Ontario Dispute Adjudication for Construction Contracts

ODACC Case No.: 5112

In the matter of an adjudication for
Ontario Dispute Adjudication for Construction Contracts (ODACC)
pursuant to the Ontario *Construction Act*, R.S.O., 1990, c. C.30, as amended.

ODACC Certification No.: 20211027
Certification Date: November 1, 2021

I, Edward Dreyer, certify that this is a true copy of the original document.

Edward Dreyer
Certified ODACC Adjudicator

DETERMINATION

DEMIKON CONSTRUCTION LTD.

Claimant

and

GUELFF ENTERPRISES INC.

Respondent

Representative of the Claimant	Robert J. Kennaley **KENNALEY CONSTRUCTION LAW** 58 Peel Street Simcoe, Ontario N3Y 1S2 p. 519.426.2577 f. 519.426.3777
Representatives of the Respondent	Faren Bogach and Paul Conrod **WEIR FOULDS LLP** 4100 – 66 Wellington Street West PO Box 35, TD Bank Tower Toronto, Ontario M5K 1B7 Canada p.: 416.365.1110 f: 416.365.1876
Adjudicator	Edward J. Dreyer

AWARD

1. INTRODUCTION

In this adjudication, Demikon Construction Ltd. (the "**Claimant**") is asking that its invoice numbers #13569R and #13626R (totalling $10,963.69, inclusive of HST), be paid by Guelff Enterprises Inc. (the "**Respondent**"). The Claimant is a contractor and the Respondent is an owner. The invoices relate to materials and services supplied to an addition at 1 Quebec Street in the City of Guelph in the Province of Ontario. The outcome of the case depends mostly, although not entirely, on the outcome of the Respondent's claim for set-off arising from differences between the dimensions specified in the plans and the as-built dimensions.

2. JURISDICTION

The Claimant completed a Notice of Adjudication on August 16, 2021, pursuant to the Ontario *Construction Act*, R.S.O. 1990, c. C.30, as amended (the "*Act*"). The Parties agreed that I should act as Adjudicator.

The Respondent has challenged my jurisdiction to hear this matter on the following grounds:

(a) The adjudication period has expired because the contract is complete pursuant to subsection 13.5(3) of the *Act*; and

(b) The contact is invalid or has ceased to exist in accordance with subsection 13.18(5).2 of the *Act.*

The Respondent asks that the Claimant's claim be dismissed for want of jurisdiction.

I invited the parties to make submissions on these jurisdictional issues. On September 12, 2021, I advised the parties that I had determined that I have jurisdiction to hear this dispute. My reasons are set out under the heading of “Reasons” below.

3. THE PROCESS

This adjudication was conducted according to a custom process agreed to by the parties.

(a) The Claimant filed the contract and the invoices in dispute on Monday, August 30, 2021.

(b) The Respondent filed their draft expert report on Thursday, September 2, 2021.

(c) On September 4, 2021, I briefly viewed the exterior of the building. I did not enter the building.

(d) The Respondent filed its submissions with respect to jurisdictional issues, limited to 10 pages in length, on Tuesday, September 7, 2021.

(e) The Claimant filed its submissions regarding jurisdiction, limited to 10 pages in length, on Friday, September 10, 2021.

(f) On September 12, 2021, I advised the parties that I had jurisdiction to hear the adjudication for reasons to follow.

(g) On September 20, 2021, the Respondent submitted its brief of evidence, limited to 50 pages in length.

(h) The Claimant submitted its brief of evidence - limited to 50 pages in length - on September 27, 2021.

(i) The Respondent filed its submission regarding the merits of the claim on October 4, 2021.

(j) The Claimant filed its submissions regarding the merits of the claim on before October 13, 2021.

(k) At the request of the parties pursuant to section 13.13(2)(b) of the Act, and with the consent of the Adjudicator, the deadline for the Adjudicator’s final Determination was extended to October 27, 2021.

The adjudication was conducted entirely in writing with no oral hearing.

4. DOCUMENTS SUBMITTED

The following documents were submitted and reviewed by me to assist me to make this Determination:

The Demikon Construction Quotation dated January 6, 2020

Demikon Invoice 13569

Demikon Invoice 13626

Google Street View of 1 Quebec Street

The Affidavit of Elena Zizza sworn September 20, 2021

The Expert Opinion Report of Arbitech Inc. Dated September 17, 2021

Permit Fees paid by Guelff Enterprises to City of Guelph

Excerpted set of stamped project drawings

Estimate from Fine Line Structures – a division of 2654531 Ontario Inc.

Excerpted contract of Lima Architects

Invoice dated July 31, 2021 from Tacoma Engineers

Invoices from Seguin Engineering Inc.

Invoices from NEEB Engineering Inc.

Invoices from Lima Architect

The Affidavit of Dave McDougall, sworn September 27, 2021

The Affidavit of Mike Demerling, sworn September 27, 2021

Email from Sam Herschorn and Revised Drawings, February 3rd, 2020

Email from Elena Zizza, April 28, 2020

Statement of Claim, CV-21-00000197, issued January 11, 2021.

5. THE FACTS

The Respondent is the Owner of 1 Quebec Street in Guelph, Ontario. 1 Quebec Street is located on the southeast corner of the intersection of Quebec Street and Norfolk Street. The existing building at 1 Quebec Street is a heritage building, and, significantly, the four-

sided lot is not square. The irregular angles of the various walls likely accounts for the discrepancies between the wall dimensions in the drawings and the as-built dimensions.

For the purpose of my Determination, I will refer to the wall facing Quebec Street as the north wall.

The Respondent retained Grinham Architects to design a small addition to the existing building. The addition was to be added to the north-east corner of the building.

On or about January 6, 2020, the Claimant submitted a quote to the Respondent to build the addition according to the designs of L. Grinham Architects dated April 5, 2019, for a fixed price of $182,840.00 plus HST.

The Claimant's Project Manager says that he identified discrepancies between the Contract Drawings and actual site conditions in early February, 2020. He further states that he advised an employee of the Architect of the discrepancies in a telephone conversation on February 12, 2021. He also says that he met with the employee of the Architect and Elena Zizza of the Respondent at the site to discuss the discrepancies and was instructed to proceed. All of this evidence is disputed by the Respondent.

