CITATION: Bridging Finance Inc. v. 1033803 Ontario Inc., 2023 ONSC 1721
COURT FILE NO.: CV-18-608978-00CL
DATE: 20230314

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: BRIDGING FINANCE INC., AS AGENT FOR 2665405 ONTARIO INC.

Applicant

AND:

1033803 ONTARIO INC. and 1087507 ONTARIO LIMITED

Respondents

IN THE MATTER OF AN APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED; AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C.43, AS AMENDED

BEFORE: Osborne J.

COUNSEL: *Jeremy Opolsky, Scott Bomhof & Jake Babad*, for the Applicant

Michael Farace, Asim Iqbal & Paul Guaragna, for the Respondents

HEARD: March 14, 2023

ENDORSEMENT

Overview

[1] KSV Restructuring Inc. ("KSV" or the "Receiver") brings this motion in its capacity as Court-appointed Receiver and Manager of 1033803 Ontario Inc. ("803") and 1087507 Ontario Limited for advice and directions as to whether, effectively, the Receiver is entitled to Holdback proceedings for the benefit of creditors, and whether it can proceed with the Lien Action and the Delay Action (defined below) and defend any counterclaim brought by MOD Developments (197 Yonge) Limited Partnership ("MOD") in those proceedings.

[2] The motion came about as a result of the Receiver seeking to recover, for the benefit of the estate, funds held back by MOD related to construction services performed.

[3] Defined terms in this Endorsement have the meaning given to them in the motion materials unless otherwise specified.

Background and Context

[4] 803 operated a concrete forming business under the name of Forma-Con Construction "Forma-Con"). It provided services to construction projects in and around the Greater Toronto Area. 803 is owned by the Aquino family and is related to Bondfield Construction Company Limited which was a general contractor with projects across Ontario. Both of those entities were members of the Bondfield Group of Companies (the "Bondfield Group").

[5] 803 was incorporated in 1993 but began operating the Forma-Con concrete forming business in or around 2016.

[6] Also part of the Bondfield Group was another company, 1428508 Ontario Limited ("508"). 508 was incorporated in 2000 and the sole shareholder was Mr. Steven Aquino. On December 20, 2014, the shares of 508 were transferred, retroactively, to 803, with the result that 508 became a wholly-owned subsidiary of 803. Until 508 was dissolved, it, too, carried on business under the name Forma-Con.

[7] This motion, and indeed broader litigation, arises out of a construction project located at 197 Yonge St., Toronto, known as the Massey Tower (the "Massey Tower Project" or the "Project"). Forma-Con provided concrete pouring and framing work as part of the construction of the Project.

The Massey Tower Agreement

[8] On December 19, 2014, an agreement was entered into between MOD and "Forma-Con Construction (a division of 142850**2** Ontario Limited)" (the "Massey Tower Agreement") (emphasis added).

[9] Pursuant to the Massey Tower Agreement, Forma-Con was to provide concrete forming services for the Project as noted above.

[10] However, there was a mistake in the naming of the parties to the Massey Tower Agreement in that it described Forma-Con Construction as a division of 142850**2** ("502") rather than the proper and intended party, 50**8**.

[11] 502 was never part of the Bondfield Group and carried on a business known as Second Floor Ltd. "(Second Floor"). It was incorporated on July 6, 2000. Second Floor ceased carrying on business and the corporation was cancelled on February 19, 2007, seven years before the Massey Tower Agreement was executed. 502 simply had nothing whatsoever to do with the Project.

[12] 502 had a different registered address and administrator than 508. Its registered address is not related to any of the entities in the Bondfield Group and the administrator was never an employee or director of any entity in the Bondfield Group.

[13] Pursuant to the Massey Tower Agreement, an unrelated entity, Tucker HiRise Construction Inc. ("Tucker"), was appointed Construction Manager. Forma-Con effectively liaised through Tucker as its primary point of contact for work on the Project. In particular, the Massey Tower Agreement provided that all communications between Forma-Con and MOD were to be forwarded through Tucker.

[14] 508 performed all Forma-Con work on the Project from the date of the Massey Tower Agreement (December 19, 2014) until December 31, 2016.

[15] 508 submitted progress billings in excess of $8,700,000 to MOD. MOD paid these billings in full (save for the required holdback).

[16] No billings were ever submitted by, or paid to, 502.

