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Cost Savings and Profit-Sharing – Are They Lienable?

Key Takeaway

Provisions which entitle a contractor to a share of the cost savings are separate and distinct from provisions which entitle a contractor to a share of profits.

While profit-sharing arrangements do not give rise to lien rights, the Ontario Superior Court, in *Dominus Construction Corporation v. H&W Development Corp.*,¹ determined that cost savings provisions do because they are “*integrally linked to the ‘service’ provided for in s. 14 of the Construction Act.*”

The Background

H&W Development Corp., an owner and developer (“**H&W**”), contracted with Dominus Construction Corporation (“**Dominus**”). Dominus was to provide construction management services for the development of H&W’s residential condominium project.²

Dominus’ management fee was made up of a fixed fee and a right to 50% of any cost saving realized against the project’s budget.

Upon completion of the project, Dominus alleged that they were entitled to approximately \$7.5M in cost savings. H&W alleged no costs were saved during the project and Dominus therefore registered a lien against the property.³

Dominus brought a motion for summary judgement and H&W brought their own motion to discharge the lien.⁴ The court dealt first with the motion to discharge the lien based on H&W’s argument that cost savings were not lienable.⁵

Cost Saving Provisions and Profit-Sharing Provisions

H&W argued that the cost saving provision was akin to profit-sharing or bonus provisions which have previously been held to not be lienable.⁶

The court disagreed and found that “*cost savings provisions are not analogous to profit-sharing provisions.*”⁷ Rather, unlike profit-sharing provisions, the court found that the cost savings provisions form a portion of the contract price as they are integrally linked to “service” as provided for in Section 14 of the *Construction Act*, namely Dominus’ “*proficiency in bringing a project to completion under budget, which is no different than the ‘service’ Dominus provided in managing the Project.*”⁸

¹ 2019 ONSC 7235.

² *Ibid* at paras 4 and 8.

³ *Ibid* at paras 12-13.

⁴ *Ibid* at para 1.

⁵ *Ibid* at paras 14 and 28.

⁶ *Ibid* at paras 21-23.

⁷ *Ibid* at para 31.

⁸ *Ibid* at paras 30-31.

The court therefore dismissed H&W's motion to discharge the lien.⁹

While logical that the cost savings do form a part of the contract price, the court's distinction between cost savings and profit-sharing is interesting given that the amount of profit is, at least in part, tied to the cost of the project. The lower the cost, the higher the profits. Therefore, even in a profit-sharing regime, the contractor would similarly benefit from its "*proficiency in bringing a project to completion under budget*". However, there are other factors that contribute to the amount of profit that perhaps cannot be directly tied to the service provided by the contractor and perhaps the inability to segregate profits due to cost savings is sufficient to draw the distinction and make one lienable and the other not.



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⁹ *Ibid* at para 34.