NOVA SCOTIA COURT OF APPEAL

Citation: ***APM Construction Services Inc. v. Caribou Island Electric Ltd.***,
2013 NSCA 62

Date: 20130510
Docket: CA 406600
Registry: Halifax

Between:

APM Construction Services Inc. and
Travelers Guarantee Company of Canada

Appellants and
Respondents by Cross-Appeal

v.

Caribou Island Electric Limited and
Canada Revenue Agency

Respondents

and

3104607 Nova Scotia Limited, carrying on business as Advanced Cabling Systems, and Her Majesty the Queen in Right of the Province of Nova Scotia as represented by the Minister of Transportation and Infrastructure Renewal

Respondents and
Appellants by Cross-Appeal

Judges: MacDonald, C.J.N.S.; Oland, Fichaud, Beveridge and Farrar, JJ.A.

Appeal Heard: January 29, 2013, in Halifax, Nova Scotia

Held: Appeal allowed, in part; cross-appeal dismissed per reasons for judgment of Farrar, J.A.; MacDonald, Oland, Fichaud, and Beveridge, JJ.A. concurring.

Counsel:

Ezra B. van Gelder, for the Appellants/Respondents by Cross-Appeal

Deanna M. Frappier, for the respondent Canada Revenue Agency

John Kulik, Q.C. and Ian Dunbar, for the Respondents/Appellants by Cross-Appeal, Advanced Cabling Systems

Michael T. Pugsley and Peter C. McVey for the Respondent /Appellants by Cross-Appeal Minister of Transportation and Infrastructure Renewal

Fraser Miller, for the Respondent Caribou Island Electric Limited not appearing

Reasons for Judgment:

Background

[1] In the fall of 2010 the Province of Nova Scotia issued a tender with respect to renovations to the Bridgewater Provincial Building. As part of the requirements for the project the successful bidder was required to obtain a labour and material payment bond. APM Construction Services Inc., the successful bidder on the project, had Travelers Guarantee Company of Canada issue the Bond. The relevant portions of the Bond provide:

> ...
>
> NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that if the Principal shall at all times promptly make payment to all Claimants for all work, materials or services used or reasonably required for use in performance of the Contract, or as the same be changed, altered or varied, to the satisfaction of the Obligee, then this obligation shall be void.
>
> ...
>
> IN THIS BOND where there is a reference to Claimant it shall mean any person, firm or corporation doing or performing any work or service or placing or furnishing any materials, or both, for any purpose related to the performance of the Contract: work, service and materials being constructed to include all water, gas, power, light, heat, oil, gasoline, service or rental equipment which is supplied or used for or in connection with the performance of the Contract. (Emphasis added)

[2] APM subcontracted work to Caribou Island Electrical Limited who, in turn, subcontracted a portion of its work to Advanced Cabling Systems (ACS). ACS performed its work and received partial payment from Caribou. However, at the beginning of March, 2012, ACS was still owed $86,201.64.

[3] On March 2, 2012, ACS gave notice pursuant to s. 3 of the **Builders' Lien Act**, R.S.N.S. 1989, c. 277 that it reserved a right to lien with respect to the holdback fund maintained by APM from Caribou and with respect to any funds

ultimately payable to Caribou for work it performed. ACS subsequently commenced a lien action to perfect its lien.

[4] On March 7, 2012, ACS notified Travelers that it was also advancing a claim under the Bond in relation to the outstanding amount.

[5] On February 15, 2012, Canada Revenue Agency (CRA) served a Requirement to Pay on APM for amounts owed by Caribou to CRA in the amount of $183,351.41. APM subsequently paid CRA the sum of $17,090.96 in partial satisfaction of CRA's outstanding claim. After payment of this amount to CRA there remained an amount of $94,441.36 owing by APM to Caribou.

[6] As a result of the competing claims of CRA and ACS, on April 2nd, 2012, APM applied for an order to permit payment of the amount owing to Caribou into court and a discharge of its obligations to ACS under the **Builders' Lien Act**. Travelers also applied for a declaration discharging it from any obligation owed to ACS under the Bond.

[7] On hearing of the application, ACS did not dispute CRA's claim of priority to the amount APM sought to pay into court.

[8] In his decision, Justice Peter Rosinski determined that an interpleader order was not necessary as he could resolve the competing claims and the obligations owed under the Bond without a further hearing. He first found that CRA was entitled to the funds APM sought to pay into court. He then found that Travelers was required to pay ACS the amount it was owed by Caribou, pursuant to the terms of the Bond. He directed APM to pay to CRA the sum of $94, 441.36 and Travelers to pay to ACS the sum of $86,201.64.

[9] Following the release of the Chambers judge's decision (now reported as 2012 NSSC 277), the parties consented to an order dismissing the lien action as against APM Construction Limited and the Province of Nova Scotia. A Consent Order was issued by Justice Kevin Coady on October 17, 2012. The action is now outstanding as against Caribou only.

