**CITATION:** Dependable Mechanical Systems Inc. v. Ledcor Construction Limited, 2026 ONSC 188
**COURT FILE NO.:** CV-20-639030
**DATE:** January 9, 2026



**ONTARIO**
**SUPERIOR COURT OF JUSTICE**
IN THE MATTER OF the *Construction Act,* R.S.O. 1990, c.C.30

| | |
|---|---|
| **B E T W E E N:** | |
| DEPENDABLE MECHANICAL SYSTEMS INC.<br>Plaintiff | Jonathan Frustaglio for the plaintiff<br>Tel.: 905-695-5500<br>Email: jfrustaglio@sutherlaw.com. |
| -and- | |
| LEDCOR CONSTRUCTION LIMITED<br>Defendant | Christopher M. Stanek for the defendant;<br>Tel.: 416-862-4369;<br>Email: christopher.stanek@gowlingwlg.com. |
| | **DECISION:** September 8, 2025. |

**Associate Justice Wiebe**

## ADDENDUM AND COSTS AND INTEREST DECISION

### A) ADDENDUM TO REASONS FOR JUDGMENT

[1] On September 8, 2025 I issued my Reasons for Judgment concerning the trial in this case. I required written costs submissions if the parties could not agree on costs. There was no agreement and the required written costs submissions have been made.

[2] In his written costs submissions, Mr. Frustaglio rightfully pointed out an error I made in tabulating the Ledcor back-charges I accepted. I denied the Ledcor management costs claim of $113,882.50, but then by error included it in the tabulation of those back-charges. Ledcor did not dispute that I made this error.

[3] The following is what the tabulation should have been:

| | | |
|---|---|---|
| 1. | Replacement costs | $806,132.50 |
| 2. | Self-performed deficiency correction | $75,975.00 |
| 3. | Coring and patching work | $268,381.25 |
| 4. | Dywall repair costs | $153,293.75 |
| 5. | Electrical repairs | $42,862.50 |
| 6. | Sprinkler pipe insulation | $11,415.00 |
| 7. | Roofing repairs due to missed stacks | $18,191.25 |
| 8. | Comms repairs due to missed sleeves | $4,348.75 |
| 9. | Paid to DMS suppliers | $461,363.64 |
| 10. | Sprinkler completion contract | $173,750.00 |
| 11. | Dewatering delay | $20,842.50 |
| 12. | Professional services | $13,884.51 |
| | SUB-TOTAL | $2,050,440.65 |
| | HST | $266,5578.28 |
| | **TOTAL** | **$2,316,997.93** |

[4] This means that the unpaid balance of the amount to be paid under the Subcontract, as described under Subcontract article 10.4(b), in favour of DMS is the following amount: $2,496,679.52 (the unpaid balance) - $2,316,997.93 (the accepted Ledcor back-charges) = **$179,681.59 (HST incl.)**, not the $50,994.37 (HST incl.) indicated in my Reasons for Decision.

[5] I herewith amend my ruling accordingly. I find that Ledcor owes DMS the amount of **$179,681.59 (HST incl.)** in breach of contract damages and that DMS has a lien in that amount. I reiterate that I dismiss the DMS claim for other contract damages and punitive damages, and I dismiss the Ledcor counterclaim.

## B) COSTS DECISION

[6] My jurisdiction concerning costs stems from *Construction Act,* R.S.O. 1990, c. C.30 ("*CA*") which gives the court broad discretion to award costs, including substantial indemnity costs. It is

accepted that in exercising this discretion, the court will be guided by section 131 of the *Courts of Justice Act,* R.S.O. 1990, c. C.43 ("*CJA*") and Rule 57 of the *Rules of Civil Procedure*.

[7] In his written costs submission Mr. Frustaglio claims on behalf of DMS partial indemnity costs in favour of DMS in the amount of $1,050,601.00 plus an additional $6,000 for the drafting of the costs submissions, all inclusive of HST. The uploaded DMS bill of costs shows partial indemnity costs totaling $1,050,601 (HST incl.), substantial indemnity costs totaling $1,191,005.67 (HST incl.) and actual costs totaling $1,291,718.03 (HST incl.).

