

*Case Name:*  
**Alexman Contracting Inc. v. 6061672 Canada Ltd.  
(c.o.b. Helical Solutions Inc.)**

**Between  
Alexman Contracting Inc., Plaintiff, and  
6061672 Canada Limited o/a Helical Solutions Inc. and  
Joe Nimens, Defendants**

[2009] O.J. No. 182

174 A.C.W.S. (3d) 107

Court File No. 07-1217

Ontario Superior Court of Justice

**M.P. Eberhard J.**

Heard: January 15, 2009.  
Judgment: January 16, 2009.

(11 paras.)

**Counsel:**

P. Daffern, for the Plaintiff.

6061672 Canada Limited o/a Helical Solutions Inc. and Joe Nimens: pleadings struck.

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**1 M.P. EBERHARD J.:**-- On November 18, 2008 judgment was granted on the liquidated damages component of the claim being \$30,000 for the return of deposit and the trial before me proceeded to assess the un-liquidated damages for breach of contract.

**2** Kirk Helleman, principal of the Plaintiff company, gave *viva voce* evidence as to the circumstances of the contract between the parties, the breach and the damages resulting. Also presented was a document brief containing numerous communications between himself and Mr. Joe Nimens, who held himself out as contracting on behalf the principal of the Defendant companies, and the Plaintiff; documents establishing the contract terms;

invoices and Plaintiff books and records demonstrating the cost of completion of the contract; and proof that at the time of contracting there was no Defendant corporation in existence.

**3** I find that Mr. Nimens is bound personally by the contracts he entered into under the corporate names. He made promises which he breached. His contracting was itself a breach of warranty of authority.<sup>1</sup>

**4** The Plaintiff has scrupulously demonstrated the cost to complete the contract. It cost much more than it would have if the Defendant had not breached for four main reasons that can be summarized as follows:

- (a) The breach necessitated that the Plaintiff enter a new contract for the pile driving as quickly as possible such that he could not reasonably avoid terms calling for pricing on the basis of time and materials;
- (b) Some preparatory and monitoring work included in the contract with the Defendant had to be completed by the Plaintiff or others hired by the Plaintiff;
- (c) The delay leading to the ultimate termination of the contract by the Plaintiff necessitated completion during the winter which increased costs related to concrete preparation and pours and to steel installation; and
- (d) The total increased length of the commitment to the project caused by the Defendant's delay impacted the Plaintiff's overhead and profit on the total project.

**5** I find the Plaintiff suffered the following un-liquidated damages as a direct result of the Defendant's breach:

Weatherall piling work	87,412.52
Pito monitoring	22,999.11
Readimix concrete heating	4,103.57
Winter concrete curing	49,778.60

Plaintiff forces to assist Weatherall	14,158.06
Plaintiff forces extra winter rebar installation	9,150.54
Beamish paving premium	12,862.50
Extended overhead	81,274.80
Total compensation for breach of contract	<u>281,739.70</u>

**6** I am not persuaded that the representations of Mr. Nimens as to why the delay occurred or when he intended to commence at the job site were necessarily false when asserted. The insistence on the deposit, seen in the context of subsequent evasion of further communications, colours the representations with a deceitful aura and further ties Mr. Nimens, in his personal capacity, to the wrong suffered by the Plaintiff. The November 18, 2008 judgment against Mr. Nimens and the named corporations addresses his personal liability for retaining the deposit in the face of clear breach of his obligation.

**7** Nevertheless, damages in contract are intended to compensate, not punish, except in compelling circumstances. On the continuum of civil wrongs Mr. Nimens's conduct is blameworthy among fair minded persons of commerce but not reprehensible such as to cry out for punitive remedy. He deserves to lose the case. He has lost. A review of jurisprudence where punitive damages have been granted in contract cases shows circumstances of a callous, high-handedness beyond the disregard and opportunism that occurred here.

**8** Similarly, substantial indemnity costs do not follow upon every legal victory. The Defendant's litigation sins here amount to failure to participate. Although one wonders if that arises from a strategic reliance on the corporate veil, the Defendant has neither succeeded in the litigation nor impeded the Plaintiff in attaining full success in the contract claim.

**9** The Plaintiff files a bill of costs showing \$21,401.25 in fees and disbursements with GST. In submissions a "top up" of the partial indemnity costs of \$2,684.46 ordered in November is sought. I specifically do not go behind that order to "top up." However, the figure actually claimed by the Plaintiff is itself entirely reasonable.

**10** I fix fees at \$10,000 plus \$500 GST and disbursements at \$1,942.62 plus GST of \$49.38

**11** Pre-judgment interest on the un-liquidated damages shall be from the date of the claim at Courts of Justice Act rates and post-judgment interest from January 15, 2009 at the Courts of Justice Act rate.

M.P. EBERHARD J.

cp/e/qlqqs/qlcnt/qlced

*1 Wolfdale Electric Ltd v RPM Systems Automation & Design Quality in Motion Inc et al [2004] O.J. No. 4663.*