Court File No.CV-18-604993-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

In the matter of Sections 97 and 100 of the Courts of Justice Act, R.S.O. 1990 c. C.43, as amended

B E T W E E N:

FIRM CAPITAL MORTGAGE FUND INC.

Applicant

- and -

FORTRESS BROOKDALE INC., FORTRESS AVENUE ROAD (2015) INC. and FERNBROOK HOMES (BROOKDALE) LIMITED

Respondents

BOOK OF AUTHORITIES OF DIRCAM ELECTRIC LIMITED
(Application Returnable On December 19, 2018)

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TAB 1

<u>Excerpts from the Construction Act, R.S.O. 1990, c. C.30, as amended</u>

s.1 – Definition of Owner

"owner" means any person, including the Crown, having an interest in a premises at whose request and,

(a) upon whose credit, or

(b) on whose behalf, or

(c) with whose privity or consent, or

(d) for whose direct benefit,

an improvement is made to the premises but does not include a home buyer; ("propriétaire")

Creation of lien

14 (1) A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials. R.S.O. 1990, c. C.30, s. 14 (1); 2017, c. 24, s. 12 (1), 66.

Lien a charge

21 The lien of a person is a charge upon the holdbacks required to be retained by Part IV, and subject to subsection 17 (3), any additional amount owed in relation to the improvement by a payer to the contractor or to any subcontractor whose contract or subcontract was in whole or in part performed by the supply of services or materials giving rise to the lien. R.S.O. 1990, c. C.30, s. 21; 2017, c. 24, s. 67.

Personal liability

23 (1) Subject to subsections (2), (3) and (4), an owner is personally liable for holdbacks that the owner is required to retain under this Part to those lien claimants who have valid liens against the owner's interest in the premises. R.S.O. 1990, c. C.30, s. 23 (1); 2017, c. 24, s. 70.

Limitation

(2) Where the defaulting payer is the contractor, the owner's personal liability to a lien claimant or to a class of lien claimants as defined by section 79 does not exceed the holdbacks the owner is required to retain. R.S.O. 1990, c. C.30, s. 23 (2).

Same

(3) Where the defaulting payer is a subcontractor, the owner's personal liability to a lien claimant or to a class of lien claimants as defined by section 79 does not exceed the lesser of,

(a) the holdbacks the owner is required to retain; and

(b) the holdbacks required to be retained by the contractor or a subcontractor from the lien claimant's defaulting payer. R.S.O. 1990, c. C.30, s. 23 (3).

How determined

(4) The personal liability of an owner under this section may only be determined by an action under this Act. R.S.O. 1990, c. C.30, s. 23 (4).

(5) REPEALED: 2017, c. 24, s. 18.

Section Amendments with date in force (d/m/y)

2017, c. 24, s. 18, 70 - 12/12/2017

Payments that may be made

24 (1) A payer may, without jeopardy, make payments on a contract or subcontract up to 90 per cent of the price of the services or materials that have been supplied under that contract or subcontract unless, prior to making payment, the payer has received written notice of a lien. R.S.O. 1990, c. C.30, s. 24 (1); 2017, c. 24, s. 19 (1), 66.

Same

(2) Where a payer has received written notice of a lien and has retained, in addition to the holdbacks required by this Part, an amount sufficient to satisfy the lien, the payer may, without jeopardy, make payment on a contract or subcontract up to 90 per cent of the price of the services or materials that have been supplied under that contract or subcontract, less the amount retained. R.S.O. 1990, c. C.30, s. 24 (2); 2017, c. 24, s. 19 (2, 3).

Section Amendments with date in force (d/m/y)

2017, c. 24, s. 19 (1-3), 66 - 12/12/2017

Vacating lien by payment into court

Without notice

44 (1) Upon the motion of any person, without notice to any other person, the court shall make an order vacating,

(a) where the lien attaches to the premises, the registration of a claim for lien and any certificate of action in respect of that lien; or

(b) where the lien does not attach to the premises, the claim for lien,

where the person bringing the motion pays into court, or posts security in an amount equal to, the total of,

(c) the full amount claimed as owing in the claim for lien; and

(d) the lesser of $250,000 or 25 per cent of the amount described in clause (c), as security for costs. R.S.O. 1990, c. C.30, s. 44 (1); 2017, c. 24, s. 36 (1), 63, 64, 70.

On payment in of reasonable amount

(2) Upon the motion of any person, the court may make an order vacating the registration of a claim for lien, and any certificate of action in respect of that lien, upon the payment into court or the posting of security of an amount that the court determines to be reasonable in the circumstances to satisfy the lien. R.S.O. 1990, c. C.30, s. 44 (2); 2017, c. 24, s. 63.

Where lien does not attach to premises

(3) Where the lien does not attach to the premises, the court may make an order, upon the motion of any person, vacating a claim for lien given to the owner, upon the payment into court or the posting of security of an amount that the court determines to be reasonable in the circumstances to satisfy the lien. R.S.O. 1990, c. C.30, s. 44 (3); 2017, c. 24, s. 36 (3), 70.

Vacating written notice of lien

(3.1) The court shall, on motion, vacate a written notice of a lien if any of the circumstances in subsection (1), (2) or (3) apply. 2017, c. 24, s. 36 (4).

Where general lien

(4) Where a motion is made to vacate the registration of a general lien against one or more of the premises subject to that lien, the court may apportion the general lien between the premises in respect of which the motion is made and all other premises that are subject to the lien. R.S.O. 1990, c. C.30, s. 44 (4); 2017, c. 24, s. 72.

Reduction of amount paid into court

(5) Where an amount has been paid into court or security has been posted with the court under this section, the court, upon notice to such persons as it may require, may order where it is appropriate to do so,

(a) the reduction of the amount paid into court, and the payment of any part of the amount paid into court to the person entitled; or

(b) the reduction of the amount of security posted with the court, and the delivery up of the security posted with the court for cancellation or substitution, as the case may be. R.S.O. 1990, c. C.30, s. 44 (5).

Letters of credit

(5.1) A letter of credit containing reference to an international commercial convention is acceptable as security for the purposes of this section, as long as the convention text is written into the terms of the credit and the letter of credit is unconditional and accepted by a bank listed in Schedule I to the *Bank Act* (Canada) that is operating in Ontario. 2017, c. 24, s. 36 (5).

Lien a charge upon amount paid into court

(6) Where an order is made under clause (1) (a) or subsection (2), the lien ceases to attach to the premises and ceases to attach to the holdbacks and other amounts subject to a charge under section 21, and becomes instead a

charge upon the amount paid into court or security posted, and the owner or payer shall, in respect of the operation of sections 21, 23 and 24, be in the same position as if the lien had not been preserved or written notice of the lien had not been given. R.S.O. 1990, c. C.30, s. 44 (6); 2017, c. 24, s. 70.

Power to discharge

47 (1) The court may, on motion, order the discharge of a lien,

(a) on the basis that the claim for the lien is frivolous, vexatious or an abuse of process; or

(b) on any other proper ground. 2017, c. 24, s. 37 (1).

Power to vacate, etc.

(1.1) The court may, on motion, make any of the following orders, on any proper ground:

1. An order that the registration of a claim for lien, a certificate of action or both be vacated.
2. If written notice of a lien has been given, a declaration that the lien has expired or that the written notice of the lien shall no longer bind the person to whom it was given.
3. An order dismissing an action. 2017, c. 24, s. 37 (1).

Conditions

(1.2) An order under subsection (1) or (1.1) may include any terms or conditions that the court considers appropriate in the circumstances. 2017, c. 24, s. 37 (1).

Direction by court

(2) Where a certificate of action is vacated under paragraph 1 of subsection (1.1), and there remain liens which may be enforced in the action to which that certificate relates, the court shall give any directions that are necessary in the circumstances in respect of the continuation of that action subject to paragraph 4 of subsection 44 (9). R.S.O. 1990, c. C.30, s. 47 (2); 2010, c. 16, Sched. 2, s. 2 (13); 2017, c. 24, s. 37 (2).

Section Amendments with date in force (d/m/y)

2010, c. 16, Sched. 2, s. 2 (13) - 01/07/2011

2017, c. 24, s. 37 (1, 2) - 01/07/2018; 2017, c. 24, s. 63 - 12/12/2017

Court to dispose completely of action

51 The court, whether the action is being tried by a judge or on a reference under section 58,

(a) shall try the action, including any set-off, crossclaim, counterclaim and third party claim, and all questions that arise therein or that are necessary to be tried in order to dispose completely of the action and to adjust the rights and liabilities of the persons appearing before it or upon whom notice of trial has been served; and

(b) shall take all accounts, make all inquiries, give all directions and do all things necessary to dispose finally of the action and all matters, questions and accounts arising therein or at the trial and to adjust the rights and liabilities of, and give all necessary relief to, all parties to the action. R.S.O. 1990, c. C.30, s. 51; 1994, c. 27, s. 42 (4); 1996, c. 25, s. 4 (1); 2017, c. 24, s. 40.

Reference to master, etc.

58 (1) On motion made after the delivery of all statements of defence, or the statement of defence to all crossclaims, counterclaims or third party claims, if any, or after the time for their delivery has expired, a judge may refer the whole action or any part of it for trial,

(a) to a master assigned to the area in which the premises or part of the premises are situate;

(a.1) to a case management master;

(b) to a person agreed on by the parties; or

(c) if the action is for an amount that is within the monetary jurisdiction of the Small Claims Court, as set out in section 23 of the *Courts of Justice Act*, to a deputy judge of that Court or to the Small Claims Court Administrative Judge. 1994, c. 27, s. 42 (5); 1996, c. 25, s. 4 (3); 2017, c. 24, s. 43 (1), 73.

Powers of master on reference

(4) A master or case management master to whom a reference has been directed has all the jurisdiction, powers and authority of the court to try and completely dispose of the action and all matters and questions arising in connection with the action, including the giving of leave to amend any pleading and the giving of directions to a receiver or trustee appointed by the court. R.S.O. 1990, c. C.30, s. 58 (4); 1996, c. 25, s. 4 (6).

Right to share in proceeds

64 Where an interest in the premises is sold under court order, or by a trustee appointed under Part IX, a person with a perfected lien is entitled to share in the proceeds of sale in respect of the amount owing to the person, although that amount or part thereof was not payable at the time of the commencement of the action or at the time of the distribution of the proceeds. R.S.O. 1990, c. C.30, s. 64; 2017, c. 24, s. 70.

Orders for completion of sale

65 (1) The court may make all orders necessary for the completion of a sale and for vesting an interest in the premises in the purchaser. R.S.O. 1990, c. C.30, s. 65 (1); 2017, c. 24, s. 70.