[8] In their written costs submission, Ledcor counsel claim full indemnity costs in favour of Ledcor in the $1,451,084.33 (HST incl.) plus a markup of 15% for overhead and 10% for profit in accordance with Subcontract article 10.4(b), for a grand total of $1,813,855.41. The uploaded Ledcor bill of costs shows partial indemnity costs totaling $1,014,453.69 (HST incl.) and actual costs totaling $1,451,084.33 (HST incl.).

*b.1) Result*

[9] The result is the single most important factor on the issue of costs in this case and has some complexity as there were several issues and divided results. DMS claims it was the successful party because it succeeded in getting a ruling that found that DMS has breach of contract damages and a lien, albeit for a fraction of what it claimed, and that dismissed the Ledcor counterclaim.

[10] I do not agree. Where there are several issues and a divided result, the question is which party was "substantially successful." Substantial success is not determined by the numeral net outcome of the ruling, but rather by the success of the parties on the issues that drove the action; see *539618 Ontario Ltd. v. Stathopoulos*, 1992 CanLII 7617 (ONCA) at paragraph 64.

[11] In this case, the liability of the parties for Ledcor's decision to terminate DMS work in January, 2020 was without a doubt the core issue in this case. The vast majority of the fact witnesses focused on this issue: the bulk of Mr. Ahuja's evidence, the bulk of Mr. Cooke's evidence, Mr. Larsen, Mr. Amorin and Mr. Van Noort, The two expert witnesses, Mr. Pearson and Ms. Burnell, focused the vast majority of their evidence on this issue. The only evidence that focused on damages was that of Mr. DiGennaro and some of Mr. Cooke's and Ms. Burnell's.

[12] On the issue of liability, I found in paragraph 113 of my Reasons, based largely on the evidence of Mr. Pearson, that, "Ledcor has proven that DMS failed to properly and diligently perform its work, thereby giving Ledcor the right to terminate the Subcontract work as it did under article 10.4(a) of the Subcontract."

[13] The only reason DMS did not end up owing money to Ledcor was Ledcor's failure to prove all its claimed damages. It failed entirely to prove its claims for its own delay costs, the additional staff costs, the costs for the alleged Phasecorp delay and its legal costs due to the DMS default. This failure had nothing to do with DMS. Ledcor also failed to prove all but a fraction (ie. less than 50%) of Ledcor's claims for replacement costs (the largest claim), comms repair costs and dewatering delay costs. DMS counsel was instrumental in the replacement costs issue through a skillful cross-examination. However, on eight out of the sixteen back-charges Ledcor was entirely successful.

[14] Ledcor in total proved 41% of the quantum of its claimed back-charges. DMS's only other success on the damage calculation was in proving some of its $74,926.98 (HST incl.) claim for

"outstanding changes." Given Ledcor's level of success on damages and its complete success on liability, I have no difficulty finding that Ledcor was "substantially successful" in this case and deserves costs.

[15] The measure of those costs is, however, also impacted by the result in this case. Ledcor failed to prove no more than 41% of the quantum of its back-charges leaving DMS with a net recovery in breach of contract damages and a lien in the amount of $179,681. This leads to the conclusion that Ledcor's entitlement to costs should similarly be reduced. To compensate Ledcor fully for it costs when it has significantly failed to prove the majority of its damages is not fair and reasonable.

*b.2) Article 10.4(b)*

[16] Ledcor argues that, as the successful party, it should be compensated for all of its legal costs in this action plus a markup of 15% for general overhead and 10% for profit. It says this accords with article 10.4(b) of the Subcontract. This is the article that gives Ledcor the right, in the event of DMS's default, to back-charge against the unpaid balance of the Subcontract price "expenses incurred by Contractor in finishing the Subcontract." Article 10.4 specifies that "attorney's fees" are included in such expenses. It also states that there is a markup of 15% for general overhead and 10% for profit on all Ledcor "expenses."

[17] Ledcor argues that this article applies to the costs of this action and should be respected. It, therefore, claims its full indemnity costs as shown in its bill of costs, $1,451,084.33 (HST incl.), plus the 25% markup for general overhead and profit for a total of $1,813,855.41 (HST incl.).