[17] All progress billings included a WSIB Clearance Certificate certifying the compliance of Forma-Con with its WSIB obligations. Each of those Certificates describes the parties to the Massey Tower Agreement as MOD and "142850**8** Ontario Limited/Forma-Con Construction" (emphasis added).

[18] Forma-Con's general liability insurance, required pursuant to the terms of the Massey Tower Agreement, was maintained and paid for by 508. As required according to the terms of the Massey Tower Agreement, MOD received an insurance certificate dated October 30, 2015 confirming that the insurance was issued in favour of "Forma-Con Construction, a Division of 1428508 Ontario Limited".

[19] Apparently, no one ever noticed the error in the naming of the party in the Massey Tower Agreement as 502 rather than 508. MOD never took the position that the Massey Tower Agreement was invalid, nor did it ever object to 508 providing services under the Massey Tower Agreement. Essentially, the Massey Tower Agreement was performed by both parties for approximately two years without incident or complication - 508 provided the concrete forming services, and MOD paid 508 for those services.

[20] It is common ground on this motion that the concrete forming services were performed and delivered pursuant to the Massey Tower Agreement at a fixed payable value of $23,084,770. The Holdback represents 10% of this amount or, net of taxes, $2,038,704.26.

The Dissolution of 508 and Assignment to 803

[21] As it turns out, a resolution approving the dissolution of 508 was passed on December 31, 2014. It provided that the property of 508 was to be distributed to 803. Those two entities entered into a dissolution agreement also dated December 31, 2014 (the "Dissolution Agreement"), pursuant to which 508 assigned and transferred to 803 all of its right, title and interest in and to all of its property, assets and business.

[22] The Dissolution Agreement provided that it would not constitute an assignment or attempted assignment of any contract to which 508 was a party which was not assignable without the consent or approval of any third party and where such consent or approval had not been obtained, such that any such contracts were to be held in trust for 803 and performed by 803 in the name of 508, with all benefits derived therefrom for the account of 803.

[23] The Articles of Dissolution for 508 were, however, issued and effective almost two years later on June 21, 2016. Those Articles confirm that all of the assets of 508 were distributed to 803 pursuant to the Ontario *Business Corporations Act.*

Performance of the Massey Tower Agreement Subsequent to the Dissolution of 508

[24] 803 performed all of the Forma-Con services pursuant to the Massey Tower Agreement from January 1, 2017 until completion of the Project. 803 issued progress billings to MOD which were paid in the ordinary course (again less the required holdback) in the aggregate amount of approximately $11,700,000.

[25] Each of these progress billings included, as of March 2017, the required WSIB Clearance Certificate, and these identified the parties to the Massey Tower Agreement as "1033803 Ontario Inc./Forma-Con Construction" and MOD.

[26] Tucker, in its capacity as Construction Manager of the Project, was aware that 803 was performing the concrete forming services under the Massey Tower Agreement, at least by correspondence with Forma-Con where the issue arose as a request for clarification as to the proper name of the counterparty, but there is no evidence of formal notice of any assignment having been given.

[27] Tucker issued a revised insurance certificate in April 2017 naming as an additional insured, "Forma-Con Construction, a Division of 1033803 Ontario Ltd.".

[28] The Receiver who brings this motion was appointed by order of Justice Hainey dated November 19, 2018 (the "Receivership Order"). The Receiver determined, upon review, that there was potential value for creditors of Forma-Con if the Project was completed. In particular, the Receiver concluded that its ability to collect the funds previously held back by MOD (in the amount of $2,038,704.26) (the "Holdback") would be impaired if the Project was not completed.

[29] The Receiver therefore set about to negotiate with MOD the terms of a closeout agreement for the Project, in December 2018. It was then that MOD asserted for the first time that the Receiver lacked any standing to deal with the Massey Tower Agreement because the Receiver had no authority with respect to 502.

[30] The Receiver and MOD entered into an agreement on December 27, 2018 (the "Close-Out Agreement"), setting out the terms pursuant to which the Receiver, acting on behalf of 803, agreed to complete the concrete forming work on the Project. That Close-Out Agreement, however, specifically provided that any dispute with respect to or arising from its terms was to be heard by this Court.

[31] The Receiver, on behalf of 803, performed all of the remaining work required under the Close-Out Agreement, and sent billings to MOD with respect thereto in the approximate amount of $420,000, which invoices were paid in full by MOD.

[32] Following completion of the Project in 2019, the Receiver requested payment of the Holdback (which is equal to 10% of the work performed by Forma-Con and now exceeds $2 million), and MOD refused.