Payment into court of proceeds

(2) Where an interest in the premises is sold under court order, or by a trustee appointed under Part IX, the proceeds of the sale shall be paid into court to the credit of the action. R.S.O. 1990, c. C.30, s. 65 (2); 2017, c. 24, s. 70.

Fees and disbursements

(3) The court may add to the claim of the party having carriage of the action the fees and actual disbursements of the party in connection with the sale. R.S.O. 1990, c. C.30, s. 65 (3).

To whom proceeds paid

(4) The court shall direct to whom the proceeds shall be paid in accordance with the priorities established by this Act. R.S.O. 1990, c. C.30, s. 65 (4).

Where proceeds insufficient to satisfy judgment

(5) Where the proceeds of the sale are not sufficient to satisfy the judgment and costs, the court shall certify the amount of the deficiency and give personal judgment in the appropriate amount to each party whose judgment is not satisfied out of the proceeds against each person who has been found liable to the party. R.S.O. 1990, c. C.30, s. 65 (5).

Section Amendments with date in force (d/m/y)

2017, c. 24, s. 70 - 12/12/2017

67 Repealed: 2017, c. 24, s. 46.

Section Amendments with date in force (d/m/y)

2006, c. 21, Sched. C, s. 102 (2) - 01/05/2007

2017, c. 24, s. 46 - 01/07/2018

Application for appointment of trustee

68 (1) Any person having a lien, or any other person having an interest in the premises, may apply to the court for the appointment of a trustee and the court may appoint a trustee upon such terms as to the giving of security or otherwise as the court considers appropriate. R.S.O. 1990, c. C.30, s. 68 (1); 2017, c. 24, s. 70.

Powers of trustee

(2) Subject to the supervision and direction of the court, a trustee appointed under subsection (1) may,

(a) act as a receiver and manager and, subject to the *Planning Act* and the approval of the court, mortgage, sell or lease the premises or any part thereof;

(b) complete or partially complete the improvement;

(c) take appropriate steps for the preservation of the premises; and

(d) subject to the approval of the court, take such other steps as are appropriate in the circumstances. R.S.O. 1990, c. C.30, s. 68 (2); 2017, c. 24, s. 70, 71.

Liens a charge on amounts recovered

(3) Subject to subsection 78 (7), all liens shall be a charge upon any amount recovered by the trustee after payment of the reasonable business expenses and management costs incurred by the trustee in the exercise of any power under subsection (2). R.S.O. 1990, c. C.30, s. 68 (3).

Priority over mortgages, etc.

78 (1) Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises. R.S.O. 1990, c. C.30, s. 78 (1); 2017, c. 24, s. 70.

Building mortgage

(2) Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered. R.S.O. 1990, c. C.30, s. 78 (2).

Prior mortgages, prior advances

(3) Subject to subsection (2), and without limiting the effect of subsection (4), all conveyances, mortgages or other agreements affecting the owner's interest in the premises that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent of the lesser of,

(a) the actual value of the premises at the time when the first lien arose; and

(b) the total of all amounts that prior to that time were,

(i) advanced in the case of a mortgage, and

(ii) advanced or secured in the case of a conveyance or other agreement. R.S.O. 1990, c. C.30, s. 78 (3); 2017, c. 24, s. 70, 71.

Prior mortgages, subsequent advances

(4) Subject to subsection (2), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that was registered prior to the time when the first lien arose in respect of an improvement, has priority, in addition to the priority to which it is entitled under subsection (3), over the liens arising from the improvement, to the extent of any advance made in respect of that conveyance, mortgage or other agreement after the time when the first lien arose, unless,

(a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or

(b) prior to the time when the advance was made, the person making the advance had received written notice of a lien. R.S.O. 1990, c. C.30, s. 78 (4); 2017, c. 24, s. 53 (1), 70.

Special priority against subsequent mortgages

(5) Where a mortgage affecting the owner's interest in the premises is registered after the time when the first lien arose in respect of an improvement, the liens arising from the improvement have priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV. R.S.O. 1990, c. C.30, s. 78 (5); 2017, c. 24, s. 70.

General priority against subsequent mortgages

(6) Subject to subsections (2) and (5), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that is registered after the time when the first lien arose in respect to the improvement, has priority over the liens arising from the improvement to the extent of any advance made in respect of that conveyance, mortgage or other agreement, unless,

(a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or

(b) prior to the time when the advance was made, the person making the advance had received written notice of a lien. R.S.O. 1990, c. C.30, s. 78 (6); 2017, c. 24, s. 53 (1), 70.

Advances to trustee under Part IX

(7) Despite anything in this Act, where an amount is advanced to a trustee appointed under Part IX as a result of the exercise of any powers conferred upon the trustee under that Part,

(a) the interest in the premises acquired by the person making the advance takes priority, to the extent of the advance, over every lien existing at the date of the trustee's appointment; and

(b) the amount received is not subject to any lien existing at the date of the trustee's appointment. R.S.O. 1990, c. C.30, s. 78 (7); 2017, c. 24, s. 70.

Where postponement

(8) Despite subsections (4) and (6), where a preserved or perfected lien is postponed in favour of the interest of some other person in the premises, that person shall enjoy priority in accordance with the postponement over,

(a) the postponed lien; and

(b) where an advance is made, any unpreserved lien in respect of which no written notice has been received by the person in whose favour the postponement is made at the time of the advance,

but nothing in this subsection affects the priority of the liens under subsections (2) and (5). R.S.O. 1990, c. C.30, s. 78 (8); 2017, c. 24, s. 70.

Saving

(9) Subsections (2) and (5) do not apply in respect of a mortgage that was registered prior to the 2nd day of April, 1983. R.S.O. 1990, c. C.30, s. 78 (9).

Financial guarantee bond

(10) A purchaser who takes title from a mortgagee takes title to the premises free of the priority of the liens created by subsections (2) and (5) where,

(a) a bond of an insurer licensed under the *Insurance Act* to write surety and fidelity insurance; or

(b) a letter of credit or a guarantee from a bank listed in Schedule I or II to the *Bank Act* (Canada),

in the prescribed form is registered on the title to the premises, and, upon registration, the security of the bond, letter of credit or the guarantee takes the place of the priority created by those subsections, and persons who have proved liens have a right of action against the surety on the bond or guarantee or the issuer of the letter of credit. R.S.O. 1990, c. C.30, s. 78 (10); 1997, c. 19, s. 30; 2017, c. 24, s. 53 (2), 70.

Home buyer's mortgage

(11) Subsections (2) and (5) do not apply to a mortgage given or assumed by a home buyer. R.S.O. 1990, c. C.30, s. 78 (11).

Distribution of proceeds of sale

84 Where an interest in the premises is sold or leased under an order of the court or by a trustee appointed under Part IX, the proceeds received as a result of that disposition, together with any amount paid into court under subsection 65 (2), shall be distributed in accordance with the priorities set out in this Part. R.S.O. 1990, c. C.30, s. 84; 2017, c. 24, s. 70.

Section Amendments with date in force (d/m/y)

2017, c. 24, s. 70 - 12/12/2017

TAB 2

1975 CanLII 164 (SCC)

Baxter Student Housing Ltd. and R. C. Baxter Ltd. (*Defendants*) *Appellants*;

and

College Housing Co-operative Limited and College Housing Holdings Incorporated (*Plaintiffs*) *Respondents.*

1975: May 12; 1975: June 26.

Present: Martland, Judson, Spence, Pigeon and Dickson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Mechanics' liens—Appointment of receiver to draw upon and borrow undrawn balance of proceeds under a mortgage—Whether judge exceeded jurisdiction in ordering that mortgagee, in respect of any moneys advanced by mortgagee to receiver, should have priority over any other registered or unregistered charges or encumbrances—The Mechanics' Liens Act, R.S.M. 1970, c. M80, s. 11(1)—The Queen's Bench Act, R.S.M. 1970, c. C280, s. 59.

The respondent housing co-operative and the respondent holding company (both non-profit corporations, without funds) entered into a contractual relationship with the appellants whereby, *inter alia*, the first appellant was to construct a student housing project. Title to the project was in the name of the holding company; the housing co-operative was to be the head tenant; the second appellant was to be property manager. In the late summer of 1972 construction was substantially completed, and the first tenants moved into the building. During the winter of 1972/73 a moisture problem developed in the building, which recurred during the winter of 1973/74, resulting in accumulation of ice, water and mould in some of the suites. The owner of the building sought advice of experts who recommended remedial measures, the estimated cost of which amounted to $135,000. The contractor refused to authorize that the work be done at its expense. Proceedings subsequently commenced between the parties but little progress was made.

The construction cost of the building, $2,209,790, was to have been provided from the proceeds of a Central Housing and Mortgage Corporation first mortgage in the principal amount of $1,988,831, all of which had been advanced except for a holdback of $228,897, and from a second mortage in the amount of $220,959, all of which had been advanced. On June 22, 1973, the contractor caused a mechanics' lien to be filed against the

Baxter Student Housing Ltd. et R. C. Baxter Ltd. (*Défenderesses*) *Appelantes*;

et

College Housing Co-operative Limited et College Housing Holdings Incorporated (*Demanderesses*) *Intimées.*

1975: le 12 mai; 1975: le 26 juin.

Présents: Les juges Martland, Judson, Spence, Pigeon et Dickson.

EN APPEL DE LA COUR D'APPEL DU MANITOBA

Privilège de constructeur—Nomination d'un séquestre pour effectuer des retraits et emprunts sur le solde non versé d'une hypothèque—Le juge a-t-il outrepassé ses pouvoirs en ordonnant que, pour toutes les avances faites par le créancier hypothécaire au séquestre, le créancier hypothécaire ait priorité sur toutes les autres charges, enregistrée ou non—The Mechanic's Liens Act, R.S.M. 1970, c. M80, art. 11(1)—The Queen's Bench Act, R.S.M. 1970, c. C280, art. 59.

La coopérative intimée et la société de portefeuille intimée (toutes deux des sociétés sans but lucratif et sans actif) ont conclu un contrat par lequel, entre autres choses, la première appelante devait construire un immeuble destiné à loger des étudiants. La société de portefeuille en était propriétaire, la coopérative en était locataire principal et la seconde appelante devait en être le gérant. Vers la fin de l'été 1972, la construction étant presque achevée, les premiers locataires s'installent dans l'immeuble. Au cours de l'hiver 1972-73, des problèmes d'humidité surviennent; ils se reproduisent pendant l'hiver 1973-74 avec accumulation d'eau, de glace et de moisissure dans certains appartements. La propriétaire consulte des experts qui recommandent, pour remédier aux difficultés, des travaux dont le coût est évalué à $135,000. L'entrepreneur a refusé de consentir que les travaux soient effectués à ses frais. Des procédures ont par la suite été instituées entre les parties mais elles ne sont guère avancées.