[18] The courts have consistently held that contractual provisions respecting litigation costs do not bind the court in exercising its jurisdiction in determining costs awards. Nevertheless, courts will generally exercise this jurisdiction to accord with contractual costs clauses; see *Bossé v. Mastercraft Group Inc.*, 1995 CanLII 931 (ONCA) and *Burr v. Tecumseh Products of Canada Limited*, 2023 ONCA 135 (CanLII). In *Burr* at paragraph 131 the Court of Appeal held that a court will refuse to enforce contractual costs clauses only where there is "inequitable conduct" or "special circumstances."

[19] I do not accept Ledcor's argument here. The issue is the proper interpretation of the Subcontract concerning litigation costs. As I stated in my Reasons at paragraph 64, contract interpretation must be based on a reading of the text and the entire contract, and the must apply the ordinary and grammatical meaning of words consistent with the surrounding circumstances known to the parties at the time. The purpose is to determine the intention of the parties and scope of their understanding; see *Sattva Capital Corp. v. Creston Molly Corp*, 2014 SCC 53 at paragraphs 47, 48 and 57.

[20] Article 11 of the Subcontract concerns "Dispute Resolution." This article goes into detail as to what is to happen in the event of a dispute between the parties. It outlines the steps that must be followed, such as negotiation and mediation. Article 11.7 is stated as pertaining to "Legal Fees." It states that if either DMS or Ledcor commences an action against the other, the party that prevails in the action is entitled to recover from the other "its attorney's fees, expert witness fees and costs of suit in reasonable amount, which shall be determined by the court and included in the judgment."

[21] In my view, article 11.7 deals specifically with the costs of this action and makes it clear that the parties agreed in that article that the successful party shall be paid a "reasonable amount" in

costs with the court to determine such "reasonable amount" exercising its unfettered discretion on costs. In short, this article reinforces the application of the court's unfettered discretion to award costs in this action.

[22] When considered in the context of article 11.7, the reference to "attorney's fees" in article 10.4(b) must be read as pertaining only to the legal costs of completing the Subcontract work, such as the legal costs incurred in procuring completion contracts and perhaps dealing with disputes concerning the completion work. Such completion legal work can rightfully be viewed as being a part of the Ledcor completion work that, as a result, merits full recovery plus the 25% markup. The parties to the Subcontract were, after all, sophisticated parties with lawyers who should have known of the details of the law of costs at the time of the Subcontract. That is what I find.

*b.3) Offers to settle*

[23] Offers to settle were exchanged by the parties. On October 28, 2024 Ledcor offered to accept $2.5 million in settlement. This clearly exceeded what Ledcor recovered at trial. DMS offered to accept $1.35 million. This also exceeded what DMS recovered at trial. Both offers were, therefore, not factors to be considered on the issue of costs.

*b.4) Reasonable expectation of the unsuccessful party*

[24] Given the relative similarity in sizes of the bills of costs of the parties, I do not consider the reasonable expectation of what DMS should expect to pay in costs in the event of a defeat to be a factor. DMS's claim for costs is in the same order of magnitude as Ledcor's.

*b.5) Complexity, importance and proportionality*

[25] The parties submitted that this case involved significant complexity. I agree. While there was no delay claim concerning the critical path of the project, there was the hotly disputed issue of what and how DMS was delayed to the point where Ledcor terminated DMS's work. This issue involved numerous other issues, such as the DMS manpower, the sleeving, the winter heating, the sequencing with the forming contractor, and the DMS deficiencies, to name but a few. There were two experts who served lengthy reports with detailed analysis of the issues. Then there were the damages issues.

[26] As for the importance of this case to the parties and proportionality, given the size of the respective claims, I accept that both sides were justified in applying the resources that they did.

*b.6) Quantum*

[27] The relative parity in the amounts contained the two bills of costs also indicates that the costs claimed by Ledcor were reasonable; see *FCP (BOPC) Ltd. v Callian Capital Partners Inc.*, 2023 ONSC 3045 (CanLII) at paragraph 7.

[28] I make an additional comment. The Ledcor bill of costs shows a substantial amount for "expert fees," $248,630. This was the cost Ledcor incurred for its expert John Pearson. I found Mr. Pearson to be the more convincing expert and very helpful. I have no difficulty endorsing the reasonableness of this disbursement.

