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 AUTHORTIES OF THE RESPONDENT, INNOCON, A PARTNERSHIP OF LAFARGE CANADA INC., LEHIGH HANSON MATERIALS LIMITED AND INNOCON INC.

(Returnable on October 18, 2018)

October 17, 2018

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Innocon, a Partnership of Lafarge Canada Inc., Leigh Hanson Materials Limited, and Innocon Inc.

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CITATION: *Filippi v 315 Pembroke St East*, 2017 ONSC 3851
COURT FILE NO.: CV-15-871
DATE: June 22, 2017

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE *CONSTRUCTION LIEN ACT*,

R.S.O. 1990, c.C.30, AS AMENDED

B E T W E E N:	)	
	)	
TONY FILIPPI	)	Mark Huckabone for the Plaintiff
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
	)	
315 PEMBROKE STREET EAST HOLDINGS INC., WEST CHAMPLAIN HEALTH COMMUNITY CORPORATION	)	John Parr Telfer for the Defendant 315 Pembroke Street East Holdings Inc., Jean-Pierre Quintal for 771793 Ontario Limited operating as Pembroke Tile Carpet and Drapery
	)	
Defendants	)	
	)	
	)	**HEARD:** June 19, 2017
	)	

REASONS FOR DECISION

James, J.

[1] 315 Pembroke Street East Holdings Inc. ("315") brings this motion for an order discharging several construction liens registered against its property.

[2] 315 is the owner of premises in the City of Pembroke formerly occupied by Algonquin College. 315 bought the property in 2014 for the purpose of installing medical suites in the southerly portion of the building and student housing in the northerly portion. This case involves the claims that arose during the renovations of the southerly portion.

[3] In 2014 315 entered into a lease with a not-for-profit corporation called West Champlain Health Community Corporation (W.C.) which in turn intended to enter into a series of subleases.

[4] Construction work began apparently at the request of W.C. in early 2015 and a partial occupancy permit was issued on or about September 25, 2015. A series of construction liens were registered from July, 2015 to August, 2016. W.C. made an assignment in bankruptcy in July, 2016.

[5] At some point 315 began paying the construction trades who were working on the project, precisely when is not clear, but it was likely during the summer of 2015. That is around the time W.C. encountered financial difficulties, in part due to the discovery of asbestos in the building. According to the proof of claim filed by 315 in W.C.'s bankruptcy, 315 paid $563,886 in "leasehold improvement costs" which it says were the responsibility of W.C.

[6] It is not clear what percentage the payments by 315 represent of the total construction costs.

[7] It appears that neither W.C. nor 315 maintained a holdback account.

[8] Numerous liens have been registered against the interest of 315 which has resulted in this motion because 315 says it is not an owner within the meaning of the *Construction Lien Act*. In support of its position 315 submits that:

1. Its tenant, W.C., requested the work;
2. None of the lien claimants plead a contractual relationship with 315;
3. Notice under section 19 of the *Construction Lien Act* was not given to 315 in its capacity as landlord;
4. Because of these factors, it would be appropriate to grant leave to bring this motion under section 67(2); and,
5. This motion is in the nature of a summary judgment motion and the claimants have not raised a genuine issue requiring a trial regarding the liability of 315.

[9] For the reasons that follow, I have determined that this motion ought to be dismissed.

[10] 315 and W.C. are connected by the following factors:

a. J. Weatherill is an officer and director of both W.C. and 315
b. Kenneth Gibson was the solicitor for W.C. at the material time. He was also an officer and director of 315. He was also the solicitor for 315.

[11] Turner and Townsend, a construction management firm, provided services to W.C. on this project at a cost of $13,503.50. This invoice was paid by Kenneth Gibson's law firm, Gibsons LLP.

[12] In addition, Gibsons LLP paid substantial amounts in connection with the renovations, including direct payments to contractors, of approximately $368,503.50. There is no

evidence that any holdback was retained on the direct payments to contractors. These payments may have been made on behalf of and as an agent for 315 or at the direction of 315. That Gibson LLP may have submitted a proof of claim for these payments in the bankruptcy of W.C. is inconclusive.

[13] The definition of "owner" for the purposes of the *Construction Lien Act* is not the ordinary or dictionary meaning of the word. It is a term of art designed to fit into the statutory payment scheme created by the *Act* and includes anyone having an interest in the premises, who requests that work be done and:

a. Upon whose credit, or

b. On whose behalf, or

c. With whose privity and consent, or

d. For whose direct benefit, an improvement is made to the premises.

[14] As noted by Perrell, J in *Industrial Refrigerated Systems Inc. v. Quality Meat Packers Limited et al*, 2015 ONSC 4545 at paragraphs 11, 12, 15:

> Whether or not a person is an "owner" under the *Construction Lien Act* is dependent on the factual circumstances of each case… Ownership under the statute is a factually-intensive matter, and it is the substance and not the form of the arrangement between the parties that determines whether a person qualifies to be an owner under the *Act*… There may be more than one owner.

[15] In the record before me, there are no copies of any construction contracts, design documents, payment certificates, site reports or inspections or job minutes of any sort. There is no evidence with respect to who was involved in the financing of the work, either as financier or as borrower, or the timing and amount of any draws to finance the work. The identity of whoever was providing site superintendence and co-ordination for the project and the identity of the person to whom they reported has not been disclosed.

[16] 315 and W.C. entered into a new lease on October 2, 2015. In the new lease the initial base rent agreed to in August, 2014 was increased from $225,000 per year to $382,500 per year with stepped increases over the 10 year term. At the hearing of the motion, counsel for 315 indicated that the rent increase was intended to recapture the expenditures by 315 in completing the work left unfinished by W.C.'s insolvency. In the Proof of Claim filed by Mr. Gibson as secretary of 315 in the W.C. bankruptcy, Mr. Gibson also characterized the payments by 315 totaling $563,886 as leasehold improvement costs.

[17] Expenditures by landlords for the leasehold improvements of their tenants are a common practice. They are able to recover what they spend making the improvements over time through the collection of rent. It allows the landlord to control the construction process by hiring and paying for the contractor of his choice with a view to ensuring that the work is of high quality and completed on time. Generally speaking, when landlords perform their

tenant's leasehold improvements, it is the landlord who is the owner for construction lien purposes.

[18] Another point: on the facts before me it is difficult to reconcile the Proof of Claim, asserting as it does that $563,886 in leasehold improvements was provable in the bankruptcy as due and owing, with the new lease where these costs would be collected as rent over the term of the lease and were not immediately payable.

[19] When one considers that it is the substance, not the form, of a transaction that ought to bear on the question of who is an owner in any particular situation, the connections between 315 and W.C. through common directors, officers and legal counsel and the lack of basic project documentation on the available record, I am satisfied that there is a genuine issue regarding the status of 315 that requires a trial. Common sense suggests to me that no one acting reasonably would pay out nearly a million dollars without exerting control over what the money was being paid for and taking steps to ensure that they were getting fair value for the amount expended.

[20] The motion of 315 ought to be dismissed.

[21] In its pivotal decision in *Hryniak v. Mauldin*, 2014 SCC 7, the Supreme Court of Canada directed judges hearing motions like this to take a proactive approach and assess whether the new, enhanced forensic tools of summary judgment can be applied to determine the case at this stage or in a summary trial. This case does not lend itself to summary disposition but would benefit from case management. A settlement meeting under sections 60 and 61 of the *Construction Lien Act* has not been convened. To my knowledge the quantum and timeliness of the liens have not been considered by a vetting committee. The actions have not been consolidated and no one has applied for or been awarded carriage of the proceeding on behalf of the lien claimants under section 59 of the *Act*. Accordingly, I direct that the solicitor for 771793 Ontario Limited shall apply for an order for a settlement meeting on a date to be provided by the trial coordinator in conjunction with my availability.

[22] On the issue of costs, I have costs outlines from 315, 771793 Ontario Limited and Oh! Sar Ltd. Any party wishing to make any additional submissions shall do so within 10 days.

Mr. Justice Martin James

DATE RELEASED: June 22, 2017

CITATION: *Filippi v 315 Pembroke St East*, 2017 ONSC 3851
COURT FILE NO.: CV-15-871
DATE: June 22, 2017

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

TONY FILIPPI

Plaintiff

- and –

315 PEMBROKE STREET EAST HOLDINGS., WEST CHAMPLAIN HEALTH COMMUNITY CORPORATION

Defendants

REASONS FOR DECISION

Mr. Justice Martin James

DATE RELEASED: June 22, 2017

TAB 2

CITATION: RONI EXCAVATING v. SEDONA DEVELOPMENT, 2015 ONSC 389
COURT FILE NO.: CV- 12- 3238-00
DATE: 20150126

SUPERIOR COURT OF JUSTICE - ONTARIO
IN THE MATTER OF THE *CONSTRUCTION LIEN ACT*, R.S.O. 1990, c. C. 30

RE: RONI EXCAVATING LIMITED

Plaintiff

AND:

SEDONA DEVELOPMENT GROUP (LORNE PARK) INC., CASACO DEVELOPMENTS INC. AND CASIMIRO HOLDINGS INC.

Defendants

BEFORE: Ricchetti, J.

COUNSEL: R. Kennaley, Counsel for the Plaintiff

C. Reed, Counsel for the Defendants

HEARD: December 11 and 12, 2014

ENDORSEMENT

THE SUMMARY JUDGMENT MOTION

[1] This is a summary judgment motion.

[2] There are a number of agreements which need to be noted:

a) all lien claimants agreed to be bound by the decision on this motion;

b) all parties agreed leave should be granted under the *Construction Lien Act* for this motion to be heard;

c) all parties agreed that this matter can and should be heard by way of summary judgment motion on the affidavit evidence and cross examinations.

[3] The primary issue is whether Casaco Developments Inc. and Casimiro Holdings Inc. ("Casaco/Casimiro") are statutory owners as defined in the *Construction Lien Act* for the

improvement which forms the basis of the liens, namely the construction of the residential homes on the Lorne Park Project, as defined below:

a) If Casaco/Casimiro are statutory owners under the *Construction Lien Act*, s. 9 of the *Construction Lien Act* makes the proceeds of sale of the subject lands (presently in court) trust funds; or

b) If Casaco/Casimiro are not statutory owners under the *Construction Lien Act*, subject to holdback liability, Casaco/Casimiro would have priority to those funds in court for the unpaid purchase price.

[4] The Lien Claimants are the trades who supplied materials or services to the construction of the Lorne Park Project as described below. The Lien Claimants submit that Casaco/Casimiro are statutory owners under the *Construction Lien Act*. As a result, the monies in court are trust funds for the "contractor", which they say are the Lien Claimants.

[5] Casaco/Casimiro submit that they are not statutory owners under the *Construction Lien Act* as they made no "request" for the improvement being the construction of the residential homes in the Lorne Park Project. Casaco/Casimiro submit that the development work and the construction work are two different improvements for the Lorne Park Project. Casaco/Casimiro submit that the development improvement was complete by early 2009 and their sole interest, after 2010 during the construction, was to receive the balance of the purchase price under its agreement to sell the subject lands. Casaco/Casimiro submit that the entire benefit of the construction/sale of the residential homes was for Sedona. Casaco/Casimiro submit that, after 2010, Sedona was the sole equitable owner of all interest in the Lorne Park Project, except for the payment of the balance of the purchase price.

[6] Casaco/Casimiro submit that, **if they are owners**, then Sedona is the contractor and the proceeds in court are trust funds for Sedona's benefit. Entitlement and priority to those trust funds would have to be subsequently determined.

[7] Sedona has not defended these proceedings.

BACKGROUND FACTS

[8] Claudio Posocco ("Posocco") is the principal of Sedona Development Group (Lorne Park) Inc. ("Sedona").

[9] Jose Casimiro ("Casimiro") is the principal of Casaco/Casimiro.

[10] Posocco and Casimiro have, in the past, cooperated in certain residential land projects.

[11] In 2006, their first project, near Southdown and Lakeshore, Casimiro purchased the lands, Posocco and Casimiro developed the lands and they sold the lands prior to any residential construction. They divided the profits.

[12] In 2006, their second project was the subject lands located at 1191 - 1203 Lorne Park Road ("Lands"). The Lands were purchased by Casimiro through Casaco/Casimiro. Posocco and Casimiro proceeded to develop these lands from 2006 until approximately 2009, eventually, into a nine townhome development (the "Lorne Park Project"). I will describe the Lorne Park Project in more detail below.

[13] In 2008, Posocco and Casimiro purchased lands on Dixie Road, Mississauga. Through corporations, Posocco acquired title to the lands and Casimiro provided the financing by way of a mortgage. Posocco and Casimiro entered into a written joint venture agreement dated October 17, 2008. The joint venture proceeded to develop these lands. The subsequent construction of the residential homes would require both partners' agreement.

THE LORNE PARK PROJECT

[14] As set out above, the Lands were acquired in December 2006 by Casimiro through Casaco/Casimiro for approximately $1,225,000.

[15] There is a disagreement between the Posocco evidence and the Casimiro evidence as to the initial intention for the Lands – to develop or develop and construct. For the reasons which will become evident, whatever the intention was, when the Lands were acquired in 2006, it is the roles of their respective companies after April 2010 that is relevant to and determinative of this motion.

[16] From 2006 until approximately 2009, Casimiro funded the expenses (approximately $450,000) to develop the Lorne Park Project. This included costs for architects, planners, consultants and others for such things as legal expenses, architectural design, soil drilling and testing, geotechnical and environmental services, and planning reports.

[17] By the end of 2008 or early 2009, the Lorne Park Project had proceeded to the point where pre-sales could be commenced.

[18] Casimiro's evidence was that he didn't want to be involved in the construction phase of the Lorne Park Project and that by 2009 he was looking to sell the Lands to a builder while Posocco remained interested in proceeding with the construction of the residential homes.

[19] Casimiro remained involved in the Lorne Park Project in 2009. Marketing and pre-sales of the nine residential townhomes was started by or through Sedona. Casimiro directly funded some of the marketing costs (approximately $100,000). After some point in time, Posocco started to fund the marketing costs. During this time, Posocco was also speaking with trades, construction financiers and making preliminary arrangements for construction of the residential units.

[20] At least 4 and perhaps as many as 7 townhomes were pre-sold by the end of 2009.

[21] During 2009, draft joint venture agreements were exchanged between Posocco and Casimiro but no agreement was concluded.

[22] In April 2009, Casimiro advised Posocco he would sell to him the Lands for $2,350,000 ($1,000,000 on closing and $1,350,000 as a 2nd mortgage at 12% with partial discharges available at $150,000 for each of the lots). No agreement materialized.

[23] On December 3, 2009, Casimiro received an offer from a third party for the Lands for $2,500,000. The offer was not accepted by Casaco/Casimiro. It should be noted that this offer was entirely conditional on the purchaser being satisfied with the Lands and the development potential of the Lorne Park Project. In many ways, this offer was in essence an option by the purchaser. Casimiro submits that this offer is indicative of the fair market value of the Lands. I am not persuaded that Casaco/Casimiro have established that either the April 2009 offer to Posocco or the December 2009 offer is proof of the fair market value of the Lands at the time.

[24] Finally, on April 19, 2010 Posocco and Casimiro, through their companies, entered into an Agreement of Purchase and Sale ("Agreement") for the Lands. It is the substance of this Agreement, the relationship between the parties created by this Agreement and their subsequent actions which are critical to and determinative of this summary judgment motion.

THE AGREEMENT

[25] The relevant portions of the Agreement provide as follows:

> The Purchaser agrees to purchase from the Vendor, and the Vendor agrees to sell all and singular that certain parcel or tract of land and premises, situate, lying and being in the City of Mississauga being a parcel of land of approximately two (2) acres known municipally as 1195 - 1197 Lorne Park Road and 1203 Lorne Park Road (the "**Property**"), for the price and on the terms and conditions hereinafter set out:
>
> **Purchase Price**
>
> 1. The purchase price (the "**Purchase Price**") shall be the total of the following amounts:
>
> (a) Two Million Five Hundred Thousand ($2,500,000.00) Dollars: and
>
> (b) Interest at 12% per annum calculated monthly on One Million Five Hundred Thousand ($1,500,000.00) Dollars from the date that the Vendor receives One Million ($1,000,000.00) Dollars in partial payment of the Purchase Price in accordance with the terms of this agreement.
>
> **Purchaser's Obligations**
>
> 2. The Purchaser shall forthwith proceed with the development and subdivision of the Property into lots to permit the construction of five (5) bungalows and four (4) semi-detached residential units (the "**Residential Units**") and to sell and build such Residential Units and in this regard shall at its sole cost and expense:
>
> (a) complete all re-zoning, site and development plan approvals and requirements and all other governmental requirements to permit the development of the property for the

construction of the Residential Units;

(b) install and complete all services in accordance with the requirements of the municipality and other duly constituted authorities, being those services provided for in the all agreements entered into, or to be entered into between the Vendor and the Municipality, Region, or Public Utility (the "**Development Agreements**") which shall include but not be restricted to:

(i) storm and sanitary sewers to service each lot and to connect the same to municipal trunk sewers, and to provide lateral connections to the lot line in front of each building site;

(ii) water service to each lot and connected to the municipal service;

(iii) functioning gas service;

(iv) hydro service and as required by the Municipality, street signs and a lighting system along the road;

(v) paved roads in accordance with municipal requirements;

(vi) as required by the Municipality, gutters, curbs, public sidewalks and walkways;

(vii) all fencing, berming, landscaping and screening required to be installed pursuant to the provisions of the Development Agreements;

(viii) compliance with all requirements external to the lot line of the lots as may be required by the Development Agreements;

(ix) all those obligations and responsibilities normally assumed by a builder of similar dwellings to include without limitation:

(I) a replacement of topsoil, suppression of weeds, survey bars and water boxes and adjustment thereof;

(II) maintaining subdivision services, utility easements, other lots and access roadways, and access by utilities unimpeded, free of deposits of soil or mud, free of building materials, debris or other obstructions, including conformity with all municipal requirements with respect to preservation of trees, disposition of earth, protection of ravine slopes, planting of trees and landscaping;

(III) installation of or payment for all services and installations;

(IV) conformity with municipal by-laws and regulations and the provisions of the Development Agreements;

(V) trenching, back-filling, grading, sodding and planting;

(VI) preventing any occupancy of the land except in conformity with the Development Agreements and municipal requirements.

(c) the sale of the Residential Units and their construction in accordance with the sale requirements. The parties acknowledge that at the date herein seven (7) of the Residential Units have been sold.

Vendor's Obligations

3. The Vendor acknowledges that the development of the Property may require:

(a) The granting of rights of way and/or easements to utility providers for the construction and installation of utility services: and

(b) The execution of site plan/ development agreements or agreements for the developmnet and servicing of the Property:

and the Vendor agrees to without delay or cost provide such agreements,, right of way and/or easements and conveyances as may be required to complete the development of the Property in accordance with the design of the Tenant.

4. The Vendor acknowledges that the Purchaser has received from the Laurentian Bank of Canada a letter of interest dated the 16th day of March, 2010, a copy of which is attached hereto as Schedule "A" to provide financing for to the Purchaser for the purposes of completing the development of the Property and the construction of the Residential Units (the "**Laurentian Letter**").

5. The Vendor agrees that to provide the mortgage security referred to in the Laurentian Letter on the following terms:

.....

6. The Vendor acknowledges that the sale of the Residential Units requires the Purchaser to provide mortgage security to secure a bond to The Guarantee Company of North America in the principal amount of One Hundred and Eighty ($180,000.00) Dollars and agrees to execute such mortgage security.

7. The Vendor shall not otherwise mortgage or encumber the Property.

Payment of Purchase Price

11. The Purchase Price shall be paid to the Vendor from proceeds of the sale of the Residential Units providing that the proceeds from sales, subject to maintaining an amount reasonably required for the completion of the development of the Property and the Residential Units which is not to exceed One Hundred Thousand ($100.000.00) Dollars shall be paid, applied and distributed as follows:

(a) Firstly, to the payment of all the Corporation's indebtedness which may be due and payable to third parties in accordance with the "Budget" attached as Schedule "B".

(b) Secondly, to the payment all indebtedness to the Laurentian Bank of Canada;

(c) Thirdly, payment to the Vendor of amount or amounts not to exceed One Million Five Hundred Thousand ($1,500,000.00) Dollars in partial payment of the Purchase Price;

(d) Fourthly payment to the Vendor of interest as provided for in paragraph 1(b) in payment of the Purchase Price.

Construction Liens

13. Without limiting the generality of the foregoing, and notwithstanding any notices which the Vendor may receive from the Purchaser's contractors or subcontractors, the Vendor shall not be liable, and no lien or other encumbrance shall attach to the Vendor's interest in the Property pursuant to the *Construction Lien Act* (Ontario) or any other Laws, in respect of materials supplied or work done by Purchaser or on behalf of the Purchaser and the Purchaser shall so notify or cause to be notified all its contractors and subcontractors.

14. The Purchaser shall promptly pay all of its contractors and suppliers and shall do any and all things necessary so as to minimize the possibility of a lien attaching to the Property and should any such lien be made or filed, the Purchaser shall discharge it within 5 days following the date of the registration of such lien, provided however that the Purchaser may contest the validity of any such lien and in so doing shall obtain an order of a court of competent jurisdiction discharging the lien from the title to the Property by payment into Court or by furnishing to the Vendor security satisfactory to the Vendor in nature and amount against all loss or damage

16. If and whenever an Event of Default occurs then:

(a) the Vendor has the immediate right of entry upon the Property;

(b) at the Vendor's option the Laurentian Letter and all further agreements resulting therefrom shall be automatically assigned to the Vendor;

(c) at the Vendor' option all contracts for the supply of labour and material shall automatically be assigned to the Vendor;

(d) at the Vendor's option all agreements for the purchase and sale of the Residential Units shall automatically be assigned to the Vendor; and

(e) the balance of the Purchase Price shall become due and payable.

