Construction Law

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How Lean Is Your Lien?

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HOW LEAN IS YOUR LIEN?

THE ISSUE

Does the Builders Lien Act permit the filing of a lien for damages?

Assume your general contractor client is 50% complete on a $10 million contract for the construction of an office building. The owner recently deleted a third of the remaining contract work although the general contract made no provision for this deletion. There are hot disputes concerning unapproved extra work and alleged delays caused by the owner and architect. The general contract has just been terminated by the owner on the basis that the construction period specified in the general contract was one year and it has taken two years to complete only 50% of the work.

Your client advises you that he wishes to claim against the owner as follows:

(a) $100,000 for work certified by the consultant but not yet paid;
(b) $500,000 in holdback;
(c) $1,000,000 for the increased cost of the work actually done, including overhead, resulting from the delays caused by the owner and the architect;
(d) $500,000 for the loss of profit which would have been made on the second half of the project; and
(e) $500,000 for loss of profit that would have been made on an unrelated contract which could not be undertaken as a result of the delays caused by the owner and the architect on this contract.

TOTAL CLAIM: $2,600,000

Your client wants you to file a lien for the whole amount and the last day for filing is tomorrow. What are your obligations? What do you do?

YOUR OBLIGATIONS

Professional Conduct Handbook

Chapter 1 - Canons of Legal Ethics

3. A Lawyers Duties to the Client

(1) A lawyer should obtain sufficient knowledge of the relevant facts and give adequate consideration to the applicable law before advising a client, and give an open and undisguised opinion of the merits and probable results of the client's cause. The lawyer should be wary of bold and confident assurances to the client, especially where the lawyer's employment may depend on such assurances. The lawyer should bear in mind that seldom are all the law and facts on the client's side, and that *audi alteram partem* is a safe rule to follow....

(5) A lawyer should endeavour by all fair and honourable means to obtain for a client the benefit of any and every remedy and defence which is authorized by law. The lawyer must, however, steadfastly bear in mind that this great trust is to be performed within and not without the bounds of the law. The office of the lawyer does not permit, much less demand, for any client, violation of law or any manner of fraud or chicanery. No client has a right to demand that the lawyer be illiberal or do anything repugnant to the lawyer's own sense of honour and propriety....[1]

Chapter 8 - The Lawyer as Advocate

Prohibited conduct

1. A lawyer shall not:

(a) abuse the process of a court or tribunal by instituting or prosecuting proceedings which, although legal in themselves, are clearly motivated by malice on the part of the client or are brought solely for the purpose of injuring another party,

[1] The Law Society of British Columbia, Professional Conduct Handbook, Chapter 1, sections (1) and (5)

> (b) knowingly assist the client to do anything or acquiesce in the client doing anything which is dishonest or dishonourable,...
>
> (e) knowingly assert something for which there is no reasonable basis in evidence, or the admissibility of which must first be established,...[2]

THE DOWN SIDE

Many counsel would agree that the Courts in British Columbia have been slow to mete out appropriate punishment to parties filing liens for excessive amounts. It may be that as a result of this, counsel are disposed to give aggressive advice with respect to questionable claims.

Certainly there is ample discretion in the Court to punish parties filing excessive liens. The leading case is Guilford Industries Ltd. v. Hankinson Management Services Ltd. et al, [1974] 1 W.W.R. 141. In Hankinson, a lien was filed to force a settlement. The Court awarded damages, including exemplary damages, for abuse of process and noted the following:

> "There have been few occasions in British jurisdiction to develop this tort, (Varawa v. Howard Smith Co., supra; Parton v. Hill (1864), 10 L.T. 414; Gilding v. Eyre (1861), 10 C.B.N.S. 592, 598, 142 E.R. 584) but American decisions have contributed much to put it in proper perspective. (Prosser s. 100). The essential elements of abuse of process are: first, a collateral and improper purpose, such as extortion, and secondly, a definite act or threat, in furtherance of a purpose not legitimate in the use of the process. Some such overt conduct is essential, because there is clearly no liability when the defendant merely employs regular legal process to its proper conclusion, albeit with bad intentions. Thus, the crucial feature in the above mentioned decision was not the issue of the capias in isolation, but the accompanying demand for the register which disclosed the real purpose behind the defendant's manoeuvre.
>
> In the case at bar, the lien proceedings are completely devoid of any legal foundation and were initiated for an unlawful purpose, namely, to obtain a settlement by means of legal "blackmail".
>
> While the courts must protect the right of every resident "to have his day in Court" where there is some evidence, however slight, on which a claim might be supported,