*b.7) Conduct*

[29] The costs submissions contained criticisms of conduct. DMS criticized Ledcor for not disclosing its AXA XL default insurance policy and recovery in a timely way, namely well before trial. I was concerned about this at the time of the trial hearing when the policy and recovery came to light. But, after considering submissions on this point, I determined, as indicated at the end of my Reasons, that this issue was irrelevant to damages due to the "private insurance exception" to the double recovery rule. Therefore, I am not prepared to find fault with Ledcor on this point.

[30] DMS criticized Ledcor for advancing a huge counterclaim in the amount of $5,551,896.76, a counterclaim that was dismissed in the end. I do not agree with this criticism. There were suggestions in the evidence that Ledcor may have in fact incurred completion costs in excess of the unpaid balance of the Subcontract price, thereby justifying the counterclaim. That was particularly the case with the Ledcor replacement cost claim. It was primarily the lack of sufficiency and credibility of the damages evidence Ledcor presented that caused the dismissal of the counterclaim. In these circumstances, I am not prepared to criticize Ledcor for having in the first place created and advanced its counterclaim.

[31] DMS criticized Ledcor for calling witnesses who gave evidence that lacked credibility and had limited probative value. Mr. Frustaglio named Mr. Cooke, Mr. Amorin, Mr. Van Noort and Mr. DiGennaro. I indeed made such comments in my Reasons about these witnesses. But I do not find find this to be an important factor, particularly when weighed against the glaring fact, on the other side, of DMS calling as its only fact witness a person, Mr. Ahuja, who was clearly biased and not a direct observer of many of the critical facts in this case. I found that there were problems with witnesses on both sides.

[32] On the other hand, Ledcor criticized DMS for having not properly cooperated with Ledcor in preparing the Joint Document Book, for DMS's largely unsuccessful motion at the beginning of the trial hearing attacking 35 paragraphs of the DiGennaro affidavit (ie. only two paragraphs were struck in the end), for not getting and not sharing the cost of getting copies of the Ledcor obtained trial transcripts, and for calling Ms. Burnell as DMS's first witness causing an unnecessary interruption of the trial to have that unusual issue dealt with. These were indeed irritating events, but not such as to qualify Ledcor for an award of substantial indemnity costs.

[33] Ledcor also criticized DMS for registering an exaggerated claim for lien. Ledcor argued that the DMS lien in the end was but a small fraction (6%) of the $2.851 million that was originally claimed. It raised *CA* section 35, but did not make a s.35 claim for damages.

[34] I note that at trial the DMS lien claim was reduced to $1.615 million, which corresponded to the evidence of DMS's outstanding draws, holdback, claimed extras, demobilization costs, costs of material left on site and unbilled contract work, all of which were proper subject matters of a claim for lien, if proven. Given this evidence, I am not prepared to penalize DMS on the issue of costs for an exaggerated claim for lien.

[35] In the end, I have decided to award Ledcor costs based on the usual standard for an award of costs, namely its partial indemnity costs, without deduction due to conduct.

*b.8) Conclusion*

[36] Having considered all of these factors, I have decided to order that DMS pay Ledcor **$415,000** in partial indemnity costs. This represents 41% of the Ledcor claim for partial indemnity costs, $1,014,453.69. This proportion corresponds to the degree to which Ledcor was successful in proving the quantum of its back-charges, namely 41%. It is an award that, in my view, is fair and reasonable in the circumstances of this case.

## c) INTEREST

*c.1) Prejudgment interest*

[37] Under *CLA* section 128(1) DMS is entitled to prejudgment interest on its breach of contract damages judgment of $179,681.59 (HST incl.) at the rate specified by the *CJA* "calculated from the date the cause of action arose to the date of the order."

[38] Relying on *CJA* section 130 (2), Mr. Stanek argues that I should disallow the prejudgment interest due to my finding that DMS was in default of the Subcontract pursuant to Subcontract article 10.4(a). I am not prepared to do this. Subcontract article 10.4(b) gives DMS an entitlement to payment should Ledcor's "expenses" to complete not excess the unpaid balance. That is what I found. Ledcor's proof of its completion expenses produced this result. There is nothing unjust about imposing the consequences of article 10.4(b) and *CJA* section 128(1) in these circumstances.

[39] *CJA* section 127(1) specifies that the prejudgment rate is the bank rate at the end of the first date of the last month of the quarter preceding the quarter when the proceeding was commenced. The Ontario Government has established tables for these rates. This action was commenced on April 2, 2020. The specified prejudgment interest rate for this quarter is 2% per annum.

