No. S-228723
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, c.57

AND

IN THE MATTER OF THE PLAN OF COMPROMISE AND ARRANGEMENT OF PURE GOLD MINING INC.

PETITIONER

BOOK OF AUTHORITIES of SCR Mining and Tunnelling L.P.

June 23, 2023

GLAHOLT BOWLES LLP
Barristers and Solicitors
141 Adelaide Street West, Suite 800
Toronto, Ontario, M5H 3L5

BRENDAN BOWLES LSO No.: 42802I
brendanbowles@glaholt.com
JOHN PAUL VENTRELLA LSO No.: 64269R
johnpaulventrella@glaholt.com

Tel. No.: 416.368.8280
Fax. No.: 416.368.3467

Lawyers for the Respondent,
SCR Mining and Tunnelling L.P.

TO: **KSV Restructuring Inc.**
220 Bay Street, 13th Floor, PO Box 20,
Toronto, Ontario, M5J 2W4

Court Appointed Monitor

AND TO: **Fasken Martineau DuMoulin LLP**
550 Burrard Street, Suite 2900
Vancouver, British Columbia V6C 0A3

Kibben Jackson
kjackson@fasken.com
Glen Nesbitt
gnesbitt@fasken.com
Fergus McDonnell
fmcdonnell@fasken.com
Suzanne Volkow
svolkow@fasken.com
Ashley Kumar

rnguinambaye@fasken.com
richeung@fasken.com

Counsel for the Monitor, KSV Restructuring In

AND TO: **Blake Cassels & Graydon LLP**
Three Bentall Centre
595 Burrard Street, Suite 2600
Vancouver, British Columbia, V7X 1L3

Peter Rubin
peter.rubin@blakes.com
Peter Bychawski
peter.bychawski@blakes.com
Claire Hildebrand
claire.hildebrand@blakes.com
Alison Burns
alison.burns@blakes.com
Jennifer Alambre
jennifer.alambre@blakes.com

Counsel for the Petitioner

AND TO: **DLA Piper (Canada) LLP**
Park Place
666 Burrard Street, Suite 2800
Vancouver, British Columbia V6C 2Z7

Edmond Lamek
edmond.lamek@dlapiper.com
Colin Brousson
colin.brousson@dlapiper.com
Ilia Danef
ilia.danef@dlapiper.com

Counsel for Sprott Resource Lending Corp., Sprott Private Resource Lending II (Collector) LP, and Sprott Resource Lending II (CO), Inc.

AND TO: **SERVICE LIST at Schedule "A"**

SCHEDULE "A"

No. S228723
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, c. 57

AND

IN THE MATTER OF THE PLAN OF COMPROMISE AND ARRANGEMENT OF PURE GOLD MINING INC.

PETITIONER

CCAA SERVICE LIST
As at May 26, 2023

Fasken Martineau DuMoulin LLP Attention: **Kibben Jackson** **Glen Nesbitt** **Fergus McDonnell** **Suzanne Volkow** **Ashley Kumar** Email: kjackson@fasken.com gnesbitt@fasken.com fmcdonnell@fasken.com svolkow@fasken.com rnguinambaye@fasken.com richeung@fasken.com *Counsel for the Monitor, KSV Restructuring Inc.*	Blake Cassels & Graydon LLP Attention: **Peter Rubin** **Peter Bychawski** **Claire Hildebrand** **Alison Burns** **Jennifer Alambre** Email: peter.rubin@blakes.com peter.bychawski@blakes.com claire.hildebrand@blakes.com alison.burns@blakes.com jennifer.alambre@blakes.com *Counsel for the Petitioner*

KSV Restructuring Inc. Attention: **Bobby Kofman** **David Sieradzki** **Christian Vit** Email: bkofman@ksvadvisory.com dsieradzki@ksvadvisory.com cvit@ksvadvisory.com *Court Appointed Monitor*	DLA Piper LLP Attention: **Edmond Lamek** **Colin Brousson** **Ilia Danef** Email: edmond.lamek@dlapiper.com colin.brousson@dlapiper.com ilia.danef@dlapiper.com *Counsel for Sprott Resource Lending Corp., Sprott Private Resource Lending II (Collector) LP, and Sprott Resource Lending II (CO), Inc.*
Sprott Resource Lending Corp. Attention: **George Kirichek** **Narinder Nagra** **Jim Grosdanis** Email: gkirichek@sprott.com nnagra@sprott.com jgrosdanis@sprott.com	KND Complex Litigation Attention: Sage Nematollahi Eli Karp Take Soo Shin Email: sn@knd.law ek@knd.law ts@knd.law *Counsel for Linda Larouche*
Miller Thomson LLP Attention: Riccardo Del Vecchio Lori Goldberg Email: rdelvecchio@millerthomson.com lgoldberg@millerthomson.com *Counsel for Nuna Logistics Limited*	Caterpillar Financial Services Corporation Attention: Brett Parks Email: brett.parks@cat.com
Desmarais, Keenan LLP Attention: J. Robert Leblanc Email: leblanc@dklawyers.ca *Counsel for SCR Mining and Tunnelling LP*	Glaholt Bowles LLP Attention: Brendan Bowles Email: Brendanbowles@glaholt.com *Counsel for SCR Mining and Tunnelling LP*