[33] The Receiver registered a lien in respect of the Project and commenced a lien action in connection therewith (the "Lien Action"). The Receiver also commenced an action against MOD for amounts owing to 803 for work done in connection with the Project (the "Delay Action").

[34] MOD challenged the authority of the Receiver to pursue that Lien Action and moved to have it dismissed, in response to which the Receiver advised that it intended to bring this motion for directions in respect of the authority of the Receiver.

[35] Accordingly, the Receiver seeks advice and direction on the following questions:

a. Is 508 the proper party to the Massey Tower Agreement (rather than 502)?

b. Is the Holdback "Property" within the meaning of the Receivership Order?

c. Was the Massey Tower Agreement assigned at law or in equity from 508 to 803?

d. Is MOD estopped from asserting that the current party to the Massey Tower Agreement is 502 or 508?

e. In the alternative, is the Massey Tower Agreement held in trust for 803 with the result that 803 is entitled to the benefits thereunder?; and

f. is the Receiver entitled to continue to pursue claims against MOD in the Lien Action and the Delay Action and defend any counterclaims brought by MOD?

[36] If the above questions are answered affirmatively, the Receiver seeks an order:

a. rectifying the Massey Tower Agreement by changing the name effectively to 508;

b. declaring that the Holdback is "Property" within the meaning of the Receivership Order";

c. declaring that the Massey Tower Agreement was assigned law or in equity from 508 to 803;

d. declaring that MOD is estopped from asserting or claiming that the party to the Massey Tower Agreement is either 502 or 508;

e. in the alternative, declaring that the Massey Tower Agreement is held in trust for 803, and 803 is entitled to the benefits thereunder; and

f. declaring that the Receiver is entitled to pursue claims against MOD in both the Lien Action and the Delay Action and defend any counterclaims.

Positions of the Parties and Analysis

[37] When the Receiver sought to recover the Holdback for the benefit of creditors, MOD refused. It opposes this motion on the same basis.

[38] This motion is brought to determine the authority of the Receiver to bring and defend the relevant claims and counterclaims concerning the Holdback. The merits of those Holdback claims will be determined in separate proceedings and are not the subject of this motion.

[39] I also observe that there is no issue on this motion that:

a. the Massey Tower Agreement was performed and the concrete forming services were provided:

b. pursuant to the terms of the Massey Tower Agreement, MOD was required to release the Holdback to Forma-Con no later than 60 days after the contract was completed (Article A – 5.1); and

c. the Receiver is seeking to recover the Holdback for the benefit of the creditors of Forma-Con.

[40] Accordingly, the main issues on this motion are these:

a. should the Massey Tower Agreement be rectified to reflect 508 rather than 502 as a party?

b. is 803 a party to the Massey Tower Agreement by assignment or successorship? and

c. is MOD estopped from taking the position that 803 is not a party to the Massey Tower Agreement?

Rectification and The Limitation Period

[41] First, MOD submits that the party to the Massey Tower Agreement was plainly 502 and not 508, the predecessor of 803.

[42] Moreover, MOD submits that, since 508 filed Articles of Dissolution on June 6, 2016 based on its Dissolution Resolution dated December 31, 2014 yet continued to submit applications for payment and WSIB clearance certificates to MOD up until December 20, 2016, its conduct was wrongful in that it submitted documentation that amounted to successive misrepresentations as it was no longer an existing entity. The result, submits MOD, is that 508 lacks clean hands and is therefore not entitled to equitable relief.

[43] The Receiver takes the position that since it is conceded by MOD that the description of the party in the Massey Tower Agreement was a mistake, the contract should be rectified to reflect 508 as the proper and intended party.

[44] In my view, the Massey Tower Agreement should be rectified to reflect 508 rather than 502.

[45] I find that it is beyond any serious dispute that both parties intended from the outset that 508 was to be the named party, and the naming of 502 was the result of a simple clerical mistake.

[46] MOD agrees and concedes that the naming of 502 was a mistake. Its affiant on this motion, Aidan Ball, stated in his affidavit that "…… it appears that 1428502 due to an error was not properly named in the Contract and should have been named as 1428508" (para. 27). He conceded the same point on cross-examination (Q 279-80).

[47] Even without that admission, however, I would have reached the same conclusion. As submitted by the Receiver, and as summarized above, 502 never had anything to do with the Massey Tower Agreement, Forma-Con, or the Project. MOD does not put forward any evidence that it did.

