

In the Court of Appeal of Alberta

**Citation: Castle Building Centres Group Ltd v Alberta Drywall & Stucco Supply Inc, 2023
ABCA 298**

Date: 20231020
Docket: 2303-0033AC
Registry: Edmonton

Between:

Castle Building Centres Group Ltd

Appellant/
Cross-Respondent
(Plaintiff)

- and -

**Alberta Drywall & Stucco Supply Inc and
Richard Blair Cunningham**

Respondents/
Cross-Appellants
(Defendants)

The Court:

**The Honourable Justice Peter Martin
The Honourable Justice Dawn Pentelechuk
The Honourable Justice Jane A. Fagnan**

Memorandum of Judgment

Appeal from the Decision by
The Honourable Justice S.E. Richardson
Dated the 18th day of January, 2023
(2023 ABKB 32, Docket: 1803 04770)

Memorandum of Judgment

The Court:

[1] The parties each appeal ancillary aspects of a chambers judge's order setting aside an applications judge's order for summary judgment in favour of the appellant/cross-respondent Castle Building Centres Group Ltd. (Castle Building) and permitting the Counterclaim of the respondent/cross-appellant Alberta Drywall & Stucco Supply Inc. (Alberta Drywall) to continue: *Castle Building Centres Group Ltd v Alberta Drywall & Stucco Supply Inc*, 2023 ABKB 32.

[2] Castle Building is a buying group that extends preferential pricing to its members, which since 2000 has included Alberta Drywall. In late 2017, Alberta Drywall – questioning the accuracy of Castle Building's invoices and having requested third party source documents – stopped paying invoices for materials purchased by Castle Building on its behalf. In March 2018, Castle Building filed a Statement of Claim against Alberta Drywall for the amount it claimed was owing (\$407,856.74 plus interest at a rate of 19.5%); Alberta Drywall issued a Counterclaim alleging breach of the membership agreement through overcharging and misrepresentations.

[3] In January 2021, the applications judge granted Castle Building summary judgment in the sum of \$913,920.67 inclusive of 19.5% interest, plus costs on a solicitor-client basis. The judgment amount included a "termination penalty" of \$143,857.13 not sought in the Statement of Claim but which Castle Building added to Alberta Drywall's account after terminating its membership in July 2018. The applications judge permitted Alberta Drywall's Counterclaim to proceed.

[4] Alberta Drywall appealed the order for summary judgment in April 2021. However, Castle Building executed on its judgment prior to the appeal hearing in May 2022, receiving a total of \$961,548.94 between June and October 2021.

[5] In January 2023, the chambers judge allowed the appeal, setting aside both the summary judgment and the costs award and permitting the Counterclaim to proceed. In so doing, she ascribed "an adverse inference to [Castle Building]'s continued refusal to provide the third party source documents to support the quantum of their claim" (para 39).

[6] Following her decision, the parties applied to the chambers judge to settle the terms of the order. Alberta Drywall requested the return of all monies paid to Castle Building. While Castle Building agreed to return the termination penalty (though disputed how much interest was owing), it sought to keep the balance of the judgment monies pending final determination of the action. For its part, Castle Building requested that the order expressly state that the chambers judge's reasons, including the adverse inference drawn, have no application in future proceedings.

[7] The chambers judge ordered that the termination penalty (\$143,857.13) be returned to Alberta Drywall, plus 19.5% daily interest from August 15, 2018 (when the termination penalty was applied to Alberta Drywall's account) to February 24, 2023 (the date of the order). She also ordered that the costs paid by Alberta Drywall (\$46,069.46) be returned. However, the chambers judge declined to order the balance of the judgment returned, reasoning that the issue "was not litigated on the appeal, accordingly, it cannot form part of the final Order on the appeal". The same was said of the applicability of her adverse inference finding to the outstanding litigation.

[8] We are advised that on March 13, 2023, Castle Building returned the sum of \$328,896.75 to Alberta Drywall.