Borden Ladner Gervais LLP Attention: Lisa Hiebert Jennifer Pepper Email: lhiebert@blg.com jpepper@blg.com *Counsel for Epiroc Canada Inc.*	Hydro One Networks Inc. Email: londoncollectionsclientservices@hydroone.com
	Cassels Brock & Blackwell LLP Attention: John Birch William Onyeaju Email: jbirch@cassels.com wonyeauju@cassels.com *Counsel for XL Specialty Insurance Company*
Lister Beaupré Attention: Ahmed Elahi Chantal Beaupre Disha Gajera Email: ahmed@listerlawyers.com chantal@listerlawyers.com disha@listerlawyers.com *Counsel for Teresa Closs*	Osler, Hoskin & Harcourt LLP Attention: Mary Buttery, K.C. Amanda Manasterski Bridget Berner Email: mbuttery@osler.com amanasterski@osler.com bberner@osler.com *Counsel for His Majesty the King in Right of Ontario*
Attorney General for Ontario Attention: Adam Mortimer Shahana Kar Email: adam.mortimer@ontario.ca _____ shahana.kar@ontario.ca	Stikeman Elliott LLP Attention: Lee Nicholson Joseph Reynaud Jonathan Buysen Email: leenicholson@stikeman.com jreynaud@stikeman.com jbuysen@stikeman.com *Counsel for Veolia Water Technologies Canada*

Miller Thomson Attention: Spencer Norris Email: snorris@millerthomson.com *Counsel for Nuna Logistics Limited*	

E-Service List

kjackson@fasken.com; gnesbitt@fasken.com; fmcdonnell@fasken.com; svolkow@fasken.com; rnguinambaye@fasken.com; richeung@fasken.com; peter.rubin@blakes.com; peter.bychawski@blakes.com; claire.hildebrand@blakes.com;; alison.burns@blakes.com; Jennifer.alambre@blakes.com; bkofman@ksvadvisory.com; dsieradzki@ksvadvisory.com; cvit@ksvadvisory.com; edmond.lamek@dlapiper.com; colin.brousson@dlapiper.com; ilia.danef@dlapiper.com; gkirichek@sprott.com; nnagra@sprott.com; jgrosdanis@sprott.com; sn@knd.law; ek@knd.law; ts@knd.law; rdelvecchio@millerthomson.com; lgoldberg@millerthomson.com; brett.parks@cat.com; leblanc@dklawyers.ca; Brendanbowles@glaholt.com; lhiebert@blg.com; jpepper@blg.com; londoncollectionsclientservices@hydroone.com; jbirch@cassels.com; wonyeaju@cassels.com; ahmed@listerlawyers.com; chantal@listerlawyers.com; disha@listerlawyers.com; mbuttery@osler.com; amanasterski@osler.com; bberner@osler.com; adam.mortimer@ontario.ca; shahana.kar@ontario.ca; leenicholson@stikeman.com; jreynaud@stikeman.com; jbuysen@stikeman.com; snorris@millerthomson.com

Table of Contents

TAB 1

1996 CarswellOnt 1325
Ontario Court of Justice (General Division)

Lake of the Woods Electric (Kenora) Ltd. v. Kenora Prospectors & Miners Ltd.

1996 CarswellOnt 1325, [1996] O.J. No. 1349, 27 C.L.R. (2d) 184, 62 A.C.W.S. (3d) 1064

Lake of The Woods Electric (Kenora) Ltd. (Plaintiff) and Kenora Prospectors & Miners Limited, S.D. Exploration Limited Gold Point Farm Camp, Bond Gold Canada Inc., Sue Dobson, The Royal Bank of Canada, Medlee Limited, Olympia Mines Inc. and Machin Mines Inc. (Defendants); Gordon Kid (Plaintiff) and Kenora Prospectors and Miners Limited, Bond Gold Canada Inc., Sue Dobson and S. D. Exploration Ltd., (Defendants); Campbell North (78) Ltd. (Plaintiff) and Kenora Prospectors and Miners Limited, Bond Gold Canada Inc., Sue Dobson and S. D. Exploration Ltd. (Defendants); Bestway Security Ltd. (Plaintiff) and Kenora Prospectors & Miners Limited, S. D. Exploration Limited Gold Point Farm Camp, Bond Gold Canada Inc., Sue Dobson a.k.a. Susan Dobson, Olympia Mines Inc., and Machin Mines Inc. (Defendants)

Stach J.