On or about April 16, 2020, the Respondent directed the Claimant to stop work because of discrepancies between the Contract Drawings and the as-built conditions. At this point the Claimant had already completed the foundation walls and framing. The addition remains in substantially the same state now as it was when the stop work order was given.

The deficiencies at issue in this adjudication are described in detail under the heading of "Deficiencies" below.

Collectively, the Deficiencies have a significant impact on the usefulness of the addition. According to the Respondent's expert, there is a 12% reduction in useable floor space. Furthermore, when the pillars in the north wall are eventually finished, they will not provide the balanced appearance and proportions shown on the rendering.

Initially the Respondent believed that the Deficiencies were solely the fault of the Architect. Early on, the Respondent intended to demolish the work that had been completed to date and then have the Claimant build the addition in accordance with new drawings. However, the Respondent says that the Claimant stopped responding to its emails in the Fall of 2020 and that it concluded that the Claimant did not intend to continue with the Project. The Claimant says that it always intended to return and complete the Project when the Respondent was ready to proceed.

The Respondent says that the Claimant issued new invoices to it in March and June, 2021. The Claimant says that it issued the disputed invoices 13569 and 13626 to the Respondent after the Respondent had served it with a Statement of Claim issued June 11, 2021, seeking damages for the Deficiencies.

6. THE DEFICIENCIES

One of the documents submitted by the Respondent is the Expert Opinion Report of Arbitech Inc. Dated September 17, 2021 (the "Report"). The Report was written by Mina Tesseris, P.Eng. and peer reviewed by Gerald R. Genge, C. Eng., P. Eng, BDS, C. Arb, Q. Med. The Report documents discrepancies between the Drawings prepared by Grinham Architect dated April 5, 2019, and the as-built conditions of the addition.

It is worth noting that it is a matter of common ground between the Claimant and the Respondent that there were discrepancies between the Drawings and the as-built conditions and that the Architect is at least partly at fault for the Deficiencies. What is in dispute between the Claimant and the Respondent for the purpose of the Respondent's claim for set-off is whether the Claimant bears any liability for the Deficiencies.

Parenthetically, I note that the drawings that were submitted as part of the Respondent's brief do not appear to be the same set drawings that were available to the parties at the time that the Contract was entered into or the same set that that were available to Arbitech Inc. In the revision block, the set included in the Respondent's brief are dated "05/03/2020". And whereas the dimensions in the drawings referred to in the Arbitech Report are in metric, the dimensions in the set included in the Respondent's brief are in imperial measurements. Since the Affidavit of Dave McDougall indicates that he had already advised Sam Herschorn of discrepancies between the Drawings and site conditions on February 12, 2020, I infer that the set of drawings in the Respondent's brief was prepared after the discrepancies were first noted.

Width of the East Wall of the Addition

As described by Ms. Tesseris, there is a discrepancy between the as-built width of the east wall of the addition and the width as it appears in the Drawings.

The north wall was designed to extend outward from and parallel to the existing north wall of the heritage building, and the east wall was designed to extend outward from and parallel to the existing east wall of the heritage building. Here is an excerpt from drawing A100 taken from the Report:

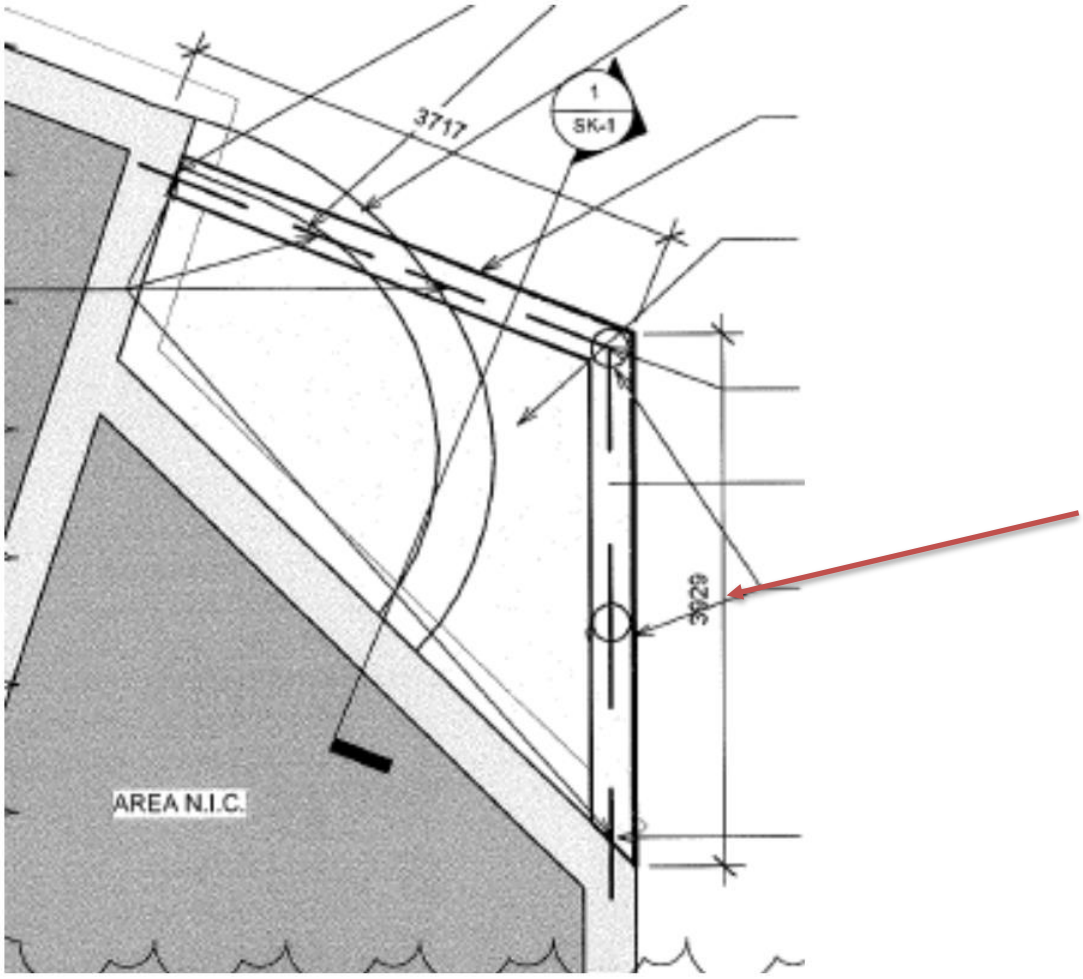


Figure 2.1: Excerpt from Drawing A100 Foundation Plan at new addition

As indicated on drawing A100, the length of the east wall of the addition was supposed to be 3929 mm. However, Ms. Tesseris says that the as-built dimension of the east wall is 4160 mm. Therefore, according to Ms. Tesseris, the east wall is 231 mm wider than it was designed to be.

