliver documents supporting Scott Schedule positions. LMB argues that such conduct increased LMB's costs of discovery, trial preparation, and trial. I agree that such conduct is relevant in costs, particularly given s. 67(1) of the *CLA*, which requires that the procedure in a lien action be as far as possible of a summary character, having regard to the amount and nature of the lien in question.

[8] However, 200's conduct is tempered in costs by LMB's invalid lien. 200 relies on s. 35 of the *CLA*, which provides that any person who preserves a claim for lien (a) for an amount which the person knows or ought to know is grossly in excess of the amount which the person is owed; or (b) where the person knows or ought to know that the person does not have a lien, is liable to

any person who suffers damages as a result. I agree with LMB that s. 35 damages were not argued at trial and no evidence was tendered on such damages. However, preserving or perfecting a lien that has expired is expressly contemplated as being relevant to costs in s. 86(1) of the *CLA.*

[9] LMB registered its lien for $260,134.31. That amount had been reduced to $259,866.50 by the time of the first hearing for trial directions in this reference. It was further reduced to $244,611.49 in November 2023, when the claim was amended. The lien was not ultimately proven. Although judgment was obtained, it was for a lesser amount than the claim. 200 incurred costs dealing with the lien, notably costs of vacating it and bond premiums, which ought to be costs and disbursements under s. 86(1) of the *CLA.* However, although the fact of annual bond premiums is noted in 200's submissions, there is no evidence of the cost of that bonding.

[10] Ultimately, though, I am not convinced that 200 is entitled to costs. LMB was the successful party and is presumptively entitled to costs. 200 has not satisfied me that the presumption should not be followed in this case. That said, the factors in subrule 57.01(1) and those discussed above support that the amounts claimed by LMB are not proportionate or reasonable in context of the outcome at trial, including my adverse findings against LMB. I maintain that view even considering 200's conduct during the reference. In my view, a partial indemnity award is appropriate, reduced to account for the extent of divided success on issues, including pursuant of an invalid lien, but accounting for the extent of judgment obtained.

[11] I agree with LMB's submission that the losing party's reasonable expectation as to costs is also a relevant factor: *Rules*, subrule 57.01(1)(0.b); *R&G Draper Farms (Keswick) Ltd. v. Nature's Finest Produce Ltd., supra* at para. 12. In that regard, 200's own bill of costs is material. Although the total costs claimed by 200 are lower than those claimed by LMB, the claimed rates of the lawyers and clerks are also lower.

[12] For these reasons, I fix reduced partial indemnity costs of this action, payable by 200 to LMB, in the amount of $48,000, including HST, plus disbursements of $3,708.60, for a total of $51,708.60, which sum shall be payable within thirty (30) days following confirmation of my report from this reference.

Prejudgment interest

[13] At para. 179 of my reasons for decision, I held that LMB was entitled to pre-judgment interest on the judgment amount calculated in accordance with Article 5.3 of the parties' contract, which governs interest. Both parties have made submissions on pre-judgment interest.

[14] LMB submits that pre-judgment interest should run from February 5, 2019, the approximate date of LMB's abandonment (as I found) based on the record at trial. Alternatively, LMB claims pre-judgment interest from the date of registering its lien on October 24, 2019. 200 argues that LMB should be denied interest because it breached the contract and, as the breaching party, LMB cannot rely on the breached agreement to collect interest on the terms of that agreement.

[15] I reject both submissions. 200's submission ignores my finding (as pointed out by LMB in its submissions) and neither party's submissions address operation of Article 5.3. Interest should be calculated in accordance with parties' written agreement.

[16] Article 5.3.1 provides as follows:

> Should either party fail to make payments as they become due under the terms of the *Contract* or in an award by arbitration or court, interest at the following rates on such unpaid amounts shall also become due and payable until payment:
>
> (1) 2% per annum above the prime rate for the first 60 days.
>
> (2) 4% per annum above the prime rate after the first 60 days.
>
> Such interest shall be compounded on a monthly basis. The prime rate shall be the rate of interest quoted by Laurentian Bank of Canada for prime business loans as it may change from time to time.

[17] On a close reading of Article 5.3.1, the clause provides for interest on amounts that are not paid either (i) "as they become due" under the contract, or (ii) in an award by arbitration or court. In my view, the contract does not contemplate interest on earned and unpaid amounts that are not yet "due" under the contract prior to an award by arbitration or court being made and not complied with.

[18] I found an earned and unpaid contract balance of $172,740.47. I did not, however, make any finding that the amount was due under the contract. To the contrary, I found that the unpaid amounts invoiced by LMB were not billed in compliance with the contract and that, as a result, non-payment by 200 was not a breach of the contract.

[19] In my view, the earned and unpaid amount was not "due" under the contract as of abandonment by LMB. No argument has been advanced for why it was "due" when the lien was registered. As set out in para. 157 of my reasons, the amount was recoverable, but at law rather than under the strict terms of the contract.

[20] Article 5.3.1 supports that, since the earned and unpaid amount was never "due" under the contract, pre-judgment interest is not otherwise contemplated by the contract and, therefore, the judgment amount does not accrue it. Interest would accrue only from the date of my judgment since I did not fix a payment deadline. Accordingly, albeit for different reasons, applying Article 5.3.1 leads to the same result as submitted by 200: there shall be no pre-judgment interest on the judgment amount, but interest shall accrue on the judgment amount and costs at the rates outlined in Article 5.3.1.

Report

[21] Competing versions of a report in this reference have been submitted by the parties. I anticipate revising, and signing a final report this week.

ASSOCIATE JUSTICE TODD ROBINSON

DATE: August 11, 2025