[2] The Law Society of British Columbia, Professional Conduct Handbook, Chapter 8, section 1

> the courts will not permit the processes of the law to be used for ulterior purposes. This Court cannot shut its eyes to the fact that mechanics' liens, lis pendens and garnishing orders are sometimes, though not often, used by unscrupulous persons to achieve results which could not otherwise be obtained. The courts will be quick to curb such acts and, hence, protect the sanctity of the courts and processes provided by law for the achievement of lawful purposes. [emphasis added]"

Although the principles set out in Hankinson have been referred to with approval in subsequent cases, the B.C. Courts appear to have been slow to punish claimants when there existed even a colour of right to file the lien in the amount claimed (see Zanon Sheet Metal Inc. v. Boffo Brothers Construction Ltd., [1993] B.C.W.L.D. 1429 (S.C.) and Galvin v. Secretain [1986] B.C.J. #2267, Victoria Registry No. 83/0767, January 17, 1986.

On the other hand, at least one Ontario decision should be hailed by the conservatives among us. In Concord Construction Inc. v. Jose Manuel Camara et al (1992), 4 C.L.R. (2d) 263 (Ont. Court of Justice) the Court dealt with a case where the lien claimant issued inflated invoices, obtained falsified back-up documents and filed and excessive lien. Section 35 of the Ontario Construction Lien Act reads as follows:

> "35. In addition to any other ground on which the person may be liable, any person who preserves a claim for lien or who gives written notice of a lien,
>
> > (a) for an amount which the person knows or ought to know is grossly in excess of the amount which the person is owed; or
> >
> > (b) where the person knows or ought to know that the person does not have a lien,
>
> is liable to any person who suffers damages as a result. 1983, c.6, s.35."

The Court awarded damages claimed with respect to the filing of the excessive lien. The Court went on to consider a claim for damages against the principal of the corporate lien claimant. The Court said:

> "The Camaras rely, inter alia, on the decision in *Kepic v. Tecumseh Road Builders* (1985), 29 B.L.R. 85 (Ont. H.C.), affirmed on appeal (sub nom. *Kepic v. Tecumseh Road Builders, division of Countryside Farms Ltd.*) (1987), 18 C.C.E.L. 218, 23 O.A.C. 72 (C.A.) in support of their assertion that Martin Bonello should be held

personally liable for the sums found to be owing from Concord to the Camaras. I note in particular the following findings of the trial court [pp. 116-117]:

> "I am satisfied that the Marentettes intentionally caused M.B.L. to present to Kepic, and subsequently to the Court, a statement of accounts which they knew did not represent the net profit on the Great Lakes contract as defined in cl. 9 of the employment contract. I consider that they did so fraudulently, with the clear intention of depriving Kepic of his right to share in the contract profits.
>
> Directors cannot be held liable for inducing a corporation to breach a contract when their acts are performed bona fide in the best interests of the corporation: see *Said v. Butt*, [1920] 3 K.B. 497, [1920] All E.R. Rep. 232; *D.C. Thomson & Co. v. Deakin*, [1952] Ch. 646, [1952] 2 All E.R. 361 (C.A.).
>
> There are undoubtedly numerous occasions when it is the duty of directors acting in the interests of a corporation to cause the corporation to breach a contract, written or implied, and permit the corporation to suffer the resultant liability in damages. This is frequently the case where employees are dismissed without just cause in the legal sense, but where such dismissal is desirable or necessary to accomplish some legitimate corporate objective. In such a case it would be unfair to hold directors personally liable, since they are the only vehicles through which the corporation can act.
>
> Certainly, acting to increase the revenue of a corporation is normally in its best interests; however, doing so fraudulently could never be said to be bona fide in its best interests: see *Einhorn v. Westmount Invts. Ltd.* (1969), 69 W.W.R. 31, 6 D.L.R. (3d) 71 (Sask. Q.B.), affirmed (1970), 73 W.W.R. 161, 11 D.L.R. (3d) 509 (Sask. C.A.); *McFadden v. 481782 Ont. Ltd.* (1984), 47 O.R. (2d) 134, 27 B.L.R. 173, 5 C.C.E.L. 83 (Ont. H.C.). I find Henry and Navarre Marentette liable in their personal capacities for inducing M.B.L. to breach its contract with Kepic by refusing to pay when due the amount properly payable under the contract.
>
> The quantum of damages recoverable for the tort of inducing breach of contract is equal to the contractual damages flowing from the breach."