[26] The most significant terms of the Agreement, for the purpose of this motion, can be summarized as follows:

a) Casaco/Casimiro agreed to sell the Lands to Sedona for $2,500,000;

b) Sedona had a positive contractual obligation to proceed to complete the development and construction of the Lorne Park Project: "Sedona "**shall** forthwith proceed with the **development** and **subdivision** of the Property into lots... and **to sell and build** such Residential Units" at Sedona's expense (emphasis added);

c) Sedona had a positive contractual obligation to sell the "Residential Units and their construction in accordance with the sale requirements. The parties acknowledge that at the date herein seven (7) of the Residential Units have been sold";

d) Sedona had a positive contractual obligation to exercise "all those obligations and responsibilities normally assumed by a builder of similar dwellings";

e) Casaco/Casimiro had a positive contractual obligation to grant, at no cost, any easements, rights of way and agreements for the development and servicing of the Lands;

f) Casaco/Casimiro had a positive contractual obligation to permit financing on the Lands, for an existing financing Letter of Intent from the Laurentian Bank, "for the purposes of completing the development of the Property and the construction of the Residential Units". In essence this was construction financing and would become a first charge on the Lands. Casaco/Casimiro would not have personal liability for this construction financing but Laurentian Bank would have full recourse to Casaco/Casimiro's Lands as security in the event of default;

g) Casaco/Casimiro had a positive obligation to permit a further mortgage security on the Lands to The Guarantee Company of North America in the amount of $180,000. This appears to be the Tarion registration security by a builder for each new home to be sold at $20,000 per home;

h) $1,000,000 of the first advance from Laurentian Bank was to be paid to Casaco/Casimiro as part of the purchase price;

i) The balance of the purchase price was to be paid from the proceeds of sale of the residential units (after $100,000 to be reserved or set aside "for the completion of the development of the Property and the Residential Units") in the following order:

   i. first, to pay Sedona's indebtedness to third parties in accordance with a "budget". Neither Casaco/Casimiro nor Sedona produced a copy of the "budget" but there was no dispute this was or would include contracts for the supply of materials and services which Sedona would enter into to complete the Lorne Park Project – the residential construction;

   ii. secondly, to repay the construction financing to Laurentian Bank;

   iii. thirdly, the balance of the purchase price principal; and

   iv. fourthly, interest on the balance of the purchase price at 12%.

   The order of payment meant that Casaco/Casimiro would only be paid after the costs to construct and the construction financing was paid from the proceeds of sale of the townhomes. In other words, the remaining $1,500,000 would only be paid to Casaco/Casimiro from any net profits, if any, upon completion of the Lorne Park Project;

j) Title would pass directly from Casaco/Casimiro to the third party home buyer.

k) Casaco/Casimiro were not to be responsible for construction liens. No one suggested that this provision was enforceable to deny the Lien Claimants rights under the *Construction Lien Act*. See s. 4 of the *Construction Lien Act*; and

l) In the event of default, Casaco/Casimiro had the right to take an assignment of the construction financing, the agreements of purchase and sale of the townhomes, and all contracts for the supply of labour and materials;

[27] In June 2010 Laurentian Bank advised it would not finance the Lorne Park Project if the land was valued at $2,500,000. Posocco proposed to Casimiro a revised Agreement for $1,800,000 plus a $700,000 bonus – for a total of $2,500,000 - the same price as set out in the Agreement. Posocco submits that an amending agreement was signed to this effect. Casimiro submits that no such executed amending agreement exists and that the copy produced contains his forged signature. However, nothing turns on this as both the

Agreement and the alleged amending agreement contain the same terms described above except for how the purchase price was to be allocated. For simplicity I will continue to refer to the "Agreement".

[28] The construction financing with Laurentian Bank was completed in December 2010. Casaco/Casimiro received $800,000 of the purchase price instead of the $1,000,000 set out in the Agreement. Despite the breach of the Agreement Casimiro took no steps to enforce his rights under the Agreement. Instead, he considered the balance of the purchase price owed to Casaco/Casimiro under the Agreement to be $1,700,000. The fact the result was an even greater balance to be paid from any net profits from the construction and sale of the townhomes, was not addressed by Casimiro.

[29] Casimiro submits that the $2,500,000 purchase price under the Agreement was the fair market value of the Lands. However, during oral submissions Defence counsel was asked, if this was accurate, why would Casaco/Casimiro sell the Lands for that price but subordinate being paid for the Lands until after the construction trades were paid and the construction financing was repaid? In other words, why risk payment of the purchase price on the success of the construction and sale of the Lorne Park Project? In my view, there was no reasonable answer to this question.

[30] Similarly, Defence counsel was asked why Casaco/Casimiro didn't transfer the Lands and assume a Vendor Take Back mortgage, which could have been postponed to the construction financing. This proposal had been discussed as early as April 2009. The response was that this would avoid land transfer tax being paid twice since the individual lots and homes would be transferred directly from Casaco/Casimiro to the third party home buyers. The problem with this answer is that, even at a high 2% land transfer tax rate on the $2,500,000 price, this would only be approximately $50,000 and this cost is usually payable by the purchaser. This amount appears nominal compared with the risks to a vendor of subordinating and risking the payment of the substantial balance of the purchase price to the net profits of a hopefully successful construction project.

[31] After the Agreement was executed, Sedona continued with the completion of the Lorne Park Project. Sedona dealt with the municipality. Sedona proceeded with the sale, the necessary steps to arrange for and the construction of the townhomes. Sedona was the only party who contracted with the suppliers and trades for the construction of the townhomes. Sedona was the only party who contracted with the third party home buyers of the townhomes.

[32] The construction contracts between Sedona and, at least some of the Lien Claimants, contained a provision that the contractor's rights and remedies were limited to Sedona and no other third party. No one attempted to suggest that this provision was enforceable at law to deny the Lien Claimants their statutory lien rights and trust claims under the *Construction Lien Act*.

[33] Sedona paid the trades for the construction of the Lorne Park Project. There is no doubt that many of the payments to the trades were made using the construction financing.

[34] All the townhomes were sold by Sedona.

[35] Construction was substantially completed when Sedona ran into financial difficulties.

[36] Construction liens were registered on title to the Lands. Laurentian Bank's construction financing went into arrears. The third party home buyers were concerned about their deposits and their rights to purchase the townhomes.

[37] Title to the Lands continued to remain in the name of Casaco/Casimiro.

[38] Litigation ensued.

[39] The various judicial proceedings relating to the Lorne Park Project were case managed. The agreements of purchase and sale to the third party home buyers were completed through vesting orders upon the buyers paying the balance owed under their agreements of purchase and sale into court.

[40] All parties agreed that Laurentian Bank had priority to a portion of the monies in court. As a result, Laurentian Bank was repaid its construction financing.

[41] After payment out to Laurentian Bank, there remain substantial monies in court. However, there are not sufficient monies to pay both Casaco/Casimiro and the Lien Claimants. There will be a considerable shortfall to whichever party does not have priority to the funds in court.

ANALYSIS

Leave and Summary Judgment

[42] The *Construction Lien Act* provides:

> 67. (1) The procedure in an action shall be as far as possible of a summary character, having regard to the amount and nature of the liens in question.
>
> (2) Interlocutory steps, other than those provided for in this Act, shall not be taken without the consent of the court obtained upon proof that the steps are necessary or would expedite the resolution of the issues in dispute.
>
> (3) Except where inconsistent with this Act, and subject to subsection (2), the *Courts of Justice Act* and the rules of court apply to pleadings and proceedings under this Act.

[43] Summary judgment is available in Construction Lien actions. See *Exteriors by Design v. Traversy*, 2012 ONSC 3164 and *Kiewswetter v. Traugott*, 2014 ONSC 1397.

[44] I am satisfied that this is a proper case to grant leave to bring a summary judgment motion. Clearly, the determination of which of the two parties, Casaco/Casimiro or the Lien Claimants, has priority to the funds in court will expedite the resolution of the remaining issues in these proceedings.

[45] Rule 20.04 of the Rules of Civil Procedure provides:

> (2) The court shall grant summary judgment if,
>
> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
> (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment
>
> (2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
> 2. Evaluating the credibility of a deponent
> 3. Drawing any reasonable inference from the evidence
>
> (2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

[46] In *Hryniak v. Mauldin*, 2014 SCC 7, the Supreme Court set out an approach to summary judgment motions where it is claimed there is "no genuine issue requiring a trial".

> [49] There will be no genuine issue requiring trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[47] In this case, the parties agreed to have the issues determined by way of summary judgment. See R. 20.04(2) (b). In any event, I am satisfied it is appropriate to grant summary judgment in this case as I have determined there is no genuine issue requiring a trial for a fair and just determination of the issues set out above.

[48] While Casimiro takes issue with the credibility of Sedona, I am not persuaded that there are any credibility issues which require further evidence or *viva voce* evidence. As I stated above, the primary issue is whether Casaco/Casimiro are statutory owners under the *Construction Lien Act* and this can be determined based on the terms of the Agreement and the respective roles of the parties after the Agreement was executed.

[49] In the same manner, it is not necessary to determine whether there was in 2006 through 2009 a joint venture agreement between Sedona and Casaco/Casimiro with respect to the construction of the townhomes or that such an intention existed in 2006.

What constitutes a Statutory Owner?

[50] The *Construction Lien Act* defines "owner" as follows:

"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;

[51] This is referred to as a "statutory owner". There may or may not be more than one statutory owner for *Construction Lien Act* purposes. .

[52] There is a three part test for a party to be a statutory owner under the *Construction Lien Act*:

a) The party must have an interest in the premises;

b) The party must have requested the improvement in the premises; **and**

c) The improvement on the premises must have been made upon that party's credit **or** behalf **or** with that party's privity **or** consent **or** for that party's direct benefit.

[53] As stated in *Advanced Construction Techniques Ltd. v. OHL Construction Canada*, 2013 ONSC 7505 at para. 151, [2013] O.J. No. 6013 whether or not a party is a statutory owner is dependent on the circumstances of each case.

[54] The registered owner of property may or may not be a statutory owner under the *Construction Lien Act*. In *Phoenix Assurance Co. of Canada v Bird Construction*, [1984] 2 S.C.R. 199 at p. 213, 1984 Canlii 79 the Supreme Court commented on the definition of "owner" under Ontario's *Mechanics Lien Act* and stated:

> In applying these provisions of the Act, it must be remembered that "owner" under the statute is not necessarily the registered or legal owner of the fee. The security afforded by the Act is a claim against the interest of the person requesting the work and whose interest is to be thereby enhanced.

[55] In *Bird Construction v Ownix* (1981), 33 O. R. (2d) 807, 125 D.L.R. (3d) 680 (C.A.) Wheatherson J.A. stated:

> Although the statutory definition of "owner" in s. 1(1)(d) of the Act "includes any person", etc., it is not, in my opinion, an extended, but rather a comprehensive definition of an owner against whose estate or interest a lien may attach under s. 5 [now s. 6] of the Act. In Sanderson Pearcy & Co. Ltd. v. Foster (1923), 53 O.L.R. 519, Middleton J. said at p. 521:
>
> > "But this definition was only intended as a definition, and not as a means of fixing upon the owner some liability for a kind of lien not given by the statute. There are many cases in which several "own" land. The case of landlord and tenant is specially provided for, but joint ownership, tenancy in common, life-estates, etc., are not. The intention of the statute clearly is to prevent any one who has an estate or interest in lands upon which a lien may be claimed under secs. 6 and 8 [now ss. 5 and 7] from having liability imposed

> upon his estate unless there is on his part, first, a request, and, secondly, one or more of the alternative requirements mentioned."

How does the Court determine whether a party requested the Improvement?

[56] In *Hamilton (City) v Cipriana*, [1977] 1 S.C.R. 169 at p. 173, 67 D.L.R. (3d) 1, Chief Justice Laskin held that "direct dealing" was not a necessary requirement in finding that a request is made.

[57] In *Orr v Robertson* (1915), 34 O.L.R. 147, 23 D.L.R. 17, the Court of Appeal held that work "can be found to have been performed at the request of a person" so as to make him an "owner" under the lien legislation even though the request was not made directly by that person but instead someone acting on the person's behalf.

[58] In *Grecor Engineering Inc. v Kingston 2000 Developments Ltd.*, 30 C.L.R. (3d) 107, [2003] O.J. No. 5101 at paras. 16-18 (Sup. Ct.) and in *Advanced Construction Techniques Ltd. v OHL Construction Canada*, 2013 ONSC 7505 at para 148, [2013] O.J. No. 6013, the court concluded that a request for the purposes of determining whether a party was a statutory owner under the *Construction Lien Act* could be implied or inferred from all the surrounding circumstances even if there was no direct dealing between the "owner" and the "lien holders".

[59] In considering the "totality of the circumstances", one must consider the relationship between the parties. Where there is an agreement between the parties, it is the substance of the transaction and not the form of the agreement between the parties that must be considered. In *Parkland Plumbing and Heating Ltd. v. Minaki Lodge Resort 2002 Inc.* 2009 ONCA 256, 305 D.L.R. (4th) 577, the Court of Appeal observed at paras. 67 - 68 that:

> The absence of direct dealings between the person said to be an owner under the Act and construction suppliers is only one factor to consider in examining the relationship between the parties. It is not determinative. Were it otherwise, a developer could easily escape its obligations to suppliers by the simple device of arranging for an associated or related company to directly engage suppliers for the provision of services or materials. This would defeat the intended protection provided to lien holders under the Act. For this reason, the courts have recognized that a 'request' for work to be done may be inferred from the totality of the circumstances, viewed in light of the substance of the relationship between the parties: *Phoenix*, [1984] 2 S.C.R. 199, at pp. 215-18; *Cipriani*, [1977] 1 S.C.R. 169, at p. 173; *Northern Electric*, at p. 769; *Roboak*, [1986] O.J. No. 2681, at pp. 203-04; *Muzzo*, at pp. 469-71; *Orr v. Robertson* (1915), 23 D.L.R. 17 (Ont. C.A.), at p. 18.
>
> Nor was the trial judge's reliance on *Muzzo* misplaced. In that case, the court was concerned with the meaning of 'owner' under s. 1(1)(d) of the *Mechanics' Lien Act*, R.S.O. 1970, c. 267, a predecessor statute to the current Act. The court considered *Phoenix*, *Northern Electric* and *Cipriani* and, consistent with these authorities, concluded that a request by a person to have work performed could be inferred from all the circumstances of the case. Thus, in *Muzzo*, a vendor of subdivision land was held to be an owner for the purpose of a lien claim where, following the sale transaction, the vendor remained the registered owner of the land and retained the rights to approve building plans and to repurchase the land on certain events.

[60] In *Muzzo Brothers Ltd. v. Cadillac Fairview Corp. Ltd. et al,* (1982), 34 O.R. (2d) 461, Justice West had the following to say:

> These cases support two general principles; that the substance, and not merely the form, of the relationship between the parties must be considered and that a request to have work performed may be inferred from a consideration of all the circumstances even in the absence of direct dealings between the parties.

[61] The Defence submits that the authorities suggest that for a registered owner to be a statutory owner, the court should find the owner to be an "entrepreneur". The authorities relied on by the Defence do not define what constitutes an entrepreneur. I should add that "entrepreneur" is not a requirement of the *Construction Lien Act*'s definition of "owner".

[62] Two definitions of entrepreneur are as follows:

- Merriam-Webster: "one who organizes, manages and assumes the risks of a business or enterprise."
- Dictionary.com: "a person who organizes and manages any enterprise, especially a business, usually with considerable initiative and risk."

[63] In *Ken Gordon supra*, the Supreme Court used the following analysis to determine whether the party in that case was an "entrepreneur":

> It is clear that OHC, as a Crown corporation, can qualify as an owner under the Act (s. 1(1)(*d*)). OHC has an interest or estate in these lands. By its arrangements and relationship with E, OHC has a very extensive interest, in the broader sense of the word, but over and above all these considerations is the similarity of the relationship between OHC and E to those relationships examined by this Court in *Northern Electric Co. v. Manufacturers Life Insurance Co.,* [1977] 2 S.C.R. 762, *Hamilton (City of) v. Cipriani,* [1977] 1 S.C.R. 169, and *Phoenix, supra.* In each case the entrepreneur of the project, though with varying final positions or interests, was found to be an owner under the Act. OHC, on these authorities, clearly falls within the statutory definition of an owner, and in this, I am in respectful agreement with all the others below.

[64] Obviously, a party who organizes, manages a project and assumes a risk of the project is an entrepreneur. An entrepreneur's role will vary from project to project. The degree of organization, management and risk will also vary from project to project. An entrepreneur need not carry out all three roles and could still be an entrepreneur.

[65] Whether a party might or might not be an "entrepreneur" is not definitive as to whether the court should imply a request for the improvement. I am not persuaded there is any "magic" to the word "entrepreneur". If a party is an entrepreneur, namely the party has a role and interest in the project, depending on the role and interest of that party, the court could and should consider that as a factor in determining whether the party implicitly requested the improvement.

[66] All the circumstances relating to the party, including the party's interest in the lands, the role of the party before, during and after the improvement, the party's interest in the

financial aspects of the improvement, must all be considered as factors in the court's determination.

[67] Once all the relevant circumstances are considered, the court must proceed to determine whether, in those circumstances, it is reasonable for the court to imply a request by that party for the supply or services provided to the improvement.

The Position of the Parties on Statutory Owner

[68] It is common ground that Casaco/Casimiro have an interest in the Lands on which the improvement took place. It is also common ground that the improvement was made with, at a minimum, the Casaco/Casimiro's knowledge and consent.

[69] The issue which separates the parties is whether there was a "request" by Casaco/Casimiro for the improvement in the Lands.

[70] The Lien Claimants submit that they have established that Casaco/Casimiro made a "request":

a) There was only one improvement - the Lorne Park Project - commencing from 2006. The Lien Claimants submit Casaco/Casimiro contracted and paid for expenses relating to the development and the subsequent construction phase of the Lorne Park Project; or

b) The work done by the Lien Claimants, even if restricted to the improvement being the construction of the townhomes, while directly at the request of Sedona, was also implicitly at the request of Casaco/Casimiro.

[71] Casaco/Casimiro submit that there was no request by them for the supply of materials or services to the improvement for which the Lien Claimants liens arose:

a) There were two separate improvements. Casaco/Casimiro were only involved in the development improvement and not the construction improvement of the Lorne Park Project; and

b) The construction improvement was done solely at the request of Sedona.

[72] The Lien Claimants rely heavily on *Phoenix Assurance Co. of Canada v Bird Construction Co.*, [1984] 2 S.C.R. 199 as having direct application to the present case. In *Phoenix Assurance*, in order to establish a head office building in Toronto, Phoenix entered into an arrangement with Ownix. Ownix lacked adequate financing to develop the property that would become the head office for Phoenix. Phoenix assisted with the financing. The actual construction was undertaken under a contract between Ownix and the General Contractor, Bird. The Court held that Phoenix made a request for work from the contractor Bird despite

"in a strict factual sense" Ownix entered into the construction contract with Bird. The Supreme Court stated:

> I do not think that the interposition of Ownix and the separation of the guarantor and the mortgagor roles, as compared to Northern Electric where the four roles were played by only two parties, is a difference with legal consequences under the Act. Consequently, I conclude, as did the Divisional Court and the Court of Appeal below, that Phoenix did make "the request" that the work for which the lien claim (other than third party space tenants' improvements) was made be done by Bird. The request was made in a strict factual sense by Ownix who, of course, entered into the construction contract with Bird in the performance of its role under the development contract between Ownix and Phoenix. That agreement stipulated that:
>
> > The building shall be constructed by the Developer at its expense in accordance with detailed drawings, elevations and specifications (including materials to be used) which must first be approved by Phoenix Canada and such approval shall not be unreasonably withheld or delayed.
>
> While the construction contract was signed before the development contract, the latter had long negotiation roots as the parties to the project organized finances, plans, specifications, permits and all the paraphernalia of modern urban building projects. The sequence of the execution of these contracts is unimportant to the determination of the position of the parties under The Mechanics' Lien Act, supra.
>
> In Hamilton (City of) v. Cipriani, [1977] 1 S.C.R. 169, the City, with the provincial agency, The Ontario Water Resources Commission, as its banker, entered into an agreement to cause a works to be built on city land. The Commission was found to have become the general contractor, though actual construction was carried out under a construction contract entered into by the City and not the Commission. Laskin C.J., speaking for a unanimous Court, stated at p. 173:
>
> > Schroeder J.A. in the Ontario Court of Appeal, looking to the substance of the transactions between the City, the Commission and McDougall, construed the interrelationship as one where the Commission became the general contractor for the City and, as such, proceeded to carry out its contract through another general contractor. In my opinion, this is a proper analysis, recognizing the fact that the Commission was being the City's banker. The City was and remained the "owner" within s. 1(d) so as to make its land lienable under s. 5, and it is idle formalism to contend that the work was not done at its request.
>
> Ownix was in much the same position as the Commission, and Phoenix, like the City, was the legal owner throughout.

[73] Casaco/Casimiro heavily rely on *JDM Developments Inc. v J. Stollar Construction Ltd.* [2005] O.J. No. 4817 (ONSC) as being on "all fours" with the present case. J. Stollar Construction Limited (JSCL) was the owner of a number of lots in a subdivision it was developing. It was alleged that the owner of JSCL, prior to his death, had agreed to allow JDM Developments Inc. (JDM) to build on two lots and from the sale of the proceeds, pay to JSCL the sum of $60,000 for each lot. JDM started to build on the two lots. A dispute arose when JSCL refused to advance mortgage funds for the buyers. JDM liened the two lots. JDM admitted that it was its own decision as to whether to build on a lot, the type of home, the price and all other terms of the sale. The Court found at para 53 that JDM did not have a valid claim for lien and that his claim was in reality a claim for the sale of the building lots. The Court at para 61 found that JSCL was not a statutory owner.

The court went on to make the following findings of fact and determinations at paras 63-64, 67 and 69:

> It is clear on the evidence that the improvements were not done upon JSCL's request, or upon any of the required elements within the statutory definition of "owner". In my view, there neither an express request or a request by implication on the part of JSCL derived from the circumstances in order to give rise to lien rights against JSCL's interests sought to be charged. The evidence clearly establishes that JDM, on its own version of the alleged oral agreement, had complete control over how the houses were built, designed, constructed or sold. There was no privity or consent between JDM and JSCL in this regard. The houses were not constructed upon JSCL's credit and certainly not on JSCL's behalf.
>
> In order to have a valid and enforceable lien, a lien claimant must show that the person sought to be charged as "owner" requested directly or impliedly, the work, service or material to be supplied, so as to enhance his estate or interest in the property. This requirement has not been met as JDM in this case intends to solely retain the benefit of the improvement. See: Constructions Builders' and Mechanics' Liens in Canada, Macklem and Bristow, Vol. 1, p. 2-4.
>
> I agree with JSCL's submission that JDM seeks to lien its own improvement. ...
>
> I further find that the quantification of JDM's liens have nothing to do with the price or cost of improvements to Lots 167 and 175...

Application to this case

Were there two improvements?

[74] It is not necessary to decide whether there were two improvements as submitted by Casaco/Casimiro or one improvement as submitted by the Lien Claimants.

[75] As set out below, I am satisfied that Casaco/Casimiro are statutory owners even if the construction phase of the Lorne Park Project was treated as a separate improvement from the development prior to the early part of 2009.

What is the substance of the transaction between Casaco/Casimiro and Sedona?

[76] The Defence submits that Casaco/Casimiro' sole interest was to be paid for the balance of the purchase price being the fair market value of the Lands at the time. I cannot agree with the Defence that the substance of the transaction was that Sedona was building the homes solely for its own account.