[48] I am satisfied that the four elements established by the Supreme Court of Canada in *Canada (AG) v. Fairmont Hotels Inc.,* 2016 SCC 56 at para. 14 have been met here:

a. The parties had reached a prior agreement, the terms of which are definite and ascertainable;

b. the agreement was still effective when the instrument was executed;

c. the instrument fails to report accurately that prior agreement; and,

d. if rectified as proposed, the instrument would carry out the agreement.

[49] The parties intended, at the time the agreement was made and throughout the relevant period during which it was performed, that Forma-Con would perform the concrete pouring services for the Project. Moreover, and precisely as intended since it was the skill and expertise of 508 that MOD desired, 508 in fact performed those concrete pouring services for the Project without incident or complication for two years from December 19, 2014 until December 31, 2016.

[50] All of this is consistent with the undisputed fact that the parties intended to name 508 as "Trade Contractor" and in fact properly referred to that party as Forma-Con, but the clerical error was made in describing Forma-Con as a division of 502 rather than 508.

[51] For all of the above reasons, I am satisfied that rectification is appropriate and, if granted, the Massey Tower Agreement would properly reflect the intention of the parties or, as the Supreme Court of Canada expressed it, "the instrument would carry out the agreement".

[52] However, that is not the end of this issue since, albeit belatedly as asserted in its factum for the first time, MOD also submits on this motion that the Receiver's request for rectification of the

Massey Tower Agreement is a request for equitable relief to which the *Limitations Act, 2002*, S.O. 2002, c.24 Sched. B, applies.

[53] MOD takes the position that the claim was discovered by the Receiver on December 21, 2018 when it received a letter of the same date from counsel to MOD advising that the Receivership Order related to two companies, neither of which was the counterparty to the Massey Tower Agreement. MOD's Amended Statement of Defence and Counterclaim served on July 15, 2019 was to the same effect.

[54] Accordingly, MOD submits that, taking into account the adjustments to the applicable limitation period brought about by the extensions related to the Covid 19 pandemic, the Receiver should have brought its claim for rectification on or before January 15, 2022. Since its Notice of Motion is dated September 8, 2022, the claim ought to be statute-barred.

[55] The Receiver submits that it is not out of time since it position was first advanced in the Lien Action when it asserted its right to the Holdback, with the result that the Notice of Motion did not advance a new claim.

[56] The Court of Appeal for Ontario has been clear that a new cause of action is not asserted if the [new claim] arises out of the same facts previously pleaded and no new facts are relied upon, or amounts simply to different legal conclusions drawn from the same set of facts or to simply provide particulars of an allegation already pleaded or additional facts upon which the original right of action is based: *Klassen v. Beausoliel*, 2019 ONCA 407 ("*Klassen*") at para. 29, citing with approval, Paul M. Perell & John W. Morden, *The Law of Civil Procedure in Ontario*, 3rd ed. (Toronto: LexisNexis, 2017), at p. 186.

[57] The Court in *Klassen* went on to observe that it is necessary to read the original Statement of Claim generously and with some allowance for drafting deficiencies (para. 30), and that the Court may refuse an amendment where it would cause non-compensable prejudice (para. 31).

[58] The Receiver's Statement of Claim in the Lien Action was issued on March 13, 2019. Through that pleading, the Receiver sought to recover the Holdback, and asserted that its rights flowed from the Massey Tower Agreement. The Receiver pleaded that it was entitled to advance the claim on behalf of 803.

[59] In its Statement of Defence, MOD defended the Lien Action precisely on the basis that the party to the Massey Tower Agreement was 502 instead of 508 and that it never entered into any contract with 803.

[60] In Reply, the Receiver expressly pleaded that the mis-naming of the counterparty was a clerical error.

[61] MOD expressly refers to and relies upon these pleadings in the Lien Action in its factum responding to this motion (see paras. 8-15).

[62] This motion for advice and directions arises directly out of the Lien Action and the Delay Action. Its purpose is to determine the threshold issue of whether the Receiver can assert claims

of, and defend claims against, 803, including the claim for the Holdback, before the parties spend the financial resources litigating the quantum of the amounts owing, again including the Holdback.

[63] I am satisfied that the *Klassen* test applies and no new cause of action is advanced on this motion. No new facts are pleaded. Moreover, there is no prejudice to MOD, let alone non-compensable prejudice. MOD has engaged on this motion in the very issue, based on the very facts, that were the subject of the Lien Action.