In this case I am satisfied that Mr. Bonello was the directing mind and will of Concord in terms of causing it to issue inflated invoices to the Camaras and in causing Concord to obtain falsified invoices from subcontractors. In terms of the latter conduct, I am further satisfied that it occurred, in at least one case, i.e., the surveying invoice, prior to the breakdown in relations between the parties.

Based on my findings as to Mr. Bonello's knowledge of the nature of the contract, it is my view that Mr. Bonello's actions were a fraudulent attempt to cause the Camaras to pay more than was properly owing on their contract with Concord, which thus renders Mr. Bonello personally liable to the Camaras for inducing Concord to breach its contract with them by delivering inflated invoices. There will

> accordingly be judgment against Mr. Bonello personally in favour of the Camaras for the sum of $49,964.09.
>
> I do not consider that the damages pursuant to s. 35 of the *Construction Lien Act* flow from the breach of contract in and of itself. I am, however, satisfied that such damages arise from the fraudulent actions of Mr. Bonello in causing the corporation to register the lien in order to secure payment when he knew that the invoices on which it was based were inflated. Where a corporation is used as "a vehicle for fraud" it is open to the court to impose personal liability: *Leon Kentridge Associates v. Save Toronto's Official Plan Inc.* (unreported) (March 27, 1990), Doc. York 301578/87, Conant D.C.J. (Ont. Dist. Ct.). There will, accordingly, be judgment against Mr. Bonello personally in favour of the Camaras for the sum of $14,123.38."

In Ansco Construction Ltd. v. Audax Investments Inc., [1994] S.J. No. 119 Appeal File No. 910, Unreported, the Saskatchewan Court of Appeal considered the Hankinson decision and dealt with an argument from the lien claimant that if there was some evidence upon which a claim might be supported then the claim of lien could not be deemed excessive. The Court in Ansco said:

> "The Guilford decision was based on common law principles and before the statutory requirements of section 52 were enacted. I do not think anything turns on this. The emphasized portion is still relevant [see quote pages 4 and 5 of this paper], but with all due respect, does not mean the lien claimant's claim will not be found to be excessive if it is grossly exaggerated, but rather it means only the lien claimant will be given the opportunity to explain its position and have a judge rule on it."

SECTION 37 OF THE ACT

> **Costs against owner or contractor**
>
> 37. Where it appears to the court in any action to enforce a claim of lien that the action has been brought from the failure of an owner or contractor to fulfil the terms of the contract or engagement for the improvement for which the claim of lien is sought to be enforced or to comply with this Act, the court may order the owner or contractor to pay all the costs of the action in addition to the amount of the contract or subcontract, or wages due by him or them to any contractor, subcontractor,

material man or worker, and may order a final judgment against the owner or contractor, or both of them, for costs.[3]

THE PURPOSE OF THE ACT

It has been suggested that the object of builders lien legislation is to ensure, by a cheap and expeditious method, the payment for work and materials out of property on which the work was done or for which the materials were furnished. The person who has supplied labour and material is enabled by the Act to establish a lien, thus acquiring authority to sell the property so as to realize the claim. One of the beauties of providing the security of a lien is theoretically that potential claimants will be able to obtain payment and thus financing more easily, ultimately resulting in lower prices through a more competitive marketplace.

Many of the more notable features of the builders lien flow from the fact that the lien is a statutory right in rem. This fact tends to operate to prevent the filing of a lien where the claim is not sufficiently connected to the right in rem.

Keeping all of this in mind, if an owner or architect delays a contractor in the performance of its work and thereby increases the contractor's cost of performance, should the contractor be entitled to the benefit of a lien? What about losses consequential to the delay but not directly increasing the cost of the construction? What about an owner terminating a contract unjustly and denying the contractor the profit which would otherwise have been made?

