

DON'T FORGET A CONTRACT: *HODDER CONSTRUCTION (1993) LTD. V. TOPOLNISKY*

A recent decision by the British Columbia Supreme Court shows the importance for both contractors and owners to have a written contract, and the pitfalls that can result when parties proceed on a project without one.

BACKGROUND

In *Hodder Construction (1993) Ltd. v. Topolnisky*, 2021 BCSC 666 the parties were involved in a project to construct a three-story, 3,850 square foot home near Kamloops. Hodder Construction (1993) Ltd. ("**Hodder Construction**") was the general contractor for the project and Topolnisky was the owner. The design involved a specially engineered steel framed structure, rather than conventional wood framing. Despite the size and complexity of the project, the parties did not have a written contract. Construction began in September 2016 but did not go smoothly. By October 2017, the supervising architect had withdrawn, leading to a stop work order, Topolnisky had fallen behind in payments to Hodder Construction, and the cost of the project was exceeding early estimates.

In December 2017, Hodder Construction withdrew from the project, filed a claim of builders lien against title to the property, and sued Topolnisky for \$359,400 in unpaid invoices. Topolnisky countersued for \$131,094 for items they claimed were within the scope of Hodder Construction's work but were over an alleged agreed upon maximum cost of \$850,000.

THE COURT'S ANALYSIS

A primary question the Court addressed was whether there was a binding contract, and if so, whether it was a fixed price contract, a cost plus contract, or some other form of contract. The Court determined there was no contract because, despite a substantial number of communications between the parties, including

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text messages, in-person meetings, and issued and paid invoices, the parties never reached a *meeting of the minds* on the essential terms of the contract, including a timetable, a completion date of the project, the contract price or the remuneration Hodder Construction was to receive for its work.

RECOVERY BY THE GENERAL CONTRACTOR

Hodder Construction was able to recover \$199,879 plus interest, but this was 44% less than the amount it had claimed. Hodder Construction's invoices to Topolnisky included:

- i) a ten percent markup on the cost of materials;
- ii) labour and rental costs calculated by reference to Hodder Construction's charge out rate (as opposed to the actual cost to Hodder Construction); and
- iii) a further five percent management fee on items i) and ii).

This case shows the importance for parties in a construction project to have a clear agreement, evidenced in writing.

The Court made it clear there would have been nothing wrong with such charges if they had

been agreed to by both parties as part of a fee structure in a binding contract. But since there was no binding contract, Hodder Construction was only able to recover under the legal principle of restitutionary *quantum meruit* for the reasonable value or the costs of providing the services, which was less than the amount it had invoiced.

CONTRACT PRINCIPLES

This case shows the importance for parties in a construction project to have a clear agreement, evidenced in writing. It also reaffirms some key principles of contract law in the construction context, including that:

- a binding contract requires a meeting of the minds;
- the parties having agreed to work together on a project, including invoicing and payment, is not sufficient to create a binding contract; and
- a binding construction contract generally requires agreement on material terms, such as the scope of the construction, the timeline for completion of the work, and the price.

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Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

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