North Wall of the Addition

Furthermore, the north wall of the addition appears to be substantially narrower than it was designed to be. Here is an excerpt of Drawing A200 taken from the Report:

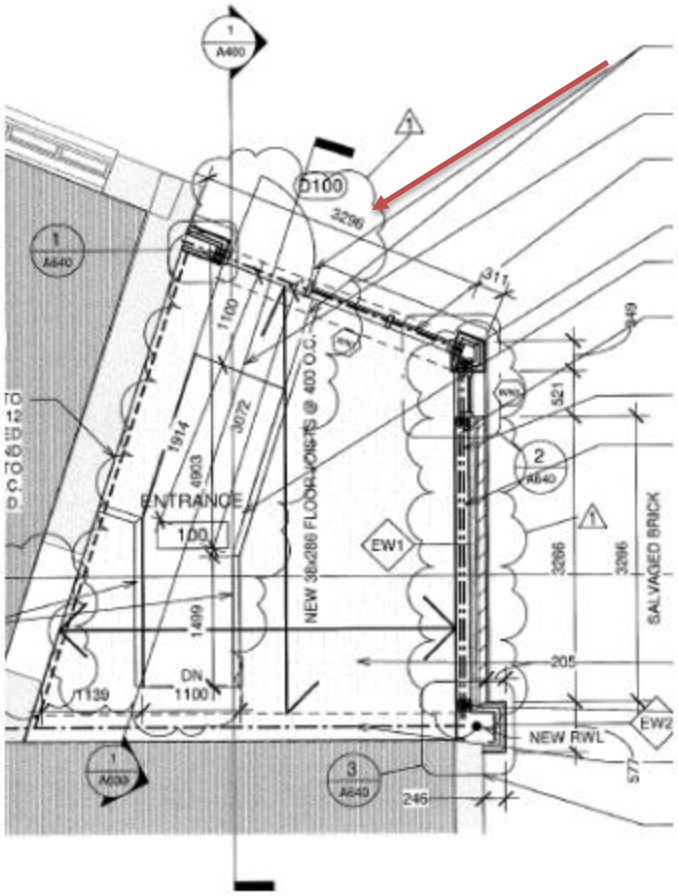


Figure 3.2: Excerpt for Drawing A200 Ground Floor Plan at new addition

According to drawing A200, the width of the north wall of the addition was supposed to be 3296 mm. However, Ms. Tesseris reports that the as-built measurement of the north wall is only 2800 mm. Therefore, the north wall is 496 mm narrower than it was designed to be.

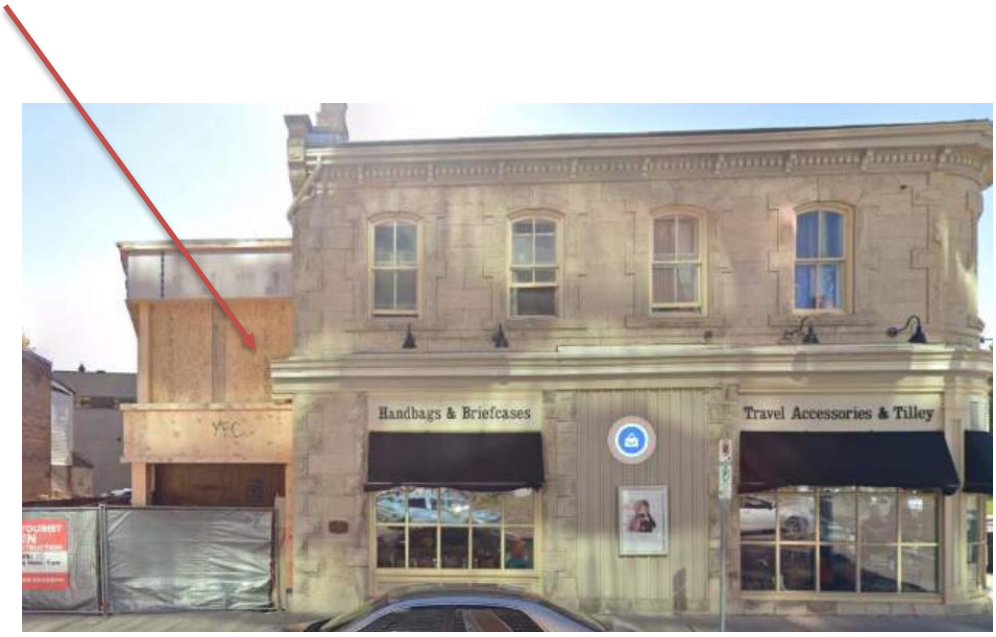
The Height of the Signbox

An isometric rendering of the proposed addition shows that the top of the signbox on the north wall of the addition was to be the same height as the top of the cornice on the north wall of the heritage building. Here is an excerpt from the Report illustrating the rendering:

is of the building.

Figure 2.1.2: Isometric rendering of proposed addition and north façade at 1 Quebec Street shown on Drawing A000 [dashed white line added by author]

A screen shot of the partially completed building taken from Google Street View shows that the top of the signbox on the addition is substantially below the top of the cornice on the heritage building:



According to Ms. Tesseris, the signbox was constructed 202 mm shorter than it was designed to be.

Framing of the East and West Pillars in the North Wall

According to Ms. Tesseris, the structural framing of the west pillar in the north wall was 290 mm narrower than designed. She further indicates that the width of the "west pillar" in the north wall is 96 mm wider than it was designed, although referring to Figure 3.5 of her report, she appears to be referring to the east pillar in the north wall.