[3] Section 37 of the Builders Lien Act, supra

PROVISIONS OF THE ACT

Liens created in respect of work and material

4. Subject to this Act, a worker, material man, contractor or subcontractor who does or causes to be done any work on, or supplies material, or does both work and supplies materials, to or for an improvement, for an owner, contractor or subcontractor, has a lien for wages or **for the price of the work or material**, or both or any of them, or for so much of it as remains owing to him, on the interest of the owner in the improvement, on the improvement itself, on the material delivered to or placed on the land on which the improvement is situate, and on the land.[4]

Interpretation

1. In this Act

"work" means the doing of work, labour or service, skilled or unskilled, on an improvement;

"material" means every kind of movable property;[5]

"Price" is not defined in the Act.

It would appear from section 1 of the Act that the lien must relate to work done* on an improvement or material supplied to an improvement.

CONCLUSION BASED SOLELY ON PROVISIONS OF ACT?

Assuming your client has a lien "for the price of the work or material", which of the following claims of your client should form a part of the lien?

(a) Certified but unpaid contract payments?

Yes. Work was done.

(b) Holdback?

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[4] Section 4 of the Builders Lien Act R.S.B.C. 1979 c.40

[5] Section 1 of the Builders Lien Act, supra

Yes. Work was done.

(c) Damages for delay resulting in increased cost of the work done?

Yes. Work was done

(d) Damages for loss of profit for balance of contract?

No. No work done.

(e) Damages for loss of profit on unrelated contract?

No. No work done.

THE DECISIONS

There is a dearth of Canadian authority on point. Further, it appears that a number of decisions have been cited by Courts and well respected authors in support of propositions for which they do not stand. Before foraging for those elusive threads of logic, it may be appropriate to consider certain preliminary matters about which the Courts and the authors appear to be in agreement. Certain of those matters are the following:

(a) A lien can be filed for work done pursuant to either a lump sum or a cost plus contract.

(b) A lien can be filed and proven based upon the equitable doctrine of quantum meruit where there is no agreed method for ascertaining the price.

THE "PRICE OF THE WORK OR MATERIAL"

It would appear that a determination of the nature of the claims for which a lien may be filed must start with a consideration of the meaning of "the price of the work or material" referred to in s. 4 of the Act. Unfortunately, although many cases may have been decided on this point, relatively few appear to go into any depth as to the meaning of the phrase.

The Alberta Court of Appeal in Coneco Equipment v. Esso Resources Canada Ltd. (1984) 13 D.L.R. (4th) 310 (Alta. C.A.) shed some light on the appropriate interpretation to be given to the term "price" in the context of the Alberta Act:

> "The problem generally with a lien for interest is obvious. Interest is usually thought to be the price paid for delayed payment, and delayed payment does not enhance the value of the land. The statutory right of lien extends to the "price of the work or material.... It is arguable that interest is the price paid for something other than work..."

In Coneco the Court reached the conclusion that it was proper to lien for interest due to the "long standing rule" (in Alberta) that a lien lies for interest if it is provided for in the construction contract.

One of the most comprehensive considerations of the meaning of "price" appears to be contained in Harrington Electric Ltd. et al v. Lougheed Towers Ltd. (1984), 48 B.C.L.R. 224, upheld on appeal, sub nom Westburne Industrial Enterprises Ltd. and Gough Electric Limited v. Lougheed Towers Ltd. (1985), 61 B.C.L.R. 187 (C.A.). In that case, Mr. Justice Boyle (as he now is) said:

> "What is "the price"?
>
> None of the dictionaries or texts of legal definitions that I reviewed (Black's Law Dictionary, 5th ed. (1979), Jowitt's Dictionary of English Law, 2nd ed. (1977), Words and Phrases) were helpful specifically. They say "price" means "consideration", "pecuniary consideration" or those factors constituting "an integral part of the cost", e.g., transportation.
>
> I would not conclude from them nor from my own sense of the word that "price" includes interest. I agree with Oppal Co. Ct. J. in *Markan*, supra, at p. 321: "The interest on outstanding accounts is merely the cost of deferring payment of that price..." This distinguishes it as something other than an integral part of the price itself."

On Appeal, Mr. Justice Hinkson also dismissed the argument that the "price" referred to in section 4 of the Act included interest. Mr. Justice Hinkson concluded that interest on outstanding accounts was merely the cost of deferring payment of the "price".