[64] The result, since the Lien Action was commenced well within time, is that the relief sought on this motion is not statute-barred.

The Effect of the Assignment and Dissolution Agreement

[65] MOD submits that 803 is not a party to the Massey Tower Agreement even as successor to 508, as a result of the corporate reorganization described above, pursuant to which 508 was dissolved in 2016. MOD's position is, effectively, that any assignment by agreement between 803 and 508 is invalid because MOD did not provide its consent as was expressly required in writing pursuant to the terms of the Massey Tower Agreement (Supplementary Conditions, Section GC 1.4.1). Such consent was neither sought nor granted.

[66] Moreover, MOD argues that the Receiver's position that 803 is a successor to 508 (with the result that no assignment was necessary) cannot succeed since according to the terms of Dissolution Agreement, 508 assigned to 803 its contracts, with the result that 803 is an assignee of certain contracts but not a successor. MOD submits that 508 was dissolved and assigned its assets to 803; 508 and 803 were not amalgamated.

[67] The Receiver argues that the Massey Tower Agreement was validly assigned from 508 to 803 and in any event, since 803 is the successor in law of 508, no consent was required for that assignment in any event.

[68] The Receiver argues in the alternative that, if consent was required, MOD had notice of the assignment, did not object, and through its actions and conduct consented to or otherwise accepted the assignment, which acceptance was relied upon by 803 to continue to provide services under the Massey Tower Agreement.

[69] In the absence of that acceptance by MOD, or if MOD had objected or declined to honour the Massey Tower Agreement on the basis that the assignment from 508 to 803 was invalid or for any other reason, 803 would not have continued to perform services under the Massey Tower Agreement.

[70] Finally, the Receiver argues that in any event, pursuant to the terms of the Dissolution Agreement, any rights under the Massey Tower Agreement which were not assigned to 803 are held in trust for 803 and can be performed by 803 in the name of 508, with all benefits derived therefrom being for the account of 803.

[71] The Massey Tower Agreement by its terms permitted an assignment, but only by written consent, such consent not to be unreasonably withheld (GC 1.4.1). At the same time, the enurement clause provides that [the terms of the Agreement] enure to the benefit of and are binding upon

successors and assigns (A-9.1). No consent is required for the Massey Tower Agreement to enure to the benefit of and be binding upon a successor.

[72] As noted, MOD submits that the required consent to an assignment was never requested nor given. The Receiver was obviously not involved at the relevant time but concedes that it cannot find any evidence of a request for consent to an assignment. The fact that the Receiver does not have all of the facts relating to the events that occurred before its appointment in the first place, is perhaps not surprising in the circumstances of this case.

[73] Notwithstanding the lack of a formal request for consent to assignment, it seems clear that the issue of the identity of the party did arise in the context of an electronic mail exchange between the Bondfield Group and Tucker (the Construction Manager of the Project for MOD) in April, 2017.

[74] The representative of Tucker, in response to an electronic mail message from the Bondfield Group referencing 803, inquired as to whether the company had been sold or whether the crane was owned by another entity and noted that: "previous certificates were to …… 508". This exchange is quoted from and relied upon in the factum of MOD (see para. 38) in support of its argument that the Receiver conceded that there were no additional emails (i.e., that there was no additional evidence regarding consent to the assignment).

[75] All of that in turn follows on a lengthy submission by MOD, repeated in argument on this motion, about the activities and alleged activities at and within the Bondfield Group and involving certain of its then principals who were members of the Aquino family and particularly John Aquino. I observe, however, that it is precisely as a result of the alleged misconduct and unlawful activity involving the Bondfield Group that the Receiver was appointed in the first place and now seeks to recover what assets it can for the benefit of its creditors.

[76] However, consent is not required pursuant to the terms of the enurement clause, since the Massey Tower Agreement is binding on "successors" as well as assigns.

[77] For the purposes of the Massey Tower Agreement then, is 803 the corporate successor of 508?