7. ISSUES TO BE DECIDED

The following issues are to be decided in this adjudication:

(a) Has the adjudication period expired?

(b) Has the Contract ceased to exist?

(c) Should the Claimant's claim be dismissed because the invoices referenced in the Notice of Adjudication do not correspond exactly with the invoices rendered by the Claimant to the Respondent?

(d) Are the invoices not "Proper Invoices" because they encompass services rendered over several months?

(e) Were the invoices "given" to the Respondent for the purpose of the *Act* if they were given to Counsel and not the Respondent itself?

(f) Did the Claimant have an implied duty to warn?

(g) If so, did the Claimant satisfy its duty to warn?

(h) Did the Claimant breach its Contract by failing to build according to the Contract Drawings?

(i) Did the Claimant breach its implied design obligations?

(j) Is the cost of repair of the signbox deficiency causally connected to the breach of the Contract?

8. THE CLAIMANT'S ARGUMENTS

With respect to jurisdiction, the Claimant points out that an Adjudicator has jurisdiction pursuant to section 13.5(1) to hear disputes regarding payments. In other words, the jurisdiction of the Adjudicator is not limited to disputes regarding proper invoices. Furthermore, the Claimant states that the adjudication period does not expire pursuant to

section 13.5(3) until the contract is “completed”. The Claimant also says that a contract does not cease to exist even if it is abandoned, assuming for the sake of argument that it was abandoned.

With respect to the merits, the Claimant relies on the evidence of Dave McDougall, its Project Manager, to the effect that he had warned the Architect about the discrepancies on February 12, 2020. Furthermore, Mr. McDougall says that a three-way meeting took place at the site with the Architect and the Respondent to discuss the discrepancies, and that the Architect instructed him to proceed. The Claimant argues, furthermore, that it was impossible to build in accordance with the Drawings because of the discrepancies.

9. THE RESPONDENT’S ARGUMENTS

With respect to jurisdiction, the Respondent states that the adjudication period expired pursuant to section 13.5(3) of the *Act* because the Claimant abandoned the Contract. In addition, the Respondent says that I have no jurisdiction to hear this matter because the Contract has ceased to exist within the meaning of section 13.18(5).

The Respondent has raised several issues with respect to the Claimant’s invoices. First, the Respondent notes that the description of the invoices in the Notice of Adjudication “13569R and 13626R” does not match the invoices themselves. Second, the Respondent says that the Claimant’s invoices were not proper invoices for the purpose of the *Act* because they were not delivered monthly. Third, the Respondent says that the invoices referred to in the Notice of the Adjudication were given to Respondent’s counsel, and not the Respondent itself. Fourth, the Respondent says that the disputed invoices that were delivered to counsel on July 27, 2021, are revisions of previous invoices to bring them into compliance with the requirements of the *Act*.

The Respondent acknowledges that the Architect's drawings were deficient. However, the Respondent asserts that the Claimant failed to identify and warn the Respondent of the discrepancies in the Architect's drawings and that some degree of fault ought to be attributed to the Claimant for the deficiencies and the cost of repairs. It states that the Affidavit evidence submitted by the Claimant is vague, self-serving, and unreliable. It notes the absence of any independently verifiable record that the Claimant had given a warning concerning the discrepancies. The Respondent says that it was not notified of the discrepancies or the Deficiencies until April 2020, by which time the foundations and framing of the addition were complete or near complete.

The Respondent argues that the Claimant has breached its implied duty to perform its work with reasonable care and skill because it failed to construct the Project in accordance with the drawings and specifications supplied to it by the Respondent.

The Respondent has included in its Brief of Evidence an estimate for the cost of repair. The Respondent says that, even if the Claimant bears a small degree of fault for the deficiencies, the Respondent's claim for set-off against the Claimant will exceed the amount of the invoices in dispute.

10. DECISION

I find that the Respondent should be required to pay invoices #13569 and #13626 to the Claimant in full in the amount of $10,963 inclusive of HST plus pre and post judgment interests in accordance with the *Courts of Justice Act*.

11. **REASONS**

Interpretation of the Act

This dispute raises several questions concerning the interpretation of the *Act* that have not yet been addressed by any Court.

The starting point to an issue of statutory interpretation is section 64(1) of the *Legislation Act* which provides that legislation shall be interpreted in a "fair, large, and liberal manner" as best ensures its "remedial objects":

> Rule of liberal interpretation
>
> 64 (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects. 2006, c. 21, Sched. F, s. 64 (1).

This is in line with the so-called modern approach to statutory interpretation that the words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament.[1]

I have been guided by these principles in my interpretation of the *Act*.

Has the Adjudication Period Expired?

Section 13.5(3) of the *Act,* says that an adjudication may not be commenced after the date the contract is "completed":

> Expiry of adjudication period
>
> 13.5 (3) An adjudication may not be commenced if the notice of adjudication is given after the date the contract or subcontract is

[1] *Rizzo & Rizzo Shoes Ltd., Re*, 1998 CarswellOnt. 2; [1998] 1 S.C.R. 27

> completed, unless the parties to the adjudication agree otherwise. 2017, c. 24, s. 11 (1).

The context of the *Act* as a whole suggests that the termination of a contract was not intended to prevent a contractor from commencing an adjudication to enforce payment of a proper invoice.

"Completed" for the purpose of subsection 13.5(3) means "completed" for the purpose of section 2(3):

> 2(3) For the purposes of this Act, a contract shall be deemed to be completed and services or materials shall be deemed to be last supplied to the improvement when the price of completion, correction of a known defect or last supply is not more than the lesser of,
>
> (a) 1 per cent of the contract price; and
>
> (b) $5,000.

Looking at the context of the *Act* as a whole, it is important that the word "termination" was added to section 31(2) as a separate triggering event for the running of the 60 days for the expiration of a contractor lien. The addition of the word "termination" to section 31(2) signals a legislative intent to distinguish a "terminated" contract from a "completed" contract. If the legislature had intended the adjudication period to expire upon the termination of a contract or subcontract, it would have said so in subsection 13.5(3). Alternatively, if all contracts that were terminated were also completed, then the amendment to section 31(2) would have been unnecessary.