[40] DMS argues that the court should calculate the prejudgment interest for each period there is a new rate in the Government's prejudgment interest chart during the period when prejudgment interest was running, and then add the resulting totals. Mr. Frustaglio asserted that this produced a total of $27,565.08 of prejudgment interest for the 2,062 days between the date of the claim for lien, January 8, 2020, and the date of my Reasons, September 8, 2025. He argued that this reflected changes in market interest rates which the court should consider pursuant to *CJA* section 130(2).

[41] I do not accept this argument. The mandated prejudgment interest rates under the *CJA* may reflect fluctuations in the market rates, as that *CJA* rates are tied to the minimum rates charged by the Bank of Canada for short-term loans to Schedule A banks. But the issue under *CJA* section 130(2) is whether it would be "unjust" to implement the basic rule on prejudgment interest set by *CJA* section 128(1) in this case. Mr. Frustaglio does not address this issue. If the implied argument is that the market rate fluctuations create an unjust denial of prejudgment interest for DMS, I am not convinced. Calculating the 2% per annum on the judgment amount over Mr. Frustaglio's 2,062 day period produces a total that is only about $7,000 below his total. Whether this is "unjust" is debatable, particularly given my ruling that DMS is at fault for breach of the Subcontract.

[42] The "date of the order" is defined by *CLA* section 127(1) to be, in the case of a reference such as this, "the date the report on the reference is confirmed." That means that the prejudgment interest does not run to the date of my Reasons or even to the date of my eventual report. It runs to the date my report is confirmed, which is in the future and is unclear.

[43] The "date the cause of action arose" in this case appears to be contested. DMS submitted that the date should the date of the claim for lien, January 8, 2020. I disagree. I found that DMS's right to work was properly terminated by Ledcor pursuant to Article 10.4(a). Article 10.4(b) of the Subcontract specifies that upon termination of its right to work, DMS "shall not be entitled to receive any further payment under this Subcontract until the work undertaken by Contractor on the Project is completed." That means, in my view, that DMS's entitlement to be paid the $179,681.59 arose when its scope was completed by Ledcor pursuant to article 10.4(b). Prejudgment interest runs from the date the losses for breach of contract are incurred or realized; see *Livent Inc. v. Deloitte & Touche LLP*, 2014 ONSC 4085 (CanLII) at paragraph 10.

[44] There was some evidence of this completion date. Mr. DiGennaro stated in his affidavit that the last Zencorp payment application was dated January 25, 2021. That payment application indicates that all work was done. He also attached the Certificate of Substantial Performance for the project which was dated March 1, 2021. The Certificate indicates that the project was substantially performed on January 31, 2021. Given this evidence, I have concluded that the date DMS should have been paid was January 31, 2021.

[45] Therefore, I rule that DMS is entitled to prejudgment interest on the breach of contract damages judgment amount of $179,681.59 at the rate of 2% per annum running from January 31, 2021 to the confirmation of my report.

*c.2) Post-judgment interest*

[46] *CJA* section 129(1) specifies that parties owed monies under an order are entitled to post-judgment interest "from the date of the order." Under *CJA* section 127(1), the rate for post-judgment interest is the rate that is mandated by the *CJA* for the quarter when the order is made. This issue applies to the DMS's entitlement to damages and Ledcor's entitlement to costs.

[47] As stated above, for a reference such as this one, the "date of the order" is defined to be the date my report is confirmed which is in the future. If the parties have difficulty establishing the post-judgment interest to be applied here, they can contact me for a further trial management conference. No more needs to be said here.

## D) CONCLUSION

[48] In summary, I change my Reasons for Judgment as indicated in the Addendum above. Furthermore, I order that DMS must pay Ledcor partial indemnity costs of **$415,000**. I also order that DMS is entitled to prejudgment interest on its damages judgment of $179,681.59 calculated at the rate of 2% per annum running from January 31, 2021 to the date my report is confirmed.

[49] With this decision I circulate a draft of my report for review and comment. Please note that I intend on signing the report on January 20, 2026.

**Released:** January 9, 2025

**ASSOCIATE JUSTICE C. WIEBE**

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**ADDENDUM AND COSTS AND INTEREST DECISION**

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Associate Justice C. Wiebe

**Released:** January 9, 2026