Le coût de construction de l'immeuble, soit $2,209,-790, devait être payé avec une première hypothèque de $1,988,831 consentie par la Société centrale d'hypothèques et de logement (SCHL), dont $228,897 n'avaient pas encore été versés, et une seconde hypothèque de $220,959, dont le montant avait été versé en entier. Le 22 juin 1973, l'entrepreneur a fait enregistrer sur les

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property in the amount of $310,440, claimed to be due to it under the contract.

In the summer of 1974, the owner of the property applied to a Queen's Bench judge in chambers for an order appointing a receiver of the balance of the proceeds of the C.M.H.C. mortgage. The order was granted and contained a provision that any moneys paid by the mortgagee "shall upon payment from time to time to the receiver have priority over any and all other charges or encumbrances registered or unregistered affecting the said lands." An appeal was dismissed by the Court of Appeal, and the appellants, with leave, then appealed to this Court. The question to be decided was whether the judge exceeded his jurisdiction in making the said order.

Held: The appeal should be allowed and the application for the order dismissed.

The appointment of the receiver was wrong in law because the provision ordering that any moneys paid by C.M.H.C. to the receiver would have priority over any other registered or unregistered charges or encumbrances ran contrary to s. 11(1) of *The Mechanics' Liens Act*, R.S.M. 1970, c. M80. Section 11(1) goes a long way in ensuring that once a lien claimant has protected his rights by filing a lien in accordance with the provisions of the Act, the lien is a paramount legal charge not subject to being defeated or eroded in any manner. The inherent jurisdiction of the Court of Queen's Bench, under s. 59 of *The Queen's Bench Act*, R.S.M. 1970, c. C280, is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will. The effect of this order was to alter the statutory priorities which a court simply cannot do.

Boake v. Guild, [1932] O.R. 617, aff'd. [1934] S.C.R. 10, *sub nom. Carrel v. Hart*; *Earl F. Wakefield Co. v. Oil City Petroleums (Leduc) Ltd. et al.*, [1958] S.C.R. 361; *Montreal Trust Co. et al. v. Churchill Forest Industries (Manitoba) Ltd.*, [1971] 4 W.W.R. 542; *Winnipeg Supply & Fuel Co. Ltd. v. Genevieve Mortgage Corp. Ltd.*, [1972] 1 W.W.R. 651, referred to.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], dismissing an appeal from an order of Nitikman J. appointing a receiver. Appeal allowed.

[1] [1975] 1 W.W.R. 311, 50 D.L.R. (3d) 122.

biens-fonds un privilège de constructeur pour un montant de $310,440, dû, selon lui, en vertu du contrat.

A l'été 1974, la propriétaire a adressé une requête à un juge en chambre de la Cour du Banc de la Reine demandant que soit nommé un séquestre du solde du prêt hypothécaire consenti par la SCHL. Il a été fait droit à la requête. L'ordonnance contenait une disposition portant que tous les fonds avancés par le créancier hypothécaire [TRADUCTION] «dès leur versement au séquestre, auront priorité sur toutes les autres charges, enregistrées ou non, grevant lesdits biens-fonds.» Un appel interjeté devant la Cour d'appel a été rejeté par celle-ci, et les appelantes, autorisées à cet effet, ont ensuite interjeté un pourvoi devant cette Cour. Il s'agit de décider si le juge a outrepassé ses pouvoirs en rendant ladite ordonnance.

Arrêt: Le pourvoi doit être accueilli et la requête visant à faire nommer un séquestre rejetée.

Le juge a commis une erreur de droit en nommant un séquestre parce que la disposition portant que les sommes versées au séquestre par la SCHL auraient priorité sur toutes les autres charges, enregistrées ou non, va à l'encontre du par. (1) de l'art. 11 du *Mechanics' Liens Act* du Manitoba, R.S.M. 1970, c. M80. Le paragraphe (1) de l'art. 11 va très loin pour assurer qu'une fois que le créancier a protégé ses droits en enregistrant un privilège conformément aux dispositions de la Loi, celui-ci devienne une charge prioritaire qui ne saurait être supplantée ou entamée d'aucune façon. La compétence inhérente de la Cour du Banc de la Reine, en vertu de l'art. 59 du *Queen's Bench Act*, R.S.M. 1970, c. C280, n'autorise pas ses juges à rendre une ordonnance qui va à l'encontre de la volonté clairement exprimée du législateur. L'ordonnance rendue en l'espèce vise à modifier l'ordre des privilèges fixé par la Loi, ce qu'un tribunal ne peut simplement pas faire.

Arrêts mentionnés: *Boake v. Guild*, [1932] O.R. 617, confirmé à [1934] R.C.S. 10, *sub nom. Carrel c. Hart*; *Earl F. Wakefield Co. c. Oil City Petroleums (Leduc) Ltd. et autre*, [1958] R.C.S. 361; *Montreal Trust Co. et al. v. Churchill Forest Industries (Manitoba) Ltd.*, [1971] 4 W.W.R. 542; *Winnipeg Supply & Fuel Co. Ltd. v. Genevieve Mortgage Corp. Ltd.*, [1972] 1 W.W.R. 651.

POURVOI à l'encontre d'un arrêt de la Cour d'appel du Manitoba[1], rejetant un appel interjeté d'une ordonnance du juge Nitikman nommant un séquestre. Pourvoi accueilli.

[1] [1975] 1 W.W.R. 311, 50 D.L.R. (3d) 122.

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K. B. Foster and *C. R. MacArthur*, for the defendants, appellants.

K. G. Houston, for the plaintiffs, respondents.

The judgment of the Court was delivered by

DICKSON J.—This is an appeal from a judgment of the Court of Appeal for Manitoba affirming an order of Nitikman J. appointing a receiver to draw upon and borrow the undrawn balance of proceeds under a mortgage. The question to be decided is whether the judge exceeded his jurisdiction in ordering that the mortgagee, in respect of any moneys advanced by the mortgagee to the receiver, should have priority over other charges or encumbrances registered or unregistered affecting the lands.

The facts are unusual. In late 1971 College Housing Co-operative Limited (the Housing Co-operative) and College Housing Holdings Incorporated (the Holding Company) entered into contractual relationship whereby *inter alia* Baxter Student Housing Ltd. (Baxter Housing) was to construct on a "turnkey" basis a four-storey, 192-suite apartment building, known as "Dalhousie Drive Project", to provide housing for students at the University of Manitoba. Title to the project was in the name of the Holding Company; the Housing Co-operative, a students' co-operative, was to be the head tenant; R.C. Baxter Ltd. (R. C. Baxter) was to be property manager. In the late summer of 1972 construction was substantially completed, and the first tenants moved into the building. During the winter of 1972/1973 a moisture problem developed in the building, which recurred during the winter of 1973/1974, resulting in accumulation of ice, water and mould in some of the suites. The owner of the building, the Housing Co-operative, sought advice of experts who recommended certain remedial measures, the estimated cost of which amounted to $135,000. Baxter Housing refused to authorize that the work be done at its expense. Two questions therefore became crucial (i) who would pay for the remedial work and (ii) where would the money come from. On point (i) I should say that in September 1973 the Housing Co-operative and the Holding Com-

K. B. Foster et *C. R. MacArthur*, pour les défenderesses, appelantes.

K. G. Houston, pour les demanderesses, intimées.

Le jugement de la Cour a été rendu par

LE JUGE DICKSON—Le pourvoi est à l'encontre d'un arrêt de la Cour d'appel du Manitoba, qui confirme une ordonnance du juge Nitikman nommant un séquestre pour effectuer des retraits et emprunts sur le solde non versé d'une hypothèque. Il faut décider si le juge a outrepasssé ses pouvoirs en ordonnant que, pour toutes les avances faites au séquestre, le créancier hypothécaire ait priorité sur les autres charges, enregistrées ou non, qui grèvent les biens-fonds hypothéqués.

Les faits sortent de l'ordinaire. A la fin de 1971, College Housing Co-operative Limited (la coopérative) conclut avec College Holdings Incorporated (la société de portefeuille) un contrat par lequel, entre autres choses, Baxter Student Housing Ltd. (Baxter Housing) doit construire, et livrer prêt à habiter, un immeuble de quatre étages, désigné sous le nom de *Dalhousie Drive Project*. L'édifice comprend 192 appartements destinés à loger des étudiants de l'université du Manitoba. La société de portefeuille en est propriétaire, la coopérative formée d'étudiants est locataire principale et R.C. Baxter Ltd. (R.C. Baxter), gérant. Vers la fin de l'été 1972, la construction étant presque achevée, les premiers locataires s'installent dans l'immeuble. Au cours de l'hiver 1972-1973, des problèmes d'humidité surviennent; ils se reproduisent pendant l'hiver 1973-1974 avec accumulation d'eau, de glace et de moisissure dans certains appartements. La propriétaire et la coopérative consultent des experts qui recommandent pour remédier aux difficultés, des travaux dont le coût est évalué à $135,000. Baxter Housing refuse de consentir que les travaux soient effectués à ses frais. Deux questions cruciales se sont alors posées: 1) qui paiera le coût des travaux? 2) où prendra-t-on l'argent? Quant à la première question, je dois signaler qu'en septembre 1973 la coopérative et la société de portefeuille ont intenté une action contre Baxter Housing et R.C. Baxter: elles y réclament des

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pany issued a statement of claim against Baxter Housing and R. C. Baxter seeking damages and other relief to which the defendants responded with a counterclaim for $310,440 for balance of construction cost and the defence, in brief, that the project had been completed in accordance with the plans and specifications in a good and workmanlike manner. Those proceedings have not yet been litigated and little progress has been made. The facts material on point (ii) I take to be the following. The Housing Co-operative and the Holding Company are non-profit corporations, without funds. The construction cost of the building, $2,209,790, was to have been provided from the proceeds of a Central Housing and Mortgage Corporation (C.M.H.C.) first mortgage in the principal amount of $1,988,831, all of which has been advanced except for a holdback of $228,897, and from a second mortgage in the principal amount of $220,959, all of which has been advanced. On June 22, 1973, Baxter Housing caused a mechanics' lien to be filed against the property in the amount of $310,440 claimed to be due to it under the contract.