Furthermore, permitting a contractor to commence an adjudication after its contract is terminated is consistent with the remedial purpose of the *Act*.

In the introduction to their chapter on Adjudication in *Striking the Balance: Expert Review of Ontario's Construction Lien Act,* at page 202, Bruce Reynolds and Sharon Vogel said that adjudication was a proven solution for projects "gridlocked" by disputes and saw their task as customizing adjudication to work together with the existing lien remedy and Prompt Payment:

> "Adjudication is a proven, pragmatic solution for projects gridlocked by disputes, a solution that frees cash flow and resources, while at the same time striking an appropriate balance among competing interests. The task, as we see it, is to adapt the known and proven model of adjudication in a way that suits Ontario, given the existing lien regime and given our recommendations in relation to promptness of payment as described in Chapter 8 – Promptness of Payment and the summary procedures described in Chapter 6 – Summary Procedure."
>
> [Emphasis Added]

In the introduction to their chapter on Prompt Payment, at page 152, Reynolds and Vogel indicated that timely payment and gridlock were two concerns raised by stakeholders:

> "As discussed with the stakeholders during the Consultation Process, two aspects of promptness of payment require consideration in relation to payment issues encountered on both public and private sector projects, namely:
>
> 1. The “ordinary course” aspect of promptness of payment, which relates to the payment of monthly progress draws and holdbacks in the ordinary course of a project, with respect to which payment periods have become elongated in relation to the period of time from the submission of a payment application to the receipt of payment; and
>
> 2. The “gridlock” aspect of promptness of payment, which occurs when there is a significant dispute resulting in delays and damages incurred at all levels of the construction pyramid, a cessation of payment, and potentially protracted litigation."

Permitting a party to commence an adjudication after their contract is terminated or abandoned is consistent with the legislative intent of adjudication as a means of resolving project gridlock, and particularly gridlock that can arise as a result of Ontario's lien remedy.

On the one hand, interpreting "completed" as it appears in section 13.5(3) in a manner consistent with section 2(3) is consistent with the legislative intent of using adjudication to resolve gridlock. In the conventional method of project delivery where an owner enters into a single contract with a single contractor, there is little risk of project gridlock when the work remaining to be performed pursuant to the contract is the lesser of 1% of the contract value and $5000. There is no risk of project gridlock at that point because the work is finished.

On the other hand, the termination or abandonment of a contract or subcontract gives rise to the real possibility of project gridlock. There is a high likelihood of a contractor or subcontractor that is terminated part way through the performance of their contract or subcontract will preserve a claim for lien that may disrupt the flow of funds on the as-yet incomplete project. If adjudication was intended as a tool for resolving project gridlock, it is precisely in circumstances where the contract or subcontract is terminated or abandoned where a party should have access to early and prompt dispute resolution to resolve that gridlock.

In summary, an interpretation of subsection 13.5(3) that permits a contractor to commence an adjudication after the termination or abandonment of its contract (provided that it is not also "complete" for the purpose of subsection 2(3)) advances the

remedial intent of the *Act* to resolve or avoid project gridlock and is the interpretation that is most consistent with the language of the *Act* as a whole.

Has the Contract Ceased to Exist?

Subsection 13.18(5) of the *Act,* lists the grounds upon which the Divisional Court may set aside the determination of an Adjudicator. Number 2 on the list is where, "The contract or subcontract is invalid or has ceased to exist."

Subsection 13.18(5) of the *Act* is modeled after section 46(1) of the *Arbitration Act*, which sets out the circumstances in which the decision of an arbitrator may be set aside even in the absence of a right of appeal. Number 2 on the list of grounds where the decision of an arbitrator may be set aside is also where, "The contract or subcontract is invalid or has ceased to exist."

The seminal case regarding the availability of arbitration in circumstances where the contract was terminated is the House of Lords decision in *Heyman* v *Darwins.*[2] At page 374, Lord MacMillian explained that a repudiated contract continued to exist, although both parties were relieved from further performance:

> "I am, accordingly, of opinion that what is commonly called repudiation or total breach of a contract, whether acquiesced in by the other party or not, does not abrogate the contract, though it may relieve the injured party of the duty of further fulfilling the obligations which he has by the contract undertaken. The contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining

[2] *Heyman* v *Darwins* (1942) AC 356.

> the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract."

The principle that arbitration clauses survive the termination of the contract has been followed in Ontario. See *Automatic Systems Inc.* v. *E.S. Fox Ltd.*, 1995 CarswellOnt. 246 at paragraph 30 and *Cityscape Richmond Corp.* v. *Vanbots Construction Corp.* 2001 CarswellOnt. 517 at paragraph 19.

Also, it is worth noting that adjudication is available in the United Kingdom even after the contract in question has been terminated or abandoned.[3] Since the system of adjudication in Ontario was based on the UK model, that tends to confirm that the Ontario Legislature did not intend for adjudication to be unavailable in circumstances where the contract was terminated or abandoned.

Therefore, the Contract between the Claimant and the Respondent has not ceased to exist for the purpose of subsection 13.18(5) 2 even if it has been terminated or abandoned.

Should the Claimant's claim be dismissed because the invoices referenced in the Notice of Adjudication do not correspond exactly with the invoices rendered by the Claimant to the Respondent?

The Notice of Adjudication seeks payment of the Claimant's Invoices "#13569R" and "#13626R". Although the "R" was likely intended to refer to the fact that these were revisions to invoices previously rendered by the Claimant to the Respondent, the actual

[3] A*&D Maintenance and Construction Ltd* v *Pagehurst Construction Services Ltd* [1999] 64 Con LR.

invoices that were delivered by the Claimant to Respondent's counsel do not include the "R".

As noted in *Striking a Balance,* adjudication is intended to be a pragmatic form of dispute resolution that is accessible to lawyers and laypersons alike. Furthermore, adjudication occurs on an expedited timetable. In my view, the legislature did not intend for Adjudicators to apply a technical approach to the Notice of Adjudication. A technical approach to the Notice of Adjudication may be appropriate where the Respondent suffers some form of prejudice. Since there appears to be no confusion about which invoices are in dispute, I am not inclined to give effect to this objection.