[10] The funds have been paid as directed by the Chambers judge. APM and Travelers appeal. ACS and the Province cross-appeal.

Issues

[11] The three issues raised on the appeal and cross-appeal are:

1. Did the Chambers judge err by failing to discharge APM's obligations under the **Builders' Lien Act**?

2. Did the Chambers judge err by failing to discharge APM and Travelers of their obligations to ACS under the Bond?

3. Did the Chambers judge err in failing to make an award of costs and disbursements in favour of ACS and the Province who were successful on the application?

[12] I would allow the appeal, in part, and discharge APM of its obligations under the **Builders' Lien Act.** Otherwise I would dismiss the appeal and cross-appeal. I would not award costs to any party.

Standard of Review

[13] The first two issues on this appeal involve the interpretation and application of the **Builders' Lien Act**, the **Income Tax Act**, R.S.C. 1985, c. 1 (5th Supp.) and the Bond. Neither the facts nor the application of the law to them is in dispute. They are questions of law and the standard of review is correctness. (**Housen v. Nikolaisen**, 2002 SCC 33, ¶8; **McPhee v. Gwynne-Timothy**, 2005 NSCA 80, ¶33).

[14] On the third issue, whether the Chambers judge erred in failing to award costs to ACS and the Attorney General, we will not interfere unless he has erred in principle (**McPhee v. Canadian Union of Public Employees**, 2008 NSCA 104, ¶71; **Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)**, 2011 NSCA 43, ¶22).

Analysis

1. **Did the Chambers judge err by failing to discharge APM's obligations under the Builders' Lien Act?**

[15] In its Notice of Application, APM requested a declaration discharging it of its obligations under the **Builders' Lien Act**. Regardless of the outcome of the Interpleader Application, this did not appear to be a contentious issue before the Chambers judge. The solicitor for ACS, in making submissions to the court, said that APM's position in seeking the declaration was reasonable and agreed APM should be relieved of its obligations under the **Builders' Lien Act**:

> ... There are four items of relief that APM is seeking in their amended Notice of Application in Chambers. The first two relate to the interpleader paying the money into court and having the court determine at a later date who should get the money, that APM should be relieved of its obligations by doing so under the **Builders' Lien Act**. And we have no objection to that. Advanced Cabling Systems agrees with that position. That's a reasonable position. (Emphasis added)

[16] CRA also agreed relying on s. 224(2) of the **Income Tax Act**. In its pre-hearing brief it wrote the following:

> 26. In addition, it is noted that subsection 224(2) of the *Income Tax Act* provides that receipt of the moneys subject to an ERTP by the Crown is good and sufficient discharge of the original liability to the extent of the payment.
>
> 27. Subsection 224(2) was considered by the Court in *Dias v. MacLean*. The Court held that payment of funds to the Crown pursuant to the ERTP was a discharge of the payor's liability:
>
> > It is submitted on behalf of Mr. Dias that to allow interception of the funds by Revenue Canada exposes the owners to a continuing obligation for the holdback. Section 224(2) of the **Income Tax Act** specifically states that the payment to Revenue Canada in response to the demand is a discharge of the payor's liability. I do not, therefore, accept that submission.
>
> 28. Subsection 224(2) was also considered by the Tax Court of Canada in *Imperial Pacific Greenhouses v. R.* The Court held:

> It seems to me that any amounts paid by the Appellant as a result of the requirement to pay issued pursuant to subsection 224(1) of the *Act* or as a result of the liability arising pursuant to subsection 224(4) of the *Act* (for failing to comply with the requirement to pay) would both be amounts that would be paid as required under this section and hence the payment of an amount under either the requirement to pay or as a result of the Appellant being liable under subsection 224(4) of the *Act*, would result in a discharge of the liability of the Appellant to Paul Houweling …

> 29. It is submitted, therefore, that the payment of monies directly to the Crown pursuant to the ERTP would relieve APM of obligations to ACS as a lien claimant pursuant to the builders' lien legislation. (My emphasis)

[17] The Attorney General did not address this issue in its brief or oral submissions.

[18] Section 224(2) of the **Income Tax Act** provides:

> **224**(2) The receipt of the Minister for moneys paid as required under this section is a good and sufficient discharge of the original liability to the extent of the payment.

[19] Section 224(1) allows CRA to require a person, in this case APM, to pay amounts owing by it to Caribou to CRA.

[20] The funds paid to CRA in this case were the builders' lien holdback (the **Builders' Lien Act**, ss. 12 & 13). It follows that APM's "original liability" was to retain the funds and pay them out in accordance with the **Builders' Lien Act**.

[21] Notwithstanding the parties' submissions and the lack of any apparent dispute on this point, the Chambers judge declined to discharge APM of its obligations under the **Builders' Lien Act**.

