

They Breached the Contract: Now what?

BY REBECCA BEATCH



A common contract law misconception is that once a party has breached a contract, the non-breaching party is automatically entitled to be compensated for that breach. In fact, the Courts take a much more nuanced approach to determining when it is appropriate to award compensation, and the conduct of the non-breaching party is important. In *New Westminster Contracting Ltd. v. Nagina Property Ltd.*, 2010 BCSC 62 (“*NWC v. Nagina*”), a recent decision of the Supreme Court of British Columbia, the Court reconfirmed the general principles of damages for breach of a construction contracts.

In *NWC v. Nagina*, the Plaintiff agreed to provide structural framing and form working for a two-lot project. The Plaintiffs executed the contract and revised the drawings, resulting in a decrease to the scope of work by approximately 10 per cent. The Defendants executed the contract and accepted the revised drawings, but mistakenly failed to notice the revised scope of work. In a rush to commence the work, the Defendants instructed the Plaintiff to commence the work on “Lot A”. Shortly thereafter, the Defendants noticed the revised scope of work and a dispute arose between the parties in regards to the price and scope of work. Ultimately, the Defendants

retained a new contractor to complete the work on “Lot B” and the Plaintiff abandoned its work on “Lot A”. The Plaintiff commenced an action against the Defendants claiming damages for breach of contract and seeking lost profits. The Court held that the Defendants had breached the contract, but refused to award the Plaintiff damages for the breach because the Plaintiff failed to prove any loss and, alternatively, failed to mitigate its losses by not continuing its work on “Lot A” at a renegotiated price.

As a general principle, damages for breach of contract are intended to put the innocent party in the same position as if no breach had occurred and the contract had been performed. For a contractor suing for an owner’s breach of contract, this usually translates into a determination of the contractor’s lost profits, subject to any limiting language contained in the contract itself. However, an innocent party is not entitled to damages for breach of contract unless it has actually incurred the loss that it claimed. Therefore, if a contractor is able to immediately find replacement work and earn a comparable profit on that work, then the innocent party has not incurred a loss.

In *NWC v. Nagina*, the Plaintiff claimed damages in the amount of approximately \$60,000,

being the difference between the agreed contract price and the amount the Plaintiff had agreed to pay its sub-contractors, less a deduction for overhead costs which would have reduced its profit margin. The Plaintiff was able to immediately find replacement work and thus the Court held that it had not incurred a loss. The Court rejected the Plaintiff’s submission that had the Defendants not breached the contract, it could have carried out both that contract and any additional work which was available to it because the majority of the work would have been carried out by its subcontractors. The Court did not close the door on this argument entirely, but instead held that there was insufficient evidence to support that assertion in this case, and therefore this argument may be available to a contractor in the future if evidence in support is entered at the trial.

In addition to having to prove actual loss, a contractor seeking damages for breach of contract must also take steps to actively mitigate its losses (for example, by finding alternative work). The law does not allow a party to simply sit back as its losses accrue with the intention of claiming those losses against the breaching party. If a party fails to mitigate its damages, then the Court may reduce the amount of damages claimed. In *NWC v. Nagina*, the Court held, in the alternative, that had it found damages the Plaintiff had failed to mitigate when it stopped working on “Lot A” despite attempts by the Defendants to renegotiate a price for that work. The evidence at trial was that had the Plaintiff continued its work on “Lot A” at a renegotiated price (and had it actually incurred losses of \$60,000) then its lost profit would have only been \$7,000 less than under the original contract. The Court held that it was unreasonable for *NWC* to have refused to continue its work on “Lot A” for a renegotiated price simply because the Defendants had awarded the “Lot B” work to another contractor.

NWC v. Nagina provides an important reminder to consider the legal consequences of breach of a construction contract. The innocent party to a contract must take steps to mitigate its loss, and in doing so, the result may be that no actual loss is incurred. These principles of contract law seek to ensure that parties do not profit from pursuing litigation, but rather are put back in the position they would have been in had the contract not been breached. **CB**

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