The Claimant's Failure to Deliver Invoices Monthly

Section 6.3(1) of the *Act* provides proper invoices shall be given to an owner on a monthly basis, unless the contract provides otherwise. Since the Contract itself is silent as to when the Claimant may render invoices, section 6.3(1) required invoices to be delivered monthly.

On its own, the failure of a contractor to deliver its invoices monthly does not mean those invoices are not "proper invoices" for the purpose of the *Act.* Section 6.1 of the *Act* sets out 6 minimum requirements of a "proper invoice". There may be additional requirements for a "proper invoice" where such requirements are required by the regulations or the terms of the contract. The timeliness of the invoice is not one of the 6 minimum requirements of a "proper invoice" pursuant to section 6.1 nor is it required by the Regulations or the terms of the Contract. Therefore, the invoices delivered by the

Claimant on July 27, 2021, may be “proper invoices”, even if they were not delivered in a timely way.

Furthermore, the Claimant’s failure to deliver its invoices on a monthly basis does not, on its own, relieve the Respondent of the obligation to pay the Claimant’s invoices. Although section 6.3(1) of the *Act* says that the Claimant “shall” deliver its invoices monthly, it does not expressly state that an owner is relieved of the obligation to pay a contractor’s invoices if they are not delivered monthly. Clear words would be required to extinguish a contractor’s *prima facie* right to payment for materials or services supplied pursuant to a contract because the contractor’s invoices are delivered late. There is no such language in the *Act*.

Were the Invoices “Given” to the Owner?

Section 6.3(1) of the Act provides Proper invoices shall be “given” to an owner on a monthly basis, unless the contract provides otherwise. The Respondent argues that the invoices at issue in this dispute are not “proper invoices” because they were not delivered to the Respondent, although they acknowledge that the invoices were emailed to counsel for the Respondent.

Subsection 87(1) of the Act address how a document may be given under the *Construction Act*.

> 87 (1) Except where otherwise ordered by the court, all documents and notices required to be given or that may be given under this Act, may be served in any manner permitted under the rules of court or, in the alternative, may be sent by certified or registered mail addressed to the intended recipient at the recipient’s last known mailing address,
>
> (a) according to the records of the person sending the document; or

> (b) as stated on the most recently registered instrument identifying the recipient as a person having an interest in the premises.

Section 87(1) is permissive. Although section 87(1) permits a document to be given by certified mail or by any manner permitted by the Rules of Court, it does not rule out the giving of documents by other means.

In circumstances where the Contract is silent on how invoices are to be given, where counsel to whom the invoices were sent by email was retained in respect of the same improvement at issue in this dispute, and where the subject invoices clearly came to the attention of the Respondent, my view is that the invoices at issue in this dispute were given to the Respondent for the purpose of section 6.3(1) and received by the Respondent for the purpose of section 6.4(2) of the *Act*.

Revisions to the Invoices

The Respondent observes that the invoices at issue in this dispute are revisions to earlier invoices delivered by the Claimant to the Respondent. Section 6.3(5) of the *Act* restricts the ability of a contractor to revise invoices delivered by the contractor to an owner:

> Revisions
>
> 6.3(5) A proper invoice may be revised by the contractor after the contractor has given it to the owner, if,
>
> (a) the owner agrees in advance to the revision;
>
> (b) the date of the proper invoice is not changed; and
>
> (c) the proper invoice continues to meet the requirements referred to in the definition of "proper invoice" in section 6.1. 2017, c. 24, s. 7.

Nothing turns on the fact that the invoices at issue in this dispute were revisions of invoices previously delivered by the Claimant to the Respondent. The limitations on

the ability of a contractor to revise its invoices pursuant to section 6.3(5) only apply to "proper invoices". There are no such limitations on the ability of a contractor to revise improper invoices. Since the Respondent's position is that the invoices previously delivered by the Claimant were improper, then section 6.3(5) does not prevent the Claimant from revising those invoices.

Did the Claimant have an express or implied duty to warn the Respondent?

As pointed out by the Respondent's expert, the contract drawings include the following note located beneath the Architect's seal:

> "The Contactor shall verify all dimensions on site and report and discrepancies immediately to the architect before proceeding with the work."

As these Drawings were referred to in the Claimant's quote, in my view this note is sufficient to give rise to an express obligation on the part of the Contractor to warn the Architect of discrepancies between site conditions and the designs.

I would not go further, however, and find that the Claimant had an implied duty to warn the Respondent directly. As a general rule, implied terms should not contradict express terms.[4] Furthermore, whether and to what degree a contractor has an implied duty to warn an owner of deficiencies in an architect's designs as an incident of the contractor's duty to perform its work with reasonable care and skill is a grey area. In *Brunswick Construction Ltée* v. *Nowlan*[5], the Supreme Court of Canada found that a contractor

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[4] *Walsh et. al.* v. *Marathon Investments*, (1983) 2 C.L.R. 147 (Sask. C.A.)

[5] *Brunswick Construction Ltée* v. *Nowlan*, [1975] 2 S.C.R. 523.

who constructed a house where the architect was not supervising the construction had a duty to warn the owner of design flaws of which the contractor reasonably ought to have known. The *Brunswick* decision has been the subject of some academic criticism.[6] *Brunswick* itself is distinguishable because, in the present case, the Architect was supervising the construction. In any event, the relationship between an Architect and the Respondent is one of principal and agent, such that the knowledge of the agent is imputed to the principal. I find that the Claimant would satisfy its contractual duty to warn by reporting directly to the Architect.

Finally, the Claimant did not need to report separately regarding separate but related discrepancies between the Drawings and actual field dimensions. Assuming, for the moment, that the deficiency with the pillars is causally connected with the deficiency with the north and east walls, it was not necessary for the Claimant to report separately to the Architect regarding each discrepancy. The Architect was responsible for the designs. One warning should be enough.

Did the Claimant warn the Respondent of the deficiencies?

Whether or not the Claimant warned the Architect of the deficiencies in the drawings is the key issue in this case. Unfortunately, the evidence on this key issue is somewhat sparse.

The Claimant relies on the evidence of its Project Manager, David McDougall. In a sworn Affidavit, Mr. McDougall states that he discovered the discrepancies between the

[6] See the 1995 edition of Hudson's Building and Engineering Contracts, at section 4 – 102.