[22] The issue was raised with the Chambers judge post-hearing when the parties could not agree on the form of order. ACS's counsel, in his post-hearing submissions to the Chambers judge on the form of order, questioned the court's jurisdiction to grant the relief sought:

> Counsel for the Applicants submits that there should be a provision in the Order providing that the Applicant APM Construction has no further obligation to ACS under the Builders' Lien Act, R.S.N.S. 1989, c. 277. I did not include such relief in the Order since, quite frankly, I could not find any place in Your Lordship's Decision where that relief was granted. Furthermore, ACS' Lien is subject to a separate action (Hfx. No. 391919) which was commenced on May 1, 2012 to perfect its Lien, notice of which was given on March 2, 2012. I continue to have doubts whether Your Lordship has jurisdiction to make any finding or a declaration with respect to that Lien proceeding;

[23] ACS does not explain why its position changed since the hearing of the application. The Order was issued without the provision requested by APM's counsel.

[24] Rule 76.04 provides:

> (1) A judge who determines an application or motion for an interpleader order may order that the person who makes the application or motion deliver the property at issue to a person appointed by the judge or make a payment at issue into court or to a person appointed by a judge.
>
> (2) The judge may order that the person is discharged from liability for the property, or the obligation to make the payment, when the person makes the delivery or payment provided for in the interpleader order.

[25] The Chambers judge required APM to pay the builders' lien holdback to CRA as he is permitted to do by Rule 76.04(1) but did not declare that the obligations of APM were discharged under the **Builders' Lien Act**. He did not provide any reasons why he did not grant the relief requested.

[26] In his decision he concluded:

> [54] To these arguments I say:
>
> i) CRA has been permitted to have the benefits of a Respondent's status; and
>
> ii) not only was it pleaded in its Notice of Contest, but CRA's "relief" is effectuated by operation of law, and there is no good reason to

> postpone what appears inevitable to me - i.e. that APM must pay Caribou's monies in the amount of $94,441.36 to CRA and so will be absolved of its debt to Caribou;
>
> iii) by my declarations and Order, I will have removed APM's need for a court to decide on the entitlement to the disputed monies by way of interpleader. (Emphasis mine)

[27] The Chambers judge relieved APM of its obligations to pay Caribou the amounts ordered to be paid to CRA. What the Chambers judge failed to appreciate is that the obligation of APM under the **Builders' Lien Act** was not only to Caribou but to subcontractors of Caribou who have performed work on the project including ACS. Section 44B of the **Builders' Lien Act** creates a trust fund for the benefit of the subcontractors. It provides:

> 44B (1) All amounts
>
> (a) owing to a contractor or subcontractor, whether or not due or payable; or
>
> (b) received by a contractor or subcontractor,
>
> on account of the contract or subcontract price of any of the purposes enumerated in Section 6 constitute a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to any of the purposes enumerated in Section 6 who are owed amounts by the contractor or subcontractor.
>
> (2) The contractor or subcontractor is the trustee of the trust fund created by subsection (1) and the contractor or subcontractor shall not appropriate or convert any part of the fund to the contractor's or subcontractor's own use or to any use inconsistent with the trust until all subcontractors and other persons who supply services or materials to any of the purposes enumerated in Section 6 are paid all amounts related to any of the purposes enumerated in Section 6 owed to them by the contractor or subcontractor. (Emphasis added)

[28] Bateman, J. (as she was then) addressed this issue in **Dias v. MacLean**, [1993] N.S.J. 218 (Q.L.)(S.C.) at p. 6 where she held:

> It is submitted on behalf of Mr. Dias that to allow interception of the funds by Revenue Canada exposes the owners to a continuing obligation for the holdback.

> Section 224(2) of the Income Tax Act specifically states that the payment to Revenue Canada in response to the demand is a discharge of the payor's liability. I do not, therefore, accept that submission.

(Note: **Dias v. MacLean** was decided prior to the trust provisions amendments to the **Builders' Lien Act**. However, because ACS acknowledged CRA's priority nothing turns on that point.)

[29] In other words, on payment of the amounts to CRA, by operation of s. 224(2) of the **Income Tax Act**, the owners were relieved of their original obligations under the **Builders' Lien Act** with respect to the holdback. Similarly, APM by making payment, is relieved of its obligations under the **Builder's Lien** Act with respect to the holdback retained from Caribou.

[30] The Chambers judge erred in failing to give effect to the provisions of the **Builders' Lien Act** and the **Income Tax Act**. Had he done so, he would have granted the relief sought by APM and released it of its obligations under the **Builders' Lien Act**.

[31] ACS, in its factum on this issue, says that the issue of APM's obligations under the **Builders' Lien Act** is moot because the lien action has been dismissed as against APM. With respect, I disagree. Section 44B of the **Builders' Lien Act** creates obligations on APM as the contractor to maintain a lien holdback; to hold that amount in trust for the subcontractors; and not to convert it or use it for any purpose inconsistent with the trust until all subcontractors have been paid. APM simply sought a declaration to which it was entitled, that it would not face an argument in the future that it has failed in some way to fulfil its obligations under the **Builders' Lien Act**. It is relief to which it was entitled by operation of law and which should have been granted by the Chambers judge. In failing to do so he erred.

