



Civil Resolution Tribunal

Date Issued: June 4, 2021

File: SC-2020-008625

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Capilano Stucco Ltd. v. Buildologist Construction Group Ltd.*,
2021 BCCRT 609

B E T W E E N :

CAPILANO STUCCO LTD.

APPLICANT

A N D :

BUILDOLOGIST CONSTRUCTION GROUP LTD.

RESPONDENT

A N D :

CAPILANO STUCCO LTD.

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

Micah Carmody

INTRODUCTION

1. This dispute is about a construction contract addendum allegedly agreed to under duress.
2. The applicant and respondent by counterclaim, Capilano Stucco Ltd. (Capilano), provided stucco work under contract for the respondent, Buildologist Construction Group Ltd. (Buildologist). The parties signed a contract addendum under which Buildologist held back 10% of the contract price in case of deficiencies. Capilano says it signed the amendment under duress. Although 10% of the contract price is \$3,832.50, Capilano only claims \$3,800 and does not explain the difference.
3. Buildologist says the contract addendum is binding and standard in construction contracts to address deficiencies that may not be immediately apparent. It also says there are deficiencies in Capilano's work, so it is entitled to keep the holdback in any case. Buildologist counterclaims \$5,000 for time spent responding to this dispute and for lost income.
4. It is undisputed that under the contract addendum, the final 10% was not payable for 1 year. Accordingly, if the addendum is enforceable, I must also consider whether Capilano's claim is premature.
5. Capilano is represented by Kevin Diell, a principal. Buildologist is represented by Tony Singh, a person I infer is a principal.

JURISDICTION AND PROCEDURE

6. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). Section 2 of the CRTA states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and

flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.

7. The CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In some respects, the parties in this dispute call into question each other's credibility. Credibility of witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. In *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not necessarily required where credibility is in issue. In the circumstances of this dispute, I find that I am able to assess and weigh the evidence and submissions before me. Bearing in mind the CRT's mandate that includes proportionality and prompt resolution of disputes, I decided to hear this dispute through written submissions.
8. Section 42 of the CRTA says the CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
9. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.

ISSUES

10. The issues in this dispute are:
 - a. Is the contract addendum unenforceable due to duress?
 - b. If not, should the CRT refuse to resolve Capilano's claim on the basis that it is premature?

- c. Is Buildologist entitled to damages for lost income and time spent responding to this dispute?

EVIDENCE AND ANALYSIS

11. In a civil dispute like this, Capilano must prove its claim on a balance of probabilities, and Buildologist must prove its counterclaim to the same standard. I have considered all the parties' evidence and submissions, but only refer to what is necessary to explain my decision.
12. The parties' agreement is documented in a December 2, 2019 contract in which Capilano agreed to supply Buildologist with materials and labour for a stucco exterior for a fixed price (stucco contract). The price was \$38,325, payable by 4 installments tied to completion of certain project components. The final 20% was due upon completion. There was no mention of any holdback.
13. As work progressed, the parties agreed to certain extra work that was not part of the stucco contract.
14. On August 5, 2020, the parties signed a contract addendum. The addendum says the stucco contract is amended as follows:

Due to the deficiencies in Stucco work that appeared at the front facing wall, Buildologist here by will hold 10% of the contract amount until 1 Full season of 2021 (reproduced as written).
15. Although the meaning of "1 Full season of 2021" is not clear to me, it is undisputed that it means 1 year from the addendum date. I say this because in its Dispute Notice, Capilano said Buildologist amended the contract to hold back 10% "for a year" and in its Dispute Response, Buildologist said, "We agreed on 1 full year of 2021 hold back." Contemporaneous text messages confirm this. So, I find the 10% holdback, if payable, is payable August 5, 2021.

Is the contract addendum unenforceable due to economic duress?