Drawings and the site conditions and notified the Architect of the discrepancies on February 12, 2020. Paragraphs 2, 3, and 4 of his Affidavit provide as follows:

> "2. As Demikon was performing Work in relation to the foundation of the building, Demikon discovered a discrepancy between the measurements contained in the drawings from the architect (the "Drawings") and the actual dimensions present at the Project.
>
> 3. Upon discovering same, I contacted our President, Mike Demerling, to advise of the situation involving the Drawings, and Mike advised me to inform the architect, Grinham Architects ("Grinham").
>
> 4. Subsequently, I notified Sam Hershorn on February 12, 2020, via a telephone call, who is an employee of Grinham, and advised him that there were discrepancies between the measurements contained in the Drawings and the actual dimensions present at the Project."

Mr. McDougall then says that there was a three way-meeting on site between Elena Zizza of the Respondent, Sam Herschorn of the Architect, and Mr. McDougall. Mr. McDougall described the meeting at paragraphs 5, 6, and 7 of his Affidavit:

> "5. Shortly thereafter, a meeting took place at the Project which involved myself, Sam Hershorn of Grinham and Elena Zizza, a representative of Guelff. At that meeting, the issues with the building footprint configuration at the Project in comparison to the dimensions on the Drawings were discussed.
>
> 6. Following that discussion, I saw Sam and Elena step away to discuss the matter themselves, however, I was not a participant in that conversation.
>
> 7. Shortly after the discussion I saw between Sam and Elena, Sam directed me to proceed with the foundation layout as configured on the drawings, regardless of the incorrect dimensions."

The Claimant also relies on the Affidavit of Mike Demerling. Mike Demerling confirms Mr. McDougall's evidence that Mr. McDougall advised him of the discrepancies between the Drawings and the site conditions. At paragraphs 2 and 3 of his Affidavit, Mr. Demerling gives the following evidence:

> ‘2. I was notified by Demikon’s Project Manager for this Project, Dave McDougall, on or about February 12, 2020, that there were discrepancies between the measurements contained in the drawings from the architect (the “Drawings”) and the actual dimensions present at the Project.
>
> 3. I then advised Dave to contact the architect (“Grinham”) and inform him of the discrepancies”.

The Respondent, on the other hand, relies on the Affidavit of Elena Zizza. She says that she did not learn about the discrepancies until mid-April. Set out below is paragraph 2 from her Affidavit:

> 2. On or about April 16, 2021, after learning that the portions of the Project that had been built by that date did not align with the initial Project renderings that Guelff had approved, I directed the contractor, Demikon Construction Ltd. (“Demikon”) to stop work.

The Respondent says that I should give no weight to the Affidavit evidence of Mr. McDougall and Mr. Demerling as it is vague, self-serving, and, in Mr. Demerling’s case, hearsay. That is true to a point. Mr. McDougall does not specify what discrepancies he had identified and what, exactly, he had told Mr. Herschorn. Furthermore, Mr. McDougall’s Affidavit does not specifically say when the three-way meeting occurred. However, Mr. McDougall’s Affidavit is clear that on February 12, 2020, he told Mr. Herschorn that there were discrepancies in the Drawings. Furthermore, Mr. Zizza’s Affidavit is also vague. We know that she directed the Claimant to stop work on or about April 16th, 2020. We know that she directed the Claimant to stop work after she learned about the discrepancies. But Ms. Zizza does not specifically say when she first learned of the discrepancies or how she learned about the Deficiencies. Ms. Zizza’s evidence allows for the possibility that she was previously aware of discrepancies but did not order work to stop until she learned about the Deficiencies. Unfortunately, Ms.

Zizza's Affidavit was delivered before Mr. McDougall's Affidavit, and so she did not have an opportunity to comment on the alleged three-way meeting.

The Respondent says that Mr. McDougall's and Mr. Demerling's evidence is self-serving. That is true, but it is not particularly helpful. Parties rarely lead evidence in an adversarial proceeding that is not helpful to them.

Finally, the Respondent says that Mr. Demerling's evidence is hearsay. Some of it is hearsay. Hearsay is admissible in an adjudication. More importantly, Mr. Demerling's evidence to the effect that Mr. McDougall told him in February that there were discrepancies in the Drawings and that he instructed Mr. McDougall to advise the Architect of those discrepancies is not hearsay. If Mr. McDougall believed that he had identified discrepancies in the drawings in early February and had been instructed to report those concerns to the Architect, then that increases the likelihood that he did so.

It would have been helpful to have the evidence of Sam Herschorn on the key point of whether the Claimant had reported discrepancies to him, and, if so, what was reported to him and when. Section 13.12(1).2 of the *Act* authorizes an Adjudicator to take the initiative in ascertaining the facts. On October 14, 2021, I invited Counsel for the parties to supply me with contact information for counsel for the Architect so that I could direct written questions to the Architect. When that was not immediately forthcoming, I reached out directly to Mr. Herschorn. The full extent of the conversation with Mr. Herschorn was my introduction, my request for the name of counsel acting for the Architect, and Mr. Herschorn advising me that I would need to speak to his employer, Lloyd Grinham. I left two messages for Mr. Grinham. On October 19, 2021, Counsel

for the Respondent supplied me with the name of the lawyer acting for the Architect in the lawsuit before the Ontario Superior Court of Justice. Furthermore, on October 20, 2021, Mr. Grinham supplied me with the same information. By that time, however, it was too late. I had substantially completed my Determination. I never did direct any questions to counsel for the Architect.

The Respondent bears the burden of proof to establish its claim for set-off and the paucity of the evidence on this point generally works to the Respondent's disadvantage. On the balance of probabilities, I find that it is more likely than not that Mr. McDougall notified Sam Herschorn that there were discrepancies between the Drawings and actual site dimensions of the north and east wall on February 12, 2020, and thereby satisfied the Claimant's express obligation pursuant to the Contract to report discrepancies to the Architect.

Did the Claimant breach its Contract by failing to build according to the Contract Drawings?

The Respondent argues that the Claimant breached the Contract by failing to construct the building in according with the Drawings.