[78] The Receiver relies on the observations of Côté, Brown and Rowe JJ, in their dissenting reasons, although not on this point, (from the majority of four) in *Resolute FP Canada Inc. v. Ontario (Attorney General),* 2019 SCC 60 at paras. 159-160 ("*Resolute FP Canada*"), as to what constitutes a corporate successor:

> [159] Like the majority at the Court of Appeal, we are of the respectful view that the motion judge made a palpable and overriding error in concluding that the enurement clause extended the benefit of the Ontario Indemnity to successor owners of the Dryden Property (i.e., successors-*in-title*). In our view, the term "successors" clearly refers only to *corporate* successors. It is worth noting that this clause is a standard contractual term — that is, "boilerplate" — that solicitors use in order to protect their clients' interests and expectations (see *Canadian Contract Law,* at pp. 741-42). Certainty in commercial transactions is best protected where courts give effect to the common understanding and inclusion of such terms in contracts, absent any indication that the parties intended them to have a different effect.

> [160] In *National Trust Co. v. Mead*, 1990 CanLII 73 (SCC), [1990] 2 S.C.R. 410, this Court observed that, "[w]hen used in reference to corporations, a 'successor' generally denotes another corporation which, through merger, amalgamation or some other type of legal succession, assumes the burdens and becomes vested with the rights of the first corporation" (p. 423). Indeed, this common understanding of the term "successor" has been recognized in considering enurement clauses like the one at issue here (see C. L. Elderkin and J. S. Shin Doi, *Behind and Beyond Boilerplate: Drafting Commercial Agreements* (1998), at pp. 250-51; M. H. Ogilvie, "*Re-defining Privity of Contract: Brown v. Belleville (City)*" (2015), 52 *Alta. L. Rev*. 731, at p. 736). Again, bearing in mind that the object of contractual interpretation is to discern the parties' objective *intentions,* the commonly accepted meaning of that term provides a helpful starting point to considering what the parties understood the words in the enurement clause to mean.

[79] As noted above in these reasons, the Dissolution Agreement provided according to its terms that all of the assets of 508 were distributed to, and became the property of, 803 or in the alternative were held in trust. 803 assumed all of the rights and burdens of 508.

[80] Moreover, the cross-examination of Steven Aquino conducted October 7, 2022 on his affidavit sworn August 11, 2022 in support of the Receiver's motion includes a lengthy exchange about the intentions of the parties with respect to the reasons for the dissolution resolution and related steps. To quote from the factum of MOD at para. 29:

> "the reason there was a dissolution resolution passed for 508 on December 31, 2014 was that we were considering the sale of a property that is owned or held within 803 that would have resulted in the group being exposed to a large capital gains expenditure. Whereas 508 had had losses in its operations that would have been utilized to offset the gains realized in the sale of the property. So we -- it was decided to amalgamate the two companies for tax planning purposes (questions 77 to 79, pages 22 to 23); …. He does not know why nobody on behalf of 508 or 803 did not tell anyone at MOD Developments or Tucker Hi-Rise Construction that this dissolution of 508 had taken place by way of a dissolution resolution signed on December 31, 2014 (question 79, page 23); …… He does not believe that dissolution information that 508 was dissolved on December 31, 2014 was sent to MOD Developments and Tucker Hi-Rise (question 89, page 23); …… when he stated in paragraph 11 of his August 11, 2022 that "Following the dissolution of 508 from December 2016 through to completion of the Massey project, 803 was the proper party to the Massey Tower project agreement and it was the proper party who was required to perform the work.", he believed that 803 was a proper party to the Contract because 803 was doing the work (question 112, page 34)"

[81] On cross-examination, Mr. Ball for MOD agreed that MOD wanted to contract with the Forma-Con entity, irrespective of the numbered company behind it (Q 291). According to him, what mattered to MOD was that it was the Forma-Con entity that was doing the work; was contractually obligated to do the job; with the management that MOD knew at Forma-Con; with the expertise that MOD knew that Forma-Con had; and with Forma-Con's equipment, all with the result that the numbered company behind Forma-Con did not matter (Q 291 – 296).

[82] In my view, to the extent that there is evidence of the intentions of the parties to the Massey Tower Agreement in the somewhat unusual and challenging circumstances of this case, it is to the effect that the intention of the parties was to have Forma-Con perform the concrete forming obligations under the Massey Tower Agreement.

[83] It is also my view that it was the intention of the Bondfield Group that 803 would assume all of the benefits and burdens of the contracts to which 508 was a party, and 803 was the party performing the concrete forming services on the Project in any event (through its division, Forma-Con). MOD clearly sought and understood that it was dealing with "Forma-Con", and in fact it was dealing with Forma-Con, whether as a division of 508 rather than 502 (the mistake) or whether as 803 in turn as a corporate successor of 508 within the meaning contemplated by the Supreme Court of Canada.