[77] I conclude that Casaco/Casimiro implicitly "requested" the work done by the Lien Claimants. Casaco/Casimiro was an "entrepreneur" in the Lorne Park Project based on the clear and unambiguous terms of the Agreement and the actions by the parties taken in furtherance of that Agreement. There are a number of reasons for coming to this conclusion (in no particular order):

a) The transaction set out in the Agreement is not a simple sale of property as suggested by the Defence. Mr. Casimiro was a sophisticated investor. He had lawyers representing him. Lawyers were involved in the preparation of the

Agreement. Even by his own evidence, Casimiro clearly knew the difference between development and construction. Casimiro chose to execute the Agreement and was bound by its terms. It is clear from the terms of the Agreement that Casimiro *required* Sedona to construct the residential homes and *needed* the construction to take place and the Lorne Park Project to be successful for Casaco/Casimiro to be paid the balance of his purchase price. As a result, Casimiro clearly had a significant interest in the construction and sale of the residential homes on the Lands;

b) As a sale of property for $2,500,000, if that was the fair market value of the Lands as submitted by the Defence, the Agreement makes little sense. Clearly, if the Lands were worth less than $2,500,000 then Casaco/Casimiro would have had "skin in the game" and the balance of the terms in the Agreement would make much more sense in that Casimiro would be sharing in the profits of a successful completion of the Lorne Park Project. However, it is not necessary to decide whether the Lands were worth $2,500,000 in 2010. Assuming the Lands were worth $2,500,000 in 2010, structuring the transaction to *require* Sedona to build the townhomes, subordinate Casaco/Casimiro's payment of the balance of the purchase price until *after* payment of all the suppliers and trades contracted by Sedona and repayment of the construction financing, puts the balance of the purchase price entirely at risk and contingent on a successful construction and sale of the townhomes by Sedona - the Lorne Park Project. This is entirely inconsistent with Casmiro's evidence that he did not want to be involved or take the risk of the construction of the townhomes. By structuring the transaction as he did: he required the construction, assisted in the construction by agreeing to and permitting the use of his Lands for this purpose and assumed the risk of the successful construction and sale of the townhomes in order to be paid the substantial balance of the purchase price;

c) Casaco/Casimiro could easily have taken a VTB (Vendor take back) mortgage. Casimiro stated that he was surprised when he returned from his trip that the Lands remained in the name of his companies. He knew what a VTB was from the first offer he made to Posocco in April 2009. He did nothing to fix the manner in which the Agreement was structured and allowed the Lands to remain in the name of Casaco/Casimiro. Casimiro suggested that his lawyer provided him advice that the delayed closing was the "same practical effect as an immediate sale". No affidavit was submitted by Casimiro's lawyer. It is hard to imagine that any lawyer could have advised the Agreement had the same practical effect as an immediate sale and transfer of title to the Lands, when it is clear that the balance of the Casaco/Casimiro's purchase price is subordinated to all lien claimants and construction financing and dependent on net profits for payout. Casaco/Casimiro had no security for the balance of the purchase price. Casaco/Casimiro would only get paid if and to the extent there were net proceeds of sale of the newly constructed homes. Even if the Defence is correct that Casimiro received bad legal advice, this doesn't alter the clear terms and conditions Casimiro agreed to in writing and the subsequent role he played in the

construction of the residential lands through the respective obligations carried out by the "vendor" under the Agreement;

d) Unlike a typical agreement for the sale of property, the Agreement required the purchaser to construct homes on the property. The Agreement uses the words "shall". Sedona had no choice but to proceed to construct the residential homes or be in breach of the Agreement. In many ways, this is similar to the facts in *Hamilton*, where the court found that, in essence, the City used the Commission to act essentially as its general contractor for the improvement;

e) Despite the outstanding balance of the purchase price, the Agreement permits the Lands to be encumbered for financing, granting of easements, rights of way and so forth. Clearly, Casimiro agreed to and accepted this role in the construction and sale of the Lorne Park Project and proceeded on this basis for a number of years. Casimiro agreed he would transfer title directly to the third party home buyers. While Casimiro's role is a very different role than Sedona's role in the completion and construction of the Lorne Park Project, it is still a significant role in the completion, construction and sale of the Lorne Park Project;

e. The payment of the balance of the purchase price clearly demonstrates the role and interest of Casimiro in the construction and sale of the Lorne Park Project. Casaco/Casimiro specifically agreed to be paid the balance of the purchase price from the "proceeds of sale of Residential Units" but only AFTER:

   i. Deduction of $100,000 as "reasonably required for the completion of the development";

   ii. Payment of Sedona's suppliers and trades; and

   iii. Payment of the construction financing to Laurentian Bank;

   If the Lien Claimants are successful in this motion (i.e. Casaco/Casimiro are statutory owners) then the priority of payment from the funds in court is exactly in the same order as Casaco/Casimiro had agreed to pursuant to the terms in the Agreement. On the other hand, if Casaco/Casimiro are successful in this motion (i.e. Casaco/Casimiro are not statutory owners) Casaco/Casimiro would be paid in priority to Sedona's third party obligations (i.e. the suppliers and trades), entirely contrary to the order of payments set out in the Agreement;

f. Casaco/Casimiro had a significant role in financing the construction and sale of the Lorne Park Project. Casaco/Casimiro actively financed the construction by postponing payment of the balance of the purchase price and allowing the construction finance to be a first charge on their Lands. Casaco/Casimiro actively participated in the construction by permitting various agreements, rights of way, easements etc. to encumber the Lands. Casaco/Casimiro delegated to Sedona the detailed requirements regarding the construction and sale of the townhomes as set out in paragraph 2 of the Agreement. Casaco/Casimiro would be the transferor

of the land (with the newly constructed home) directly to the third party home buyer. Casaco/Casimiro and Sedona were jointly dependent on a successful construction project to be paid – they both had "skin in the game";

g. To use the language in *Phoenix, Northern Electric and Hamilton* and repeated in *Ken Gordon Excavating Ltd v. Edstan Construction Ltd* [1984] 2 S.C.R. 280 at 289, Casaco/Casimiro were "entrepreneurs" in the Lorne Park Project. To use the language of Casaco/Casimiro in their factum – "If the owners plan to benefit from the improvements being constructed... they are owners for the purposes of the *Construction Lien Act*." Without any question, Casaco/Casimiro would benefit from the improvement – the payment of the balance of the purchase price from the net profits of the Lorne Park Project. The Defence submits that the purchase price did not include a premium or sharing of the profits of the Lorne Park Project. Even if that was so, Casaco/Casimiro had a $1,700,000 interest or benefit in the improvements to be constructed. I fail to see how Casaco/Casimiro would not benefit from the construction and sale of the residential homes;

h. Despite the submissions of the Defence, the substance of the Agreement was not just the mere financing of the balance of the purchase price. The provisions in the Agreement which permit Casaco/Casimiro to take over the construction contracts, the construction financing and the third party purchase agreements would not normally, by themselves, attract an implied request for the supply or services to the improvement. Project lenders who lend money for construction typically have such provisions but are not statutory owners. Such provisions are simply security interests of the lender until and if/when the lender chooses to exercise its remedies to step into the shoes of the borrower. In this case, an ability to take over all aspects of the construction, financing and sales, when coupled with the provisions directing Sedona to build and sell the townhomes, along with consents and agreements by Casaco/Casimiro to assist Sedona with the construction and sale of the townhomes, creates a significant involvement of Casaco/Casimiro in the improvement;

i. Casimiro had the ability to structure the transaction in any manner he chose. In April 2010, Casimiro chose to do it in the manner described above whereby Casaco/Casimiro actively participated in the Lorne Park Project and had an interest in the Lorne Park Project being financially successful; and

j. By analogy, Casaco/Casimiro's unpaid balance is akin to an unregistered mortgage for the unpaid purchase price. S. 78(1) of the *Construction Lien Act* provides that liens arising from an improvement have priority over all conveyances, mortgages or other agreements, affecting the owner's interest in the premises. It is important to note that this section refers to all "mortgages" and "other agreements". The balance of the section in the *Construction Lien Act* goes on to give "registered mortgages" priority over liens in certain circumstances and limited to certain amounts. To accede to the Defence submissions would create a

new priority in favour of an owner for unpaid purchase price which is even better than some registered mortgages.

[78] I conclude that the substance of the transaction between Casaco/Casimiro and Sedona was a joint venture, with respective roles and interests, for the successful construction and sale of the Lorne Park Project. Casaco/Casimiro was an entrepreneur in the Lorne Park Project.

Was there an implied request by Casaco/Casimiro?

[79] I find that, in this case, there was an implied request by Casaco/Casimiro for the provision of supplies and services for the improvement on the Lands. Given the role of Casaco/Casimiro in the Lorne Park Project set out above, which I will not repeat, it is reasonable to imply a request for the improvement made to the Lands and I do so imply such a request.

[80] In fact, had it been necessary, in my view, an express request for the improvement might have arisen from the fact that Casaco/Casimiro specifically required Sedona to proceed with the construction and sale of the townhomes and provided Sedona with the financial and other critical support relating to the construction which was to occur on the Lands.

[81] The Defence submits that the Lien Claimants have a lien solely against Sedona's interest in the Lorne Park Project. This makes little sense as, Sedona's only interest under the Agreement, where title remained with Casaco/Casimiro, was to net profits if any from the Lorne Park Project. This would be a "hollow" interest for the Lien Claimants to attach to despite that it was their materials and services who added to the value of the Lands.

Conclusion on Casaco/Casimiro as a Statutory Owner

[82] As a result of finding that Casaco/Casimiro made a request for the supply of materials and services to the improvement, being the construction of the residential homes, Casaco/Casimiro are statutory owners under the *Construction Lien Act*.

Is Sedona a statutory owner under the *Construction Lien Act*?

[83] Casaco/Casimiro submitted that Sedona was the owner on the basis it had an equitable interest created by the Agreement, despite the fact the Agreement had not closed. See para 38 of the Defence factum: "As owner in equity, Lorne Park Sedona has an interest in the Lorne Park lands."

[84] I agree. By virtue of the Agreement, Sedona had an equitable interest in the Lorne Park Project lands through the Agreement whether or not you characterize the Agreement as a joint venture agreement.

[85] Having determined that Sedona has an equitable interest, there is no issue that the supply of materials and services to the improvement was done at the request of and with the consent, knowledge and benefit of Sedona.

[86] There is nothing in the *Construction Lien Act* prohibiting there from having more than one statutory owner for an improvement. See *Celebrity Flooring Systems Ltd. v. One Shaftsbury Community Association*, (2006) 55 C.L.R. (3d) 184 (Master).

[87] As a result, I find that Sedona is also a statutory owner for this improvement. Sedona as a statutory owner has its interest in the Lands also subject to any construction liens.

Do Casaco/Casimiro owe a trust to the construction trades?

[88] If Casaco/Casimiro are statutory owners, the Defence submits the monies in court are trust funds for the benefit of the contractor.

[89] I do not accept the Defence's alternative submission, that, if Casaco/Casimiro is a statutory owner, Sedona was the "contractor".

[90] Contractor is defined in the Construction Lien Act as follows:

> "contractor" means a person contracting with or employed directly by the owner or an agent of the owner to supply services or materials to an improvement; ("entrepreneur")

[91] The Defence submits that, since no one contracted directly with Casaco/Casimiro, Sedona must be the contractor and the monies are trust monies for Sedona.

[92] I have determined that BOTH Casaco/Casimiro and Sedona were statutory owners for this improvement. Therefore, their respective interests in the Lands are subject to the statutory trust in favour of those contracting with either or both of them.

[93] In this case, all the suppliers and trades had contracted with Sedona. The monies in court are in trust for the Lien Claimants.

[94] I make no finding whether Sedona was or was not the agent of Casaco/Casimiro in these circumstances. This issue was not fully addressed by counsel in submissions.

CONCLUSION

[95] I find that:

a) Casaco/Casimiro are statutory owners with respect to the residential construction improvement on the Lorne Park Project;

b) Sedona is also a statutory owner of the residential construction improvement on the Lorne Park Project; and

c) the monies in court are trust funds for the "contractors" who contracted with either Casaco/Casimiro and/or Sedona.

COSTS

[96] Unless the parties can settle the issue of costs or both parties can agree on making written submissions on costs, either party may arrange for an attendance before me to make oral submissions on costs.

Ricchetti, J.

Date: January 26, 2015

TAB 3

1993 CarswellOnt 821
Ontario Court of Justice (General Division)

Boehmers v. 794561 Ontario Inc.

1993 CarswellOnt 821, [1993] O.J. No. 1805, 105 D.L.R. (4th) 473, 11 C.L.R. (2d) 99, 14 O.R. (3d) 781, 42 A.C.W.S. (3d) 20

BOEHMERS v. 794561 ONTARIO INC.

Killeen J.

Heard: September 14-15, 1992
Judgment: July 23, 1993
Docket: Doc. 2382/91

Counsel: *A. Szemenyei*, for Del-Ko Paving & Construction Company Ltd.
J.W. McLeish, for Co-Fo Concrete Forming Construction Limited, Development Engineering (London) Limited, Solmar Painting Inc., and Capital C Construction Ltd.
D.W. Snider, for Boehmers, a division of St. Lawrence Cement Inc.
M. Stambler, for 638559 Ontario Limited.
T. Van Klink and *T.D. Little*, for Royal Life Insurance Company of Canada.

Subject: Contracts; Corporate and Commercial

Headnote

Construction Law --- Construction and builders' liens — Procedure to obtain lien — Determining time for registration — Completion/substantial performance — By subcontractor

Construction Law --- Construction and builders' liens — Priorities — Between types of creditors — Prior mortgagees and lienholders

Liens — Procedure to obtain lien — Determining time for registration — Completion/substantial performance — By subcontractor — Section 2(3) of Construction Lien Act not applying — No evidence of section including subcontractor — Construction Lien Act, R.S.O. 1990, c. C.30, s. 2(3).

Liens — Priorities — Between types of creditors — Prior mortgagees and lienholders — Bona fide mortgage moneys — Effect of advancing mortgage moneys after lien registered — Section 78(4) only giving priority to advances made when no liens registered — Advances made later losing priority — Construction Lien Act, R.S.O. 1990, c. C.30, s. 78(4).

Liens — Practice on enforcement of lien — Determining amount of lien — Inclusion of interest in lien claim — Interest not included because of s. 14(2) of Act — Construction Lien Act, R.S.O. 1990, c. C.30, s. 14(2).

The general contractor on the development of a 55-unit townhouse project defaulted on payments to its subcontractors on the project, with the result that 18 lien claims were filed against the property. The mortgagee became mortgagee of the property under a mortgage registered on September 7, 1989, for a face amount of $3,895,000. On September 7 and November 27, 1989, and January 8, 1990, the mortgagee made advances under its mortgage. On January 25, 1990, the first lien (the "Moffatt lien") was registered on title. On February 2, 1990, a mortgage advance of $252,759 was made. The mortgage advance was followed by an order on February 6, vacating the Moffatt lien. Five more mortgage advances totalling $1,259,059 were made between February 28 and June 22 after the clearance of the Moffatt lien. On July 13, another lien (the "Wannacott lien") was registered. After this lien went on title, two advances totalling $419,485 were made. On August 28, the Wannacott lien was vacated by order. The last two advances totalling $359,112 were made on September 28 and November 23, respectively. There were three main issues: whether the plaintiff B Ltd.'s lien rights expired because of the application of s. 2(3) of the *Construction Lien Act* (Ont.); what was the priority of the mortgage advances with respect to the lien claims; and whether interest be included in the lien claim.

Held:

B Ltd.'s lien rights did not expire; the lien claimants had priority over the fourth mortgage advance; interest was not included in the lien amount.

Since B Ltd. supplied materials to the general contractor on a running basis over an extended time period, its lien rights would only expire if s. 2(3) applied. However, s. 2(3) did not apply, because there was no evidence in the subsection itself or its statutory context to indicate that it was intended to embrace subcontracts.

It was conceded that the mortgage constituted a "prior mortgage" within the meaning of s. 78 because it was registered on September 7, 1989, at a time when no liens had arisen on the project. Accordingly, the first three advances clearly had priority over the lien claims because they were advanced before January 25, 1990, the date the Moffatt lien was registered on title. However, s. 78(4) provides that a mortgagee will only get priority for "any advance" if there is no lien registered at the time of such advance. In the result, the mortgagee lost its priority for the full amount of the fourth advance on February 2, 1990, with respect to not only the Moffatt lien, but all liens arising on the project.

The lien claimants were not entitled to include interest in the amount of their liens because to do so would be to subvert the effect of s. 14(2), which provides that "no person is entitled to a lien for any interest on the amount owed ..."

Table of Authorities

Cases considered:

Anron Mechanical Ltd. v. Valantori Construction Ltd. (1990), 43 C.L.R. 220 (Ont. H.C.) — *referred to*

Horsman Brothers Holdings Ltd. v. Dolphin Electrical Contractors Ltd. (1985), (sub nom. *Horsman Brothers Holdings Ltd. v. Lee*) 12 C.L.R. 145 (B.C. C.A.) — *referred to*

Norwon Electric Sault Co. v. Ross (1984), 7 C.L.R. 1, 47 O.R. (2d) 794 (H.C.) — *referred to*

Trane Canada Inc. v. George Evans Co. (1986), 22 C.L.R. 18 (Ont. H.C.) — *not followed*

Waynco Ltd. v. Terrance Manor Ltd. (1981), 39 C.B.R. (N.S.) 203, 21 R.P.R. 258, 127 D.L.R. (3d) 142 (Ont. Div. Ct.) — *considered*

Statutes considered:

Construction Lien Act, 1983, S.O. 1983, c. 6 [R.S.O. 1990, c. C.30] —

s. 1(3) [R.S.O. 1990, c. C.30, s. 1(3)]

s. 2(3) [R.S.O. 1990, c. C.30, s. 2(3)]

Construction Lien Act, R.S.O. 1990, c. C.30 —

s. 1(1)

s. 1(1) "contract"

s. 1(1) "contractor"

s. 1(1) "improvement"

s. 1(1) "price"

s. 1(1) "subcontract"

s. 1(1) "subcontractor"

s. 2(1)

s. 2(1)(*b*)

s. 2(2)

s. 2(3)

s. 5(1)

s. 8(1)(*a*)

s. 8(1)(*b*)

s. 14(1)

s. 14(2)

s. 31

s. 31(2)

s. 32

s. 33

s. 44

s. 76

s. 78

s. 78(1)

s. 78(2)

s. 78(3)

s. 78(4)(*a*)

s. 78(4)(*b*)

s. 78(6)

s. 78(8)

s. 80(4)

Land Titles Act,R.S.O. 1990, c. L.5.

Mechanics' Lien Act, The, R.S.O. 1970, c. 267 —

s. 14(1)

Registry Act, R.S.O. 1990, c. R.20.

Words and phrases considered:

improvement — "The term 'improvement' is meant to be a term of art under this definition [*Construction Lien Act*, R.S.O. 1990, c. C.30, s. 1(1)(8)]. It is the project designed and to be undertaken as between the owner and general contractor, whether it be a new building or some mere alteration, addition or repair. It cannot be seriously said to embrace subcontracts as such. Thus, the use of this term of art, 'improvement,' in both s. 2(1) and s. 2(3) is a strong indicator that s. 2, in each of its subsections, was only intended to deal with and control the general contract and not subcontracts."

Action to determine validity of construction liens and priorities as between prior mortgagee and lien claimants.

***Killeen J.*:**

1 This action is brought under the *Construction Lien Act, 1983*, S.O. 1983, c. 6 [now R.S.O. 1990, c. C.30]. There have been changes in the numbering of some of the sections of the 1983 Act, as reflected in the 1990 revision, and references to the current statute will show the 1990 revised numbering.

2 There are several contested issues to be resolved in this lawsuit the validity of three liens filed by Capital C, Boehmers and Development Engineering; the priorities as between the proven lien claims and advances under a mortgage held by the defendant, Royal Life; and, finally, the question of whether interest may accrue on a holdback deficiency in the same way it does under a mortgage.

The Background Facts

3 The defendant 810650 Ontario Limited is the owner of a parcel of land municipally known as 151 Bonaventure Drive, the legal description of which is Block 52, Plan 33M-208 in the City of London, County of Middlesex.

4 The owner had a 55 unit townhouse development built on its property using the co-defendant 794561 Ontario Inc. as general contractor. This general contractor defaulted on payments to its many subcontractors on the project with the result that some 18 lien claims were filed against the property.

5 The defendant Royal Life became mortgagee of the property under a mortgage registered on September 7, 1989 for a face amount of $3,895,000. It is conceded that this mortgage was to secure the financing of the construction of the townhouse development and, in addition, to assist in the acquisition of the lands in question.

6 The interplay between mortgage advances and the registration and vacation of liens becomes important later in these reasons and, for ease of reference, I now set out the particulars of those occurrences in tabular form:

Date	Advance or Lien	Total Advances
1. Sept. 7/89	$959,878	
2. Nov. 27/89	$226,247	
3. Jan. 8/90	$420,461	$1,606,586
Jan. 25/90	Moffatt Lien	
4. Feb. 2/90	$252,759	$252,759
Feb. 6/90	Moffatt Lien vacated	
5. Feb. 28/90	$294,358	
6. March 26/90	$264,520	
7. May 9/90	$274,662	
8. June 1/90	$151,193	
9. June 22/90	$274,326	$1,259,059
July 13/90	Wannacott Lien	
10. July 23/90	$217,680	
11. Aug. 16/90	$201,805	$419,485

Aug. 28/90	Wannacott Lien vacated		
12. Sept. 28/90	$159,370		
13. Nov. 23/90	$199,742	$359,112	
	TOTAL ADVANCES:		$3,897,001

Additional Outstanding Liens

Oct. 30/90	Del-Ko
Nov. 7/90	ESC (Myles) Inc.
Nov. 7/90	Dwyer Floor
Nov. 8/90	Bryanston Sales
Nov. 8/90	Capital C
Nov. 9/90	638559 Ontario
Nov. 9/90	Forest City
Nov. 13/90	County Heritage
Nov. 13/90	Lambeth Precast
Nov. 22/90	509907 Ontario
Nov. 23/90	Co-Fo Concrete
Nov. 27/90	Fortese Concrete
Nov. 30/90	Attsun Systems
Dec. 6/90	Solmar Painting
Dec. 10/90	Boehmers
Dec. 14/90	Development Engineering

The Lambeth Precast Claim

7 This claimant did not appear at trial to prove its claim and, accordingly, its claim must be dismissed for want of proof.

The Capital C Claim

8 The lien claimants took the position that this claimant should be required to prove its claim.

9 Suffice it to say that the evidence of Mr. Gonzales, the president of this company, entirely satisfied me that its subcontract claim for lien was registered timeously and that the net balance owing on its claim was $17,278.61.

The Boehmers' Claim

10 This claim has been accepted by all lien claimants appearing at trial but its validity is disputed by Royal Life on the ground of timeliness. The quantum of the claim is not, then, in issue and has been agreed to at a figure of $18,103.76. Mr. Van Klink, of counsel for Royal Life, attacks the validity of the claim under s. 2(3) of the Act, reading as follows:

> (3) For the purposes of this Act, a contract shall be deemed to be completed and services or materials shall be deemed to be last supplied to the improvement when the price of completion, correction of a known defect or last supply is not more than the lesser of,
>
> (*a*) 1 per cent of the contract price; and
>
> (*b*) $1,000.