The tender documents represent an implied representation to compliant bidders that the work described in the tender documents could be built as described. Those bidders are entitled to rely upon the accuracy of design information prepared by the owner or its consultants. [7] Subject to the possibility of a duty to warn, an owner cannot complain

[7] *Asco Construction Ltd.* v. *Epoxy Solutions Inc*., 2014 ONCA 535.

about deviations from the Drawings to the extent that those deviations were the result of errors in the drawings that make it impossible to build in strict accordance with the drawings.

The Respondent's expert indicates that the framing of the storefront window and problems with the pillars flow from the incorrect dimensions of the north wall. At page 21 of the Report, Mina Tesseris, wrote:

> "The incorrect width of the north wall caused the storefront window opening to be constructed 217 mm narrower than specified. In my opinion, it was necessary to reduce the width of the window in order to leave the necessary space for the pillars. When the ground level pillars at the north wall of the addition are eventually finished, I estimate their widths will be 200 mm at the west corner (290 mm narrower than shown on the drawings) and 406 mm at the east corner (95 mm wider than shown on the drawings). The width of the pillars would then deviate significantly from the dimensions on the drawings. When the pillars are eventually finished, they will not provide the balanced appearance and proportions shown on the rendering."

I infer from this that all of the deficiencies noted by the Respondent's expert, with the possible exception of the signbox, flowed from the discrepancy in the dimensions of the north and east walls that had been reported to the Architect by the Claimant.

Is the cost of repair of the signbox deficiency causally connected to a breach of the Contract?

It is unclear to me whether the deficiency with respect to the height of the signbox also flows from the discrepancy in the dimension of the north and east walls of the addition. Mr. Demerling says at paragraph 7 of his Affidavit:

> "7. In relation to the sign bulkhead (the "Signbox"), the difference in height is the result of the window heights. The ground floor windows are framed tight to the underside of the opening lintel. The 2nd floor window openings are framed to the underside of the

> opening lintels as well. The Signbox height was then dictated by what was left vertically after framing in the window openings the subject heights. Demikon installed the window openings in accordance with the Drawings, which contained various errors and inaccuracies."

However, I do not need to decide whether the deficiency with the signbox height is caused by the errors in the Drawings with respect to the north and east walls. The documents filed by the Respondent in support of its claim for damages indicate that it intends to demolish the building and its foundations. The signbox would be demolished as a result of the Deficiencies in the north and east wall even if it had been properly constructed. Therefore, the cost of repairing the signbox is not causally connected to any breach of contract by the Claimant.

Did the Claimant breach its implied design obligations?

The Claimant had no obligation to comply with the Drawings to the extent that it was impossible to do so based on actual site conditions. However, to the extent that the Claimant supplied its own design for those elements, as a matter of business efficacy, there must be an implied term that its work would be reasonably fit for its intended purpose. [8]

The Respondent's expert opined that the Deficiencies resulted in a 12% reduction in useable floor space. A 12% reduction in useable floor space is a serious loss of utility. However, it is not clear to me what part of that 12% of floor space can be recovered given the actual conditions. Again, the Respondent bears the onus of proof that the

[8] *G. Ford Homes Ltd*. v. *Draft Masonry (York) Co. Ltd*, (1983) 2 CLR 210 (Ont. C.A)

12% loss of useable floor space was caused by the Claimant. The Respondent has failed to discharge the onus of proof on this issue.

The Respondent's expert also identified aesthetic concerns, such as the height of the sign box relative to the cornice on the heritage building and the proportions of the finished columns. Conventional breaches of the implied warranty of fitness occur where the work does not comply with the Building Code or where the building is uninhabitable. I am not aware of a case that has extended the application of the implied warranty of fitness to aesthetic issues. If I am wrong about the scope of the implied warranty of fitness, I find that the aesthetic concerns with the Claimant's work do not amount to a breach of the implied warranty of fitness.

The Respondent has cited *London Eco-Roof Manufacturing Inc.* V. *Syson* [9] as an authority to the effect that aesthetic problems may amount to a breach of the implied warranty to perform work with reasonable care and skill. However, the aesthetic issues referred to by the Respondent's expert arise from design decisions and not from poor workmanship.

12. **CONCLUSION**

In conclusion, I find that I have jurisdiction to hear this dispute. Furthermore, the Respondent's claim for set-off is dismissed. Therefore, I determine the Respondent shall pay invoices #13569 and #13626 to the Claimant in full plus pre and post-judgment interest in accordance with the *Courts of Justice Act*.

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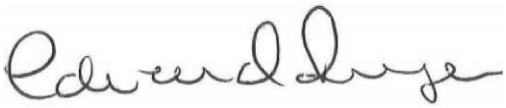
[9] *London Eco-Roof Manufacturing Inc*. v. *Syson*, 2020 ONSC 1338 at paragraph 18.

13. **COSTS**

I want to thank both counsel for the thoroughness of their submissions and their courtesy throughout this matter. There is no reason to depart from the default rule pursuant to section 13.10(3) of the *Construction Act*. The adjudication fee shall be divided equally between the Claimant and the Respondent. Each party shall absorb its own costs.



October 26, 2021

Edward J. Dreyer
ODACC Adjudicator

Date

Ontario Dispute Adjudication for Construction Contracts

ODACC Case No.:5112

In the matter of an adjudication for
Ontario Dispute Adjudication for Construction Contracts (ODACC)
pursuant to the Ontario *Construction Act*, R.S.O., 1990, c. C.30, as amended.

DEMIKON CONSTRUCTION LTD.

Claimant

and

GUELFF ENTERPRISES INC.

Respondent

ORDER

Pursuant to the Ontario *Construction Act*, R.S.O., 1990, c. C.30, as amended, it is ordered that:

1. Guelff Enterprises Inc. shall pay the invoices of Demikon Construction Ltd. #13569 and #13626 in the amount of $10,963.69, inclusive of HST.
2. Guelff Enterprises Inc. shall pay Demikon Construction Ltd. pre-judgment interest at 0.5% per annum over 67 days fixed in the amount of $10.06.
3. Guelff Enterprises Inc. shall pay Demikon Construction Ltd. post-judgment interest at 2% per annum from the date of this Determination.
4. The adjudication fee shall be divided equally between Guelff Enterprises Inc. and the Demikon Construction Ltd.

October 26, 2021

Edward J. Dreyer
ODACC Adjudicator

Date