[84] I am satisfied that 803 is a successor of 508 as described in *Resolute FP Canada* above for the purposes of an enurement clause like the one at issue here: it is another corporation which, "through merger, amalgamation or some other type of legal succession, assumes the burdens and becomes vested with the rights of the first corporation".

[85] Accordingly, I find that for the purposes of the Massey Tower Agreement, 803 was the successor of 508.

[86] I am not prepared to find however, as argued in the alternative by the Receiver, that MOD in fact did formally consent to the assignment through the correspondence and actions of its Construction Manager, Tucker. Consistent with the failure of either party to realize the mistake that had been made, when the representative of Tucker was informed in April 2017 that the relevant entity operating as Forma-Con was in fact 803 and not 508, his response was: "okay, I'll get it changed" referring to the insurance certificates which he then set about to amend as he had undertaken to do (Motion Record, Tab 2.AA, p. 682). The insurance certificates and WSIB certificates were issued in the name of 803.

[87] There is also no question that progress payments were submitted by, and paid to, 803.

[88] I discuss these facts and others in the section below entitled "Estoppel", and in my view they are relevant to this motion but do not in my view amount to an express consent to an assignment of the Massey Tower Agreement.

[89] Rather, to me they reflect what I have already found above; namely, that the parties jointly thought in April, 2017 as reflected in the email exchange noted above that a clerical error had been made and conducted themselves in all respects as if the clerical error had not been made, just as they had done throughout the performance of the Massey Tower Agreement. As I say, that is a relevant fact, but it does not in my view amount to an express consent to an assignment of the contract as that was contemplated by the parties. Simply put, neither MOD nor its Construction Manager Tucker adverted to the fact that Tucker was doing anything other than correcting a clerical or typographical error.

[90] As noted, however, is not necessary for me to find that there was an express consent to the assignment, given my conclusion that 803 is the corporate successor to 508.

Estoppel

[91] In any event, if I am mistaken as to my conclusion that 803 is the corporate successor to 508 for the purposes of the Massey Tower Agreement, I would conclude for the reasons set out

below that MOD is now estopped from resiling from its position that 803 is the proper party to the contract.

[92] The Receiver submits that, from 2017 until the end of 2018, Forma-Con and MOD (including its Project Manager, Tucker), acted on the shared assumption that 803 was the party to the Massey Tower Agreement. MOD objected to 803 as a counterparty only once the Receiver was appointed and sought to recover the Holdback. Equity, through the doctrine of estoppel by convention, does not permit one party to reside from a shared assumption.

[93] The Receiver submits that it entered into the Close-Out Agreement to preserve the claim of 803 to the Holdback, and as noted, would not have undertaken the work required to fulfil its obligations under the Massey Tower Agreement without an express understanding that the Holdback was an asset of 803. It submits that it in fact performed the work, and MOD benefited from the completion of that work, all with the result that MOD is now estopped from resiling from the shared understanding that 803 was the party to the Massey Tower Agreement.

[94] MOD submits that estoppel does not apply since MOD was not aware of the dissolution of 508 as of December 31, 2014 or that 803 was the proper contractual counterparty, with the result that the required element of estoppel by convention of proof that the dealings of the parties were based on a shared assumption of fact or law, even if mistaken, cannot be made out.

[95] The parties are agreed on the elements of estoppel by convention:

i) the parties' dealings were based on a shared assumption of fact or law, even if mistaken. Nevertheless, estoppel can arise out of silence (impliedly);

ii) a party must have acted in reliance on the shared assumption; and

iii) it would be unjust and unfair to allow one of the parties to resile or depart from the common assumption.

See: *Ryan v. Moore*, 2005 SCC 38 at para. 59 and *Fram Elgin Mills 90 Inc. v. Romandale Farms Ltd.,* 2021 ONCA 201 at para. 144.

[96] However, they disagree on whether there was a shared assumption here; namely, that 803 was the proper contractual counterparty.

[97] In my view, the elements of estoppel by convention are made out here for the reasons set out above. The evidence of MOD was clear that it intended to contract with Forma-Con and in fact thought it was doing so; the numbered company behind Forma-Con was not relevant. The shared assumption, although mistaken, was that 803 was the counterparty. Generally, equity will not favour the party seeking to resile from the shared assumption (see *Fram-Elgin*).