[32] I would allow this ground of appeal.

[33] One final point before leaving this issue. ACS did not dispute CRA's priority claim to the funds sought to be paid into court. The issue of CRA's priority was not before us and nothing in this decision should be taken as my agreement that, in circumstances such as these, CRA has a priority to the lien

funds. **Dias v. MacLean, supra**, determined that CRA had a priority to the lien holdback. However, as noted above, when **Dias v. MacLean** was decided the **Builders' Lien Act** did not contain trust provisions. Since then, the **Act** has been amended and a trust has been created for the benefit of subcontractors. Whether the amendments to the **Builders' Lien** Act affects CRA's priority is for another day.

2. Did the Chambers judge err by failing to discharge APM and Travelers of their obligations to ACS under the Bond?

[34] The central issue on this ground of appeal is the interpretation of the Bond's condition:

> NOW THEREFORE, THE CONDITION OF THIS OBLIGATION is such that if the Principal shall at all times promptly make payment to all Claimants for all work, materials or services used or reasonably required for use in performance of the Contract, or as the same be changed, altered or varied, to the satisfaction of the Obligee, then this Obligation shall be void, BUT OTHERWISE it shall remain in full force and effect. (Emphasis added)

(I will refer to this as paragraph 4 of the Bond.)

[35] APM acknowledges that ACS falls within the definition of claimant. Claimant is defined as follows in the Bond:

> IN THIS BOND where there is a reference to Claimant it shall mean any person, firm or corporation doing or performing any work or service or placing or furnishing any materials, or both, for any purpose related to the performance of the Contract: work, service and materials being constructed to include all water, gas, power, light, heat, oil, gasoline, service or rental equipment which is supplied or used for or in connection with the performance of the Contract. (Emphasis added)

[36] However, by paying CRA, APM says it has fulfilled its obligation to pay for all work, materials or services used or reasonably required for use in performance of its contract with the Province and its obligation under the Bond is void.

[37] It asks us to distinguish or overturn this Court's decision in **ICI Paints (Canada) Inc. v. J.M. Breton Plastering (1984) Co.**, 1992 CarswellNS 293

arguing that the reasoning in that case is no longer applicable because since the amendments to the **Builders' Lien Act** in 2005, contractors and subcontractors can now lien Crown projects.

[38] In **ICI Paints**, the Province, as here, was the owner/obligee. Four Seasons was the principal, and Canadian Surety was the surety. Four Seasons made a subcontract with J.M. Breton Plastering which, in turn, subcontracted with ICI Paints. Breton did not pay ICI Paints, and when ICI Paints tried to claim under the bond, Canadian Surety denied liability.

[39] Freeman, J.A., writing for the majority, points out early on in his reasons that the definition of claimant in the bond was broader than the equivalent provisions of the **Mechanics' Lien Act**, R.S.N.S. 1989, c. 277 (¶7). He also noted that the duty in the **Mechanics' Lien Act** to hold back a portion of the contract price for the benefit of unpaid sub-trades did not apply in these circumstances as it was a Crown project (¶10).

[40] The lack of lien protection in the **Act** clearly influenced Justice Freeman's interpretation of the parties' objective intentions in entering into the bond:

> This is such an unusual feature that it may be a misnomer to call the document a 'bond', although it has many other characteristics in common with a bond. There is nothing, however, to have prevented the province, Four Seasons, and the appellant from entering into just such a contract to ensure that sub-subcontractors and suppliers shall not go unpaid. A reasonable person reading the contract would conclude they did exactly that. The language is clear, no strained or novel interpretation is required, and the apparent contractual objective is a fair and reasonable one. **The conclusion is fortified by the recognition that the parties are all experienced persons in the field, presumably familiar with the plight of small tradesmen and suppliers *who have no right to mechanics' liens against Crown property*.** Only the form is unusual. If the contracting parties choose to call the document a bond, they are at liberty to do so. (¶12) (My emphasis)

[41] Similarly, the absence of statutory coverage was an integral part of his conclusion that the broad interpretation would not create an absurdity:

> It is not an absurdity that claimants without a claim against the general contractor should be paid. A principal purpose of the *Mechanics' Lien Act* is to give a remedy

> to persons in just such a position. It is not absurd that a contract should provide similar protection when mechanics' liens are not available. (¶17)

[42] Even though this interpretation of the bond, particularly the expansive "claimant" provision, would represent a "marked departure" from traditional surety law, Justice Freeman concluded that it still accorded with the parties' objective intentions, and suggested that the provincial government used this kind of bond *specifically because* the Act did not apply to Crown projects:

> The respondent's argument places the surety in the position of guaranteeing payment by subcontractors whom it does not know and whose financial stability it cannot assess. That would be a marked departure from the usual practice of sureties in the business of issuing construction bonds. It might nevertheless be what the parties intended. All of the contracting parties would be aware from experience that most "claimants" defined in the bond would be persons entitled to claim mechanics' liens against the property of the owner, when the owner was not the Crown. For practical or political reasons, or from considerations of fairness, a provincial government might well insist on such protection for suppliers of labour and materials who lack protection under the *Mechanics' Lien Act*. For equally sound business reasons, such as a premium appropriate to the risk, a surety could contract to provide that protection, whether or not the instrument chosen for affecting the purpose was a true surety bond. (¶23)

[43] The sophistication of the contracting parties, and their presumed awareness of the scope of the **Mechanics' Lien Act**, also strengthened the majority's assessment of the parties' objective intentions:

> 40 In ascertaining the intention of the contracting parties, it must be emphasized that they were experienced and knowledgeable in the subject-matter of their contract and competent in every sense of the word. In particular they would have been aware of the expectations such a bond would raise among persons in the position of ICI: sub-subcontractors and materialmen without the protection of the *Mechanics' Lien Act*.
>
> 41 At the time of contracting the bond all parties must have been aware that actions under the *Mechanics' Lien Act* do not lie against property owed by the Crown. The purpose of the payment bond therefore was not to protect the owner from mechanics' liens — that was not necessary. At least one purpose must have been to provide a remedy for the small players at the end of the chain of contracts who were otherwise devoid of the protection the *Mechanics' Lien Act* normally

> affords. Sound reasons, both practical and political, for affording such protection come easily to mind.
>
> 42 That would explain the unusually broad definition of "claimants" remarked on by Mr. Justice Nunn, which must have been equally obvious to the contracting parties when the bond was drafted. It would have been reasonable for prospective sub-subcontractors and suppliers to assume they were protected.
>
> 43 Protection of such persons is a recognized contractual objective, particularly when the property owner is a public body (see Goldsmith, supra).

[44] The rationale of protecting the "small players" through the bond when they were not protected under the lien legislation was a central theme throughout the majority judgment upholding the Chambers judge's interpretation of the bond. Based on these passages, it is evident that Justice Freeman's interpretation was inextricably linked with the statutory situation; if there *had been* lien protection for subcontractors in ICI's position his analysis may not have been the same.

[45] I agree with APM that the lack of protection for subcontractors in the **Mechanics' Lien Act** at the time **ICI Paints** was decided played such a crucial role in the majority's analysis that the force of its reasoning is drastically reduced now that provisions have been enacted to protect subcontractors. This makes the case distinguishable.

Should the Bond be interpreted differently now that there is protection in the Builders' Lien Act for subcontractors?

[46] In considering the interpretation of this Bond it is useful to outline the characteristics of a surety bond. A surety bond is a contract between three parties, the surety who acts as a guarantor and issues the bond; the principal (usually a contractor or subcontractor) is the party whose contractual obligations are guaranteed by the surety; and finally, the obligee, usually the owner. The obligee is the party to whom the principal's obligations are owed (see Leonard Ricchett and Timothy Murphy, *Construction Law in Canada* (Markham, Ont.: LexisNexis Canada Inc., 2010) at pp. 168-69.

[47] The Bond here is a double bond; double because it contains two things:

1. an undertaking to pay;

2. a condition, the performance of which nullifies the undertaking to pay.

(See *Scott & Reynolds on Surety Bonds* (Toronto: Carswell, 1993) at pp. 2-14 to 2-15.)

[48] Paragraph 4 of the Bond contains the obligation for which, if it is not met by APM, Travelers will be answerable. However, if APM meets its obligation then the Bond is null and void (*Construction Law in Canada*, p. 168). It says it has done so by paying for all work, material and services used in the performance of its contract with the Province.

Rules of Interpretation relating to Surety Bonds

[49] At their most basic, the rules of interpretation require that the words used in a surety bond must be given their ordinary and literal meaning.

[50] In **Harris Steel Ltd. v. Alta Surety Co.** (1993), 119 N.S.R. (2d) 61 (C.A.), leave to appeal dismissed [1993] S.C.R. v, a decision of this Court, Alta Surety tried to defend against a claim on a labour and material payment bond by arguing that the owner/obligee had breached the contract with the principal by not making payment. Given that the owner/obligee was also the trustee for the claimants, it argued that the breach by the owner discharged it of its surety obligations. Both the trial judge and the Appeal Division rejected this argument. Roscoe, J.A. held:

> [17] The first problem with the appellant's argument is that it is not the obligations of KMI [the owner/obligee] that have been guaranteed. What has been guaranteed is the performance of Gem [the general contractor] under its subcontracts.