16. Capilano says when Buildologist asked it to sign the addendum, there were invoices outstanding for months. The latest invoice in evidence is dated June 4, 2020 and shows \$7,899 outstanding. It is not clear to what extent this includes amounts under the stucco contract as opposed to extra work.
17. Capilano says it says it had to agree to the addendum in order to receive payment of this invoice, as the alternative was to get nothing. It says it signed under duress.
18. Duress is a defence to the enforceability of a contract. I find Capilano is claiming economic duress. In order to establish economic duress, Capilano must show that 1) Buildologist exerted pressure to such a degree that its true consent did not exist, and 2) there was an improper or illegitimate element to the pressure: see *Dairy Queen Canada, Inc. v. M.Y. Sundae*, 2017 BCCA 442.
19. The factors the courts (and the CRT) weigh related to the first issue of coercion or consent include:
 - a. Did the person object,
 - b. Did the person have an alternative course available, such as an adequate legal remedy,
 - c. Did the person receive independent advice, and
 - d. Did the person take steps to avoid the contract?
20. Capilano does not say that it objected to the contract addendum when Buildologist proposed it. In early August 2020, Mr. Diel and Mr. Singh discussed the addendum by text message. After reviewing the addendum, Mr. Diell said he did not see anything wrong with it. He signed it the next day, on August 5, 2020. It was only on August 10 that he raised an objection, upon realizing that 10% amounted to nearly \$4,000. I find that the late objection is not evidence of coercion because it happened after Mr. Diell signed the addendum. Even at that point, he still agreed with the addendum, saying,

“Send me the damn money” and that he stood by the quality of his work. He accepted payment as per the addendum and did not take steps to avoid the addendum.

21. Capilano says it had no legal options because in May 2020 when it threatened to register a builder’s lien, Mr. Singh said that Buildologist would sue and Capilano would not see any money because its work had many defects. I find that Buildologist’s assertion of defences to a claim did not preclude Capilano from making a claim. I find that Capilano had alternatives to signing the addendum, including registering a lien or filing a claim in the BC Provincial Court’s Small Claims Court. So, I find Capilano consented to the addendum.
22. The second part of the economic duress test is whether the pressure was improper or illegitimate. There are photos and text messages documenting Buildologist’s concerns about the stucco work. Although Capilano says it remedied the deficiencies identified, on balance, I am persuaded that Buildologist had legitimate concerns about deficiencies that may not immediately be apparent in the stucco work. I am satisfied that those concerns underpinned Buildologist’s request for the addendum.
23. In summary, I find Capilano’s agreement to the addendum was voluntary and not coerced with improper pressure. As I find the addendum is enforceable, the next question is whether the CRT should refuse to resolve the claim and counterclaim.

Should the CRT refuse to resolve Capilano’s claim?

24. It is undisputed that under the contract addendum, Buildologist is entitled to withhold 10% of the contract price, or \$3,832.50, for 1 year, which is until August 5, 2021.
25. The addendum explicitly says the 10% is due to deficiencies in the stucco work that appeared at the front facing wall. Although Capilano says it has addressed all the deficiencies, I find the parties’ agreement on a 1-year term reflects their mutual understanding of the possibility that deficiencies may arise as late as 1-year after the addendum.

26. Therefore, I find Capilano's claim for the holdback is premature. In the circumstances, I exercise my discretion to refuse to resolve the claim under CRTA section 11(1)(b), as the request does not disclose a reasonable claim at this time. Given the addendum, Capilano has no reasonable claim to the holdback until August 5, 2021.
27. Nothing in this decision prevents Capilano from filing a claim if the holdback is unpaid after August 5, 2021, subject to the applicable limitation period. I have not considered the merits of the claim and Buildologist's defence of alleged deficiencies here.

Counterclaim

28. Buildologist counterclaims for \$5,000 for time spent on the dispute and for lost income. It says that to respond to Capilano's claim it had to "get back in the office" and away from construction, which slows down production and costs money.
29. Buildologist provided no evidence in this dispute despite having the opportunity to do so. I find that without evidence or even a detailed breakdown of its estimated costs, Buildologist has not proved any monetary damages.
30. Moreover, the CRT does not generally award compensation for time spent on a dispute, which is consistent with its rules against awarding reimbursement of legal fees except in extraordinary cases. I find this is not an extraordinary case. I dismiss Buildologist's counterclaim.

CRT fees and expenses

31. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. Neither party was successful here. I find it appropriate that each party should pay its own CRT fees, so I make no order for reimbursement. Neither party claimed dispute-related expenses.

ORDERS

32. Under CRTA section 11(1)(b), I refuse to resolve Capilano's claim.

33. I dismiss Buildologist's counterclaim.

Micah Carmody, Tribunal Member