In the summer of 1974, almost a year ago, the plaintiff owner of the property moved before Nitikman J. for an order appointing W. E. Shields or some other fit and proper person as receiver of the balance of the proceeds of the C.M.H.C. mortgage. The notice of motion referred to (i) the dispute between the parties as to the adequacy of the design and construction of the student housing project, (ii) the recommendations of the experts, (iii) the likelihood that if the repairs were not carried out forthwith there was every probability they would not be able to be done before freeze-up, with the result the project would suffer another winter with the moisture problem in the suites with an anticipated loss of goodwill and an increased vacancy rate, (iv) the filing by the defendants of the mechanics' lien and (v) the refusal by C.M.H.C., by reason of the lien, to advance further moneys under the mortgage. Affidavits were filed in support of the motion and the affiants cross-examined, following which Nitikman J. made the order called into question in these proceedings. That order contained the following provision, inserted no doubt in the hope that C.M.H.C.,

dommages-intérêts et d'autres redressements. Les défenderesses ont répondu par une demande reconventionnelle de $310,440 pour le solde à payer sur le coût de la construction et invoqué comme moyen de défense, en résumé, que le projet avait été réalisé conformément aux plans et devis et selon les règles de l'article. Ces procédures n'ont pas encore été entendues par les tribunaux et elles ne sont guère avancées. A l'égard de la deuxième question les faits pertinents sont, à ce qu'il me semble, les suivants. La coopérative et la société de portefeuille sont des sociétés sans but lucratif et sans actif. Le coût de construction de l'immeuble, soit $2,209,790, devrait être payé avec une première hypothèque de $1,988,831 consentie par la Société centrale d'hypothèques et de logement (SCHL), dont $228,897 n'ont pas encore été versés, et une seconde hypothèque de $220,959 dont le montant a été versé en entier. Le 22 juin 1973, Baxter Housing a fait enregistrer sur les biens-fonds un privilège de constructeur pour un montant de $310,440 dû, selon elle, en vertu du contrat.

A l'été 1974, soit il y a environ un an, la propriétaire demanderesse adressa une requête au juge Nitikman demandant que W. E. Shields ou une autre personne habilitée soit nommé séquestre du solde du prêt hypothécaire consenti par la SCHL. L'avis de requête relate: 1) le litige entre les parties sur la suffisance des plans et de la construction de l'immeuble destiné aux étudiants; 2) les recommandations des experts; 3) le fait que si les réparations ne sont pas effectuées sur le champ, elles ne pourront pas l'être avant le gel et, en conséquence, les appartements subiront de nouveau à l'hiver la même humidité, ce qui entraînera une perte de clientèle et un taux d'inoccupation accru; 4) l'enregistrement du privilège de constructeur par les défenderesses; 5) le refus de la SCHL d'avancer d'autres fonds sur l'hypothèque à cause du privilège. Des déclarations sous serment furent présentées à l'appui de la requête et les déclarants furent contre-interrogés; après quoi, le juge Nitikman rendit l'ordonnance qui fait l'objet du présent litige. Cette ordonnance contient la disposition suivante, introduite sans aucun doute avec l'espoir que la SCHL, ainsi rassurée, versera le montant

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relying thereon, would advance the holdback moneys notwithstanding the mechanics' lien filed:

2. AND IT IS FURTHER ORDERED AND DECLARED that any monies paid by the said Central Mortgage & Housing Corporation shall upon payment from time to time to the receiver have priority over any and all other charges or encumbrances registered or unregistered affecting the said lands.

Did the learned chambers judge exceed his jurisdiction in making the order? However politic and expedient the appointment of a receiver may have appeared as a means of tapping the only available source of funds and preventing a stalemate, I am of opinion that the judge had no proper ground in law for making the appointment. The appointment was wrong in law because provision 2 above quoted runs contrary to s. 11(1) of *The Mechanics' Liens Act* of Manitoba, R.S.M. 1970, c. M80, reading:

11(1) The lien created by this Act has priority over all judgments, executions, assignments, attachments, garnishments, and receiving orders, recovered, issued or made after the lien arises, and over all payments or advances made on account of any conveyance or mortgage after notice in writing of the lien to the person making those payments or after registration of the lien as hereinafter provided.

Section 11(1) goes a long way in ensuring that once a lien claimant has protected his rights by filing a lien in accordance with the provisions of the Act, the lien is a paramount legal charge not subject to being defeated or eroded in any manner. See *Boake v. Guild*[2], and Rand J. in *Earl F. Wakefield Co. v. Oil City Petroleums (Leduc) Ltd. et al.*[3], at p. 364. Section 59 of *The Queen's Bench Act*, R.S.M. 1970, c. C280, it is to be observed, empowers the Court to appoint a receiver "in all cases in which it appears to the Court to be just and convenient so to do" and further provides that "any such order may be made either unconditionally or upon such terms and conditions as the Court thinks fit"; but this cannot afford comfort to the owner because s. 11 of *The Mechanics' Liens*

[2] [1932] O.R. 617, aff'd, [1934] S.C.R. *sub nom. Carrel v. Hart.*

[3] [1958] S.C.R. 361.

retenu en garantie nonobstant l'enregistrement du privilège de constructeur:

[TRADUCTION] 2. ET IL EST DE PLUS STATUÉ que tous les fonds avancés par ladite Société centrale d'hypothèques et de logement, dès leur versement au séquestre, auront priorité sur toutes les autres charges, enregistrées ou non, grevant lesdits biens-fonds.

Le savant juge en chambre a-t-il outrepassé ses pouvoirs en rendant cette ordonnance? Pour opportune et souhaitable que soit la désignation d'un séquestre comme moyen de puiser à la seule source de financement disponible et d'éviter l'impasse, je suis d'avis que le juge n'avait pas en droit de bons motifs de faire cette nomination. Il a commis une erreur de droit, parce que la clause 2 précitée va à l'encontre du par. (1) de l'art. 11 du *Mechanics' Liens Act* du Manitoba, R.S.M. 1970, c. M80, qui prévoit:

[TRADUCTION] 11(1) Le privilège créé par cette loi a priorité sur tous jugements, exécutions, cessions, saisies, saisies-arrêts et ordonnances de mise sous séquestre postérieurs à sa naissance, et sur tous versements ou avances de fonds à valoir sur un montant payable en vertu d'un transfert ou d'une hypothèque, après qu'avis écrit du privilège a été donné à la personne effectuant ces versements ou avances ou que le privilège a été enregistré selon les modalités prévues ci-après.

Le paragraphe (1) de l'art. 11 va très loin pour assurer qu'une fois que le créancier a protégé ses droits en enregistrant un privilège conformément aux dispositions de la Loi, celui-ci devienne une charge prioritaire qui ne saurait être supplantée ou entamée d'aucune façon. Voir *Boake v. Guild*[2] et le juge Rand dans *Earl F. Wakefield Co. c. Oil City Petroleums (Leduc) Ltd. et al.*[3], à la p. 364. Il convient de noter que l'art. 59 du *Queen's Bench Act*, R.S.M. 1970, c. C280, donne à la Cour le pouvoir de nommer un séquestre [TRADUCTION] «dans tous les cas où la Cour estime juste et utile de le faire» et prévoit en outre que [TRADUCTION] «une telle ordonnance peut être rendue soit inconditionnellement soit selon les modalités que la Cour juge appropriées». Cela ne peut toutefois être

[2] [1932] O.R. 617, confirmé [1934] R.C.S. 10 sous le nom *Carrel c. Hart.*

[3] [1958] R.C.S. 361.

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Act, in terms, gives a lien created by the Act priority over all receiving orders made after the lien arises. The question whether the receiving order here in question is a receiving order of the kind contemplated in s. 11(1) need not detain us because even if this question be resolved in favour of the validity of the appointment, the closing words of the subsection, in clearest language, give a mechanics' lien priority over all payments or advances made on account of any mortgage. One may escape the first part of the subsection only to be impaled on the second part of the subsection and Mr. Houston, counsel for the owner, concedes as much.

In my opinion the inherent jurisdiction of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will. The effect of the order made in this case was to alter the statutory priorities which a court simply cannot do.

In the Court of Appeal Matas J.A. *per curiam* said:

> In any event, I am of the opinion that sec. 11(1), *supra*, cannot be interpreted, under the circumstances before us, so as to frustrate the jurisdiction of Court of Queen's Bench to appoint a receiver with effective power to carry out his mandate. (*Montreal Trust Company et al. v. Churchill Forest Industries (Manitoba) Limited*, [1971] 4 W.W.R. 542 at p. 546 *et seq.*) In my view, the order appealed from is not in conflict with *The Mechanics' Liens Act, supra*, and is in accordance with its intent.

Montreal Trust Company et al. v. Churchill Forest Industries (Manitoba) Limited may well be cited as a paradigm of the exercise of judicial discretion but Chief Justice Freedman, speaking for all his colleagues, was careful to state, p. 547:

> Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or Rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.

utile au propriétaire, parce que l'art. 11 du *Mechanics' Liens Act*, donne, explicitement, priorité à un privilège établi en vertu de la Loi sur toutes ordonnances de séquestre émises après sa création. La question de savoir si l'ordonnance de séquestre en l'espèce en est une de même nature que celle visée au par. (1) de l'art. 11 est sans intérêt parce que, même si la réponse favorisait la validité de la nomination, les derniers mots de l'alinéa donnent, sans équivoque, priorité au privilège de constructeur sur tous versements ou avances à valoir sur un montant payable en vertu d'une hypothèque. On ne peut se soustraire à la première partie de l'alinéa sans se faire enfourcher par la seconde, Me Houston, l'avocat de la propriétaire, en convient.

A mon avis, la compétence inhérente de la Cour du Banc de la Reine n'autorise pas ses juges à rendre une ordonnance qui va à l'encontre de la volonté clairement exprimée du législateur. L'ordonnance rendue en l'occurrence vise à modifier l'ordre des privilèges fixé par la loi, ce qu'un tribunal ne peut simplement pas faire.

Le juge Matas de la Cour d'appel a dit pour elle:

> [TRADUCTION] De toute façon, je suis d'avis que le par. (1) de l'art. 11 ci-dessus ne saurait être interprété, dans les circonstances présentes, de façon à détruire la compétence de la Cour du Banc de la Reine de nommer un séquestre nanti des pouvoirs nécessaires à l'exécution de son mandat. (*Montreal Trust Company et al. v. Churchill Forest Industries (Manitoba) Limited* [1971] 4 W.W.R. 542 aux pp. 546 et suiv.) Selon moi, l'ordonnance qui fait l'objet de l'appel ne vient pas en conflit avec le *Mechanics' Liens Act* ci-dessus et est conforme à son objectif.

