

# In the Court of Appeal of Alberta

**Citation: Tempo Alberta Electrical Contractors Co Ltd v Man-Shield (Alta) Construction Inc, 2025 ABCA 282**

**Date:** 20250815  
**Docket:** 2403-0152AC  
**Registry:** Edmonton

**Between:**

**Tempo Alberta Electrical Contractors Co. Ltd.**

Appellant

- and -

**Man-Shield (Alta) Construction Inc.**

Respondent

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**The Court:**

**The Honourable Justice Jolaine Antonio  
The Honourable Justice April Grosse  
The Honourable Justice Karan M. Shaner**

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## **Reasons for Judgment**

Appeal from the Decision by  
The Honourable Justice M. Kraus  
Dated the 14th day of June, 2024  
(Docket: 1703 06075)

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## Reasons for Judgment

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### The Court:

### Introduction

[1] This is an appeal of a chambers judge’s decision (the *Decision*) dismissing a contempt application against the respondent, Man-Shield (Alta) Construction Inc. (“Man-Shield”). The contempt application was based on Man-Shield’s failure to pay funds into court as directed by this Court in *Tempo Alberta Electrical Contractors Co Ltd v Man-Shield (Alta) Construction Inc*, 2022 ABCA 409 [*Tempo 2022*].

[2] The appeal is allowed in part for reasons below.

### Background

[3] The appellant, Tempo Electrical Contractors Co. Ltd. (“Tempo”), and Man-Shield have been involved in litigation since 2017. The litigation relates to the construction of a seniors’ care facility in Edmonton between 2015 and 2017. The owner of the facility, Shepherd’s Care, hired Man-Shield as the general contractor for the project. Man-Shield, in turn, hired Tempo as a subcontractor to perform the necessary electrical work on the project.

[4] Construction was delayed by 45 weeks. Both Man-Shield and Tempo filed builders’ liens on the property. Tempo issued a certificate of substantial performance for its work on December 22, 2016, and subsequently filed liens in February and June 2017. The first lien was removed from the property by a court order dated February 24, 2017, allowing Man-Shield to replace it with a bond as security for the land.

[5] Tempo’s second lien was removed by a consent order dated June 30, 2017, when Shepherd’s Care paid \$1,199,439.15 into court as security for Tempo’s second lien claim.

[6] In February 2018, Man-Shield and Shepherd’s Care reached a settlement agreement, which included a term by which Shepherd’s Care assigned Man-Shield its right to the money it had paid into court as partial payment of amounts owed to Man-Shield.

[7] In June 2020, an applications judge allowed Man-Shield to replace the \$1,199,439.15 with a lien bond in the same amount. *Applications Judge’s Decision*, AR 97. Tempo appealed that decision, first to the Court of Queen’s Bench (as it was then known), unsuccessfully. *Tempo Alberta Electrical Contractors Co Ltd v Man-Shield (Alta) Construction Inc*, 2021 ABQB 627 [*Tempo 2021*]. It then appealed to this Court, resulting in *Tempo 2022* and the order for Man-Shield to pay \$678,407.88 into court within 90 days. *Tempo 2022* at para 30. Pursuant to s 22 of the *Builders’ Lien Act*, RSA 2000, c B-7 (now called the *Prompt Payment and Construction*

*Lien Act*, RSA 2000, c P-26.4), this Court determined that a statutory trust was triggered when Tempo issued a certificate of substantial performance in 2016. *Tempo 2022* at paras 8, 19.

[8] Man-Shield did not pay the money into court. As a result, Tempo brought an application to hold Man-Shield in civil contempt. The chambers judge dismissed the application on June 14, 2024.

[9] In outlining the history of the litigation, the chambers judge noted that after the applications judge allowed Man-Shield to replace the \$1,199,439.15 held in court with the lien bond, Man-Shield used the money for other projects. He said the following about the statutory trust:

The release of the money was directed after Tempo prepared a certificate of substantial performance. This raises the issue of whether [the] statutory trust under section 22 of the *Builders' Lien Act* in force at the relevant time, now the *Prompt Payment and Construction Lien Act*, has been breached by Man-Shield but this issue can be dealt with at trial.

*Decision* at 5:38-41.

The dismissal of this application is also without prejudice to Tempo asserting at trial that Man-Shield breached the statutory provisions under section 22 of the *Builders' Lien Act*.

*Decision* at 7:19-20.

[10] With respect to the elements of civil contempt, the parties did not dispute that the order clearly and unequivocally stated what needed to be done by Man-Shield, that Man-Shield had actual knowledge of the order, and the breach of the order was deliberate. The only issue was whether Man-Shield had a reasonable excuse for failing to comply with it.