11 It may be added that counsel for Boehmers, Mr. Snider, frankly conceded that his client had supplied materials to the general contractor on a running basis over an extended time period and that, if s. 2(3) applied, Boehmers' lien rights would have expired.

12 Mr. Van Klink's argument goes along the following lines. His starting point is, of course, Part V of the Act which deals with the expiry, preservation and perfection of liens. Section 31(2) deals with the general contractor's lien and, generally speaking, provides that the general contractor's lien will expire 45 days after publication of a certificate of substantial performance, if the certification procedure is utilized, or, if not, 45 days after contract completion or abandonment.

13 Mr. Van Klink then referred to subcontractors' liens. He pointed out that the triggering events for the 45 day time limit for their liens would be the publication of the general contract certificate of substantial performance, if extant, or, again if utilized, the special certification date for a subcontractor's work under s. 33 or, as a last option, the date of last supply of services or materials.

14 Mr. Van Klink then moved on to consider the possible application of s. 2(3) to both the general contract and subcontracts. This proviso would provide an admittedly arbitrary and mechanical formula to determine "deemed" completion in cases where the certification procedures were not utilized. It states, in general, that deemed completion occurs at that point in the contract life when the price of completion was the lesser of 1 per cent of the contract price and $1,000.

15 This subsection clearly applies to the general contract; after all, it says in part: "a contract shall be deemed to be completed..." However, Mr. Van Klink argues that it also applies to subcontracts for the purpose of establishing a date of last supply, when the certification procedures of ss.32 and 33 do not operate.

16 In support of his position, Mr. Van Klink relies on the case of *Trane Canada Inc. v. George Evans Co.* (1986), 22 C.L.R. 18 (Ont. H.C.) where Cusinato L.J.S.C. stated, in an obiter passage, that, in his view, s. 2(3) should apply to both the main contract and subcontracts.

17 Cusinato L.J.S.C.'s view seems to have been dictated by reason of the use of the phrase "and services or materials" following upon the undoubted reference to the general contract in the subsection. As he says at p.25:

> As to s. 2(3), while I recognize that what I have to say may conflict with the text writings of a good number of authorities, including McGuinness, Construction Lien Remedies in Ontario, and Macklem and Bristow, Construction and Mechanics' Liens in Canada (5th ed., 1985), p. 251, I have nevertheless concluded that subs. (3) of s. 2, C.L.A., is open to at least two possible interpretations. From my review of text law the authorities construe that *deemed completion* relates only to the contract as defined within the C.L.A. and that s. 2(3) has no application to subcontractors.
>
> I have concluded that the reading of this subsection may nevertheless refer both to the completion of the contract and to all other persons who last supply services and/or materials.
>
> In reviewing s. 31(2) which specifically relates to the lien as between the owner and contractor, and further subs. (3) wherein the wording relates to the liens of all other persons, it is my view that subs. (3) may include the subcontractors who supply services and/or materials.
>
> This section could be construed in two parts; namely, when a contract shall be deemed to be completed, specifically relating to the owner and contractor, and situations relating to all other persons who last supply services and/or materials. The word "and" within the subsection may be interpreted to be disjunctive as opposed to conjunctive, so that services and/or materials need not necessarily complement the word "contract" within the subsection.

18 With all deference to the obiter view of Cusinato J., I cannot agree that s. 2(3) should apply to subcontracts as well as the general contract.

19 New s. 2(3) must be read consistently with the statutory context in which it appears and cannot be simply read alone. As was said by Professor Jackett in his classic treatise, *Construction of Statutes*, 2nd ed. (1983), at p. 89:

> The general principles, as we have seen, are that if the words are clear and unambiguous they must be followed; but if they are not, then a meaning must be chosen or found. But the Act must be read as a whole first, for only then can it be said that the words are or are not clear and unambiguous ... To say that a statute must be read as a whole means not merely that the meaning of the words contained in a particular provision is to be gathered from reading them in their verbal and grammatical context; it means that the substance of the particular provision must be seen in the context of the ideas expressed in the whole Act, "because" as Lord Reid said in *Inland Revenue Commissioners v. Hinchy* "one assumes that in drafting one clause of a Bill the draftsman had in mind the language and substance of other clauses, and attributes to Parliament a comprehension of the whole Act".

20 The statutory context surrounding s. 2(3) is revealing. Throughout the statute the drafter has sedulously differentiated between the general contract on the one hand and subcontracts on the other. For example, this careful differentiation starts with s. 1(1), the general definitions proviso of the Act. The terms, contract, contractor, subcontract and subcontractor are separately defined as follows in s. 1(1):

> *1.*-(1) In this Act,
>
> "contract" means the contract between the owner and the contractor, and includes any amendment to that contract; ("contrat")
>
> "contractor" means a person contracting with or employed directly by the owner or his agent to supply services or materials to an improvement; ("entrepreneur")
>
> "subcontract" means any agreement between the contractor and a subcontractor, or between two or more subcontractors, relating to the supply of services or materials to the improvement and includes any amendment to that agreement; ("contrat de sous-traitance")
>
> "subcontractor" means a person not contracting with or employed directly by the owner or his agent but who supplies services or materials to the improvement under an agreement with the contractor or under him with another subcontractor; ("sous-traitant")

21 Section 2 of the Act continues this differentiation between terms. Section 2(1) defines substantial performance of the "contract" by reference to the well-known formula taken from s. 1(3) of the old Act. This reference can only relate to the general contract.

22 When a section covers both contracts and subcontracts, the given section says so in the plainest of language. For example, s. 5 is phrased this way:

> *5.*-(1) Every contract or subcontract related to an improvement is deemed to be amended in so far as is necessary to be in conformity with this Act.

23 See, also, in this respect, s. 8(1)(*a*)-(*b*) which similarly *explicitly* mention the contractor and subcontractor.

24 Later sections continue this careful differentiation process: where the intent is to cover both contracts and subcontracts or contractors and subcontractors, as the case may be, the language says so explicitly; where the intent is to cover only one such term and not others, the language is similarly clear.

25 Against this contextual backdrop I find it impossible to conclude that s. 2(3) somehow falls out of step with the rest of statutory structuring of terms and covers both the contract and subcontracts without specifically mentioning both. If the drafter of s. 2(3) had meant to include subcontracts along with contracts in s. 2(3), surely, to be consistent with the rest of the Act, the beginning language would have read "For the purpose of this Act, a contract *or subcontract* shall be deemed to be completed". The drafter has not done so and there is simply no evidence in the subsection itself or its statutory context to indicate that it was intended to embrace subcontracts.

26 There is, in fact, strong *internal* evidence within s. 2(1) and s. 2(2) which indicates that s. 2(3) should only apply to the general contract. Note that both of these subsections speak of work on the "improvement." The term "improvement" is defined in s. 1(1) as follows:

> "improvement" means,
>
> (*a*) any alteration, addition or repair to, or
>
> (*b*) any construction, erection or installation on,
>
> any land, and includes the demolition or removal of any building, structure or works or part thereof, and "improved" has a corresponding meaning; ("ameliorations", "ameliore")

27 The term "improvement" is meant to be a term of art under this definition. It is the project designed and to be undertaken as between the owner and general contractor, whether it be a new building or some mere alteration, addition or repair. It cannot be seriously said to embrace subcontracts as such. Thus, the use of this term of art, "improvement," in both s. 2(1) and s. 2(3) is a strong indicator that s. 2, in each of its subsections, was only intended to deal with and control the general contract and not subcontracts.

28 There is, perhaps, one further bit of internal evidence in s. 2(3) militating against the interpretive theory of Mr. Van Klink. The fourth line of the subsection uses the phrase, "correction of a known defect." Where does this phrase come from and what is its purpose? We find, looking back at s. 2(1) — which incontestably can only refer to the general contract — that virtually the same phrase is used in s. 2(1)(*b*). This, again, reinforces the view that no part of s. 2 was aimed at subcontracts.

29 In s. 2(3), the drafter uses the connective "and" to link the "contract" clause with the "service or materials" clause. Normally "and" is to be construed conjunctively, not disjunctively, and there is no support in the subsection, or elsewhere, for a disjunctive reading which also enlarges the phrase "services or materials" to mean "a subcontract for services or materials."

30 As it seems to me, the "services or materials" clause was simply added to the subsection to reinforce the meaning of what preceded it, nothing more and nothing less.

31 One final but important point can be made here. Section 1(1)20 defines "price" as meaning "the contract or subcontract price." Yet s. 2(3)(*a*), which includes part of the formula establishing deemed completion, speaks of "1 per cent of the contract price." Bearing in mind the definition of "price" in s. 1, one is driven ineluctably to the conclusion that the drafter must have intended s. 2(3) to be restricted to the general contract. Why else would the drafter use the phrase, "contract price," and not, "contract or subcontract price," in s. 2(3)(*a*)?

32 There is strong support in the treatises and commentaries for the interpretation I have placed on s. 2(3) although some writers have, perhaps, had a change of heart since the *Trane* decision.

33 For example, in Macklem and Bristow's *Construction and Mechanics Liens in Canada*, 5th ed., (1985), we find that the authors are quite emphatic in their view that s. 2(3) cannot apply to sub contracts. At p.251 they say:

> Section 1(1)(3) of the new Ontario Construction Lien Act, S.O. 1983, c.6 defines "contract" as meaning the contract between the owner and the contractor; hence, the definition of substantial performance contained in section 2(1) and (2), and the provisions with respect to deemed completion contained in section 2(3), have no application to subcontractors.

34 While there are some commentators who support the *Trane* approach, I conclude that it is, with respect, an approach which tends to ignore the contrary internal evidence within s. 2 itself and the broader context of the entire Act which so carefully differentiates between the main contract and subcontracts.

35 So far as subcontracts are concerned, the concept of "last supply" creates no real and substantial evidentiary difficulties. Last supply is a question of fact and the courts will have no difficulty in deciding in a given case whether the work of subcontractors was bona fide completion work or not.

36 I add, here, that many commentators have pointed out that s. 2(3) can indirectly apply to subcontractors if the general contract has been deemed complete in virtue of the s. 2(3) formula. Thus, if the general contract is deemed complete under s. 2(3), all subcontractors on the project will lose their lien rights inescapably after 45 days from this deemed completion date for the general contract. Assuming that this approach to s. 2(3) is correct, it does not assist Mr. Van Klink's argument here because all parties have conceded that there could have been no deemed completion of the general contract until long after the events surrounding the Boehmers' subcontract.

37 In the 1990, 6th edition, of their monumental work, Macklem and Bristow seem still to be of the view reflected in the 5th edition although they note the contrary obiter view in *Trane* at ch. 6-41:

> Section 1(1), of the Ontario Construction Lien Act defines "contract" as meaning the contract between the owner and the contractor; hence, the definition of substantial performance contained in section 2(1) and (2), and the provisions with respect to deemed completion contained in section 2(3), have no application to subcontractors. But see *Trane Can. Inv. v. George Evans Co. Ltd.* (1986), 22 C.L.R. 18 (Ont. H.C.), in which the Court expressed the view that section 2(3) applied to deemed completion of sub-contracts as well as the general contract.

38 This ongoing view of Macklem and Bristow finds support in a recent comprehensive article by William Swybrous entitled "Contractors and the Construction Lien Act," found in Kirsch ed., *The Construction Lien Act: Issues and Perspectives* (1989), at pp.118-119:

> In *Trane Can. Inc. v. George Evans Co.* the Court held that the definition and determination of deemed completion applies directly to subcontracts and sub-subcontracts. Thus, where the price of completion or correction of work to be done under a subcontract or sub-subcontract was equal to the lesser of 1 per cent of the subcontract or sub-subcontract price or $1,000, the subcontract or the sub-subcontract was deemed to be complete and the lien time of that subcontractor or sub-subcontractor and all others below him commenced to run. This finding was *obiter dicta* in view of the fact that the Court found that the particular sub-subcontract was not deemed complete in any event. Further, it is respectfully submitted, that the correctness of the decision is open to significant doubt because s. 2(3) makes it clear that the determination of the concept is to be made in relation to contract and contract price, which the Act defines to mean the contract between the owner and the general contractor. The Act takes great pains to differentiate between a "contract" and "subcontract". In fact, they are mutually exclusive terms.

39 In the result, I conclude that s. 2(3) does not apply to Boehmers' lien. Since it is conceded that this lien is timely if s. 2(3) does not apply, I hold that the Boehmers' lien is valid and proved.

The Development Engineering Claim

40 It was agreed at trial that the outcome of the Boehmers' lien issue would control the validity of this lien claim. Accordingly, since I have found in favour of the Boehmers' position, I find the Development Engineering lien to be valid for its agreed quantum of $759.78.

The Section 78 Issues

A. Priorities of Mortgage Advances

41 All parties concede that the first and second priority positions in the priority scale must be accorded to (1) Royal Life for land taxes totalling $209,236.30 as of August 31, 1992, and (2) the holdback deficiency (in favour of the lien claimants), agreed at $224,572.30. The Royal Life mortgage is dated September 7, 1989, and was registered on that date in the proper land titles office as instrument no. 189606. It is also conceded by all parties that the first lien on the project arose *after* September 7 so that this mortgage is, for classification purposes, a "prior mortgage" under s. 78(3) of the Act.

42 It is further conceded that the first three advances made under this mortgage on September 7 and November 27, 1989, and January 8, 1990, having a combined total value of $1,684,161.02 as of August 3, 1992, would fall into third place in the priority scale. The first lien registered on title — the Moffatt lien — was only registered on January 25, 1990, so that, clearly, these first three advances were not subject to any form of legitimate attack.

43 Messrs. Szemenyei, Stambler and McLeish, for their respective lien-claimant clients have launched a common attack on the later advances under s. 78 of the Act. In what follows I will attempt to summarize their position.

44 The attack arises because on *two* later occasions, Royal Life chose to advance funds in the teeth of registered liens on title. The table I presented earlier shows skeletally the course of the advances and their interplay with the registration of and discharge of liens. That table outlines the following events:

(1) On January 25, 1990, the Moffatt lien was registered on title. Then, on February 2, a mortgage advance of $252,759 was made. The mortgage advance was followed by an order on February 6, vacating this lien.

(2) Five more mortgage advances totalling $1,259,059 were made between February 28 and June 22 after the clearance of the Moffatt lien.

(3) On July 13, the Wannacott lien was registered. After this lien went on title, two advances totalling $419,485, were made. Then, on August 28 this second lien was vacated by order.

(4) The two last advances, totalling $359,112, were made on September 28 and November 23 respectively.

45 The lien claimants' position, in a nutshell, is that s. 78 contains a self-contained new code for the establishment of priorities between lien claimants, on the one hand, and a mortgagee providing financing for an improvement, on the other. Since the mortgagee, Royal Life, elected to make later advances when liens were still on title, the new code of s. 78 dictates that all later advances must fall down the priority scale and cannot join the third priority position enjoyed collectively by mortgage advances Nos. 1, 2 and 3.

46 Mr. Van Klink's opposing submission for Royal Life may be summarized this way:

(1) Under s. 78(4) a mortgagee obtains full and equal priority over lien claimants for all advances which have been made when no registered lien is on title. This submission includes the proposition that the vacation of a lien under s. 44 gives the mortgagee a fresh entitlement to a priority over liens for a later advance made after the title has been cleared of liens.

(2) On the facts of this case, even advances 4, 10 and 11, which were made when liens were admittedly on title, must have full priority because s. 78(4) does not protect "future liens," that is, liens not registered prior to a mortgage

advance. Here, all of the outstanding 16 liens were, in fact, registered between October 30 and December 14, 1990, a period well after the Moffatt and Wannacott liens were removed from the title. Thus, these later registered liens cannot be "tacked on" or sheltered under the prior registered liens which were removed from title.

(3) In any event, advance 13, made on November 23, must have full priority because postponement agreements were signed by all lien claimants in favour of Royal Life for that specific advance.

47 It will be remembered that the Royal Life mortgage constitutes a "prior mortgage" within s. 78 because it was registered on September 7, 1989, a time when no liens had arisen on the project. Thus, it is necessary to look at s. 78(4) to determine the priority position of this mortgage for *subsequent* advances made after that date. Section 78(4) reads as follows:

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.

48 First, I note that no issue turns on the possible applicability of s.78(4)(*b*) because there was no evidence that any lien claimant had given written notice of a lien to the mortgagee.

49 Section 78(4)(*a*), says, in effect, that the prior mortgage will have priority over "liens arising from the improvement" to the extent of any advance made unless, at the time of the advance, there was a preserved or perfected lien against the premises.

50 Here, however, the evidence shows indisputably that, when Royal Life made advance No. 4 of $252,759 on February 2, 1990, the Moffatt lien was preserved by timely registration on January 25, 1990.

51 In my view, the inevitable effect of this advance in the teeth of the Moffatt lien must be that the mortgagee loses its priority for this advance for all purposes vis-à-vis not only the Moffatt lien but all liens arising on the project. This means that, up to the amount of this advance of $252,759, the liens arising on the project are given what amounts to another priority charge like the holdback deficiency over the mortgage.

52 As it seems to me, any other interpretation of s. 78(4) would emasculate the intended effect of the subsection. To me, s. 78(4), like s. 78(2), stands as a warning to all mortgagees who deal with the property in question: if the mortgagee wishes to finance the project, it must honour the dictates and strictures of this subsection. The mortgagee is given fair warning of the inescapable holdback deficiency priority of s. 78(2). Equally, under s. 78(4), the mortgagee is in effect told: "Thou shall not advance when a registered lien is on title" (unless it takes care to employ protective procedures otherwise available under the Act).

53 The ultimate proof of this conclusion is contained in the opening words of s. 78(1) where it is said in most explicit terms that, "except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other improvements affecting the owner's interest in the premises."

54 Section 78(1) is the overarching principle of the new regime of the Act for the determination of priorities. It is, if you will, the central interpretive principle for the adjudication of conflicts of the type before the court in this case. Surely it necessarily implies that, in cases of conflict, as here, the burden must be on the mortgagee to persuade the court that it somehow falls clearly within a specified exception to the generalized priority of the liens.

55 When one looks at the exception afforded to the mortgagee under s.78(4) one finds not a comfort station but a roadblock. The mortgagee is told that it will only get priority for "any advance" if there is no lien registered at the time of such advance. This language can only mean that the mortgagee loses priority up to the full amount of any advance made in the teeth of a registered lien.

56 Here, advance No. 4, totalling $252,759 gets no priority and, accordingly, the lien claimants must perforce have priority *over the mortgage* for up to that full advance sum of $252,759. The lien claimants move into the slot created by the mortgagee's wrongful act and have a fixed priority up to the amount involved in the advance.

57 I can see no merit in the mortgagee's position that, even though the mortgagee may lose its priority for advance No. 4, nevertheless, it may regain priority over the liens and that $252,759 priority for the liens, through *later* advances (Nos. 5-9 and 12-13) all of which happened to have been made after the removal of the Moffatt and Wannacott liens from title.

58 This position or theory of the mortgagee was called, during argument, a "percolation-upward" theory. Its gist is as follows. Even though the mortgagee must lose priority for an advance which was made in the teeth of a registered lien, it may nevertheless move above and ahead of that priority in favour of the liens for later advances properly made after removal of later registered liens. To me this ingenious percolation theory must fail for two interrelated reasons. It degrades the priority clearly accorded to the liens when an unlawful advance is made and, as well, it would allow a later advance to "leap-frog" over the priority position of the liens established through the bad advance or advances.

59 As it seems to me, s. 80(4) deals with the priorities of a mortgagee on an *advance-by-advance* basis and not otherwise. If the mortgagee loses priority for an advance, that loss is *permanent*, not temporary, and the later advances cannot percolate or bubble upwards but, rather, must always remain below the priority sum gained by the liens. To hold otherwise, as I have suggested, is to fail to recognize the re-ordering of priorities reflected in the scheme propounded under s. 78 generally.

60 It is, I think, helpful here to remember that a legitimate lien claimant is, by s. 76 of the Act, deemed to be a purchaser pro tanto within both land registration Acts, namely, the *Registry Act*, and the *Land Titles Act*. If, therefore, a mortgagee loses a possible priority by making a bad advance under s. 80(4), the purchaser pro tanto principle must necessarily come into play to fix a priority for the lien claimant or claimants, as the case may be, up to the amount of that advance.

61 As I have noted, Mr. Van Klink's position for the mortgagee is that the mortgagee must get the same priority over the liens for advance Nos. 5-9 and 12-13 as it does for advance Nos. 1-3 because, at the time of those later advances, the title had been cleared of liens. This argument has a surface attractiveness but, on closer examination, reveals a serious flaw. The flaw is that the argument ignores the fact s. 78 only provides priority for a mortgage as an *exception* rather than as a general rule and that the mortgagee's priorities are tied to individual advances and not to the mortgage as a whole. If an individual advance is bad because of an outstanding lien then the result must be that the liens have a fixed priority for the amount of the bad advance in the same way that they have a fixed priority for a holdback deficiency.

62 I cannot believe that the legislature could have intended a different result for the "bad-advance" situation from the "holdback deficiency" situation. If the result were otherwise, it would mean that the liens;rsquo; apparent priority in a bad-advance situation would be subject to defeasance by a later advance in time, something that is not said to be the result anywhere in the express language of s. 78(1)-(4).

B. The Tacking-On Issue

63 As I have noted, Mr. Van Klink's second argument was that s. 78(4)(*a*) does not protect any of the 16 later liens because such liens were registered long after the Moffatt and Wannacott liens were registered.

64 Under this argument, Mr. Van Klink attempts to interpret a key portion of the language of s. 78(4) by reference to the language of s. 14(*a*) of the predecessor *Mechanics Lien Act*, R.S.O. 1970, c. 267 and the case-law thereunder.

65 It will be recalled that s. 14(1) of the earlier Act read this way:

> *14.*-(1) The lien 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 has been given to the person making such payments or after registration of a claim for the lien as hereinafter provided, and, in the absence of such notice in writing or the registration of a claim for lien, all such payments or advances have priority over any such lien.

66 On this issue, Mr. Van Klink relied on the Divisional Court decision in *Waynco v. Terrace Manor Ltd.* (1981), 21 R.P.R. 258 (Ont. Div. Ct.).

67 In that case, the mortgagee registered a mortgage and made a $500,000 advance at a time when a registered lien was on title. Later, 10 more liens were registered and, at trial, the trial judge ruled that the latter 10 lien claims, along with the prior registered lien, had priority over the mortgage. The Divisional Court overruled the trial judge and concluded that s. 14(1) could not provide sheltering protection to subsequent registered lien claims. As was said by Saunders J. for the court at pp. 262-263:

> The subsection makes clear, in my view, that prior notice in writing or registration is the only means by which a lienholder may gain priority over a mortgage advance, subject to the other provisions in the statute dealing with "prior" mortgages with which we are not concerned in this case.
>
> . . . . .
>
> In my opinion, the result makes commercial sense. Lien claimants have a means to protect themselves by notifying the mortgagee or registering their claims for lien. In most cases, they will know or can easily ascertain the identity of the mortgagee. A mortgagee should not be forced to resort to s. 25(2) [the payment-in proviso] to protect himself from an indefinite number of lien claims in indeterminate amounts.