L'arrêt *Montreal Trust Company et al v. Churchill Forest Industries (Manitoba) Limited* peut fort bien être cité comme illustration du pouvoir discrétionnaire, mais le juge en chef Freedman, parlant au nom de tous ses collègues, y a pris la précaution de dire à la p. 547:

> [TRADUCTION] La compétence inhérente ne peut évidemment pas être exercée de façon à venir en conflit avec une loi ou un règlement. De plus, comme il s'agit d'un pouvoir spécial et extraordinaire, il ne doit s'exercer qu'avec circonspection et dans des cas bien clairs.

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The case does not stand for the proposition that the Court has a discretion in the application of a statutory imperative, such as that residing in s. 11(1) of *The Mechanics' Liens Act*, in circumstances of the nature of those upon which Matas J.A. lays emphasis in the following extracts from his judgment:

> In the case at bar the receiver has been given control of the only money available as a means of breaking the stalemate which has been created by filing of the lien. The objective in having a receiver appointed was not to prevent dissipation of the fund, but to utilize the fund as a sensible and practical way of getting the necessary work done.
>
> . . .
>
> There is ample evidence to support a finding that if plaintiffs are prevented from using the only available funds, and are thus prevented from doing the work, there will be an adverse effect on the building and the financial viability of the project will be in jeopardy. It would be fruitless to require plaintiffs to await the result of mechanics' lien or other court action, which would take place some time in the future while the property deteriorated and the financial viability of the project was being seriously affected.

These would be compelling reasons for the appointment of a receiver in the absence of s. 11(1) but, given that subsection, it would seem to me they are considerations which the Court is not entitled to bring into account. Parenthetically, events have proven, as so often appears to be the case, that peripheral skirmishing is wasteful of time and money and justice is better served by getting ahead with trial of substantial issue in the proceedings. Reference was made by Matas J.A. to the case of *Winnipeg Supply & Fuel Co. Ltd. v. Genevieve Mortgage Corp. Ltd.*[4] In that case the Court of Appeal for Manitoba held that, on an appeal from a judgment at trial in a mechanics' liens action, where a subcontractor's steel shoring supports for a building were essential to hold the building in place and to avoid serious damage, the cost of continuing supply of the supports and of removal would rank in priority to lien claimants. The priority given to the expenditure for an urgent and necessary purpose for the benefit of others was recognized in that case.

[4] [1972] 1 W.W.R. 651, 23 D.L.R. (3d) 160.

Cet arrêt n'appuie pas la prétention que le tribunal peut à sa discrétion écarter une obligation statutaire comme celle contenue au par. (1) de l'art. 11 du *Mechanics' Liens Act* dans des circonstances du genre de celles sur lesquelles le juge Matas met l'accent dans les passages suivants de son jugement:

> [TRADUCTION] Dans le cas en l'espèce, le séquestre a reçu l'administration des seuls fonds disponibles qui pouvaient permettre de sortir de l'impasse découlant de l'enregistrement du privilège. La nomination d'un séquestre n'avait pas pour but de prévenir la dissipation des fonds mais de les utiliser comme moyen raisonnable et pratique de faire exécuter les travaux nécessaires.
>
> . . .
>
> Il ne manque pas de preuves pour démontrer que si les demanderesses ne peuvent utiliser les seuls fonds disponibles, et pour cette raison ne peuvent exécuter les travaux, cela aura des effets préjudiciables sur l'immeuble et la viabilité financière du projet sera menacée. Il serait vain d'exiger des demanderesses qu'elles attendent le résultat d'une action sur privilège ou d'une autre action, qui sera entendue plus tard, pendant que la propriété se détériore et que la viabilité financière du projet est sérieusement compromise.

Ces raisons commanderaient la nomination d'un séquestre si ce n'était du par. (1) de l'art. 11 dont l'existence empêche, à mon avis, le tribunal de tenir compte de ces facteurs. Entre parenthèses, les événements ont prouvé, comme il arrive souvent, que les débats sur des incidents sont une perte de temps et d'argent et la justice est mieux servie lorsque les tribunaux vont tout de suite au fond du litige. Le juge Matas cite *Winnipeg Supply & Fuel Co. Ltd. v. Genevieve Mortgage Corp. Ltd.*[4] Il s'agissait d'un privilège de constructeur. Les étais d'acier d'un sous-entrepreneur étaient indispensables pour soutenir le bâtiment et éviter de sérieux dommages. La Cour d'appel du Manitoba a statué, en appel que le coût de la fourniture ininterrompue des étais et de leur enlèvement aurait priorité sur les autres privilèges. La priorité accordée aux dépenses effectuées dans un but urgent et nécessaire, à l'avantage des autres créanciers a été admise.

[4] [1972] 1 W.W.R. 651, 23 D.L.R. (3d) 160.

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It is commonplace to appoint a receiver at the instance of a creditor in order to preserve property pending litigation. We have here the novel situation of an owner of property applying for the appointment of a receiver. The *res* is not the property but a sum of money to which the owner wishes to have recourse for the purpose of effecting improvements to the property. Until the main litigation has been concluded, it will not be known whether the cost of such improvements will fall upon the owner or upon the contractor and in the meantime the effect of the order of Nitikman J. would be to subordinate the lien of the contractor to any advances under the mortgage made by C.M.H.C. to the receiver. The appointment would permit the receiver to borrow and expend moneys which, in the absence of the moisture difficulties and the litigation ensuing by reason thereof, would be payable to the contractor. None of the authorities to which we have been referred touches upon the appointment of a receiver in such circumstances and with such powers.

Mr. Houston advanced an argument based upon s. 4(1) of *The Mechanics' Liens Act* which reads in part:

4.(1) Unless he signs an express agreement to the contrary, any person who performs any work or service upon or in respect of, ... a lien for the price of that work, service, ... upon the ... building, ... and the lands occupied thereby or enjoyed therewith, or upon or in respect of which the work or service is performed, ... *limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing (excepting as herein provided) by the owner*; but no such lien exists under this Act for any claim for less than twenty dollars.

(The italics are mine.)

It was contended that the lien of the contractor cannot go beyond the fair value of the work done, and that although the Manitoba Courts have not made an ultimate finding they have implicitly found that no amount is justly due to the lien claimant. I do not think the record before us bears this out. Explicit in the order of Nitikman J. was a finding of a moisture problem affecting the student housing project but there was no finding,

On nomme couramment un séquestre à la demande d'un créancier pour protéger un bien-fonds durant un litige. Nous sommes ici en face d'une situation différente où la chose visée par la demande de nomination de séquestre n'est pas le bien-fonds mais une somme d'argent dont le propriétaire veut se servir pour effectuer des améliorations au bien-fonds. Tant que le litige principal n'aura pas été réglé, on ne saura pas si le coût de ces améliorations doit être à la charge du propriétaire ou de l'entrepreneur et, dans l'intervalle, l'effet de l'ordonnance du juge Nitikman serait de subordonner le privilège de l'entrepreneur à toutes les avances faites par la SCHL au séquestre sur le montant de l'hypothèque. La nomination du séquestre permettrait d'emprunter et de dépenser des sommes qui, abstraction faite des problèmes d'humidité et du différend qui en découle, devraient être versées à l'entrepreneur. Rien dans la jurisprudence citée ne touche une nomination de séquestre dans de telles circonstances et avec de tels pouvoirs.

Me Houston avance un argument fondé sur le par. (1) de l'art. 4 du *Mechanics' Liens Act* qui se lit ainsi:

[TRADUCTION] 4.(1) A moins de convention expresse à l'effet contraire, toute personne qui exécute des travaux ou rend des services sur ou à l'égard, ... un privilège pour le prix de ces travaux, de ces services ... sur ... le bâtiment et les fonds de terre sur lesquels ils sont situés ou qui s'y rattachent, ou sur lesquels ou à l'égard desquels les travaux ont été exécutés et les services rendus, ... *jusqu'à concurrence, toutefois, de la somme véritablement due au détenteur du privilège et de la somme due (sauf disposition contraire) par le propriétaire*; mais il n'existe pas, en vertu de la présente Loi, de privilège pour une réclamation inférieure à vingt dollars.

(J'ai mis des mots en italiques.)

On a soutenu que le privilège de l'entrepreneur ne peut aller au-delà de la juste valeur du travail effectué et que, même si les tribunaux manitobains ne se sont pas prononcés définitivement, ils ont conclu implicitement qu'aucune somme n'est due à celui qui revendique le privilège. Je ne pense pas que le dossier devant nous justifie cette conclusion. L'ordonnance du juge Nitikman conclut à l'existence d'un problème d'humidité dans la résidence

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express or implicit, in either of the lower Courts as to responsibility for the problem. An order directing payment to a receiver at this time of the holdback fund with C.M.H.C. would be tantamount to a finding in favour of the owner on the major issue not yet litigated. Mr. Houston contends that s. 4(1) limits the right to lien. In my opinion its only effect is to limit the amount which the lienholder can recover. Unless and until the main action has been tried, the amount, if any, justly due to the contractor will not be known. The interlocutory proceeding taken for the appointment of the receiver was not intended to have, and did not have, the effect of making any determination of this outstanding issue.

The appellant contractor submitted that the order of Nitikman J. was by its nature hypothetical and unenforceable in that C.M.H.C. did not appear in the proceedings and was known not to release funds except on assurance of priority and furthermore was not bound or directed by the order to advance funds to the receiver appointed. The effect which I would give to the express statutory provision, namely, s. 11(1) of *The Mechanics' Liens Act* makes it unnecessary to consider this additional ground of attack upon the validity of the order.

I would allow the appeal, reverse the decision of the Court of Appeal for Manitoba affirming the order of Nitikman J. and direct that the motion be dismissed with costs in this Court and in the Courts below.

Appeal allowed with costs.

Solicitors for the defendants, appellants: Aikins, MacAulay & Thorvaldson, Winnipeg.

Solicitors for the plaintiffs, respondents: Arpin & Co., Winnipeg.

d'étudiants, mais il n'y a pas de conclusion, explicite ou implicite, dans aucune des cours d'instance inférieure, sur la responsabilité de cet état de choses. Une ordonnance de paiement à un séquestre, en ce moment, des sommes retenues par la SCHL équivaut à une conclusion en faveur du propriétaire sur la question principale toujours en litige. Me Houston soutient que le par. (1) de l'art. 4 limite le droit au privilège. A mon avis, son seul effet est de limiter le montant que peut recouvrer le détenteur du privilège. Tant que l'action principale ne sera pas jugée, et jusqu'à ce qu'elle le soit, le montant véritablement dû, s'il en est, à l'entrepreneur ne sera pas connu. La procédure interlocutoire pour la nomination du séquestre n'avait pas pour but de trancher cette question en suspens, et elle n'a d'ailleurs pas eu cet effet.