[51] Roscoe, J.A. relied, at ¶18, on **Truro (Town) v. Toronto General Insurance Co.**, [1974] S.C.R. 1129, where the Supreme Court found that the plain wording of the bond did not support the position of the surety that its obligation was discharged because of a material change in the prime contract. Dickson, J. (as he was then) held at pp. 1140-41:

> […] The bond is conditioned for the due payment by Kenney of all claimants for all labour and material used or reasonably required for use in the performance of the prime contract. The town is named as trustee for all potential claimants and referred to as the obligee. The contracts, performance of which is guaranteed by the surety, are the subcontracts entered into by Kenney with labourers and materialmen. A "Claimant", for the purposes of the bond, is defined as one having a direct contract with Kenney for labour, material or both, used or reasonably required for use in the performance of the prime contract. In the present instance Arthur & Conn Ltd. is such a claimant. The contract, performance of which is guaranteed, is the subcontract between Kenney and Arthur & Conn Ltd. dated August 4, 1969. The town is not a party to that contract. Nothing done by the town made any change in or alteration to that contract. <u>It is submitted on behalf of the surety, however, that regard must be had also to the prime contract because the prime contract is by reference made a part of the bond and the surety is discharged if there has been any material change in the prime contract. For myself, I do not think that can be so. The plain words of the bond do not support the submission.</u> The "NOTE" at the top of the C bond makes evident that "another bond" is conditioned for the due performance of the prime contract. In *Doe et al. v. Canadian Surety Co.* [[1937] S.C.R. 1], and in each of the other cases cited to this Court, the acts of the obligee relate to the contract, performance of which is guaranteed by the surety. The Court has not been referred to any case, and I can find none, in which a material change in contract A, to which the obligee is a party, discharged a guarantee in respect of contract B, to which the obligee is not a party. [Underlining mine.]

[52] Roscoe, J.A. ultimately held that the trial judge had not erred "in finding that the failure of KMI to pay Gem did not release Alta from its obligation to pay the claimants under the payment bond" (¶27) based on the plain wording of the bond.

[53] **Whitby Landmark Development Inc. v. Mollenhauer Construction Ltd.**, 67 O.R. (3d) 628 (C.A.) provides a useful summary of the rules relating to the interpretation of bonds:

> [16] It is trite that in interpreting a bond, the intention of the parties as to the obligations of the surety is found in the language of the bond: *Thomas Fuller Construction Co. (1958) Ltd. v. Continental Insurance Co.*, [1973] 3 O.R. 202, 36 D.L.R. (3d) 336 (H.C.J.), at p. 216 O.R. Where the bond incorporates by reference the construction contract, the terms of the construction contract also form part of the bond. To the extent that the bond in any way [page635] qualifies its coverage, the terms of the bond govern: Kenneth W. Scott & R. Bruce Reynolds, Scott and Reynolds on Surety Bonds (Toronto: Carswell, 1993) at 7-1, 2-34. If there is

> ambiguity in the bond, the form having been chosen by the bonding company, the contra proferentem rule of interpretation applies: Thomas Fuller v. Continental, supra, at p. 218 O.R.

[54] Bruce Reynolds, in his article "*Whitby Landmark*: Much Ado About Nothing?" (2002) 12 C.L.R. (3d) 23 makes a number of significant points. First, co-extensive liability on the bond does not mean co-extensive liability on the underlying contract. The two contracts are separate documents that give rise to different obligations and must be interpreted independently. Second, it emphasizes that although the underlying contract helps to establish the "general condition of the surety's disfeasance", it does not establish the obligations under the Bond. Finally, even though recourse may be had to the underlying contract to interpret the Bond, ultimately the terms of the Bond govern.

[55] The wording of the bond was also a paramount consideration in **Arnoldin Construction & Forms Ltd. v. Alta Surety Co.** (1995), 137 N.S.R. (2d) 281 (C.A.), leave to appeal dismissed [1995] S.C.C.A. 143, where the issue was whether the surety bond contained a so-called "pay when paid" clause. A general contractor that had not been paid for its work was unable to pay its subcontractor, and the subcontractor claimed against the labour and material payment bond. There was no dispute that the subcontractor fit the definition of "claimant". The surety defended on the basis that the bond contained a condition precedent that the general contractor had to be paid before it was required to pay the subcontractor. As this had not happened, the condition precedent had not been met and the claimant could not claim under the bond. Justice Hallett held that a provision limiting the rights of subcontractors to claim on the bond would need to be written in clear language:

> 28. […] An intention so important cannot be buried in obscure language that would not alert the subcontractor that payment for the subcontract work was conditional on the owner paying the contractor.

[56] The decision had the effect of resolving the ambiguity in the language against the surety and Justice Hallett stated explicitly that he was applying *contra proferentem* as "an aid to the interpretation" of the contract: ¶34. In the result, this Court allowed the appeal, thus allowing the subcontractor to claim against the bond.