68 It will be quickly seen that Mr. Van Klink's argument faces a serious problem in that s. 78(4) of the new Act, the successor proviso to hold s. 14(1), has been sharply recast. Section 78(4) no longer says, as did the older section, that "in the absence of ... the registration of a claim for lien, all such payments or advances have priority over any such lien." Rather, s. 78(4) now replaces the narrower language of the old section, just quoted, with the phrase "over the liens arising from the improvement." Also, s. 78(2), the subsection which defines the new concept of building mortgage also makes it clear that "the liens arising from the improvement" will have priority to the extent of any deficiency in the holdback.

69 To me, the almost identical language of s. 78(2) and (4) in this respect makes it clear that s. 78(4) cannot reasonably be given the narrow meaning which was accorded to the language of old s. 14(1). Section 78(4) must mean, considered either alone or contextually, that if a mortgagee makes the mistake of advancing funds when a lien is registered on title, that mortgagee loses priority towards all liens arising on the project and not just towards prior registered liens. That is what s. 78(4) says in plain language and the context re-emphasizes this interpretation.

70 During argument, Mr. Van Klink attempted to meet his difficulties with the changed language of s. 78(4) by reliance on a comment on s. 78 contained in the *Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act*, released in April, 1982.

71 Section 78(4) of the Draft Act proposed by the Committee is, in fact, cast in identical language to the language of the subsection, as enacted. At pp. 180-181 of the Report the Committee comments as follows, in part:

> (4) Subsection 3 and 4 are similar in effect to the existing law. They specify the relative priorities between the liens arising from an improvement and mortgages, conveyances and other agreements in respect of the owner's interest in the premises that are registered prior to the commencement of the improvement. These "prior" interests are generally accorded priority over the lien. However, under subsection 3 the priority of those interests is limited in the case of advances made prior to the commencement of the improvement to the actual value of the premises at the time when

the making of the improvement commences. Where advances are made in respect of those interests after this date, they are entitled to priority in respect of those advances in accordance with much the same rules as apply under subsection 6, in respect to advances under subsequent interests.

72 Later, at p. 185, the Committee says this about s. 78(6):

Subsection 6 has the same effect as subsection 15(1) of the Mechanics' Lien act in that it gives liens priority over advances on a mortgage made after a lien is preserved or notice of lien is received by the person making the advance.

73 I must confess that I find these comments of the Committee to be ambiguous and essentially unhelpful to the mortgagee's position. Nowhere in these comments do we find a reference to the holding in the *Waynco* case and the passage quoted from p. 185 can easily be construed as implying that the Committee felt that *all* registered liens and not just a pre-registered lien would gain priority under s. 78(4).

74 It is interesting to note here the views of Kevin McGuiness who served as a secretary to the Committee during their deliberations. In his excellent monograph on the new Act, *Construction Lien Remedies in Ontario* (1983), he says this at p. 149:

It should be noted, however, that priority under section 80 is given not only to the particular lien which was registered. It extends to all liens arising from the same improvement. While section 78, by itself, would extend priority only to the registered lien, the repeated reference to "the liens arising from the improvement" in both sections 79 and 80 makes it clear that all the liens are entitled to this priority, upon the registration of any lien. This approach is followed throughout the priority provisions of the Act.

75 I think his point with reference to the repeated use of the phrase "the liens arising from the improvement" is unanswerable and adopt it. See, also, on this issue *Norwon Electric Sault Co. v. Ross* (1984), 7 C.L.R. 1 (Ont. H.C.), including the annotations of Harvey Kirsh and Kevin McGuiness at pp. 2-4.

C. The Postponement Agreements

76 Mr. Van Klink's final submission was that all lien claimants had executed postponement agreements prior to the November 23 advance of $199,742 and that this advance must be prior to all the liens in any eventuality. During argument Mr. Van Klink filed, with consent of other counsel, a sample of the postponement agreement in question (Ex. 13).

77 There is no doubt that postponement agreements are authorized under s. 78(8) of the Act:

(8) Despite subsections (4) and (6), where a preserved or per fected lien is postponed in favour of the interest of some other person in the premises, that personal 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).

78 The difficulty with this postponement agreement is its most limited scope as specified in its two conditions:

This Postponement applies only to an advance in the approximate amount of $179,530.20 to be made on or about December 21st, 1990 and will not apply to advances made subsequent to December 21st, 1990.

This Postponement applies to this advance only and does not affect priority between the lien claimant and the mortgage company with regard to any prior or subsequent advances and does not affect any rights which the lien claimant may have to priority over the mortgage company under Section 80 of the Construction Lien Act.

79 The language of these conditions makes it abundantly clear that the lien claimants were not agreeing that the advance then made would affect their priority rights under s. 78. Thus, I cannot see how this advance can move up the queue, as it were, ahead of already established priority rights of the lien claimants occasioned by prior advances made when liens were on title.

D. Interest on Holdback Deficiency

80 Counsel for the lien claimants argued that interest should be awarded to the lien claimants on the holdback deficiency sum and, perhaps, the other lien priority sums in the same way that interest must accrue under the Royal Life mortgage.

81 Section 14(2) of the Act says that "[n]o person is entitled to a lien for any interest on the amount owed ..." and I feel that the intent of this subsection would be subverted if I were to allow interest to accrue on the lien priority sums in their competition with the Royal Life mortgage: see *Anron Mechanical Ltd. v. Valantori Construction Ltd.* (1990), 43 C.L.R. 220 (Ont. H.C.) and *Horsman Brothers Holdings Ltd. v. Dolphin Electrical Contractors Ltd.* (1985), (sub nom. *Horsman Brothers Holdings Ltd. v. Lee*) 12 C.L.R. 145 (B.C. C.A.). This does not mean, of course, that the lien claimants would not be entitled to judgment interest on sums owing to each by the defaulting general contractor.

82 In summary, then, the priority scales is as follows:

(1) Royal Life (for land taxes, calculated as at August 31, 1992) $209,236.36

(2) Lien Claimants (for holdback deficiency) $224,572.30

(3) Royal Life (for advance Nos. 1, 2 and 3, calculated as at August 31, 1992) $1,684,161.02

(4) Lien claimants (the amount of advance No. 4) $252,759.00

(5) Royal Life (for advance Nos. 5, 6, 7, 8 and 9, totalling $1,319,853.46, plus $252,759 advance No. 4, as at August 31, 1992) $1,572,612.40

(6) Lien claimants for balance of claims $7,658.57

(7) Royal Life (for balance of mortgage indebtedness, calculated as at August 31, 1992) $790,859.10

83 If necessary, a special appointment may be arranged through the office of the Trial Co-ordinator so that I may deal with questions relating to costs, interest and, more generally, the form of the judgment.

Order accordingly.

1995 CarswellOnt 244
Ontario Court of Appeal

Boehmers v. 794561 Ontario Inc.

1995 CarswellOnt 244, 122 D.L.R. (4th) 596, 18 C.L.R. (2d) 255, 21 O.R. (3d) 771, 53 A.C.W.S. (3d) 252, 77 O.A.C. 276

BOEHMERS, A DIVISION OF ST. LAWRENCE CEMENT INC. v. 794561 ONTARIO INC., 743493 ONTARIO INC., 810650 ONTARIO LIMITED and ROYAL LIFE INSURANCE COMPANY OF CANADA

Grange, Labrosse and Abella JJ.A.

Heard: January 10, 1995
Judgment: February 14, 1995
Docket: Doc. CA C19236

Counsel: *Ronald B. Moldaver, Q.C.*, for appellant Royal Life Insurance Company of Canada.
J. Wayne McLeish, for lien claimants Co-Fo Concrete Forming Construction Ltd. and Solmar Painting Inc.
Andrew L. Szemenyei, for lien claimant Oelko Paving.

Subject: Contracts

Headnote

Liens — Priorities — Between types of creditors — Prior mortgagees and lienholders — Bona fide mortgage moneys — Fourth advance under mortgage being made at time when lien was registered on title — Mortgagee losing priority for fourth advance as against all liens arising from improvement and not just against prior registered liens.

The mortgagee made a fourth advance on its mortgage at a time when a lien had been registered on title. Subsequent to this advance having been made, the lien was vacated pursuant to the procedure available under the *Construction Lien Act* (Ont.). The trial judge concluded that as a result of the statutory effect of s. 80(4) of the Act, the mortgagee lost priority for its fourth advance as against all liens arising from the improvement and not just against prior registered liens. The mortgagee appealed.

Held:

The appeal was dismissed.

Per Labrosse and Abella JJ.A.

The trial judge was correct in his analysis of the relevant sections of the Act. The wording of the current Act is substantially different from that of the previous statute and the trial judge's determination of the priorities was consistent with the decisions that have been made since the new Act came into effect.

Per Grange J.A. (dissenting)

Although the mortgagee made a mistake in advancing on its mortgage before the lien had been vacated, the lien was, in fact, vacated within days, before any other lien was registered or notified to the mortgagee and there was no evidence of any prejudice to subsequent lienholders. In such circumstances, it made no commercial sense to give subsequent lienholders what amounted to a windfall of $252,000.

Table of Authorities

Cases considered:

Per Grange J.A. (dissenting)

Waynco Ltd. v. Terrace Manor Ltd. (1981), 39 C.B.R. (N.S.) 203, 21 R.P.R. 258, 12 D.L.R. (3d) 142 (Ont. Div. Ct.) — *considered*

Statutes considered:

Construction Lien Act, 1983, S.O. 1983, c. 6 [R.S.O. 1990, c. C.30] —

s. 80(4) [R.S.O. 1990, c. C.30, s. 78(4)]

Construction Lien Act, R.S.O. 1990, c. C.30 —

s. 44

s. 78(4)

Mechanics' Lien Act, The, R.S.O. 1970, c. 267 [R.S.O. 1980, c. 261] —

s. 14 [R.S.O. 1980, c. 261, s. 15]

s. 14(1) [R.S.O. 1980, c. 261, s. 15(1)]

Mechanics' Lien Act, R.S.O. 1980, c. 261 [rep. Construction Lien Act, 1983, S.O. 1983, s. 6, s. 91] —

s. 15(1)

Appeal from judgment reported at (1993), 11 C.L.R. (2d) 99, 14 O.R. (3d) 781, 105 D.L.R. (4th) 473 (Gen. Div.), holding that all lienholders arising from improvement having priority over mortgagee's fourth advance.

***Labrosse* and *Abella JJ.A.*:**

1 This is an appeal, with leave, from the judgment of the Divisional Court [unreported] dismissing an appeal from the trial judge's determination of the priorities under the *Construction Lien Act* (the "Act").

2 The facts are carefully set out in the reasons of the trial judge, reported at (1993), 14 O.R. (3d) 781 (Gen. Div.). The order of priorities determined by the trial judge is not in dispute except with respect to the fourth advance made by the mortgagee at a time when a lien had been registered on title. (Another advance was later made in the face of a lien but for practical reasons, it is not relevant to this appeal and the argument centred only on the fourth advance.) Subsequent to this advance having been made, the lien was vacated pursuant to the procedure available under the Act, subsequent advances were made with a clear title to the property and other liens were later registered on title.

3 The issue is where the fourth advance ranks in the order of priorities under the Act. The parties are in agreement that if the lien had been removed under the procedure available under the Act prior to the advances being made, no issue of priority could have arisen with respect to this advance.

4 It is acknowledged on behalf of the mortgagee that an error was made. The advance should not have been made in the face of a regis tered lien. It is also acknowledged on behalf of the mortgagee that because of the error, it has lost priority for the faulty advance to the lien claimants. However, it is argued that all subsequent advances made with a clear title rank ahead of the faulty advance as if no error had been made. The faulty advance goes to the bottom of the order of priorities for the benefit of the lien claimants but all subsequent advances made with a clean title regain priority over the liens. Yet, it is conceded on behalf of the mortgagee that the faulty advance ranks after all liens arising from the improvement and not just the lien that was registered at the time of the faulty advance.

5 The trial judge concluded that as a result of the statutory effect of s. 78(4) (previously s. 80(4)) of the Act, a mortgagee choosing to make an advance when a lien is registered on title, loses priority for that advance, whatever the amount may be, as against all liens "arising from the improvement" and not just against prior registered liens. As a mortgagee's priority for mortgage advances is tied to individual advances, each advance is to be treated separately. In other words, when the faulty advance was made the mortgagee lost priority for that advance in favour of the lien claimants. The order of priority was crystallized so that the amount of the faulty advance kept its place in the order of priorities. It remained there for the benefit of all potential liens arising from the improvement and subsequent advances are ranked after the faulty advance.

6 The trial judge referred to the mortgagee's argument as a "percolation-upward" theory. He rejected it on the basis that it degraded the priority clearly accorded to the liens when a faulty advance is made and it would allow a later advance to "leap-frog" over the priority position of the liens established through the faulty advance.

7 In our view, the trial judge was correct in his analysis of the relevant sections of the Act. The wording is substantially different from that of the previous statute and his determination of the priorities is consistent with the decisions that have been made since the new Act came into effect. From a practical point of view, no undue burden is being imposed on the mortgagee. All it has to do is proceed in accordance with the Act. When it makes an advance with a clear title it retains its priority for that advance.

8 The appeal is dismissed with costs.

Grange J.A. **(dissenting):**

9 What happened here was that the mortgagee (Royal Life Insurance Company of Canada — "Royal") made an advance on the mortgage of $262,759 on February 2, 1990, when a lien existed in favour of Moffatt & Powell Limited in the amount of $26,728.90 which lien was registered on title. On February 6, 1990, Royal paid into court the sum of $33,411.13 to stand as security for the liens and costs and it was duly discharged. It has been held by the trial judge [reported at (1993), 11 C.L.R. (2d) 99 (Ont. Gen. Div.)] and, on appeal, by the Divisional Court [unreported] and confirmed by my colleagues on this appeal that, as a result, subsequent lienholders rank ahead of the mortgagee to the extent of the advance.

10 Clearly Royal made a mistake in advancing on its mortgage before the lien of Moffatt & Powell had been vacated but the lien was vacated within days before any other lien was registered or notified to the mortgagee and there was no evidence of any prejudice to subsequent lienholders. If it is the true interpretation of the statute that these subsequent lienholders take priority over Royal to the extent of the advance, we must accept the result which amounts to a loss of $252,000 to Royal and a windfall to subsequent lienholders of the same amount. I do not, however, accept that that is the law.

11 The foundation of the trial judgment is in s. 78(4) of the *Construction Lien Act* which provides as follows:

> 78. — (4) ... [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 ... 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.

12 It is argued that since at the time of the advance the Moffatt lien existed the mortgagee lost the protection for its advance. In my respectful view, this ignores the fact that a few days later and before any other lien arose the mortgagee paid into court pursuant to s. 44 of the Act an amount equal to the claim and costs of that lien and secured its vacating.

13 It may be that under s. 78(4) the mortgagee lost its priority over Moffatt but that is not the problem. Moffatt is gone. Maybe also because the advance was made, the priority of that advance is gone. Nothing in this section gives a non-established or non-perfected lien priority over the mortgage advance. Had they been registered, or notice of them given, at the time of the advance the position would have been different. Then the mortgagee would have suffered the same penalty, that is, the need to remove the lien or take an inferior position. But here, it had no knowledge of the additional liens or any way of discovering them. The earliest of the later perfected lien was the Wonnacott lien registered on July 13, 1990. Once again, Royal made an advance in the face of this lien and later had it discharged. The problem of priorities in that instance is academic because when we reach that stage in the priorities there is no money left.

14 There seems little doubt that prior to the enactment of s. 80(4) [now s. 78(4)] in 1983, the subsequent lienholders would not be permitted to shelter under the one lien registered before the advance. In *Waynco Ltd. v. Terrace Manor Ltd.*, August 12, 1981, apparently unreported, [now reported at (1981), 39 C.B.R. (N.S.) 203 (Ont.)], the Divisional Court, consisting of Krever, Saunders and Callaghan JJ., in a judgment written by Saunders J., held in facts very similar to those at bar that the lienholder subsequent to the advance could not shelter under a prior lien. The relevant section was then s. 14(1) [of *The Mechanics' Lien Act*, R.S.O. 1970, c. 267] which now reads as follows:

> 15.—(1) The lien 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 has been given to the person making such payments or after registration of a claim for the lien as hereinafter provided, and, in the absence of such notice in writing or the registration of a claim for lien, all such payments or advances have priority over any such lien.

15 This section is not the same as the present s. 78(4). Indeed, as the trial judge noted, it has been "sharply recast." However, in my view, the effect is the same. Under s. 14 the lienholder gets priority over advances after notice in writing of the lien has been given to the person making the payment and, under s. 78(4), the mortgagee gets priority unless there was at the time of the advance a preserved or perfected lien against the premises. There was a preserved lien at the time of the advance but the subsequent lienholder cannot take advantage of that lien because that lien ceased to exist for the purpose long before those of the subsequent lienholders came into existence.

16 The trial judge has said [at p. 113]:

> To me, s. 78(4), like s. 78(2), stands as a warning to all mortgagees who deal with the property in question: if the mortgagee wishes to finance the project, it must honour the dictates and strictures of this subsection. The mortgagee is given fair warning of the inescapable holdback deficiency priority of s. 78(2). Equally, under s. 78(4), the mortgagee is in effect told: "Thou shall not advance when a registered lien is on title" (unless it takes care to employ protective procedures otherwise available under the Act).

17 In *Waynco*, Saunders J. said [at p. 207]:

> In my opinion, the result makes commercial sense. Lien claimants have a means to protect themselves by notifying the mortgagee or registering their claims for lien. In most cases, they will know or can easily ascertain the identity of the mortgagee. A mortgagee should not be forced to resort to s. 25(2) to protect himself from an indefinite number of lien claims in indeterminate amounts. There may be circumstances where he is willing to accept the priority of a registered lien.

18 In my opinion, as I have said, it may now, under the new section [s. 78(4)], be necessary to deprive the mortgagee of priority for the advance made in face of the Moffatt lien. But to me it makes no commercial sense to grant priority to the extent of that advance to lienholders who were not in existence when that advance was made, when the Moffatt lien had been discharged and when the lienholders had suffered no prejudice of any kind at any time.

19 I would allow the appeal with costs, including the costs of the order granting leave to appeal, and set aside the order below to the extent necessary to grant the appellant priority for the amount outstanding on the mortgage over the claims of the lien claimants.

Appeal dismissed.

TAB 4

Lindsay Brothers Construction Ltd. v. Halton Hills Development Corporation et al.

[Indexed as: Lindsay Brothers Construction Ltd. v. Halton Hills Development Corp.]

11 O.R. (3d) 23

Ontario Court (General Division),
Fortier J.
October 27, 1992

Construction liens -- Holdback -- Priorities -- Owner's liability for holdback calculated on the basis of a separate contract for each lien claim -- Construction Lien Act, R.S.O. 1990, c. C.30, s. 78(2).

HH Corp. was the owner of 26 lots in a plan of subdivision upon which it had been building houses; it acted as its own general contractor. Standard Trust provided mortgage financing to HH Corp. for the whole project in the amount of $5 million. Between February and May 1990, 21 construction liens were registered against one or more of five remaining unsold lots. These liens were registered by contractors with whom HH Corp. had contracted directly. HH Corp. was insolvent and unable to pay the claimants, and HH had not retained the holdbacks required by the Construction Lien Act. Standard Trust proceeded to enforce its mortgage and posted security with the court in order to complete a power of sale. Standard Trust settled with 14 lien claimants by whom the value of services and materials supplied was $885,975.43 and for whom the lien claims totalled $219,605. (With these 14 claimants, Standard Trust settled for 10% of the value of the work supplied by each claimant.) For the seven remaining lien claimants, the value of services and materials supplied was $577,348.21 and their lien claims totalled $222,723.29. There was a dispute between the seven

remaining lien claimants and Standard Trust about the priority of their respective claims.

Under s. 78 of the Construction Lien Act, liens have priority over mortgages "to the extent of any deficiency in the holdbacks required to be retained by the owner". Section 22(1) requires a holdback equal to 10% of the price of the services or materials as they are actually supplied under the contract or subcontract. Standard Trust's position was that each contract stands on its own and has a separate holdback to which a lien claimant looks for payment. The lien claimant's position was that the holdback is 10% of the whole improvement.

The lien claimants also claimed pre-judgment interest as part of their claim for priority.

Held, Standard Trust's position was correct.

The contract of a lien claimant stands on its own and has a separate holdback to which the lien claimant may look for payment. The holdback amounts to 10% of the services or materials actually supplied under each individual contract and does not extend to 10% of all contracts entered into for the whole project or improvement. The definition of "holdback" in s. 1(1) of the Act does not refer to 10% of the "improvement" or to 10% of the "project". It refers specifically to 10% of the value of services or materials under a contract or subcontract. "Contract" is singular, not plural. The lien claimants' position was illogical, contrary to the scheme of the Act, and would cause great confusion in the construction industry.

Lansing Building Supply (Ontario) Ltd. v. Kemp (1992), 9 O.R. (3d) 539 (Master), not folld

As to the lien claimants claim for pre-judgment interest, it does not have priority over the mortgagee. Section 14 of the Act governs and it excludes interest from the lien.

Arthur J. Fish Ltd. v. Moore (1985), 53 O.R. (2d) 65, 17 C.L.R. 137, 23 D.L.R. (4th) 484, 8 C.P.C. (2d) 77, 13 O.A.C. 117 (Div. Ct.), distd

Other cases referred to

Forte Aluminum Ltd. v. Frank Plastina Investments Ltd. (1988), 29 C.L.R. 167 (Ont. Master); Jerry's Asphalt Paving Ltd. v. Duplan, Ont. Master, January 15, 1990; Norwon Electric Sault Construction Ltd. v. Ross (1984), 7 C.L.R. 1 (Ont. H.C.J.); Yale Development Corp. Ltd. v. A.L.H. Construction Ltd. (1972), 32 D.L.R. (3d) 301, [1973] 2 W.W.R. 477 (Alta. C.A.)

Statutes referred to

Construction Lien Act, R.S.O. 1990, c. C.30, ss. 1(1) "holdback", "improvement", "owner", 14(2), 22, 26, 31, 44, 78(2)
Construction Lien Act, 1983, S.O. 1983, c. 6 (Bill 216) (now R.S.O. 1990, c. C.30)

MOTION to determine priorities between lien claimants and a mortgage under the Construction Lien Act, R.S.O. 1990, c. C.30.

S.C. Foster, for plaintiffs and for lien claimants, Freestone-Robert Construction Ltd., Ramrock Electric, Jure Starcevic and Franjo Pozega, carrying on business as Starpoz.

J.L. O'Kane, for lien claimant, Jose Martins, carrying on business as J. & M. Construction.

H.M. DesBrisay, for defendant, Standard Trust Co.