L'entrepreneur appelant a fait valoir que l'ordonnance du juge Nitikman était, de par sa nature, hypothétique et non applicable, parce que la SCHL n'avait pas été mise en cause dans les procédures et qu'on savait qu'elle n'avance pas de fonds sans avoir l'assurance qu'elle a priorité; de plus elle n'est pas tenue ou obligée par l'ordonnance d'avancer des fonds au séquestre désigné. L'effet que j'accorde à la disposition législative expresse, le par. (1) de l'art. 11 du *Mechanics' Liens Act*, me dispense d'examiner cet argument additionnel avancé pour contester la validité de l'ordonnance.

Je suis d'avis d'accueillir le pourvoi, d'infirmer l'arrêt de la Cour d'appel du Manitoba qui confirme l'ordonnance du juge Nitikman, et d'ordonner le rejet de la requête avec dépens dans cette Cour et dans les cours d'instance inférieure.

Pourvoi accueilli avec dépens.

Procureurs des défenderesses, appelantes: Aikins, MacAulay & Thorvaldson, Winnipeg.

Procureurs des demanderesses, intimées: Arpin & Co., Winnipeg.

TAB 3

CITATION: Northridge Homes Ltd. et al. v. The Travellers Motel (Owen Sound) Limited et al., 2015 ONSC 3743
CONSOLIDATED COURT FILE NO.: CV-14-236
DATE: 20150610

2015 ONSC 3743 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Northridge Homes Ltd. Plaintiff	)	Eric Gionet, for the Plaintiff
- and -	)	
The Travellers Motel (Owen Sound) Limited, Chandra Grewal, Pirithi Grewal, The Toronto-Dominion Bank and First Source Mortgage Corporation Defendants	)	Allen Wilford, for the Defendants The Travellers Motel (Owen Sound) Limited, Chandra Grewal and Pirithi Grewal. Nobody appearing for the Defendant The Toronto-Dominion Bank. Jeff Larry for the Defendant First Source Mortgage Corporation
- and –	)	
Harold Sutherland Construction Ltd. Plaintiff	)	Douglas Grace, for the Plaintiff
- and -	)	
The Travellers Motel (Owen Sound) Limited, Chandra Grewal, Pirithi Grewal, The Toronto-Dominion Bank and First Source Mortgage Corporation Defendants	)	Allen Wilford, for the Defendants The Travellers Motel (Owen Sound) Limited, Chandra Grewal and Pirithi Grewal. Nobody appearing for the Defendant The Toronto-Dominion Bank. Jeff Larry for the Defendant First Source Mortgage Corporation

2015 ONSC 3743 (CanLII)

- and –

CAAJ Construction Inc., 2156559 Ontario Inc., Preet Plumbing & Heating Ltd., A & M Heating & Air Conditioning Ltd., New Starline Painting Ltd. and Marble and Granite Stonecraft Ltd.

Plaintiffs

Harjaap Mann, for the Plaintiffs

- and -

The Travellers Motel (Owen Sound) Limited, Chandra Grewal, Pirithi Grewal and Northridge Homes Ltd.

Defendants

Allen Wilford, for the Defendants The Travellers Motel (Owen Sound) Limited, Chandra Grewal and Pirithi Grewal.

Eric Gionet, for the Defendant Northridge Homes Ltd.

REASONS FOR DECISION ON MOTION

Conlan J.

I. Introduction

[1] On August 7, 2013, an Owner/Contractor Agreement ("Contract") was executed by Mr. Dave Rai for Northridge Homes Ltd. ("Northridge"), as the contractor, and Traveller's Motel Owen Sound ("Motel"), Mr. Pirithi Grewal and Ms. Chandra Grewal (collectively the "Grewals"), as owners.

[2] The Contract was for the construction of a new building on the Motel property located on 9th Avenue East in Owen Sound. The Contract amount was $900,000.00 plus taxes, with some stipulations and a limited scope of work. The commencement date was August 26, 2013, and the completion date was six months thereafter.

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[3] From time to time, Change Orders (amendments to the Contract) were signed by the parties. And, from time to time, subcontractors were engaged for some of the work.

[4] It is now June 2015. The construction has not been completed. The Grewals are still operating the Motel. First Source Mortgage Corporation ("First Source") has taken steps to enforce an alleged default on its mortgage. Very recently, a Notice of Sale was issued. Northridge, the subcontractors and Harold Sutherland Construction Ltd. ("Sutherland") have advanced lien claims against the property and have issued Statements of Claim under the *Construction Lien Act*, R.S.O. 1990, chapter C.30, as amended ("CLA"). The Court actions were commenced in September and October 2014 as the result of alleged non-payment by the Motel and the Grewals.

[5] On June 9, 2015, in Owen Sound, I heard a Motion brought by the Motel and the Grewals. That Motion was opposed by Northridge, the subcontractors

(CAAJ Construction Inc., 2156559 Ontario Inc., Preet Plumbing & Heating Ltd., A&M Heating & Air Conditioning Ltd., New Starline Painting Ltd. and Marble and Granite Stonecraft Ltd.) and Sutherland. That Motion is not the primary concern of First Source – it simply wants to be paid what it is owed or at least have the mortgage brought in to good standing, failing which it intends to realize on its security.

[6] The Motion brought by the Motel and the Grewals was for some 25 heads of relief, most principally to (i) consolidate three Court files (which relief was granted, unopposed, on an earlier date), (ii) for security for costs (which request was dismissed as abandoned at the commencement of the Court hearing on June 9, 2015), and (iii) to strike/discharge/vacate all of the liens registered by the other parties (which relief is the subject of these Reasons).

[7] Oral argument on the Motion, by all counsel, took less than one-half day at Court. Thousands of pages of materials, however, were filed by the parties in the form of Records, Exhibit Books, Facta, written argument, Books of Authorities and transcripts of examinations of some of the parties.

[8] No treatise would give justice to the density of the materials filed or to the amount of work invested by counsel and the parties. Having read the materials, and having re-read those portions of them highlighted by counsel in their oral

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submissions at Court on June 9, 2015, I have attempted below to respond to the issues that are necessary to resolve at this stage. Sufficiency of reasons, of course, is not a concept that is measured by their length.

[9] After all counsel and their respective clients have had an opportunity to review and digest these Reasons, I direct that they shall, forthwith, arrange a teleconference with me to discuss where we go from here. That can be arranged through the Trial Coordinator in Owen Sound. We can discuss costs of the Motion decided herein, the outstanding Motions brought by Northridge, whether I ought to case manage this file, whether the parties are interested in having me mediate the matter to try to settle all or some of the remaining issues, a timetable for the litigation, scheduling issues, and so on.

[10] I want to be helpful to the parties. It is in everyone's interest that the Motel be a success.

II. The Undisputed Facts

[11] Very little is undisputed. That observation, in the end, drives the result of the within Motion.

[12] Besides what is outlined above in terms of the Contract, the parties and the litigation history, virtually everything else is contested but for the fact that

the Motel and the Grewals have the unfettered right to post security in order to have the liens discharged. Without the consent of any of the other parties, the amount of the security required to discharge the liens is $489,000.00 (rounded down to the nearest thousand) - $196,000.00 in favour of Sutherland and the remainder in favour of Northridge and the subcontractors.

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III. The Law

[13] All counsel agree that the Motion brought by the Motel and the Grewals to discharge the liens is akin to a motion for summary judgment (albeit under the old regime, before Rule 20 of the *Rules of Civil Procedure* was amended to provide expanded powers and pre-*Hryniak v. Mauldin*, 2014 SCC 7).

[14] I agree. Subsection 47(1) of the CLA gives me the authority to discharge a lien; vacate a claim for lien, a certificate of action or both; or dismiss an action, "[u]pon any proper ground and subject to any terms and conditions...".

[15] A motion under subsection 47(1) of the CLA is analogous to a motion for summary judgment under Rule 20. If there is a genuine issue of fact for trial, the matter should be left to the trial judge. *1246798 Ontario Inc. v. Sterling* (2000), 51 O.R. (3d) 220 (Div. Ct.), at paragraph 12; *Beaver Materials Handling Co. v. Hejna*, [2005] O.J. No. 2733 (S.C.J.), at paragraph 24; *1353025*

Ontario Inc. v. Walden Group Canada Ltd., 2006 CarswellOnt 2583 (S.C.J.), at paragraph 14.

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[16] The Motel and the Grewals have filed caselaw which confirms the authority of the Court to discharge a lien. There is no exhaustive list of circumstances in which that remedy might be appropriate. A partial list includes cases of fraud (perhaps the evidence clearly establishes that the lien is premised on a contract where the lien claimant forged the signature of the other party), or a failure to meet the statutory prerequisites (maybe the lien is based on work that was done ten years ago), or gross excessiveness or exaggeration (perhaps the evidence clearly establishes that the lien is for one million dollars while the total value of the labour and materials supplied by the claimant is far less than that), or a lack of any connection between the property against which the lien was registered and the property that the claimant worked on. Those are just examples.

IV. The Law as Applied to the Facts in this Case

[17] The Motel and the Grewals have the burden of proving, on a balance of probabilities, that the liens ought to be discharged.

[18] It must be remembered that the Motel before me, as pleaded, other than in the alternative, did not contemplate any amount of security being posted

in order to discharge the liens. It simply asked, primarily, that all of the liens be discharged, period. In submissions, however, counsel for the moving parties suggested, in the further alternative, that $100,000.00 be posted as security by the Grewals in order to vacate all of the liens.

[19] I have not been persuaded, on balance, that the liens ought to be discharged. There are far too many genuine issues of fact that require a trial for their resolution.

[20] As examples, a review of the affidavit evidence and the transcripts of the examinations reveal the following.

[21] First, a trial is required to resolve the issue of why the project was not completed on time. Northridge's position is that the major reason for that was the stubborn insistence by the Grewals, wrongly it is alleged, that the existing site services at the lot line could be utilized. The Grewals, on the other hand, allege that Northridge is responsible for the delay.

[22] Second, a trial is required to resolve the issue of whether the project was "turnkey", in other words, all-in for $900,000.00 plus taxes. For the most part, the Grewals say that it was. Northridge says that it was not. The Contract uses the term "turnkey project" but also contemplates changes to the work and extras.