[11] Man-Shield argued it was unable to pay the money into court. The evidence it adduced in support of this included an affidavit sworn by its general manager, Peter Schwind, which included Man-Shield's balance sheet and income statement as of November 2022 showing it had net assets of just over \$300,000 and liabilities of \$2,900. Mr. Schwind deposed that while Man-Shield held significant investments – worth approximately \$1.7 million – they represented investments in another business entity, M Builds (Alta) Partnership (M Builds), in which Man-Shield was a partner. According to Mr. Schwind, Man-Shield had no ability to exit the partnership with any cash. He confirmed this when questioned on his affidavit. Man-Shield also provided an affidavit from Robert Ferraro, a partner in M Builds, attaching an audited financial statement from July, 2023 showing M Builds was in a negative financial situation, with assets of \$7,811,502 and liabilities of \$11,964,299.

[12] Tempo disputed the adequacy of Man-Shield's evidence, citing, *inter alia*, a lack of information about Man-Shield's corporate structure, the details of its investments, and how long it had been operating in a negative cash flow position.

[13] In oral reasons, the chambers judge described what materials were before him and stated he had reviewed all of them. The materials included the affidavits submitted by both parties and the transcript of the questioning on Mr. Schwind's affidavit. He reminded himself that civil contempt requires proof beyond a reasonable doubt, that the onus lies on the applicant, and that a respondent's tactical decision to adduce evidence does not shift that onus. He also noted that the contempt power is discretionary and should be used with great restraint.

[14] The chambers judge accepted Mr. Schwind's evidence that Man-Shield was in a negative financial and cash flow position, noting that Mr. Schwind was unshaken on this point when questioned on his affidavit. He concluded Man-Shield had a reasonable excuse for not paying the money into court as directed by the order.

### Grounds of Appeal

[15] Tempo advances three grounds of appeal: (1) the chambers judge failed to consider all relevant evidence; (2) the chambers judge erred in concluding that Man-Shield had a reasonable excuse for not paying the money into court as ordered; and (3) the chambers judge erred in stating the question of whether the statutory trust could be resolved at trial.

### Standards of Review

[16] Failing to consider relevant evidence is an error of law, reviewable on a standard of correctness: *Millet (Town) v Tessier*, 2025 ABCA 97 at para 14; *Ball v Imperial Oil Resources Limited*, 2010 ABCA 111 at para 28 [*Ball*]. However, where the challenge is to factual findings or inferences, or the weight assigned to the evidence, the palpable and overriding standard applies. *Housen v Nikolaisen*, 2002 SCC 33 at paras 18 and 22-23 [*Housen*].

[17] The standard of review on an appeal from a contempt application varies with the issue. *Oommen v Capital Region Housing Corporation*, 2017 ABCA 143 at para 14, leave to appeal to SCC refused, 37948 (2 August 2018); *Alberta Health Services v Pawlowski*, 2022 ABCA 254 at para 42. Whether an alleged contemnor has a reasonable excuse involves the application of the legal standard to the facts. This is a question of mixed fact and law, reviewed for palpable and overriding error. *Koerner v. Capital Health Authority*, 2011 ABCA 289 at para 5; *Ouellet v BM*, 2010 ABCA 240 at para 25.

## Discussion

### *a. The chambers judge considered all relevant evidence*

[18] Tempo submits the chambers judge failed to consider all the relevant evidence, as well as Man-Shield's previous representations to the Court of King's Bench, leading him to find, erroneously, that Man-Shield had a reasonable excuse for not complying with the order. Specifically, Tempo argues that the chambers judge did not consider certain evidence from the transcript of Mr. Schwind's questioning on his affidavit and a Financial Statement of Debtor Man-Shield filled out in January 2022, which showed significantly greater assets than the financial statements from November 2022 appended to Mr. Schwind's affidavit. Tempo argues this amounted to an error of law.

[19] There is no basis for Tempo's assertion that the chambers judge did not consider the totality of the evidence. As noted, he stated at the outset of his reasons what materials he had reviewed in making his decision. Those materials included the affidavits submitted by both parties and the transcript of Mr. Schwind's questioning. The chambers judge referred expressly to the evidence he considered most important and persuasive in reaching his decision. The fact that he did not refer specifically to each piece of evidence is not, in this case, indicative of a failure to consider the totality of the evidence. Rather, it is part of the weighing process. The weight a judge assigns to evidence is, in turn, reviewable for palpable and overriding error and nothing in the record suggests the chambers judge made such an error here.

[20] There is also nothing in the chambers judge's reasons to suggest Man-Shield's previous representations in court would have had any impact on the decision. The chambers judge concluded that when the order in *Tempo 2022* was made, and when the contempt application came before him, Man-Shield was without sufficient means to pay the money into court.

### *b. The chambers judge did not err in finding Man-Shield had a "reasonable excuse" for noncompliance*

[21] Relatedly, the appellant argues the chambers judge made a palpable and overriding error in concluding Man-Shield had a reasonable excuse for not complying with the order.

[22] A palpable and overriding error is one that is obvious and affects the result. *Hydro Québec v Matta*, 2020 SCC 37 at para 33, citing *HL v Canada (Attorney General)*, 2005 SCC 25 at paras 55-56. *Benhaim v St-Germain*, 2016 SCC 48 at paras 38-40. The chambers judge did not make a palpable and overriding error in concluding Man-Shield had a reasonable excuse for failing to comply with the order. There was sufficient evidence to allow him to conclude Man-Shield did not have access to the liquid assets required to allow it to do so.