FORTIER J.:--This is a motion to determine the issue of priority between lien claimants and Standard Trust as mortgagee. The facts are agreed upon as hereinafter set out.

1. This action was a consolidation of 21 claims for lien registered against title to lands owned by Halton Hills Development Corporation ("Halton Hills") arising from the construction of a residential subdivision.

2. Halton Hills was the registered owner of a 36-lot subdivision of single-family detached dwelling.

3. Halton Hills was at all material times an "owner" of the property, as defined by the Construction Lien Act, R.S.O. 1990, c. C.30, s. 1(1), as amended (the "Act").

4. The defendant, Standard Trust Company ("Standard Trust"), was a mortgagee of the lands by virtue of a mortgage registered as Instrument No. 359633 on May 26, 1988. The face amount of the mortgage was $5,200,000 (the "Standard Mortgage").

5. The Standard Mortgage was a mortgage taken for the purpose of financing the improvement of the property within the meaning of the Act.

6. Funds were advanced under the Standard Mortgage by Standard as construction of the single-family dwellings progressed on the property. Standard Trust advanced the total sum of $4,998,181 between the date of the first advance, May 26, 1988, and its last advance, January 30, 1990, at which time the residential subdivision had been largely completed and title to all but five homes had been conveyed to third party purchasers.

7. Halton Hills became insolvent and stopped paying the trades, professionals and suppliers to the project in or about February 1990. Construction liens were registered between February 2, 1990 and May 1990. The liens were registered against one or more of the five lots which had not at the time been sold to third party purchasers.

8. All 21 claims for lien were registered by persons who had contracted directly with the owner, Halton Hills. All of the lien claimants were, accordingly, "contractors" within the

meaning of the Act.

9. In July of 1990, Standard Trust posted security (the "Original Security") to vacate the registration of the 21 claims for lien in order to permit the sale of the property under power of sale proceedings, which had been commenced by Standard Trust. The Original Security was made up of the following:

(a) a letter of credit in the amount of $509,073.35, posted pursuant to the order of the Honourable Mr. Justice Carnwath dated July 26, 1990; and

(b) cash in the amount of $64,745.80, posted pursuant to the order of the Honourable Mr. Justice Clarke dated December 5, 1990, together with accrued interest thereon.

10. All lots in the subdivision were eventually sold under power of sale. There remains owing to Standard Trust by Halton Hills $391,792.48 as of April 30, 1992, exclusive of the security in court, under Standard Trust's mortgage financing, after realization by Standard Trust on its security under power of sale proceedings.

11. Fourteen of the 21 lien claimants have now settled their claims with Standard Trust. The settlement is incorporated in the order of the Honourable Mr. Justice Speyer, which dismisses the claims of the 14 lien claimants who have settled and orders the substitution of the security then in court with new security, as hereinafter described.

12. The order of the Honourable Mr. Justice Speyer provided for a substitution of the Original Security for security in a lesser amount of $278,404.13 to stand as security for the unresolved claims for lien (the "New Security") and the Original Security was subsequently delivered up to Standard Trust.

13. There remain seven lien claimants who have not settled. They are described in Schedule A hereto [see p. 34, post]. The third column in Schedule A shows the amount of the holdback

required to be retained by Halton Hills on each of their contracts.

14. The seven lien claimants with unresolved claims for lien supplied services and materials to the property in the amounts set out in column 3 of Schedule A pursuant to their respective contracts with Halton Hills at the request of and upon the credit or upon the behalf or with the privity and consent of or for the direct benefit of Halton Hills. The parties agree that, with the exception of Jure Starcevic and Franjo Pozega, the lien claimants with unresolved claims for lien have valid claims for lien which were preserved and perfected in accordance with the provisions of the Act for the amounts set out opposite each of their names in column 2 of Schedule A. Standard Trust takes issue with the validity of the claim for lien of Jure Starcevic and Franjo Pozega. The issue of the validity of that claim for lien will be addressed in a second agreed statement of facts.

15. It is agreed that the lien claimants with unresolved claims for lien are each owed the sums set out in column 2 of Schedule A opposite each of their names, together with interest and costs by the defendant, Halton Hills. It is also agreed that Halton Hills did not maintain holdbacks required under Part IV of the Act and that Halton Hills is insolvent and unable to pay the lien claimants with unresolved claims for lien.

The issue as defined by the parties is as follows:

Issue

(a) How are the priorities as between the seven lien claimants with unresolved claims for lien and Standard Trust determined in accordance with the provisions of s. 78(2) of the Act?

(b) In particular, is each of the lien claimants entitled to priority over the first mortgage security of Standard Trust to the extent of a deficiency in the holdback required to be retained by Halton Hills on each of their contracts with

Halton Hills as maintained by Standard Trust or is each entitled to priority to the extent of the deficiency in the holdback required to be retained by Halton Hills on the contracts of all lien claimants as maintained by the line claimants?

Section 78(2) of the Construction Lien Act provides that liens have priority over mortgages "to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV".

In this case, Halton Hills was its own general contractor, contracting separately with each lien claimant. Standard Trust maintains that each contract stands on its own and has a separate holdback to which such lien claimant may look for payment.

The parties in this case agree that s. 78(2) of the Act applies and that the liens have priority over the mortgage "to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV. They cannot agree on the method of determining the amount of the holdback.

The lien claimants maintain, in effect, that the holdback is 10% of the whole improvement. I do not know the contract price of the whole improvement. The project started in 1988 and was for the erection of 36 houses on 36 single-family lots. The liens in this case are with respect to the last five lots and houses only. The mortgage money was supplied to secure the financing of the improvement and since the mortgage is in excess of $5,000,000, the lien claimants' position must be that the holdback is for an amount in excess of $500,000. This amount would ensure a payout to all lien claimants of 100%, as their claims total $222,723.29.

The term "holdback" is defined in s. 1(1) of the Act as follows:

"holdback" means the 10 per cent of the value of the services or materials supplied under a contract or subcontract required to be withheld from payment by Part IV;

Section 22(1) of Part 4 of the Act is as follows:

22(1) Each payer upon a contract or subcontract under which a lien may arise shall retain a holdback equal to 10 per cent of the price of the services or materials as they are actually supplied under the contract or subcontract until all liens that may be claimed against the holdback have expired as provided in Part V, or have been satisfied, discharged or provided for under section 44 (payment into court).

Section 22(1) has many parts and for discussion purposes, I am subdividing s. 22(1) into four parts as follows:

(a) each payer

(b) upon a contract or subcontract under which a lien may arise

(c) shall retain a holdback equal to 10 per cent of the price of the services or materials as they are actually supplied under the contract or subcontract

(d) until all liens that may be claimed against the holdback

(i) have expired, as provided in Part V, or

(ii) have been satisfied, discharged or provided for under section 44 (payment into court).

Certain facts and comments applicable to each of the four parts of s. 22(1) as I have divided s. 22(1) are as follows:

(a) Each payer

Halton Hills is the payer and if not bankrupt, although insolvent, judgment for each of the claims, interest and costs will be awarded to each lien claimant against Halton Hills.

The only probable payer in this case will be the mortgagee.

(b) Upon a contract or subcontract under which the lien may

arise

Each of the seven remaining lien claimants (as with the 14 lien claimants in this action who settled with the mortgagees) contracted directly with Halton Hills. None of them is a subcontractor, as Halton Hills acted as its own general contractor. "The liens claimed total $222,723.29 and the value of services and materials supplied by the seven remaining lien claimants is $577,348.21.

The value of work by the 14 lien claimants who settled was $885,975.43 and the liens of the 14 totalled $219,605. The mortgagees paid to the 14 a total of $88,597.55, being 10% of the value of the work supplied by each of the 14 lien claimants. An order of this court approved that settlement, together with a further amount for costs.

What other contracts can be involved? Surely a contract completed four years ago at the beginning of the project of 36 houses, and on which Halton Hills paid out the holdback pursuant to s. 31 of the Act at the expiration of the 45-day period, cannot now be revived for purposes of computing the holdback in this action. We must remember that a total of 36 houses were constructed on single-family lots in this project. In s. 78 of the Act the project is referred to as the improvement. This second part of s. 22(1), as I have divided s. 22(1) does not refer to the "project" or to the "improvement". It refers to "a contract" or "a subcontract", under which a lien might arise.

(c) Shall retain a holdback equal to 10 per cent of the price of the services or materials as they are actually supplied under the contract or subcontract

Halton Hills failed to retain holdbacks, but 10% of the price of the services or materials as they are actually supplied under the contract or contracts of 14 of the lien claimants was the basis on which their claims were settled. That $88,597.55 has been paid out.

The remaining seven lien claimants have lien claims for a

total of $222,723.29. What other moneys should have been retained by the payer as a holdback for these seven lien claimants? Should the holdback applicable to the 14 who settled with court approval be revived, so that the mortgagees must top up the 10% holdback after having paid it? Should the holdbacks of the contracts performed and paid for in 1988 with the holdbacks released pursuant to s. 31 of the Act in 1988 be revived at this time to have the mortgagees top up the holdback for the deficiency in holdback for long-completed contracts? Surely this approach is not rational.

(d) Until

(i) have expired, as provided in Part V

Part V includes s. 31, which deals with the expiry of liens. Simply put, s. 31 provides that if the lien is not preserved by registration within 45 days of completion of the contract or the contract is abandoned, the lien expires.

Surely s. 31 of the Act allows the payout of the holdback to the contractor who has completed his contract and whose lien rights have expired by the passage of the 45-day time period.

It is not rational to now suggest that the present holdback must include the 10% holdback of the contract paid out pursuant to s. 31

(ii) have been satisfied, discharged or provided for under section 44

The suggestion of the lien claimants would revive the holdbacks that have been "satisfied" or "discharged".

If the lien claimants are correct, then s. 26 of the Act has no meaning. Section 26 is as follows:

> 26. Each payer, upon the contract or a subcontract may, without jeopardy, make payment of the holdback the payer is required to retain by subsection 22(1) (basic holdback), so as to discharge all claims in respect of that holdback, where

all liens that may be claimed against that holdback have expired as provided in Part V, or have been satisfied, discharged or provided for under section 44.

In support of their position, the lien claimants referred me to two authorities: Norwon Electric Sault Construction Ltd. v. Ross (1984), 7 C.L.R. 1 (Ont. H.C.J.), and Lansing Building Supply (Ontario) Ltd. v. Kemp (unreported -- a decision of Master Saunders released June 2, 1992 [now reported 9 O.R. (3d) 539]. The Norwon case deals primarily with the issue of whether the liens which were filed prior to the mortgage advances had priority over the mortgage and is not analogous to the issue in this case.

Lansing Building Supply v. Kemp is on all fours with our case. It was a motion to determine the liability of the mortgagee, when the owner failed to maintain holdbacks. Master Saunders found that the mortgagees's "liability is for the 10% holdback that the owner is required to retain in respect to all contracts entered into by the owner for the improvement, not just contracts for which liens have been filed".

The Master felt that he was bound by the decisions in two cases: Jerry's Asphalt Paving Ltd. v. Duplan (January 15, 1990 -- unreported) and Forte Aluminum Ltd. v. Frank Plastina Investments Ltd. (1988), 29 C.L.R. 167 (Ont. Master). Jerry's Asphalt Paving was confirmed by the Court of Appeal and Forte Aluminum was confirmed by the Divisional Court. Neither the Jerry's Asphalt Paving or Forte Aluminum cases are analogous to the facts in the Lansing Building case. Both cases involve an owner contracting with a contractor, who in turn contracts with a subcontractor. The issue in both cases is whether the holdback held by the owner is for 10% of the amount of the main contract, or merely 10% of the outstanding subcontract. Both cases held that the proper holdback is 10% of the main contract and this is consistent with the scheme of the Act.

Counsel for the mortgagee referred me to Yale Development Corp. Ltd. v. A.L.H. Construction Ltd. (1972), 32 D.L.R. (3d) 301, [1973] 2 W.W.R. 477, a decision of the Alberta Court of Appeal. I find this case persuasive. Yale Development involved

whether there was a single all-inclusive lien fund for the whole project to which all lienholders had a right to look for payment of their liens, or whether there was a separate lien fund for each contract, with the right to share in it limited to those subcontractors, workmen and suppliers of material whose claims arose out of that contract.

The court held that "there is a lien fund for each contract and not an all-inclusive one for the whole project". At p. 303 D.L.R., p. 480 W.W.R., Johnson J.A. stated:

> To hold otherwise would be unfair to the individual contractors. To take a hypothetical case: if there were three contractors who had contracts for the building of a project and two of these paid their bills, so that no liens were registered, and if the third contractor failed to pay, resulting in liens being filed in excess of the holdback, if the appellants' contention is correct, the holdback of the first and second contractors could be used to make good the liens which had not been satisfied out of the third contractor's holdback. A contractor must, of course, make good the default of his subcontractors, but it is quite different to require a contractor to pay builders' liens that have been caused by the default of other contractors which he did not select and over which he had no control. No advantages accrue to the owner because the total holdback on all the contracts will approximate the amount of the holdback if there had been a single contract.

The definition of "holdback" in s. 1(1) of the Act speaks for itself. Nowhere in this definition is there a reference to 10% of the "improvement" or to 10% of the "project". It refers specifically to 10% of the value of services or materials under a contract or subcontract. "Contract" is singular, not plural.

"Improvement" is defined at s. 1(1). If it was intended that the holdback be 10% of the "improvement", the term "improvement" would have been used in s. 22(1). Instead, the word contract is used in s. 22(1).

The Act, passed by the Ontario legislature in 1983, was

introduced in the Legislature as Bill 216. Note 8 of the Explanatory Notes to Bill 216, which became the Construction Lien Act, 1983, S.O. 1983, c. 6, states:

> The Bill provides for two holdbacks. The first, or basic holdback, relates to the period prior to the time the contract is certified as substantially performed. The second, or holdback for finishing work, relates to the period between the time a contract is substantially performed and the time it is totally completed. This provision will permit early release of the basic holdback.

When introducing the draft Construction Lien Act to the legislature, the Attorney General of the Province of Ontario stated that "the effect of these and other recommended changes should be greatly to speed payment of the holdback related to the substantially performed contract while providing protection for the finishing trades and their suppliers": 2nd Session, 32nd Legislature, Ontario, Tuesday, April 20, 1982, 2:10 p.m. On the third reading of the bill, the Honourable Minister again stated that "the concept of substantial performance of the contract has been codified to allow for early release of most of the holdback, while protecting the finishing trades".

The interpretation suggested by the lien claimants in this action and accepted in the Lansing case will cause great confusion in the construction industry.

It will result in delay in the releasing of holdbacks when the work is done and the lien period expired.

Who would bother with the distinction in the Act between the basic holdback and the holdback for finishing work if the owner must hold back 10% of the value of work in place anyway?

What owner would dare pay out the basic holdback and then only retain 10% of the cost of finishing work pursuant to s. 22(2), if the owner would remain liable for a holdback of 10% of the improvement?

What owner would ever release a holdback after the 45-day

lien period has expired, even if told s. 26 of the Act says he can do so without jeopardy, if the owner remains liable to future lien claimants for that 10%?

I, therefore, find that in the circumstances of this case, the contract of each lien claimant stands on its own and has a separate holdback to which such lien claimant may look for payment. The holdback amounts to 10% of the services or materials actually supplied under the contract and does not extend to 10% of all contracts entered into for the whole project or improvement.

The lien claimants ask for pre-judgment interest, not just against the owner, but in priority to the mortgagee.

Section 14(2) of the Act is as follows:

> 14(2) No person in entitled to a lien for any interest on the amount owed to him in respect of the services or materials that have been supplied by him, but nothing in this subsection affects any right that he may otherwise have to recover that interest.

Section 14(2) seems clear enough. A lien does not arise with respect to interest.

I was referred by the plaintiff to the case of Arthur J. Fish Ltd. v. Moore (1985), 53 O.R. (2d) 65, 17 C.L.R. 137, a decision of the Divisional Court. The facts in the Fish case are not analogous to the facts in our case.

Section 14 of the Act was not considered in the Fish case. The master had awarded a personal judgment to a defendant contractor against a co-defendant contractor in a mechanics' lien case. The master refused to award pre-judgment interest. The issue before the Divisional Court was whether the master had jurisdiction under s. 36(6) of the Judicature Act, R.S.O. 1980, c. 223, to disallow interest on a claim or counterclaim. The Divisional Court held that the master had the jurisdiction to award such interest.

The question of whether a lien claimant could claim a lien for pre-judgment interest and priority over a mortgagee for that interest was not considered in Fish .

In determining priority pursuant to s. 78(2) of the Act between lien claimants and a mortgagee who provided financing for an improvement, I am of the opinion that the lien claimants' right to interest does not have priority over the mortgagee. Section 14 of the Act must govern and it specifically excludes interest from the lien.

The lien claimants are entitled to their claim for interest against Halton Hills, but not in priority to the mortgage.

The parties may make an appointment with me for a discussion of costs.

SCHEDULE A

Lien Claimants	Lien Claim Amount	Value of Services and Materials Supplied	10% of Value of Services and Materials
1. Barmill Contracting Inc.	$17,159.20	$ 17,159.20	$ 1,715.92
2. Freestone-Robert Construction Inc.	$14,316.34	$ 30,077.58	$ 3,007.76
3. Lindsay Brothers Construction	$58,107.70	$295,869.38	$29,586.94
4. Ramrock Electric COB 429382 Ontario Ltd.	$36,826.50	$ 48,783.50	$ 4,878.35
5. Jose Martins COB J & M Construction	$12,325.00	$ 12,325.00	$ 1,232.50

6. Jure Starcevic and Franjo Pozega, partners carrying on business as Starpoz	$50,210.00	$ 83,730.00	$ 8,373.00
7. Halton Forming	$33,778.55	$ 89,403.55	$ 8,940.36

Order accordingly

TAB 5

1997 CarswellOnt 1752
Ontario Court of Justice (General Division)

Tom Jones Corp. v. OSBBC Ltd.

1997 CarswellOnt 1752, [1997] O.J. No. 2166, 34 C.L.R. (2d) 44, 35 O.T.C. 142, 71 A.C.W.S. (3d) 833

In The Matter of the Construction Lien Act, R.S.O. 1990, c. C. 30

In The Matter of the Claims for Lien of Tom Jones Corporation, Barber Equipment Ltd. and Lightning Sales and Rentals Incorporated, registered as Instrument Numbers A66125, A66138, and A66210 in Land Titles Office for Land Titles Division of Rainy River against lands owned by OSBBC Limited.

Tom Jones Corporation, Plaintiff, and OSBBC Limited, Casey Industrial International Inc., Bradleigh-Moore Structures International Inc., Alert Steel Erectors Ltd., and Canadian Imperial Bank of Commerce, Defendants

Lightning Sales and Rentals Inc., Plaintiff, and Alert Steel Erectors Ltd., Defendant

Barber Equipment Rental Ltd., Plaintiff, and Alert Steel Erectors Ltd. and Emile Ross and Lynn Ross, and OSBBC Limited and Casey Industrial International Inc., and Canadian Imperial Bank of Commerce, Defendants

Kozak J.

Judgment: May 20, 1997
Docket: Thunder Bay RE 4/96; 8/97; 6/97; 104/97

Counsel: *Ian S. McMillan, Esq.*, Counsel for B.M. Structures.
Frank W.B. Morrison, Esq., Counsel for Casey International.
Christopher D.J. Hacio, Esq., Counsel for Tom Jones.
W. Derksen, Esq., Counsel for Barber Equipment.
Anthony J. Potestio, Esq., Counsel for Lightning Sales.

Subject: Contracts; Corporate and Commercial

Headnote

Construction law --- Construction and builders' liens — Payment of moneys into court — Effect of posting security — Varying amount of security

C agreed to construct plant for O on O's lands — B entered agreement with C to supply and install building on O's lands — B hired A as subcontractor to erect structural steel and A entered contract to engage services of plaintiffs — A abandoned work site and plaintiffs registered liens on O's lands — B brought motion to reduce amount of security — Motion granted — Claims limited to amounts actually owing to plaintiffs up to amount owing by B — Construction Lien Act, R.S.O. 1990, c. C.30.

Construction Law --- Construction and builders' liens — Payment of moneys into court — Types of permissible security

C agreed to construct plant for O on O's lands — B entered agreement with C to supply and install building on O's lands — B hired A as subcontractor to erect structural steel and A entered contract to engage services of plaintiffs — A abandoned work site and plaintiffs registered liens on O's lands — B brought motion to substitute lien bond for cash security — Motion granted — Statute did not expressly mention substituting bonds and not allowing substitution was unduly restrictive — Construction Lien Act, R.S.O. 1990, c. C.30, s. 44(5)(b).

The defendant, O, entered into an agreement with C, the general contractor, to construct a plant on its lands. B, a subcontractor, entered into an agreement with C to supply and install a pre-engineered metal building upon the defendant's lands. A agreed to erect all of the structural steel necessary to support the building. B was to make progress payments to A twice a month. Ten progress payments were made. B then informed A that its performance

was unacceptable and a second shift was needed to expedite the contract's completion. A abandoned the work site and notified B that it was no longer carrying on business. During the course of its work, A contracted the services of the plaintiffs. As a result of not being paid, the plaintiffs registered liens on title to O's lands. B enlisted the services of others to complete the work. C obtained an order to vacate the registered lien claims after paying into court the full amount of the claims plus costs, rather than posting a lien bond. B argued that it had no contractual obligation to the plaintiff lien claimants as there was no privity between itself and the lien claimants. B brought a motion to substitute a lien bond for the cash security and to reduce the amount of the security.

Held: The motion was granted.

The *Construction Lien Act* provides that when a person is required to pay the full amount of security for an order vacating a claim, he or she may move to have the amount reduced to a more reasonable amount. The effect of a vacating order is to remove the lien as a charge, thereby converting the lien to a charge upon the amount paid into court. The owner or payer is ultimately placed in the same position as if the lien had not been perfected. A claimant is unable to enforce a lien for more than is owed and the lien never attaches for more than is owed to the person with whom the claimant had privity. Here, the claims were limited to the amount actually owing by A to the plaintiffs up to the amount actually owing by B, whichever was the lesser amount, provided that the amount was not less than the amount required to be held back by B. There was no express mention of substituting bonds for cash or vice versa in ss. 44(5)(a) and (b) of the Act. The construction lien is purely a creature of statute and the wording receives a strict interpretation. However, not being able to substitute one type of security for another was unduly restrictive and absurd. The posting of a lien bond can free up working capital to facilitate the completion of the project.