[57] **Arnoldin** stands for, not only that *contra proferentem* is available when interpreting an ambiguous bond, but also that very clear language is needed to limit the rights of claimants: ¶28.

[58] The New Brunswick Court of Appeal decision in **Controls & Equipment Ltd. v. Ramco Contractors Ltd.** (1999), 209 N.B.R. (2d) 1, [1999] N.B.J. No. 20 (Q.L.) provides another illustration of contractual interpretation in the context of a labour and material payment bond. Justice Drapeau (as he was then) noted:

> It is settled law that the rules which guide courts in the interpretation of commercial contracts apply to the interpretation of Labour and Material Payment Bonds. The goal of any such interpretation is to ascertain the true intentions of the parties by reference to the meaning of the words used by them. […] (¶13)

[59] He then went on to stress that surety bonds are guarantees and that courts should be reluctant to interpret them in a way that would undermine the guarantee obligation:

> 18 It is axiomatic that courts should shy away from any interpretation which renders the protection of a guarantee illusory. Western Surety's interpretation will have such an effect. This Court can safely assume that the drafters of the Bond intended that it would offer real protection to its beneficiaries, the subcontractors. The plain and ordinary meaning of para. 3(b), as I have determined it above, is in harmony with the object of the Bond and reflects common business sense. In my view, para. 3(b) does not suffer from any real ambiguity, and I have no hesitation in rejecting the interpretation put forward by Western Surety.

[60] I now return to **ICI Paints** and in particular Justice Hallett's dissent. In **Scott and Reynolds on Surety Bonds**, the authors discuss **ICI Paints** in detail. They say that the wording of the bond gives rise to a freestanding obligation that is independent of any of the underlying contracts and that Justice Hallett was incorrect to find that the obligation that is guaranteed in the bond arose outside of it (i.e., in another contract). They explain the point as follows:

> In the view of the authors, with respect, Mr. Justice Hallett was correct that the literal meaning of these words [paragraph 4 of the Bond], when read in conjunction with the definition of "Claimant" contained in the bond, gives rise to an independent obligation on the part of the general contractor to pay persons which it otherwise would have had no obligation to pay. However, he was

> incorrect when he found that the word "obligation", as used in the operative paragraph of the bond, referred to an obligation arising outside the bond itself. (**supra**, @ pp. 11-18 to 11-18.17)

[61] As a result, on their analysis, with which I agree, the primary obligation owed by the principal is the broad obligation described in paragraph 4 of the Bond.

[62] In summary, the rules of contractual interpretation applicable to surety bonds are as follows:

1. The bond is a freestanding contract and its terms ultimately govern the interpretation exercise. The wording of the bond's terms must be given its ordinary and literal meaning. The words cannot be interpreted in isolation but must be looked at in the context of the bond as a whole.

2. The court will look to the intentions of the parties and, in so doing, will try to give commercial efficacy to the agreement. However, the court will not replace the parties' agreement with its own. Thus, if the wording of the agreement is clear and unambiguous, parties will be held to their agreement, even where the results appear to be draconian or absurd: Hall, **Canadian Contractual Interpretation**, 2nd ed. (Markham, Ont: LexisNexis Canada Inc., 2012) at pp. 39-40.

3. Where the disputed contract is part of a series of contracts, the court will look to the surrounding contracts as well. However, in the context of surety bonds, the terms of the bond ultimately govern; while the underlying contract may be considered, it will only be determinative if the specific obligations contained within it are incorporated by reference into the bond.

4. *Contra proferentem* is available but only where there is an ambiguity that cannot be resolved through other principles of contractual interpretation.

What is APM's Obligation?

[63] The obligation contained in paragraph 4 of this Bond is unusual. It is worth comparing it to the obligation listed in the industry-standard Canadian

Construction Documents Committee bond, as well as that required by the federal government on its construction projects.

[64] The CCDC bond, which is commonly used by private parties, states:

> Now therefore, the condition of this obligation is such that, if the Principal shall make payment to all Claimants for all labour and material used or reasonably required for use in the performance of the Contract, then this obligation shall be null and void, otherwise it shall remain in full force and effect, subject, however, to the following conditions:
>
> 1. A Claimant for the purpose of this Bond is defined as one having a direct contract with the Principal for labour, material, or both, used or reasonably required for use in the performance of the Contract…
>
> […]
>
> See *Scott and Reynolds on Surety Bonds, supra* at p. 11-2.

[65] At first glance, the CCDC obligation appears to be nearly as broad and open-ended as the one contained in this Bond. However, the broad language of the condition is limited by the definition of "Claimant", which restricts eligible claimants to those having a direct contract with the principal. Ultimately, then, the CCDC bond is very restrictive and a surety would only need to be concerned about liability arising between a principal and a party with a direct contractual relationship with the principal (*i.e.*, a sub-contractor).