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[23] Third, a trial is required to resolve the issue of whether the work done by Sutherland is included in the Contract price. The Grewals seem to imply that it is. Sutherland and Northridge assert that it is not. There is a Change Order which appears to support the proposition that the Grewals and the Motel contracted separately with Sutherland, however, the Grewals maintain their position and are entitled to explain that to the trial judge.

[24] Fourth, a trial is required to resolve the issue of whether certain work performed by Northridge and/or some or all of the subcontractors was shoddy. The Grewals assert that it was, and numerous examples are given (paragraph 30 of the Grewals' written argument). Northridge and the subcontractors allege that it was not. The photos supplied by the moving parties are helpful, however, they lack context and explanation and (where required) expert opinion.

[25] Fifth, a trial is required to resolve the issue of whether the Contract is even a legal and binding one. The Grewals state that Mr. Rai had no authority to sign it. Mr. Rai disputes that.

[26] Sixth, a trial is required to resolve the issue of whether certain additional costs are indeed proper extras. In many cases, such as footings at the back of the building, the Grewals say no. Northridge says yes. How am I to decide that? In the example of the footings, the Grewals assert that Mr. Rai

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knew about that expense (almost $6000.00) before the Contract was signed. Mr. Rai disputes that. Someone is either not telling the truth or has a bad memory. Before deciding who, any judge would like to see and hear the witnesses.

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[27] I could continue, but to what end? The above six issues are all crucial to determining whether the liens are proper or not. Without a trial, I cannot fairly and justly decide who caused the delay in completing the project, and thus, whether it was breached and, if so, by whom. I cannot decide what was included in the $900,000.00 plus taxes. I cannot decide the competence of the work performed and, by extension, the reasonableness of the amounts charged. I cannot decide whether the Contract was properly executed.

[28] In a sense, the thoroughness of the moving parties' own materials ought to have made it clear to them that their Motion could not possibly succeed. This is not a case where the documents contain all of the answers, at least not from the perspective of the Grewals. This is not a case where something extrinsic to the competing evidence of the parties clearly brings the issue in dispute out of the realm of being a genuine one that needs a trial to be resolved. This is not a case where the written record reveals that the credibility of one party is so weak that a trial is unnecessary to decide how much of that person's evidence can safely be relied upon.

[29] In short, this is not a case for summary judgment. Consequently, it is not a case for the discharging of the liens.

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[30] Faced with competing factual assertions by each side, on a myriad of items that are highly material to deciding whether these liens are proper or not, on a written record alone, the task is impossible. A trial is required in order to fully appreciate the issues. A trial is required in order to assess credibility.

[31] Finally, on the invitation by counsel for the moving parties to arbitrarily set the amount of security to be posted by the Grewals in order to discharge the liens at $100,000.00, I decline to do so. To set the quantum at anything less than that suggested by the responding parties to the Motion would be to effectively grant partial relief to the moving parties in circumstances where I have already found it impossible to decide the issues in dispute.

[32] Besides, this is not a matter of throwing darts at a board or picking a number out of the air. $100,000.00 is less than what the moving parties owe on the face of the Contract ($900,000.00 plus HST, less $813,589.36 paid to date), excluding any consideration of Sutherland's work and any extras. It is not a reasonable amount of security.

[33] As much as I want the Grewals and their business to succeed, I cannot gut the claims of the other parties by allowing their liens to be vacated on payment of an arbitrary and unreasonably low amount of security.

IV. Conclusion

[34] For all of the foregoing reasons, the Motion brought by the Grewals and the Motel is dismissed (except of course for the consolidation Order that has already been issued).

[35] The Grewals remain entitled to pay $489,000.00 in order to discharge all of the liens.

[36] I thank all counsel for their helpful materials and submissions.

Conlan J.

Released: June 10, 2015

2015 ONSC 3743 (CanLII)

CITATION: Northridge Homes Ltd. et al. v. The Travellers Motel (Owen Sound) Limited et al., 2015 ONSC 3743
COURT FILE NO.: CV-14-236
DATE: 20150610

2015 ONSC 3743 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Northridge Homes Ltd. et al.

Plaintiffs

- and -

The Travellers Motel (Owen Sound) Limited et al.

Defendants

REASONS FOR DECISION ON MOTION

Conlan J.

Released: June 10, 2015

TAB 4

CITATION: Limen Group Ltd. v Allform Group Limited, 2016 ONSC 4344
COURT FILE NO.: CV-15-531082
DATE: July 4, 2016

2016 ONSC 4344 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: CV-15-531082
Limen Group Ltd. v Allform Group Limited and Burnac Holdings Limited

AND RE: CV-15-529283
Scott Forest Products Ltd. v. Allform Group Limited and Burnac Holdings Limited

AND RE: CV-15-537037
Aluma Systems Inc. v. Allform Group Limited and Burnac Holdings Limited

AND RE: CV-15-532198
Aluma Systems Inc. v. Allform Group Limited and Burnac Holdings Limited

BEFORE: Master C. Albert

COUNSEL: J. Armel, for the moving party Limen Group Ltd.
R. Kennaley[1], for the responding parties Aluma Systems and Scott Forest
P.E. DuVernet for Burnac Holdings Limited

MASTER C. ALBERT

ENDORSEMENT

1) Limen Group Ltd. ("Limen"), a subcontractor and lien claimant on the project referred to as 377 Madison Avenue (the "Project"), asks the court to strike out four lien claims registered by co-subcontractors Aluma Systems Inc. ("Aluma") and Scott Forest Products Ltd. ("Scott"). Limen registered a lien claim for $386,649.00. The lien claims filed by Alluma and Scott total $273,181.52. Limen alleges that Aluma and Scott registered their lien claims against the wrong premises. If Limen succeeds on this motion then it would not be required to share the holdback funds of $157,000.00 posted by owner Burnac Holdings Limited ("Burnac") with Alluma and Scott.

[1] The court notes that counsel for the responding parties appearing on the motion is not the same as the lawyer who acted for the lien claimants at the time the lien claims were registered by Alluma and Scott.

2) Limen's position is that the improvement to which all three subcontractors supplied services and materials is confined to the lands described in the Ontario Land Titles registry system as PIN 21219-0161, and the only lien claim registered against that PIN is the Limen lien claim. Alluma and Scott registered their lien claims against PINS 21219-0159 and 21219-0160, being lands adjacent to PIN 21219-0161. Limen argues that the evidence is clear that the "improved" lands, as that term is defined by the *Construction Lien Act*, R.S.O. 1990, c.C.30 (the "Act") are the lands described as PIN 21219-0161 and not PINS 21219-0159 and 21219-0160.

3) Alluma and Scott take the position that their lien claims are not fatally flawed because PINS 21219-0159 and 21219-0160 are included in the improvement and as such meet the definition of improved premises in the Act. Alternatively they argue that whether or not PINS 21219-0159 and 21219-0160 are included in the improved premises raises a genuine issue that requires a trial.

Relevant facts

4) The evidence before the court is based on affidavits from two individuals. The first deponent, Mr. Pasha, is an engineer and Burnac's director of construction. He was on the Project site daily as construction manager. Limen tendered his affidavit in support of its motion. He was not cross-examined. The second deponent, Mr. Dolson, is a sales representative for Aluma. He deposed an affidavit on behalf of the responding parties and was cross-examined *viva voce* at the motion hearing. He did not attend at the site regularly or at all after arranging for the delivery of construction materials early on in the Project.

5) I find the evidence of Mr. Pasha more reliable than that that of Mr. Dolson, given Mr. Pasha's daily attendance at the site and his supervisory function as construction manager. Burnac has nothing to gain from the evidence of Mr. Pasha, having posted security to be shared among the lien claimants and having no expectation of any refund from the holdback funds posted. Burnac is no longer an active participant in this lawsuit. Mr. Pasha's evidence is more impartial than that of Mr. Dolson.

6) On the other hand, Mr. Dolson is a sales representative for Aluma, a party to the litigation claiming entitlement to a pro-rated share of the holdback funds. He has no firsthand knowledge of the how the Project was carried out. His only attendance at the site was at the outset in 2014 when materials were ordered. He has no knowledge of whether construction workers used PINS 21219-0159 and 21219-0160 for any purpose during construction. Most of his evidence is based on supposition and speculation.

7) Burnac contracted with Allform Group Limited ("Allform") as its excavation and forming subcontractor. Allform, in turn, subcontracted with Aluma to supply shoring, forming and scaffold equipment, and with Scott to supply lumber. Allform abandoned the Project on or

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about April 10, 2015. Both Alluma and Scott were suppliers of materials only and not suppliers of installation or other services.

8) Between April and July 2015 Limen, Aluma and Scott registered five lien claims against the PINS indicated beside each lien claim listed in the following chart:

Instrument/Date	Lien claimant	Amount	PIN(S)
AT3863583 April 22, 2015	Limen	$386,649.00	21219-0161
AT3856274 April 14, 2015	Aluma	$80,778.00	21219-0159 & 21219-0160
AT3943295 July 10, 2015	Aluma	$44,979.65	21219-0160
AT3949346 July 16, 2015	Aluma	$104,598.87	21219-0159 & 21219-0160
AT3857475 April 15, 2015	Scott	$42,825.00	21219-0159 & 21219-0160

PIN MAP EXTRACT:

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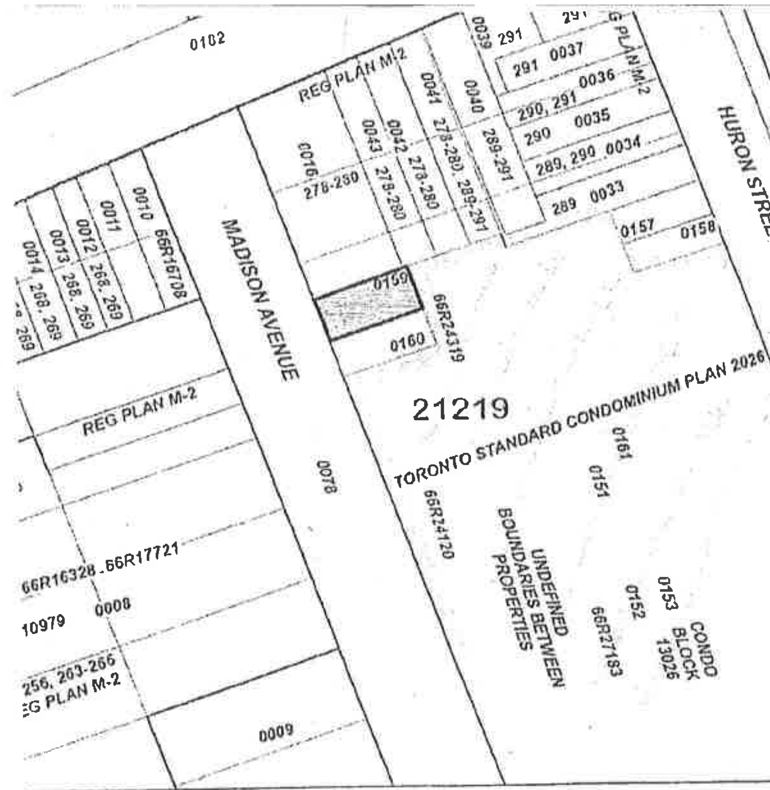

9) The Project includes a multilevel condominium building and several townhouses. It is bounded on the west by Madison Avenue and on the east by Huron Street. Site access is via Huron Street.