I. Castle Building Appeal

[9] Castle Building raises two narrow grounds of appeal. It argues the chambers judge erred, first, in finding an adverse inference against Castle Building (or alternatively, in failing to include a term in the order expressly limiting the adverse inference drawn to the appeal), and second, in awarding daily interest of 19.5% past January 19, 2021, the date of the original judgment.

[10] Notably, Castle Building does not appeal the decision to set aside its summary judgment.

The Adverse Inference

[11] The drawing of an adverse inference was part of the chambers judge's reasoning in setting aside the summary judgment. While accepting that Alberta Drywall is indebted to Castle Building, the chambers judge concluded there was a lack of clarity in the amount properly owing, due in part to Castle Building's "persistent failure to provide the third party invoices sought by [Alberta Drywall] since before the litigation began in early 2018" (para 29).

[12] Since Castle Building has not appealed the decision to set aside the summary judgment, it cannot now challenge the adverse inference finding that forms part of the reasons for that decision. An appeal is from the order granted, not the reasons for it: *Real Estate Council of Alberta v Moser*, 2023 ABCA 57 at para 33; *Ewashko v Hugo*, 2022 ABCA 194 at para 7; *CCS Corporation v Secure Energy Services*, 2018 ABCA 120 at para 14; *R v Elliott*, 2014 ABCA 431 at para 4.

[13] It bears noting that Alberta Drywall clarified in oral argument that they do not take the position that *res judicata* or issue estoppel would apply in future litigation in relation to the adverse inference drawn by the chambers judge. Further, the circumstances which led to the adverse inference may change prior to trial and it would be inappropriate in the circumstances for the Court to speculate in that regard.

Interest Calculation

[14] The question of calculating interest on the termination penalty need not be addressed here in light of our decision on the cross-appeal below and Alberta Drywall's concession that the amount to be returned would be reduced by interest paid by Castle Building.

[15] The issue of interest payable by either party and at what rate, including that related to the termination penalty, shall be determined at the trial of this matter.

[16] Castle Building's appeal is accordingly dismissed.

II. Alberta Drywall Cross-Appeal

[17] Alberta Drywall submits, for its part, that the chambers judge erred in allowing Castle Building to retain the summary judgment award given her finding that summary judgment was not appropriate.

[18] Castle Building submits that the chambers judge, through email communications following her written reasons, in effect varied her decision to overturn the summary judgment in whole in order to balance the equities between the parties pending trial.

[19] The chambers judge's emails (of February 17, 2023 and February 21, 2023) do not purport to vary her written judgment, nor do they provide a legal basis for declining to order return of the summary judgment award.

[20] The general presumption is that successful litigants are entitled to enjoy the benefits of their successful litigation, even though the matter is being appealed: *Vysek v Nova Gas International Ltd*, 2001 ABCA 300 at para 5 and cases cited therein. Absent some sort of successful application for pre-trial relief, judgment monies paid or collected should have been returned to Alberta Drywall. There was no need for Alberta Drywall to make argument on this point before the chambers judge, who erred in declining to order this when specifically requested to do so.

[21] In setting the summary judgment aside, the chambers judge found the evidentiary record did not permit her to determine the amounts owing. As the parties were put back to their original positions of having to prove their respective claims, and no application was before the Court for pre-trial relief, there was no basis for Castle Building to retain monies paid by Alberta Drywall.

[22] We therefore allow Alberta Drywall's cross-appeal and order the remaining amount paid by Alberta Drywall returned to it (which we understand to be \$632,652.19) within 45 days.

[23] Alberta Drywall shall have costs of both this appeal and cross-appeal, the result in each being consistent with the proposed form of order it submitted to the chambers judge.

Appeal heard on October 4, 2023

Memorandum filed at Edmonton, Alberta
this 20th day of October, 2023



Authorized to sign for:

Martin J.A.

Pentelechuk J.A.

Fagnan J.A.

Appearances:

R.J. Cotter, K.C.

K.P. Letwin

for the Appellant/Cross-Respondent

E.A. Maynes

for the Respondents/Cross-Appellants