[66] By comparison, the federal bond uses the following wording:

> Now, therefore, the conditions of this obligation are such that, if payment is promptly made to all Claimants who have performed labour services or supplied material in connection with the Contract and any and all duly authorized modifications and extensions of the Contract that may hereafter be made, notice of which modifications and extensions to the Surety hereby waived, then this obligation shall be void; otherwise it shall remain in full force and effect, subject, however, to the following conditions:
>
> 1. For the purpose of this Bond, a Claimant is defined as one having a direct contract with the Principal or any Sub-Contractor of the

> Principal for labour, material, or both, used or reasonably required for use in the performance of the Contract […]

[…]

See *Scott and Reynolds on Surety Bonds, supra* at p. 11-6.

[67] The federal bond broadens the definition of "Claimant" to include sub-subcontractors (those having a direct contract with "any Sub-Contractor of the Principal"). In so doing, it explicitly creates a right for any sub-subcontractor to claim against the surety for unpaid amounts.

[68] Here paragraph 4 of the Bond obligates the principal at all times to make payment to <u>all claimants</u> for all work, materials or both used or reasonably required for use in the performance of the main contract between the principal and the obligee. (I have paraphrased the wording.) It is not restricted in any way as it is in the CCDC and federal bonds. The terms of the Bond must be given their plain and ordinary meaning.

[69] While this is a very broad obligation, it is clear and unambiguous. When read in light of the rest of the contract, no ambiguities arise. "Claimant" is a defined term in the bond, as is "Contract". Neither of these defined terms presents any difficulties when interpreting the wording of paragraph 4. In the absence of ambiguity, there is no need to apply *contra proferentem*. APM's position that by making payment to its own subcontractor its obligation is null and void is simply not supported by the wording of the Bond.

[70] It is clear that paragraph 4 creates a freestanding obligation to pay third parties that are not a party to the Bond and have no contractual privity with APM. It does so by incorporating the broad definition of "Claimant" into the obligation in paragraph 4. This obligation is owed by the principal (and thus by the surety) to the obligee. It is extended to all claimants by the wording of the Bond.

[71] I recognize that this result creates a hardship for APM. Having paid Revenue Canada, it now must respond to ACS's claim, essentially paying twice for the same work. However, the Province required APM to secure a labour and material payment bond as a precondition to it being awarded the construction

contract. It intended that the protections contained within the Bond would be effective. Travelers knew that it could be called upon to pay under the bond, and APM knew it would have to indemnify the surety if a claimant was successful. Since **ICI**, the law of Nova Scotia, governing this Bond, has included the risk of double payment. It is up to a bidder, if it so chooses, to include a contingency for that risk in the calculation of its bid price for a job with the wording of this Bond.

[72] Similarly, subcontractors and sub-subcontractors would have been aware that a broadly worded bond was available to protect them should they not be paid under their contracts. As was noted by Justice Hallett in **Arnoldin, supra**, at ¶28, provisions that limit the rights of would-be claimants must be written in plain language. Similarly, Justice Drapeau (as he then was) in **Controls & Equipment v Ramco Contractors, supra**, at ¶18, stressed that "courts should shy away from any interpretation which renders the protection of a guarantee illusory".

[73] I would dismiss this ground of appeal.

Issue #3 Did the Chambers judge err in failing to make an award of costs and disbursements in favour of ACS and the Province who were successful on the application?

[74] Both ACS and the Province cross-appeal arguing that the Chambers judge erred in failing to award each of them costs. In my view, the cross-appeal is without merit. Although the trial judge is succinct in dealing with the cost award saying simply:

> [56] Given all the circumstances here, I order that each party bear its own costs.

the circumstances are apparent from his decision and the record. APM was faced with two competing claims for monies it owed to Caribou. It sought to do the right thing. It made an interpleader application seeking to pay the monies into court and have the court determine at a later date who was entitled to the funds.

[75] At the hearing and in their submissions to the Chambers judge neither the Province nor ACS sought costs.

[76] In fact, during the interpleador hearing ACS supported APM on the interpleader and argued in favour of APM paying the monies owed to Caribou into court. In these circumstances, it is not surprising that the trial judge exercised his discretion and declined to award costs to ACS.

[77] With respect to the Province, as noted earlier, it did not seek costs of the application nor did it request any relief before the Chambers judge nor was any granted to it. It was, at best, an interested party in the application. Again, I am satisfied that the trial judge properly exercised his discretion in declining to award costs.

[78] As an aside, neither ACS nor the Province sought leave to appeal the cost decision (Rule 90.10). It was not raised by the respondent by cross-appeal nor was it argued before us. In these circumstances I decline to address whether the failure to seek leave was fatal to the cross-appeal.

[79] I would dismiss the cross-appeal.

Costs of this Appeal

[80] As success was divided in the appeal and the cross-appeal I would not award costs to any party.

Farrar, J.A.

Concurred in:

MacDonald, C.J.N.S.
Oland, J.A.
Fichaud, J.A.
Beveridge, J.A.