In Horsman Bros. Holdings Ltd. et al v. Lee et al (1985), 12 C.L.R. 145 (B.C.C.A.) Mr. Justice Hinkson considered the meaning of "price", and reached the same conclusion. However, he overturned the trial court decision of Mr. Justice Oppal (as he now is) (1985), 52 B.C.L.R. 334 (Co. Ct.) in connection with whether or not air freight expenses incurred by Horsman to ship certain goods

to the improvement on a rush basis formed part of the "price". Mr. Justice Oppal concluded that air freight charges were not part of the "price". Mr. Justice Hinkson however said:

> "In my opinion that is too narrow an interpretation of the provisions of section 4 of the Builders Lien Act."

In Umacs of Canada Inc. v. Northform Construction Ltd., [1989] B.C.W.L.D. 2492 (B.C. Co. Ct.), the Court dealt with the question of whether Umacs, in addition to rental charges for scaffolding, was entitled to a lien for the price of lost scaffolding and the cost of repairing damaged scaffolding. The rental contract included the usual usurious rates for loss and damage. The Court denied Umacs its lien for the additional charges, saying:

> "The question then is does the price of the material mean only the rent or does it include, as well, the cost of lost materials and the cost of repairing damaged material.
>
> A material man who supplies material intended to become part of the improvement is entitled to a lien upon proof of delivery of the material to the site. The amount of the lien is the amount charged for the materials, i.e. the price. By the same token, the material man who rents material to be used in the making of an improvement or to facilitate the making of it is entitled to a lien for the rent, whether it be for a fixed amount or a daily rate for the period of time that the materials are on the site, i.e. the price of delivering the materials to the property. If those materials are lost or damaged those are charges over and above the "price" of placing the material on the site and while recoverable pursuant to the terms of any contract relating thereto from the party renting the material, they do not form any part of a lien claim. These charges are not an integral part of the price of renting material nor have they anything to do with the making of the improvement or facilitating the making of the improvement.
>
> In Harrington Electric Ltd. v. Lougheed Towers Ltd. (1983), 48 B.C.L.R. 224 (Co. Ct.), Boyle C.C.J. considered the meaning of "price" in s. 4 of the Builders Lien Act. He considered various definitions of "price" which included "consideration", "pecuniary consideration" or those factors constituting "an integral part of the cost" (at p. 233). Before concluding that interest on overdue accounts was not part of the "price" as used in the Act, His Honour characterized it as the cost of deferring payment rather than an "integral part of the price" (at p. 233). Stroud's Judicial Dictionary defines "price" as "the sum of money at which something is valued". This definition and the Harrington Electric "integral part" test indicates that "price" should not include extra charges for lost or damaged equipment. These charges are only payable in the event of neglect on the part of the person renting the material."

OVERHEAD AND PROFIT FOR WORK PERFORMED

In Astro Contracting Ltd. v. McCarthur (1986), 17 C.L.R. 230 (B.C. Co. Ct.), Mr. Justice Cowan (as he now is) was dealing with a contractor who had entered into a cost plus contract with an owner for renovation work. The contractor was terminated and a lien was filed including a 25% charge for "overhead". Mr. Justice Cowan said:

> "It still remains to consider whether such overhead is properly included in the labour costs as such. In my view, the term "cost" when used in a cost plus contract relates to direct costs involved in relation to the project concerned. While overhead is a properly recoverable expense, in my opinion it is a factor which is included in the 20% applied to direct costs."

Judge Cowan was dealing essentially with a dispute between the owner and the contractor concerning "overhead" in that the owner suggested that "overhead" had been charged once in respect of the labour rates and then again on the overall cost of the work. Judge Cowan found that it would not be appropriate to charge twice for the item. Finally, it does not appear that Judge Cowan was dealing with the "overhead" issue in the context of whether a lien for "overhead" was a proper one.