[98] There is no issue that both parties acted in reliance on the shared assumption: the Massey Tower Agreement was performed according to its terms. The concrete forming services were provided, payment was made and the requisite WSIB and other regulatory documents were prepared.

[99] Finally, in my view it would be unjust and unfair to allow MOD to resile or depart from the common assumption. It is difficult to come to a different conclusion in equity. The work was done, and the Holdback is owing pursuant to the terms of the Massey Tower Agreement. There is no basis upon which to conclude that it is in any sense fair or equitable for MOD to be allowed to keep that 10% Holdback.

[100] There is no contractual basis, such as a deficiency in the work performed, that is in the evidence before me, and none is asserted. Rather, the only objection to the payout of the Holdback to the Receiver for the benefit of creditors is that set out above. There is no prejudice or detriment to MOD in finding that the Receiver should be entitled to the Holdback, in the sense that MOD is not entitled to keep the Holdback in any event: its only argument would have to be that some other party, but not the Receiver, was entitled to the funds. Yet, no other party asserts any such interest.

[101] MOD itself asserts no beneficial interest to the funds. As against that, and given my reasons above, it is difficult to conclude that in equity, the Receiver ought not to be entitled to the funds constituting the Holdback.

[102] Finally, in equity, the Receiver is seeking to recover the amounts for the benefit of creditors and it would be unfair to visit the conduct of 508 or its principals, whatever that may amount to in law, on the Receiver or the creditors for whose benefit it seeks to recover the funds. I accept the submissions of MOD that the dissolution of the company was not disclosed at the time and nor were the articles registered until some considerable period of time later. However, that does not change my conclusion on this point. The alleged misconduct of the company and its principals was in large part the very basis for the appointment of the Receiver in the first place.

[103] MOD is estopped from taking the position as it did following the Receivership Order that the Receiver is not entitled to the Holdback.

Result and Disposition

[104] For all of the above reasons, the Receiver has been successful on this motion. The Massey Tower Agreement is rectified to reflect 508 as the proper party to the Massey Tower Agreement, 803 is the successor to 508 for the purposes of the Massey Tower Agreement and MOD is estopped from asserting that 803 is not the proper contractual counterparty. It follows that the Holdback is "Property" as defined in the Receivership Order, and the Receiver is entitled to pursue claims and defend counterclaims in the Lien Action and the Delay Action.

[105] Both parties provided submissions on costs. The Receiver seeks partial indemnity costs in the amount of $134,250.09, inclusive of fees, disbursements and taxes. MOD's partial indemnity costs are $40,005.73 inclusive of fees, disbursements and taxes, and submits that if the Receiver is successful, it should be entitled to costs in that same amount.

[106] I have considered my jurisdiction pursuant to section 131 of the *Courts of Justice Act* and in particular the factors set out in Rule 57.01. I have reviewed the cost outlines and submissions of both parties.

[107] The Receiver was successful on the motion and is entitled to its costs. The motion was complex, factually and with respect to the legal issues the facts presented, and the disposition will affect and hopefully simplify the Lien Action and the Delay Action going forward.

[108] The issues were important, the proceeding was complex, and I think either party could reasonably expect to pay a material amount in costs if unsuccessful. I agree with the submission of the Receiver that it was important for it to seek to recover the Holdback for the benefit of creditors, particularly in circumstances where MOD asserted no beneficial interest to the funds yet refused to pay them over. The clerical error in the Massey Tower Agreement was conceded, yet the Receiver was put to considerable effort to try to forensically examine records relating to a period of time prior to its appointment, in order to assemble the evidentiary record.

[109] On the other hand, MOD submits that the time spent by the Receiver and its counsel was inordinate and unreasonable.

[110] I have reviewed the cost outlines submitted by both parties. I am satisfied that Receiver's fees are generally reasonable, as was the allocation of work to avoid duplication and distribute it properly and proportionately as between and among counsel of different levels of experience so as to maximize efficiency.

[111] Having considered the submissions of the parties, the outlines and all of the factors as noted above, the Receiver is entitled to its costs in the amount of $110,000 inclusive of fees, disbursements and taxes, payable by MOD within 60 days.

[112] Order to go in accordance with these Reasons. The parties may submit a draft order, if agreed as to form and content, to me in writing. If the parties cannot agree on the form of order, they may schedule a Chambers appointment before me through the Commercial List Office to settle the terms of same.

Osborne J.

Date: March 14, 2023