Table of Authorities

Cases considered by *Kozak J.*:

Boehmers v. B.E. Project Managers Inc. (1993), 8 C.L.R. (2d) 51 (Ont. Gen. Div.) — considered

Com-Star Construction Ltd. v. Graduate Holdings Ltd. (January 20, 1993), Sandler Master (Ont. Master) — considered

Francon v. L. Nicolini Construction Ltd. (1988), 33 C.L.R. 107 (Ont. H.C.) — considered

J.B. Allen & Co. v. Kitchener Alliance Community Homes Inc. (1992), 6 C.L.R. (2d) 141 (Ont. Gen. Div.) — considered

Northern Air Construction Ltd. v. York (Borough) Public Library Board (1985), 50 O.R. (2d) 201, 13 C.L.R. 123, 16 D.L.R. (4th) 741, 8 O.A.C. 50 (Ont. Div. Ct.) — considered

Power Contracting Inc. v. Deemar Investments Ltd. (1992), 5 C.L.R. (2d) 119 (Ont. Master) — considered

Reliance Electric Ltd. v. G.N.S. Contractors Inc. (1989), 35 C.L.R. 310, 70 O.R. (2d) 364 (Ont. H.C.) — considered

Wasero Construction (1991) Ltd. v. 1024963 Ontario Ltd. (November 3, 1994), Doc. Newmarket 34438/94 (Ont. Gen. Div.) — considered

Statutes considered:

Construction Lien Act, R.S.O. 1990, c. C.30

s. 14 — referred to

s. 17(1) — considered

s. 17(2) — considered

s. 21 — referred to

s. 44(1) — considered

s. 44(2) — considered

s. 44(5) — considered

s. 44(5)(a) — referred to

s. 44(5)(b) — considered

s. 44(6) — considered

s. 44(9) — considered

s. 47 — referred to

s. 47(1)(a) — referred to

s. 47(1)(d) — referred to

Rules considered:

Ontario, Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 20 — referred to

MOTION to reduce amount of security and substitute lien bond for cash security.

***Kozak J.*:**

1 This is a motion brought on behalf of Bradleigh-Moore Structures International Inc., (hereinafter referred to as B. M. Structures) pursuant to Section 44(5) of the *Construction Lien Act* for an Order:

(a) Reducing the amount of money paid into Court as security for the lien claims of Tom Jones Corporation, Barber Equipment Ltd., and Lightning Sales and Rentals Inc. as ordered by Master B. Sichy on December 30, 1996.

(b) Substituting the security posted from that of cash to a lien bond.

Factual Background

2 OSBBC Limited, the owner of the lands described in the lien claims, entered into an agreement with Casey Industrial (the general contractor) to construct an oriented strandboard plant upon its lands in the Town of Barwick, Ontario.

3 By an agreement dated June 22, 1995 between Casey Industrial and B. M. Structures, B. M. Structures agreed to supply and install a pre-engineered metal building upon the owner's lands.

4 By an agreement dated May 15, 1996 between B. M. Structures and Alert Steel Erectors as a subcontractor, Alert Steel agreed to erect all of the structural steel and appurtinances necessary to support the pre-engineered metal building for a contract price of $480,000.00 plus taxes. The payment provisions of Alert's contract required B. M. Structures to make progress payments to Alert on the 15th and 30th of each month for the work performed during the preceding 15 day payment period. The total value of the work done by Alert on this project up to the end of September 1996 amounted to $480,106.47. In accordance therewith B. M. Structures made ten progress payments to Alert amounting to $432,095.82 plus taxes.

5 In mid October 1996 B. M. Structures informed Alert that its performance on the project was unacceptable and that it should consider employing a second shift to expedite the completion of the contract.

6 On November 14, 1996 Alert abandoned the work site and on November 18, 1996 notified B. M. Structures that it was no longer carrying on business. In the interim period between the last progress payment on September 26, 1996 and Alert's abandonment of the project on November 14, 1996, the value of Alert's work on the project was increased by the sum of $7,250.00 for extras, and by the further sum of $15,000.00 for additional work. The total value of Alert's work on the project amounted to $502,356.47.

7 During the course of performing its work, Alert contracted the services of certain rental equipment suppliers, namely Tom Jones Corporation, Barber Equipment Rental, and Lightning Sales and Rentals Inc. As a result of not being paid for their services, these rental equipment suppliers caused claims for liens to be registered on the title to the owner's land as follows:

Claimant	Inst. No.	Registration Date	Amount of Lien
Tom Jones Corp.	A66125	1996-12-13	$ 70,777.24
Barber Equipment	A66138	1996-12-16	$ 99,207.01
Lightning Sales	A66210	1996-12-24	$ 10,713.75

8 As a result of Alert leaving the job site, B. M. Structures enlisted the services of Cockerel Construction Inc. and others to complete the work that had been contracted to Alert. The completion costs that were incurred totalled $155,960.43.

9 On December 30, 1996, Casey Industrial (the general contractor) moved without notice pursuant to Section 44(1) of the *Act* for an Order vacating the three registered claims for lien mentioned above. Upon payment into Court of the full amount of the claims plus costs as provided for, the said claims for lien were vacated. In this regard it should be noted that rather than posting a lien bond, the cash sum of $225,892.19 was paid into Court.

10 In his affidavit of March 7, 1997, Mike Moore, the president of B. M. Structures, states in paragraph 14 that although he has no reason to question the propriety of the claims for lien of Barber Equipment or Lightning Sales, in terms of either timeliness of the preservation or amount, he does however state that he has good reason to dispute the timeliness of the preservation of the Tom Jones claim for lien given the "stand by arrangement" which Jones claims to have had with Alert. According to Mike Moore, Alert denies any such arrangement. In this regard B. M. Structures, in disputing the claim of Ton Jones, is not doing so pursuant to Section 47 of the *Act*, but rather to raise the issue so as to provide the Court with alleged facts that might have a bearing in its determination as to whether the amount paid into Court is excessive and should be reduced.

11 There are no subsequent lien claimants who have registered any claims for lien against the lands owned by OSBBC Limited, nor have any Notices of Claim for lien been received. The work required of B. M. Structures, pursuant to its contract with Casey Industrial, is 99% complete and notice of the substantial performance thereof was published in the Daily Commercial News on February 4, 1997.

12 B. M. Structures states that there is no privity between itself and the three aforesaid lien claimants who furnished labour, material or equipment directly to Alert Steel, and therefore it has no contractual obligation to the three lien claimants. B. M. Structures takes the position that its obligations are limited to the holdback provisions of the *Act*, which in this case they say amounts to $50,235.65.

13 Roy Nisula, the site superintendent of the Tom Jones Corporation, swore an affidavit on April 8, 1997, in which he states that B. M. Structures at all material times were or should have been aware that Alert Steel would be unable to complete its contract with B. M. Structures in that the contract price of $480,000.00 was at least $500,000.00 less than the work in question would have cost.

14 Nisula then goes on to state that the services provided by Tom Jones consisted of the supply of a crane and operators which services he states, were requested by both Alert Steel and B. M. Structures, and that the crane was first made available on July 4, 1996. From July 4, 1996 to the date of its claim for lien, Nisula states that the crane and operators were available to Alert Steel and B. M. Structures who both had asked that the crane and operators be available to them on a full time basis. In paragraph 8 of his affidavit, Nisula states that he had some questions throughout as to whether they were actually contracting with Alert Steel or B. M. Structures in that four work orders were signed by the superintendent of B. M. Structures and three work orders were signed by an officer and director of Alert Steel.

15 When payment of their invoices was not forthcoming, Nisula contacted the superintendent of B. M. Structures about the accounts and states that he was also advised by Troy Jones, the project manager of Casey Industrial, that they would be paid for their services. He states that they delayed putting a lien on the project because of the promises made by B. M. Structures and Casey Industrial that they would be paid.

16 The Tom Jones Corporation states that its crane and operator were last used by Alert Steel on or about August 15, 1996, but that it considers its contract with Alert Steel and or B. M. Structures as never having been terminated and accordingly, that its crane and operator were available up to and including the day that they registered their claim for lien in December 1996.

17 In a responding affidavit sworn April 18, 1997, Mike Moore, the president of B. M. Structures, states that the contract price of $1.58 per square foot with Alert Steel is both competitive and commercially reasonable, and considers Nisula's statement that the price should have been doubled, as being absurd. He denies any awareness of financial inability on the part of Alert Steel to fulfil the contract.

18 As to the contracting for the services of a crane from Tom Jones, the services were contracted as between Tom Jones and Alert on a *bare basis* according to Moore, that is without an operator or oiler, at a monthly rate of $15,000.00 for the months of July and August 1996, in keeping with the construction schedule governing the erection of structural steel. Moore states that the work orders or invoices numbered 3605 and 3628 reference that arrangement.

19 Moore further states that their construction superintendent, Dwayne Phillips, never requested, on behalf of B. M. Structures, the services of the 90 ton crane in relation to any of Alert Steel's work, nor did Mr. Phillips or anyone else at B. M. Structures promise to pay Alert's account with Tom Jones. B. M. Structures' position in the matter is that they did not have a work force on the project site and subcontracted all of its contractual obligations. Dwayne Phillips was their site superintendent and since Mr. Ross of Alert Steel was seldom at the site, it was agreed that Mr. Phillips would verify or acknowledge the time sheets presented by Mr. Nisula as an accommodation to both Ross and Nisula.

20 Moore also states that Mr. Nisula had knowledge on November 14, 1996 that Alert's forces had left the site for good. Also, during the latter part of August 1996, the 90 ton crane of Tom Jones was not large enough for the ironwork from the exterior perimeter and Alert had to rent a larger 230 ton crane from E.S. Fox Limited, following which the 90 ton crane was dismantled, and thereafter not contracted to Alert Steel and certainly not to B. M. Structures.

21 In an affidavit sworn April 16, 1997, Troy Jones, the project manager of Casey Industrial, expresses the belief based upon advice which he received from Roy Nisula, John Jones, and Dwayne Phillips, that the Tom Jones Corporation provided the services of the crane to Alert Steel. He states that he did not ever advise Roy Nisula that the Jones Corporation would be paid for the services provided to Alert Steel by Casey Industrial.

22 It should be noted that the motion record was not served upon Alert Steel or OSBBC. Also, it is to be noted that responding affidavit materials were not filed on behalf of Barber Equipment or Lightning Sales. Nevertheless, the motion was argued in full and the Court was able to reach a determination on the materials filed.

Legal Considerations

23 Section 44 of the *Act* provides a complete code for the payment of monies, or the posting of security into Court in order to vacate the registration of liens and certificates of action. Such payment of monies or posting of security with the Court is done without any admission of liability and without any admission as to the validity of the claims for lien. Once a Court Order has been obtained, the liens become detached from the owner's interest in the property and attach to the monies or the security paid into Court, pursuant to Section 44(6) and are subject to the rules set out in Section 44(9).

24 Section 44(1) enables any person to bring a motion *ex parte*, for an Order vacating the registration of a claim for lien or certificate of action, upon paying into Court or posting security in an amount equal to the full amount claimed plus the lesser of $50,000.00 or 25 percent of the amount claimed for costs.

25 Section 44(5) then provides a right to reduce the amount of money or security paid into Court upon notice of motion served upon all interested parties. In this regard subsections (a) and (b) confer upon the Court a discretionary power to reduce the monies paid into Court or to substitute the security.

26 Section 44(2) is available to those persons who do not wish to pay the full amount of the claim into Court in order to obtain an Order vacating the claim for lien. The notice of motion must be served upon all affected parties together with supporting materials outlining the proposed calculation of the payment proposed. The power to make an Order under Section 44(2) for a payment which is smaller than that called for in Section 44(1), is discretionary and requires the Court to insure that *reasonable* provision is made for the satisfaction of the lien.

27 The *Act* provides that where a person for the sake of expediency, on an *ex parte* application, is required to pay the full amount for an Order vacating a claim for lien, may at a future point in time, move to have the amount paid into Court reduced to a more reasonable amount. In this regard the provisions of Section 44(2) and Section 44(5) can be used in tandem.

28 The effect of a vacating Order is to remove the lien as a charge against the property, the holdbacks, and all other amounts subject to a charge under Section 21 of the *Act*. The lien is thereby converted to a charge upon the amount paid into Court and the owner or payer is placed in the same position as if the lien had not been perfected.

29 Section 14 states that any person who supplies services or materials to an improvement has a lien for the value of the services performed or materials supplied and that this lien arises and takes effect upon the first supply of such services or materials.

30 The extent of the lien is limited firstly by Section 17(1) to the amount owing to the claimant in respect of the improvement and secondly, to the least amount owed by a payer to a person whose work was in part performed by the claimant's work. Therefore, a claimant may never enforce a lien for more than he is owed and his lien may never attach for more than is owed to the person with whom he had privity. Subsection 17(2) applies the same limitation not just to each individual contractor or subcontractor but to all lien claimants of the same class. In this regard see *J.B. Allen & Co. v. Kitchener Alliance Community Homes Inc.* a decision of Madame Justice Bolan, of the Ontario Court (Gen. Division) delivered on June 25, 1992 and reported in (1992), 6 C.L.R. (2d) 141 (Ont. Gen. Div.); and Kirshs Case Finder as 44.24. Bolan J., succinctly states that a contractor is not liable to lien holders claiming under a subcontractor for any amount in excess of that owed by him to the subcontractor, other than for the amount of his statutory holdbacks.

31 In *Boehmers v. B.E. Project Managers Inc.* (1993), 8 C.L.R. (2d) 51 (Ont. Gen. Div.) Herold J. held that the maximum entitlement of the subcontractors to a lien against the land of the owner in a case where they were claiming through the general contractor, is restricted to the amount owed by the owner to the general contractor. In exercising his discretion under Section 44(2) Herold J. considered not only the gross amount owing under the contract, but also any proper setoffs which the owner might prove. The learned motions Court Judge also stated at paragraph 6:

> I am further satisfied that the words *satisfy the lien* at the end of Section 44(2) means satisfy the lien or liens which can be proven and not the amounts as claimed (see *Reliance Electric Ltd. v. G. N. S. Contractors Inc.* (1989), 35 C.L.R. 310 (Ont. H.C.).

In arriving at an amount that the Court determined would be reasonable in the circumstances to satisfy the liens, it was found that a good hard look at the facts as contained in the materials filed is permitted.

32 However, it was stated in *Wasero Construction (1991) Ltd. v. 1024963 Ontario Ltd.* (November 3, 1994), Doc. Newmarket 34438/94 (Ont. Gen. Div.) that the purpose of Section 44(2) is not to have a trial before a trial, but rather to ensure that the amount paid in, in exchange for clear title, is reasonable in the circumstances.

33 In *Com-Star Construction Ltd. v. Graduate Holdings Ltd.* (January 20, 1993), Sandler Master (Ont. Master); the owners moved under Sections 44(2) and 44(5) to reduce the total security to an amount that constituted the proper holdback amount. Although the owner's calculations were disputed, none of the claimants filed materials disproving the owner's calculations. The owner's motion was dismissed. It was held that the owners might be entitled to such a motion if the amount of the holdback was undisputed or there was some other reason that the claimants could not succeed over a certain amount, but they were not entitled to the Order where the calculation was clearly disputed by all claimants. Section 44(5) was for determination of the proper security and it was improper to attempt to use this provision for the determination of substantive disputed issues of fact or law which should be determined at trial or under the summary judgment provisions of Rule 20 or Sections 47(1) (a), (d).

34 In *Power Contracting Inc. v. Deemar Investments Ltd.* (1992), 5 C.L.R. (2d) 119 (Ont. Master) the plaintiff contractor entered into a fixed price contract for $60,575.00 and invoiced $42,403.00 as a portion of the contract claim, before abandoning the work because of inappropriate working conditions. The plaintiff contractor alleged that it expended $142,516.00 to achieve the completion of the contract and filed a lien for $42,403.00 for the work done plus $142,516.00 for increased costs of work for a total of $184,914.00. The owners applied under Sections 44(1) and 44(2) to vacate the plaintiff's lien upon payment of reasonable security. It was held that the plaintiff's claim at $184,914.00 was reasonable in that there was a reasonable possibility that the plaintiff could succeed at that amount. The master rejected the owner's argument that the plaintiff's claim must be restricted to the invoice claim of $42,403.00 or to what they said was the actual value of the work done, namely $26,630.00.

35 In considering what constitutes a reasonable and proper payment into Court for the purpose of vacating a registered claim for lien, I was referred to and read the conflicting decisions of our Court as a result of the *Northern Air Doctrine* that dealt with the issue of the extent of the ultimate liability of the party posting security or paying monies into Court. In *Francon v. L. Nicolini Construction Ltd.* (1988), 33 C.L.R. 107 (Ont. H.C.), Mr. Justice Hollinger, purporting to follow *Northern Air*, held that the security once posted was available to satisfy the claims of all lien claimants without regard to the liability of the party posting the security. On the other hand, Mr. Justice Misner in *Reliance Electric Ltd. v. G.N.S. Contractors Inc.* (1989), 70 O.R. (2d) 364 (Ont. H.C.) held that the claim that is secured by the posting of security is not the full amount claimed by the lien claimant, but rather the amount that he can actually establish against the person posting the security.

36 It should be noted in the case at bar that the initial payment of money into Court, although paid in by Casey Industrial, was done so on behalf of B. M. Structures as a matter of expediency. The current motion to reduce the amount paid in is brought by B. M. Structures with the consent of Casey Industrial.

37 Counsel for B. M. Structures takes the position that the payment into Court should be reduced to the sum of $50,235.65 which would represent B. M. Structures' holdback. Counsel for the lien claimants argue that the full amounts claimed should be retained in Court in the form of cash based upon the decision in *Northern Air* and *Francon*.

Conclusions

38 At this stage in the proceedings it is not the intention of the Court to adjudicate all of the outstanding issues and thereby render the trial redundant. Such matters as the timeliness and preservation of the Tom Jones claim for lien, the consequences that flowed from an alleged improvident bargain as between B. M. Structures and Alert Steel, and the matter of setoff for completion costs are left for the trial Judge. This does not mean that a motions Court Judge should not take a good hard look at the material facts as presented so as to determine a reasonable amount of cash or security to be paid into Court to satisfy the liens in question.

39 To begin with, this Court is satisfied that there was no privity of contract as between the Tom Jones Corporation and B. M. Structures, or Tom Jones and Casey Industrial with respect to the services of the 90 ton crane and the payment for such services. The contractual agreement in this regard was between the Tom Jones Corporation and Alert Steel Erectors. Although there is a dispute as to the agreed upon costs for such services, the more cogent evidence would appear to call for the payment of a flat rate of $15,000.00 a month for the months of July and August 1996.

40 There is no dispute that the actual value of the work performed by Alert Steel prior to its abandonment of the project amounted to $502,356.47 and that the amount of money actually paid to Alert Steel by B. M. Structures pursuant to their contractual agreement totalled $432,095.82, leaving the sum of $70,260.65 as owing to Alert Steel by B. M. Structures. The amounts being claimed by Tom Jones, Barber Equipment, and Lightning Sales, all of whom supplied services to Alert Steel, are $70,777.24; $99,207.01; and $10,713.75 respectively for a total of $180,698.00.

41 The general liens of Tom Jones, Barber Equipment, and Lightning Sales are lien claims of the same class derived through Alert Steel. These claims are limited to the amounts actually owing to the lien claimants by Alert Steel for the actual value of their services or the amount actually owing by B. M. Structures to Alert Steel, whichever is the lesser amount, provided always that the amount cannot be less than the amount required to be held back by B. M. Structures.

42 It is the finding of this Court that the monies paid into Court on December 30, 1996 (i. e., the sum of $225,892.19 inclusive of costs) be reduced to the sum of $70,260.65 plus $17,552.24 for costs for a total payment in of $87,812.89.

43 The Court is also being asked to convert the reduced payment into Court from cash to a lien bond. There was some discussion as to whether the Court in exercising its discretion to reduce the monies paid into Court was able to substitute the cash with a lien bond. The basis for such concern would appear to be the wording of Section 44(5) (a) and (b) where it provides for the reduction of either the amount paid into Court or the reduction of security posted with the Court with no express mention of substituting bonds for cash or vice versa. It is acknowledged that the construction lien is purely a creature of statute and as such the wording of the statute should receive a strict interpretation. However, given the intention of the legislature and considering the modern rule of statutory interpretation which involves giving the words a contextual interpretation which best advance the object of the *Act*, the matter of being unable to substitute one type of security for another, under Section 44(5), would be unduly restrictive and perhaps absurd. Our Divisional Court in *Northern Air Construction Ltd. v. York (Borough) Public Library Board* (1985), 50 O.R. (2d) 201 (Ont. Div. Ct.) made it most clear that there is no difference between the posting of a letter of credit and a payment of money into Court or, for that matter, the filing of a lien bond in lieu of cash. On the other hand, it would make a difference to the person moving to vacate the lien in that the posting of a lien bond would free up working capital which could be put to better use, to facilitate the completion of the project.

44 Accordingly, it is hereby ordered that B.M. Structures be permitted to post security with the Court in the amount of $87,812.89 in the form of an approved lien bond to stand as security for the vacated liens. It is further ordered that the monies which were paid into Court on December 30, 1996 be paid out to the person who paid the money into Court.

45 Order to issue accordingly. Costs of this motion reserved to the trial Judge.

Motion granted.

End of Document

TAB 6

1995 CarswellOnt 4019
Ontario Court of Justice (General Division)

Con-Drain Co. (1983) Ltd. v. J.D.S. Investments Ltd.

1995 CarswellOnt 4019, 58 A.C.W.S. (3d) 186, 6 W.D.C.P. (2d) 443

In The Matter of The Construction Lien Act R.S.O., 1990, Chapter c. C.30

Con-Drain Company (1983) Ltd., Plaintiff and J.D.S. Investments Limited, Metc Properties Inc., Citibank Canada, Royal Trust Corporation and The Standard Life Assurance Company of Canada, Defendants

Clark Master

Heard: September 18, 1995
Judgment: October 16, 1995
Docket: 56209/94

Counsel: *C.S. Skipper*, for Plaintiff.
F.W.B. Morison, for Gentra Canada Investments Inc.

Subject: Contracts; Corporate and Commercial
Headnote
Construction law --- Construction and builders' liens — Payment of moneys into court — Effect of posting security — Discharging lien

***Master Clark*:**

1 This is a motion by the first mortgagee to vacate the registration of a claim for lien, upon posting a letter of credit equivalent to the total of the claim of $576,852.00 and $50,000.00 more for costs.

2 The plaintiff does not oppose the face value of the letter of credit proposed, or the granting of the usual form of order under Section 44 of the Construction Lien Act. The plaintiff however, does oppose the granting of an order under the broad provisions of Section 47 of the Act and specifically opposes the form of the draft order offered by the mortgagee. (A copy of that draft is attached hereto as Schedule "B" to these reasons.)

3 The moving party, Gentra Canada Investments, became the first mortgagee by way of assignment from Royal Trust Corporation and Standard Life. (If the parties agree, I will grant an order replacing Royal and Standard in the title of proceedings with Gentra Canada Investments Inc. That provision should be made part of any order taken out as a result of this motion)

4 The owners of the property are J.D.S. Investments Limited and METC Properties Inc., neither of whom were represented on the motion and are I believe, insolvent.

5 Citibank Canada is a second mortgagee and was not represented either.

6 As a result of the default on the first mortgage, Gentra has commenced a foreclosure action, and in order to be able to eventually sell the property, it moves now to remove the plaintiff's lien.