10) The site is protected by hoarding that surrounds lands described as PINS 21219-0159, 21219-0160 and 21219-0161. The PIN map (reproduced herein) illustrates that PINS 21219-0159 and 21219-0160 are at the northwesterly portion of the site and PIN 21219-0161 is included in a grouping of multiple PINS that make up a large portion of the hoarded site.

11) The hoarding was in place prior to the commencement of construction. According to Mr. Pasha the hoarding was erected to keep out trespassers. It is not in dispute that safety codes in Ontario require property owners to erect barriers around construction sites. Even though Mr. Pasha describes the purpose of the hoarding as a means of keeping out trespassers, it is obvious that it also serves as a safety barrier to keep unauthorized people, animals and vehicles from entering the construction site. There is not a separate construction safety fence around the lands identified as PIN21219-0161 separating it from the lands described as PINS

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21219-0159 and 21219-0160. Nor is there any demarcation or internal separation of the lands described as PINS 21219-0159 and 21219-0160 from each other or from 21219-0161.

12) Affixed to the hoarding, including the portions of the hoarding on the street-side perimeter of PINS 21219-0159 and 21219-0160, is signage that advertises the condominium development called "Southhill on Madison". The hoarding on the perimeter of PINS 21219-0159 and 21219-0160 is no different from the hoarding on the perimeter of 21219-0161.

13) The buildings constructed on the site of the Project are all sitting on PIN 21219-0161, including the multiple level condominium building and the townhouses. No structures have been erected on the lands described as PINS 21219-0159 and 21219-0160.

14) The municipal address of the condominium building is 377 Madison Avenue. A search of that address discloses PIN 21219-0161. But there is no evidence that the contracts between Allform and its subcontractors, Alluma and Scott, identified the Project by municipal address. Nor is there any evidence before the court as to whether PINS 21219-0159 and 21219-0160 have been assigned separate and distinct municipal addresses from PIN 21219-0161.

15) In response to speculation advanced by Mr. Dolson that portions of the construction would necessarily have required Burnac to use the lands at PINS 21219-0159 and 21219-0160 to facilitate construction, Mr. Pasha explains that the excavation, formwork and concrete work carried out on the west side of the foundation was accessed from inside PIN 21219-0161 and not via PINS 21219-0159 and 21219-0160. Mr. Dolson's speculative evidence is of no probative value but it does raise the issue of the role of PINS 21219-0159 and 21219-0160 in the Project.

16) There is no evidence before the court of the municipal zoning and planning approvals obtained by the developer and whether the lands adjacent to the structures erected on PIN 21219-0161, namely PINS 21219-0159 and 21219-0160, were required to be retained as open space or amenity space for the benefit the condominium and townhouse development. Nor is there any evidence of a building permit and the description of lands to be improved as disclosed by the building permit.

17) Nor have any of the construction contracts, engineering drawings, legible architectural plans or foundation drawings been tendered in evidence to show the description of the lands to be improved and the relationship of the adjacent lands owned by Burnac at PINS 21219-0159 and 21219-0160 to the lands at PIN 21219-0161.

18) The foundation of the condominium building abuts PIN 21219-0160. It is not in dispute that at some point in the Project Burnac will be required to use PIN 21219-0160 for the purpose of installing masonry and cladding on the condominium building on PIN 21219-0161.

19) Limen admits that if PINS 21219-0159 and 21219-0160 have not been used for construction purposes in the past but are used in the future then these lands may fall within the definition

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of improved premises. But Limen argues that if the only use is for the purpose of encroaching to facilitate installation of masonry and cladding on the improvement on PIN 21219-0161 then it is no different from neighbour #1 encroaching on the lands of neighbour #2 (with permission, in the nature of a licence) to carry out an improvement to the lands of neighbour #1: such use would not create lien rights against the lands of neighbour #2.

20) The issue in this case, however, is whether Burnac as owner of all of the PINS in question, has treated the entire site as one Project or whether it has delineated and hived off the lands at PINS 21219-0159 or 21219-0160, ensuring that they are not used for purposes of the improvement.

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The Law as applied to the facts in this case

21) The motion is brought pursuant to section 47 of the Act. It is well settled law that such motions are akin to summary judgment motions. If there are genuine issues of fact that require a trial then the motion fails and the case must proceed to trial.

22) The onus is on the moving party to prove that the lien claimants registered their claims for lien against the wrong lands and therefore there is no genuine issue requiring a trial.

23) I am not persuaded that the lien claims of Alluma and Scott were registered against the wrong lands.

24) First, the hoarding that surrounds the construction site encases PINS 21219-0159 and 21219-0160 as well as PIN 21219-0161. The signage on the hoarding describing the condominium and townhouse project is not confined to PIN 21219-0161. There is no separation between PINS 21219-0159 and 21219-0160 as lands not subject to the improvement and PIN 21219-0161 as lands subject to the improvement. A trial is required to determine whether PINS 21219-0159 and 21219-0160 are included in the improved lands.

25) Second, there is no evidence that PINS 21219-0159 and 21219-0160 have separate municipal addresses from PIN 21219-0161. The municipal address of the condominium building is 377 Madison Avenue. Had the lien claimants searched that address they would have discovered that this address includes PIN 21219-0161 and they would not have made the mistake of omitting PIN 21219-0161 from the description of the improved lands in their lien claims.

26) However, there is no evidence that the contracts between Allform and each of its subcontractors, Alluma and Scott, identified the Project by municipal address. If the contracts did not refer to the Project by municipal address then there is no evidentiary foundation to make a finding that the lien claimants ought to have known the correct municipal address and the PINS attached to that address for purposes of registering a lien claim. This raises a genuine issue for trial, particularly since the construction site was fenced in by one large

fence that cordoned off all three PINS into one large area that to the outside world appeared to be a construction site.

27) Third, the evidence is unclear as to the extent to which access to PINS 21219-0159 and 21219-0160 will be required or has been used to complete the masonry and other exterior work to the condominium building situated on PIN 21219-0160, and the arrangements made for access, if any. This raises a genuine issue for trial as to whether PINS 21219-0159 and 21219-0160 are included in the improved lands.

28) Fourth, the absence of any evidence regarding the municipal planning approval for the site, including the site plan approval, which would likely identify clearly the lands approved for development and the use permitted or required for the various portions of the site, is glaring. Section 34 of the Act provides that a lien is preserved by registering a claim for lien against the premises. "Premises" is a defined term and includes lands "enjoyed therewith".

29) In *Phoenix Drywall v Mississauga Rest Home Two Inc.*[2] Phoenix had registered a lien claim against vacant lands adjacent to the rest home. The actual structure to which Phoenix had supplied drywall services and materials was the rest home itself. But Phoenix had registered its claim for lien against the parking lot lands under the same ownership and adjacent to the rest home lands. The parking lot and the rest home were under common management. The court determined that the vacant parking lot lands were integrated with the rest home lands and enjoyed a common purpose. Justice Goodearle found that the parking lot lands fell within the definition of "premises" as lands enjoyed with the lands that were improved and on that basis the lien had not been registered against the wrong lands.

30) In the present case there is insufficient evidence before the court to make a finding of fact as to whether the lands described as PINS 21219-0159 and 21219-0160 are lands that are included in the premises on the basis that they are or are required to be "enjoyed therewith" in relation to PIN 21219-01601. There is no evidence as to whether the developer is required to retain the lands at PINS 21219-0159 and 21219-0160 as amenity space, parking space or open space in exchange for municipal approvals for the development of the multilevel condominium and townhouse Project. Whether PINS 21219-0159 and 21219-0160 are lands included in the improved "premises" raises a genuine issue for trial.

31) Fifth, the construction contracts, engineering drawings, architectural plans and foundation drawings would likely identify the lands subject to the improvement. Their absence in evidence tendered on the motion is significant and raises a genuine issue for trial.

32) Sixth, there is no evidence of the municipal address attached to PINS 21219-0159 and 21219-0160, and whether it is the same or different from 377 Madison Avenue, evidence that is relevant to a finding of fact as to whether PINS 21219-0159 and 21219-0160 are included in the improved lands. This raises a genuine issue for trial.

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[2] 1988 CarswellOnt 766

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33) Finally, there is very little evidence as how Burnac as owner treated the lands identified by the three separate PINS. Did Burnac caution its workers to stay off of PINS 21219-0159 and 21219-0160, to ensure that no construction materials were left on PINS 21219-0159 and 21219-0160 and to ensure that no construction vehicles travel over PINS 21219-0159 and 21219-0160? If workers were so instructed and failed to adhere to the cautions did Burnac reprimand them? Or did Burnac treat all of the lands enclosed by the hoarding, including PINS 21219-0159 and 21219-0160, as the construction site? An inquiry into these facts is required to determine whether the lien claimants registered their claims for lien against lands that were not included in the improvement. This raises a genuine issue for trial.

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Conclusion

34) For all of these reasons I find that the motion brought by Limen to discharge the lien claims of Scott and Aluma must fail. There are genuine issues of fact that require a trial.

35) Costs submission may be made at the return date of July 4, 2016 at 2:30 p.m.

Master C. Albert

DATE: July 4, 2016

CITATION: Limen Group Ltd. v Allform Group Limited, 2016 ONSC 4344
COURT FILE NO.: CV-15-531082
DATE: July 4, 2016

2016 ONSC 4344 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Limen Group Ltd. v Allform Group Limited

BEFORE: Master C. Albert

COUNSEL:
J. Armel, for the moving party Limen Group Ltd.
R. Kennaley, for the responding parties Aluma Systems and Scott Forest
P.E. DuVernet for Burnac Holdings Limited

ENDORSEMENT

Master C. Albert

DATE: July 4, 2016

Firm Capital Mortgage Fund Inc. v. Fortress Brookdale Inc. et al.

Court File No.CV-18-604993-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

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