In Brookswood Ironworks Ltd. v. 229531 British Columbia Ltd., [1988] B.C.W.L.D. 1956, affirmed (sub nom Barclay Construction Corp. v. 229531 British Columbia Ltd.) 34 C.L.R. 97 (C.A.), the Court was dealing with the lien of a contractor including a claim for overhead. The Court said:

> "Thirdly, the owner submits that the contractor should not be entitled to a claim for overhead in the lien. It is not disputed that profit is recoverable under a claim for a builders lien (Lauder Bros. & Tate Builders Ltd. v. Vanmor Holdings Ltd. et. al. (1985) 12 C.L.R. 128). A contractor is also entitled to a claim for overhead. In the case at bar, the tenant agreed to pay the contractor the cost of labour and materials plus 10% for overhead and 10% for profit. Astro Contracting Ltd. v. McArthur et. al. (1986) 17 C.L.R. 230 is of no assistance to the owner. It was held that overhead is a properly recoverable expense but [the Court] refused to allow it to be charged more than once."

In the Brookswood Ironworks Ltd. case, the Court cited Lauder Bros. & Tate Builders Ltd. v. Vanmor Holdings Ltd. et al (1985), 12 C.L.R. 128 for the proposition that profit is recoverable under a claim

for builders lien. I have read that decision and am unable to find in it any reference to or consideration of profit being recoverable under a claim for a lien. It does not appear that the issue was before the Court except to the extent that the contract was a cost plus 10% contract and the contractor was awarded his cost plus 10%. It was not argued that the 10% was not the proper subject of a lien.

LOSS OF PROSPECTIVE PROFIT

There are cases suggesting that claims for loss of prospective profit are not proper lien claims, however the cases do not include a discussion of the rationale for excluding such claims.

In Seaman v. Canadian Stewart Co. (1911) 2 O.W.N. 576 (C.A.) a contractor was terminated and the lien filed included a claim for loss of prospective profits. The Court said:

> "Two course were open to [the Owner]: One to permit the plaintiffs to proceed with the work under the contract; the other to take it from them and complete it themselves. In the latter case the plaintiffs would be entitled to recover damages, if they could shew them, for loss which they properly suffered by reason of being improperly deprived of the contract. But obviously such damages could not be properly claimed in a proceeding under the Mechanics' Lien Act, nor could they, if found, be a lien on the lands."

There was no discussion as to why a lien cannot be filed for damages for loss of prospective profits. In East Central Gas Co-op Ltd. et al v. Henuset Ranches and Construction Ltd. (1976), 1 Alta. L.R. (2d) 345 (Alta.S.C.) affirmed 6 A.R. 347 (C.A.), the Court dealt with a claim of lien which included $95,000 as damages for loss of prospective profits. The owner suggested that a loss of prospective profits claim was not the proper subject matter of a lien. The claimant presented no argument in opposition and the lien was reduced by that amount.

In Hanwor Construction Ltd. v. Sundial Properties, Vancouver No. F855147, April 8, 1986 (unreported), Mr. Justice Wong (as he now is) dealt with a lien claim filed in part for damages for loss of prospective profit. He suggested that the prospective profit claim was not lienable under the Act, however he did not elaborate concerning that conclusion.

"STANDBY CHARGES" AND "WINTER OPERATING COSTS"?

In Gardon Construction Ltd. v. McConnell (1994), 11 C.L.R. 142 (Man. Q.B.), the Manitoba Court of Queen's Bench was dealing with a lien claim which included $45,000 for "off-site concrete plant standby charges" and "winter operating costs". There was no agreement with respect to these charges between the lien claimant concrete supplier and the general contractor to whom it supplied. The Court found that the charges were "in the nature of damages and were not in the circumstances properly included in the lien claim". There was no explanation as to why claims in the nature of damages should not properly be included in the lien claim.

EXTRACTING THE PRINCIPLES

From the cases it would appear that:

1. Whether or not a lien may be filed for "damages" turns on the interpretation of "the price of the work or material" as set out in s. 4 of the Act.
2. The claim must be connected with enhancing the value of the land.
3. The claim must be "an integral part of the price itself".

CONCLUSION

I would advise the hypothetical client to claim a lien for:

(a) $100,000 for work certified by the consultant but not yet paid;
(b) $500,000 in holdback;
(c) $1,000,000 for the increased cost of the work, including overhead and profit, resulting from the delays caused by the owner and the architect;

but not for:

(d) $500,000 for the loss of profit which would have been made on the second half of the project; and
(e) $500,000 for loss of profit that would have been made on an unrelated contract which could not be undertaken as a result of the delay by the owner and the architect on this contract.