- c. *The chambers judge incorrectly stated that the existence of the statutory trust was a live issue*

[23] The appellant argues that the chambers judge erred in his observation that the statutory trust arising from s 22 of the *Prompt Payment and Construction Lien Act* was a live issue, to be resolved at trial. We agree with the appellant that the chambers judge erred on this point. This Court clearly resolved that issue in *Tempo 2022*, finding that the statutory trust was triggered when Tempo issued the certificate of substantial performance in 2016. *Tempo 2022* at paras 8, 19. However, this error did not affect the result. The chambers judge's comments on the statutory trust were tangential to the main issue before him, being whether Man-Shield had a reasonable excuse for not complying with this Court's order in *Tempo 2022*.

[24] Tempo suggests the errant reference to the statutory trust was an important consideration with respect to the contempt decision because Man-Shield knew or ought to have known it could not use the funds. In support of this argument, Tempo relies on *Wade v Wade*, 2021 ABQB 994 [*Wade*].

[25] In *Wade*, the plaintiff initiated an action against two defendants who took money from their deceased father's bank account, prior to his death. The plaintiff successfully applied to have the money returned to the estate. The defendants were directed to return the money to their lawyer within three days. The defendants refused and so the plaintiff brought contempt proceedings. In response, the defendants argued that it was unfair for them to be forced to return the money when it had been withdrawn before the plaintiff filed her Statement of Claim. They also argued they had an adequate excuse for not complying with the order. Specifically, they no longer had the money, having spent it all before the plaintiff commenced her suit. Justice Lema found, *inter alia*, that the plaintiff's lawyer had advised the defendants of the plaintiff's objections and demanded the money be returned before most of the money was spent. They spent the money knowing a challenge was forthcoming. *Wade* at paras 83-87.

[26] *Wade* does not assist Tempo in this appeal. The facts are significantly different. Unlike the defendants in *Wade*, Man-Shield withdrew and, apparently, used the money, under the authority of the application judge's order. While this Court ultimately determined in *Tempo 2022* that the funds were subject to a statutory trust, there was no stay issued pending that appeal. Man-Shield was entitled to rely on the applications judge's order. An order is valid from the time it is pronounced until it is reversed or varied on appeal. *Alberta Rules of Court*, Alta Reg 124/2010, r 9.6(a) [*Rules*]; *Mazepa v Embree*, 2014 ABCA 438 at para 10.

[27] Tempo suggests that Man-Shield ought to have known it could not use the funds. We disagree. The order the applications judge made did not impose "conditions". That order, in its entirety, read:

1. Manshield may replace the cash Security deposited with the Clerk of the Court In respect of the Lien by depositing with the Clerk of the Court a lien bond in the amount of \$1,199,439.15 (the Replacement Security), in the form attached as Schedule 'A'.

2. The terms of the Initial Order shall continue to apply to the Replacement Security.

3. Upon the Replacement Security being deposited with the Clerk of the Court. the Clerk of the Court shall Immediately pay out the Security that was paid into court pursuant to the Initial Order, in the amount of \$1,199,439.15 plus any accrued Interest, to Burron Law, legal counsel for Manshield (Alta.) Construction Inc.

[28] Tempo's argument, in effect, asks this Court to read in terms to that order for its benefit. The applications judge expressly rejected Tempo's argument that the funds ought to have been impressed with a trust. She declined (albeit in error) to order any terms restricting the use of said funds. *Applications Judge's Decision*, AR 98, ll 29-37. Tempo's request for trust conditions were also rejected in the appeal to the Court of Queen's Bench. *Tempo 2021* at paras 15-22.

[29] The main question before the chambers judge was whether Man-Shield had a reasonable excuse for failing to comply with this Court's order to pay \$678,407.88 into court within 90 days. He determined, based on the evidence, that it did. The question of the statutory trust did not factor into this analysis.

[30] We note that the order resulting from the *Decision* includes the following provision:

2. This Order is made without prejudice to:

[. . .]

b. Tempo's ability to assert at trial that Man-Shield breached the statutory provisions under Section 22 of the *Builders' Lien Act*, RSA 1980, c B-12 . . .

As this issue was resolved in *Tempo 2022*, this provision of order must be set aside.

## Disposition

[31] We allow the appeal only with respect to the chambers judge's conclusion that the statutory trust imposed by s 22 of the *Prompt Payment and Construction Lien Act* was an issue to be determined at trial. Paragraph 2(b) of the order dated June 14, 2024 is set aside. The appeal is otherwise dismissed.

[32] In accordance with rr 14.88 and 14.90(a)(i) of the *Rules*, the respondent is granted the costs of the appeal except for the costs and disbursements related to its factum because it was filed late.

Appeal heard on February 3, 2025

Memorandum filed at Edmonton, Alberta  
this 15th day of August, 2025

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Authorized to sign for: Antonio J.A.

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Grosse J.A.

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Shaner J.A.

**Appearances:**

J.A. Delgado (no appearance)

M. Harris

for the Appellant

K.S. Burron

for the Respondent