7 The evidence indicates that the mortgage was fully advanced in the amount of $26,000,000, $20,000,000 of that sum going to replace two previous mortgages, and $6,000,000 going to finance improvements to the building. The mortgage is admittedly a building mortgage and the plaintiff claims that its lien, arises out of the $6,000,000. improvement.

8 The evidence of Gentra is that if the lands were sold to-day or in the foreseeable future, the proceeds of such sale would not exceed $20,000,000.

9 On behalf of the plaintiff, Mr. Skipper says that an order made in the form proposed by Gentra improperly gives directions for the conduct of the action, and alters the priorities, rights and liabilities of the parties. He further argues that to deviate from the form of order usually granted under Section 44, would be disruptive of well established construction lien practice.

10 Mr. Morison argues that because the mortgagee is foreclosing, and not proceeding under power of sale, that an order in the usual form pursuant to Section 44, is not satisfactory, and he points specifically to Rules 2 and 3 under Section 44(9) of the Act as the source of his difficulty. Instead, Mr. Morison seeks a tailored order under Section 47 of the Act.

11 My concern about the form of order suggested by Mr. Morison is that it re-writes the Construction Lien Act for the purposes of this particular law suite, and does so on very preliminary material at a very early stage in the proceedings.

12 Mr. Morison is concerned about having to litigate the questions that arose in *P. Michaud Roofing Ltd. v. National Trust Co. Ltd. et al*, (1979) 26 O.R. (2d) 482, (Div. Court) and *Gilvesy Construction v. 810941 Ontario Limited*, (1994) 17 C.L.R. (2d) 187 (Carruthers, J.). Those two cases make clear that the Construction Lien Act was never intended to displace the priority of the mortgagee, where the mortgagee clears the title pursuant to Section 44. That law should be comfort enough for the mortgagee at this stage.

13 To also grant the mortgagee an exemption from sections 21, 23, 24 and 78 would short circuit the process that should be followed in cases such as this, and defeat the intentions of the legislation.

14 There may be circumstances in which it will be appropriate to resort to Section 47 but such circumstances have not been demonstrated here.

15 In the result, the form of order usually issued under Section 44 will go.

16 The costs of the motion are fixed in the amount of $1,000.00 payable forthwith by Gentra to the plaintiff. However because costs were not specifically addressed in argument, the order is subject to the right of counsel to argue costs at a mutually convenient time in the future by arrangement with my office.

APPENDIX

Schedule B

1. THIS COURT ORDES THAT the Claim for Lien of the plaintiff registered at the Land Titles Office for the Registry Division of Durham (No.40) on the 22nd day of February, 1993, as instrument no. LT632133 against the Lands be and is vacated.

2. THIS COURT ORDERS THAT the lien of the plaintiff ceases to attach to the Lands and ceases to attach to any holdbacks and other amounts subject to a charge under section 21 of the Construction Lien Act (the "Act") and becomes instead a charge upon the Payment into Court, and the owner, payer, or Gentra shall, in respect of the operation of sections 21, 23, 24 and 78 of the Act, be in the same position as if the lien had not been preserved or written notice of the lien had not been given.

3. THIS COURT ORDERS THAT the plaintiff may proceed with this action to enforce the claim against the Payment into Court in accordance with the procedures set out in Part VIII of the Act.

4. THIS COURT ORDERS THAT the plaintiff, and all other lien claimants, if any, shall be entitled to be paid out of the Payment into Court;

Schedule B

(a) to the extent of the amount, if any, which the Payment into Court was realized by the sale of the Lands, net of all amounts to which mortgagees under the Mortgage are entitled to priority pursuant to the provisions of section 78 of the Act, if the sale of he Lands occurred on the earlier of the date Gentra obtains a final order of foreclosure against the Lands or the date of trial; or

(b) if the plaintiff proves its lien against the inteest of mortagees under the Mortgage, as ownes, in the Lands.

TAB 7

1994 CarswellOnt 950
Ontario Court of Justice (General Division)

Gilvesy Construction v. 810941 Ontario Ltd.

1994 CarswellOnt 950, [1994] O.J. No. 4206, 17 C.L.R. (2d) 187

Re CONSTRUCTION LIEN ACT, 1983, S.O. 1983, CHAPTER 6, AS AMENDED

GILVESY CONSTRUCTION, A DIVISION OF GILVESY ENTERPRISES INC. v. 810941 ONTARIO LIMITED, GENERAL TRUST CORPORATION OF CANADA and MARVIN ALBERT CROGHAN

BERNARDO MARBLE AND TILE LIMITED v. 810941 ONTARIO LIMITED, GILVESY CONSTRUCTION, A DIVISION OF GILVESY ENTERPRISES INC., GENERAL TRUST CORPORATION OF CANADA and MERVIN ALBERT CROGHAN

DEL-KO PAVING & CONSTRUCTION COMPANY LTD. v. 810941 ONTARIO LIMITED, GILVESY CONSTRUCTION LTD., GENERAL TRUST CORPORATION OF CANADA and MERVIN ALBERT CROGHAN

EDWARDS DOOR SYSTEMS LIMITED v. GILVESY CONSTRUCTION, A DIVISION OF GILVESY ENTERPRISES INC., 810941 ONTARIO LIMITED and GENERAL TRUST CORPORATION OF CANADA

FOSTER-ROSS MECHANICAL LTD. v. GILVESY ENTERPRISES INC., carrying on business under the firm name and style of GILVESY CONSTRUCTION, 810941 ONTARIO LIMITED, GENERAL TRUST CORPORATION OF CANADA and MERVIN ALBERT CROGHAN

GOLDER ASSOCIATES LTD. v. 810941 ONTARIO LIMITED, 585199 ONTARIO LIMITED, M.A.C. DEVELOPMENTS INCORPORATED and GILVESY CONSTRUCTION LTD.

THAMES GLASS LIMITED v. 810941 ONTARIO LIMITED, GILVESY CONSTRUCTION, A DIVISION OF GILVESY ENTERPRISES INC., GENERAL TRUST CORPORATION OF CANADA and MERVIN ALBERT CROGHAN

VANDENBURG CONTRACTION (1982) LTD. v. GILVESY CONSTRUCTION, A DIVISION OF GILVESY ENTERPRISES INC., 810941 ONTARIO LIMITED, MERVIN ALBERT CROGHAN and GENERAL TRUST CORPORATION OF CANADA

JERRY O'DROWSKY PLUMBING & HEATING LTD. v. 810941 ONTARIO LIMITED, et al.

ANDER/COR CONSTRUCTION INC. v. 810941 ONTARIO LIMITED et al.

Carruthers J.

Judgment: April 29, 1994
Docket: Docs. 969/90, 256/90, 136/90, 1024/90, 31/90, 5527/90, 1147/90, 5663/90, 2123/90, 2255/91

Counsel: *Frank Angeletti* and *Elizabeth A. Hewitt*, for plaintiff Gilvesy Construction.
Robert E. Hutton, for plaintiffs Jerry O'Drowsky Plumbing & Heating and Ander/Cor Construction Inc.

Andrew Szemenyei, for plaintiffs Del-Ko Paving & Construction Company, Bernardo Marble & Tile Limited, and Thames Glass Limited.
Norman M. Aitken, for plaintiff Golder Associates Ltd.
Leonard Finegold, for plaintiff Vandenburg Contracting (1982) Ltd.
J. Wayne McLeish and *Barbara F. Fischer*, for defendant General Trust Corporation of Canada.

Subject: Contracts; Corporate and Commercial
Related Abridgment Classifications
Construction law
IV Construction and builders' liens
IV.8 Payment of moneys into court
IV.8.c Effect of posting security
IV.8.c.i General principles
Construction law
IV Construction and builders' liens
IV.9 Priorities
IV.9.b Between types of creditors
IV.9.b.i Prior mortgagees and lienholders
IV.9.b.i.B Bona fide mortgage moneys
Headnote
Construction Law --- Construction and builders' lien — Payment of moneys into court — Effect of posting security
Construction Law --- Construction and builders' lien — Priorities — Between types of creditors — Prior mortgagees and lienholders — Bona fide mortgage moneys
Liens — Payment of moneys into court — Effect of posting security — Mortgagee registering building mortgage on property — Liens subsequently being registered against property — Mortgagee posting letter of credit to permit sale of property free of liens pursuant to power of sale — Issue being whether lien claimants could claim against letter of credit — Mortgagee having priority — Posting of security not having effect of altering existing priorities as between mortgagee and lien claimants.
Liens — Priorities — Between types of creditors — Prior mortgagees and lienholders — Bona fide mortgage moneys — Mortgagee registering building mortgage on property — Liens subsequently being registered against property — Mortgagee posting letter of credit to permit sale of property free of liens pursuant to power of sale — Issue being whether lien claimants could claim against letter of credit — Mortgagee having priority — Posting of security not having effect of altering existing priorities as between mortgagee and lien claimants.
In March 1989, the mortgagee signed a commitment letter in favour of the owner to provide financing for the acquisition of the property and for the construction of a planned medical office condominium. The financing was in the amount of $4.9 million and was secured by a mortgage. The mortgagee also took other security as set out in its commitment letter. The first advance under the mortgage was for $350,000 on April 17, 1989, to assist in purchasing the property. The contractor commenced work on the property in September 1989, and, including nine subsequent draws, the mortgagee advanced a total of $4,541,139. A certificate of substantial completion was dated March 12, 1991. Nine sub-trades registered liens from May 3, 1990, to March 25, 1991, for a total of $591,968.68. The contractor registered a lien on October 13, 1990, for $825,885.50. On April 1, 1992, the mortgagee posted a letter of credit pursuant to s. 44 of the *Construction Lien Act* (Ont.) in the amount of $997,623.60. This was done in order to permit the mortgagee to sell the property free of liens pursuant to its power of sale under the mortgage. The property was sold for $4.7 million and the mortgagee suffered a loss of approximately $150,000. The parties agreed that since the holdback of $404,000 was not retained by the owner, the lien claimants had priority over the mortgagee for the amount of the holdback by virtue of s. 78(2). The issue was whether, in addition to the $404,000 paid to the sub-trades through the letters of credit, the contractor could claim against the mortgagee's letter of credit for any additional sums owed to it.
Held:
The contractor was not entitled to any additional claim against the mortgagee.

The *Construction Lien Act* does not intend a different priority between lienholders and mortgagees based on the fact that a mortgagee moves under s. 44 to vacate all liens to order to facilitate a sale pursuant to its power of sale under the mortgage.

Table of Authorities

Cases considered:

Bernard J. Kamin Ltd. v. Blue Mountain Capital Corp. (1990), 43 C.L.R. 100, 72 O.R. (2d) 264 (Dist. Ct.) — *referred to*

Boehmers v. 794561 Ontario Inc. (1993), 11 C.L.R. (2d) 99, 14 O.R. (3d) 781, 105 D.L.R. (4th) 473 (Gen. Div.)*referred to*

J.B. Allen & Co. v. Kitchener Alliance Community Homes Inc. (1992), 6 C.L.R. (2d) 141 (Ont. Gen. Div.) — *referred to*

Northern Air Construction Ltd. v. York (Borough) Public Library Board (1985), 13 C.L.R. 123, 50 O.R. (2d) 201, 16 D.L.R. (4th) 741, (sub nom. *Northern Air Construction Ltd. v. Canadian Great Lakes Casualty & Surety Co.)* 8 O.A.C. 50 (Div. Ct.) — *referred to*

P. Michaud Roofing Ltd. v. National Trust Co. (1979), 26 O.R. (2d) 482, 32 C.B.R. (N.S.) 134, 9 R.P.R. 152, 103 D.L.R. (3d) 523 (Div. Ct.), affirmed (1980), 30 O.R. (2d) 620, 117 D.L.R. (3d) 786 (C.A.) — *applied*

Reliance Electric Ltd. v. G.N.S. Contractors Inc. (1989), 35 C.L.R. 310, 70 O.R. (2d) 364 (H.C.) — *referred to*

Trus Joist Canada Ltd. v. Princess Gardens Inc. (1992), 5 C.L.R. (2d) 146 (Ont. Gen. Div.) [varied (1993), 11 C.L.R. (2d) 126 (Ont. Div. Ct.)] — *referred to*

Urman, Re (1983), 44 O.R. (2d) 248, 30 R.P.R. 57, 24 B.L.R. 179, 3 P.P.S.A.C. 191, 1 O.A.C. 339, 48 C.B.R. (N.S.) 129, 3 D.L.R. (4th) 631 (S.C.) — *referred to*

Statutes considered:

Construction Lien Act, R.S.O. 1990, c. C.30 —

s. 14

s. 37

s. 44

s. 44(2)

s. 44(9)

s. 44(9)2

s. 78(2)

s. 78(3)

s. 78(4)

s. 78(10)

s. 80

Mechanics' Lien Act, The, R.S.O. 1970, c. 267 —

s. 25(4)

Mechanics' Lien Act, R.S.O. 1980, c. 261 —

s. 29(4)

Determination of question respecting priorities as between lienholders and mortgagee.

Carruthers J. **(Endorsement):**

1 In this matter, the general contractor, Gilvesy, entered into a construction contract with the owner on or about September 15, 1989. The construction contract price was $4,094,753. Earlier, in March of 1989 General Trust signed a commitment letter in favour of the owner to provide financing for the acquisition of the property and for the construction of a planned medical office condominium. This financing was in the amount of $4.9 million and was secured by a mortgage to General Trust in that amount dated September 17, 1989. General Trust also took other security, as set out in its commitment letter. The mortgage, therefore, was a building mortgage within the meaning of the *Construction Lien Act*, R.S.O. 1990, c. C.30. The first advance under the mortgage was for $350,000, on April 17, 1989, to assist in purchasing the property.

2 Gilvesy commenced work on the property in September of 1989, and, including nine subsequent draws, General Trust advanced a total of $4,541,139. A certificate of substantial completion was dated March 12, 1991. The attached schedule A [not included in this report] shows three different streams of resulting lien claimants. Nine sub-trades of Gilvesy registered liens from May 3, 1990, to March 25, 1991, for a total of $591,968.68. Gilvesy registered a lien on October 13, 1990, for $825,885.50.

3 A May 23, 1990 order pursuant to s. 44 of the Act vacated the first subcontractor's lien in the amount of $23,237, which had been filed by Golder, a Gilvesy sub-trade. The order was the result of the owner posting a letter of credit in the amount of $29,047.49.

4 On July 25, 1990, the lien of sub-trade Vandenburg was vacated by order issued pursuant to s. 44 on the posting of a bond by Gilvesy in the amount of $50,792.83, as was the lien of Foster-Ross upon Gilvesy posting another bond for $127,907.18.

5 Finally, by order dated April 1, 1992, the Gilvesy lien and the remaining liens of all sub-trades, including those of Boyle and Ander-Cor constituting two other separate classes of lienholders, were vacated on General Trust posting a letter of credit pursuant to s. 44 of the Act in the amount of $997,623.60. This action of General Trust was to permit it to sell the property free of liens pursuant to its power of sale under its mortgage, notice of sale under the mortgage having been issued by General Trust on December 5, 1990.

6 The property was sold for $4.7 million. The difference between the total of the advances and the sale price was $150,000 approximately. However, the interest owing and not paid up to the date of sale was, on the record, in excess of $150,000. General Trust also emphasizes that to facilitate the sale it was required to take back a mortgage of 75 per cent of the purchase price at annual interest rates of 0 per cent, 5 per cent, 7 per cent, 9 per cent, and 9 per cent respectively. See Record Tab 14. General Trust, regardless of this particular issue, has experienced substantial losses on this construction project. Finally, the parties also agreed the holdback that was to have been retained by the owner was $404,000, and General Trust admits the lien claimants have priority over it for the amount of the holdback, having regard to subs. 78(2) of the Act.

7 Accordingly, the questions before us and the court's answers are as follows:

(1) Can the sub-trades of Gilvesy claim against the owner's letter of credit? The owner did not appear in these proceedings, and all of the parties before us are in agreement that the sub-trades are so entitled. Accordingly, we find that they can.

(2) Can the sub-trades of Gilvesy claim against the General Trust letter of credit any additional moneys owing to them up to the agreed holdback amount of $404,000? All the parties before us are in agreement that they can and, accordingly, we concur.

(3) and (4) Is General Trust entitled as a credit against the holdback owing of $404,000 for the amount of the owner's letter of credit? All agree it is so entitled and that the answer to question 4 is $29,047.49. Accordingly, we concur on both accounts.

(5) Can the sub-trades of Gilvesy claim against the Gilvesy bonds for any further amounts of moneys owed to them on their principal claim agreed to be $419,110.79? All agree that they can on the principle of *Northern Air Construction Ltd. v. York (Borough) Public Library Board* (1985), 50 O.R. (2d) 201. See also, *Reliance Electric Ltd. v. G.N.S. Contractors Ltd.* (1989), 70 O.R. (2d) 364 (H.C.). Accordingly, we concur.

(6) Can the sub-trades of Gilvesy Construction claim against the Gilvesy bonds for such further amounts of interest and costs owing to them by Gilvesy Construction based upon their contractual agreements with Gilvesy Construction? All parties in their written submissions agreed that they can. However, in ar gument Gilvesy raised the wording of its bonds as a defense should it not prevail on its interest claim. It did not prevail but not because of any "wording" problem. Nevertheless, it is our view the wording of these bonds does not preclude recovery. Accordingly, this question is answered in the affirmative, having regard to the *Bird Construction* line of cases.

(7) In addition to the $404,000 paid to the sub-trades through the owner's letter of credit and the General Trust letter of credit, can Gilvesy Construction claim against the General Trust letter of credit for any additional sums owed to it for principal, interest, and costs? This is the main issue in dispute between the parties. We agree with General Trust that Gilvesy cannot claim against the General Trust letter of credit in this manner once the holdback is honoured by General Trust as required by subs. 78(2). In our opinion, the issue continues to be governed by the holding of and rationale behind *P. Michaud Roofing Ltd. v. National Trust Co.* (1979), 26 O.R. (2d) 482 (Div. Ct.); affirmed (1980), 30 O.R. (2d) 620 (C.A.). Section 14 of the Act makes clear that a lien is upon the interest of the owner and, of course, this interest can be subject to the giving of a mortgage. Subsections 78(3) and (4) also make clear that all building mortgages registered prior to the time when the first lien arose in respect of an improvement have priority over the lien arising therefrom unless the lien was preserved or perfected at the time of a subsequent advance or unless the mortgagee had received written notice. Thus, if the property was sold by judicial sale or simply sold by the mortgagee to a willing buyer on the understanding all proceeds would be paid into court, the mortgagee would have priority to Gilvesy and its sub-trades for the full extent of the moneys owing to it pursuant to its mortgage.

8 The rationale of *P. Michaud Roofing Ltd.* is that the legislation does not intend a different priority between lienholders and mortgagees based only on the fact a mortgagee moves under s. 44 to vacate all liens in order to facilitate a sale pursuant to its power of sale under the mortgage. Despite the able argument of counsel to the contrary, we can see no material change in subs. 44(9) of the current Act from its predecessor provisions subs. 29(4) of the *Mechanics' Lien Act*, R.S.O. 1980, c. 261 and the earlier subs. 25(4) of *The Mechanics' Lien Act*, R.S.O. 1970, c. 267, which latter provision was in effect when *P. Michaud Roofing* was decided. It is clear from the *Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act* that no change from the *P. Michaud Roofing* principle was intended by that part of subs. 44(9)2, which reads "and shall be dis tributed among all lien claimants in accordance with the priorities provided for in section 80." See the *Report of the Advisory Committee* and *Re Urman* (1981), 128 D.L.R. (3d) 33 (Ont. S.C.). This language was to require a rateable sharing between all lien claimants in money or security paid into court instead of "the first charge" advantage for the vacated lien as required by the predecessor statute. There was no intent to affect or change the priority of mortgagees in the context of s. 44, where the mortgagee is using the section to facilitate its power of sale. There is no allegation that the mortgagee has used s. 44 to affect the lien claimants' interest in any surplus on the sale. There is no surplus. We also note that any other interpretation would fail to accord any meaning to the phrase, in s. 44(9)2, "to the same extent as if the amount paid into court or security posted was realized by the sale of the premises in an action to enforce the lien..." Further, s. 80 begins "except where it is otherwise provided by this Act" and, of course, s. 14 and subss. 78(3) and (4) "otherwise provide."

9 It was argued that subs. 78(10), an entirely new provision, now provides the practical alternative for a mortgagee that was missing under the old legislation, an absence which inspired the decision in *P. Michaud Roofing Inc.* However,

subs. 78(10) in no way addresses the situation at hand in that it does not provide for the vacating of liens and responds only to liens arising from an improvement which have a priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV. The position on the meaning of s. 44 taken by Gilvesy and its sub-trades in these proceedings would expose General Trust to liability beyond any deficiency in the holdback required to be retained by the owner. This position, as was previously held in *P. Michaud Roofing Inc.*, is at odds with the scheme of the Act when read as a whole. See also *Bernard J. Kamin Ltd. v. Blue Mountain Capital Corp.* (1990), 43 C.L.R. 100 (Dist. Ct.). A mortgagee is not a general insurer for all contractors and subcontractors on a project to which a mortgage relates. See *J.B. Allen & Co. v. Kitchener Alliance Community Homes Inc.* (1992), 6 C.L.R. (2d) 141 (Ont. Gen. Div.). Accordingly, the answer to Question 7 is "no." Questions 8, 9, and 10 do no require answers given our response to Question 7.

10 We also find Gilvesy and its trades are not entitled to interest on the $404,000 from General Trust, at least in the circumstances before us. We note until very recently General Trust was reasonably asserting that none of the liens had been perfected according to the requirements of s. 37. Moreover, the sale of the property was not on particularly favourable terms. Accordingly, awaiting the determination of a court in these proceedings was not unreasonable in the circumstances. See generally *Boehmers v. 794561 Ontario Inc.* (1993), 14 O.R. (3d) 781 (Gen. Div.) and see, as well, *Trus Joist Canada Ltd. v. Princess Gardens Inc.* April 24, 1992, unrep. decision [1992] O.I. No. 902 (Gen. Div.) [now reported 5 C.L.R. (2d) 146].

(11) Is General Trust entitled to pay any moneys found to be owing by it without resorting to the General Trust letter of credit, acknowledging the right of the sub-trades to claim against the General Trust letter of credit in the event that the moneys are not paid by General Trust. All parties have answered yes and, accordingly, we so find.

11 Judgments are also to issue in accordance with paras. 29 and 30 of the stated case. And, finally, on agreement actions No. 2255/91 (Ander-Cor) and No. 2123/93 (O'Drowsky) are dismissed.

Order accordingly.

End of Document

IN THE MATTER OF Sections 97 and 100 of the Courts of Justice Act, R.S.O. 1990 c. C.43, as amended

FIRM CAPITAL MORTGAGE FUND INC.

Applicant

-and-

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

Respondents

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE RESPONDENT, INNOCON

(Returnable on October 18, 2018)

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