Judgment: April 1, 1996
Docket: 159/93, 266/93, 075/94, 091/94

Counsel: *T. Carten*, for Lake of the Woods Electric.
J. Hook, for Gordon Kidd and Campbell North (78) Ltd.
R. Seller, for Bestway Rentals.
J.W. Erickson, for Defendants.

Subject: Contracts; Corporate and Commercial

Headnote

Construction Law --- Construction and builders' liens — Procedure to obtain lien — Determining time for registration — Effect of abandonment or premature termination

Construction Law --- Construction and builders' liens — Services and materials for which liens available — What constituting improvement

Construction Law --- Construction and builders' liens — Owner

Construction Law --- Construction and builders' liens — Services and materials for which liens available — Claims by lessors of equipment

Construction Law --- Construction and builders' liens — Property or interest being subject to lien — Mines and minerals

Construction Law — Construction and builders' liens — Procedure to obtain lien — Determining time for registration — Effect of abandonment or premature termination — Mining operation stopping work on project but claiming plan to restart when financing obtained — Lien claimants losing patience and removing equipment six months later — Project being deemed to be abandoned when equipment removed — Lien claimants then having 45 days to preserve their rights.

Construction Law — Construction and builders' liens — Services and materials for which liens available — What constituting improvement — Mining companies' project being abandoned before all equipment being used or installed on site — Companies claiming that no liens attaching to unused equipment — Lien attaching to unused equipment because equipment's presence on site aiding ability of mining programme to proceed — Lien attaching to equipment because it being intended to become part of improvement.

Construction Law — Construction and builders' liens — Owner — Lien claimants supplying equipment to mining companies' project — Claimants being led to believe that equipment going to one company but companies' owner later claiming that equipment actually delivered to another insolvent company — Evidence establishing that equipment delivered to first company and claimants having lien rights against it.

Construction Law — Construction and builders' liens — Services and materials for which liens available — Claims by lessors of equipment — Lien claimants leasing equipment without operator — Claimants being able to assert lien rights regarding equipment.

Construction Law — Construction and builders' liens — Property or interest being subject to lien — Mines and minerals — Lien claimants supplying equipment to mining site — One claimant also supplying equipment to nearby camp used to house mine workers — Camp having independent existence as tourist resort — Claimant's lien attaching to site not extending to camp — Supply to camp not being part of same supply to site and camp not being sufficiently connected to site.

The owner controlled three companies, K Ltd., S Ltd. and O Ltd., which were involved in a mining project. S Ltd. was used to finance K Ltd.'s mining programme, but it was presently without assets. The owner executed an operating agreement which specified that K Ltd. and O Ltd. would be jointly responsible for the mining programme operations, and that S Ltd. would manage the programme subject to the other two companies' direction. The companies began construction of a portal and decline ramp at the mine's programme site, and of a ball mill at a nearby site.

The claimants L, G, C and B all supplied equipment, by lease and by sale, to both the programme site and the ball mill. Claimants L, G and C provided evidence showing that they had been led to believe they were originally dealing with K Ltd., and that the owner and/or the project manager represented to them that the equipment was to be bought or rented by K Ltd., but that they later received payment and correspondence from S. Ltd. The companies supplied this equipment in early 1993, but the owner stopped construction of the mining programme in May 1993, although she claimed that the programme would proceed when additional financing was obtained. In September and October of that year, some of the claimants lost patience, and removed, or attempted to remove, the equipment.

The claimants alleged that they had lien rights on the construction equipment they had supplied to the companies. Claimant L had filed a lien against the companies in June 1993, claimant B did so in September 1993, and claimants G and C did so in February and March 1994 respectively. Claimant L also argued that its lien against the mining site extended to a camp located five kilometres away, to which it had supplied a generator before it supplied equipment to the mining site. The camp was used as the owner's office and as a boarding site for mining site workers, but it had an independent existence as a tourist resort.

The owner and her companies argued that no liens ought to attach, because the equipment was not used or installed on the site, and did not thereby enhance the land's value. They also argued that there had been no supply of materials to an improvement, as defined by the *Construction Lien Act* (Ont.), since work had ceased before the equipment was used. They further claimed that the claimants had contracted solely with S Ltd., not K Ltd., and that S Ltd. had no assets against which the claimants could bring a lien. Finally, they argued that, if the claimants had lien rights, they had not preserved them within 45 days following the abandonment of the contract.

The claimants each brought actions against the owner and the companies to enforce the construction liens over the companies' land and/or to claim damages for breach of contract.

Held:

The actions were allowed.

The evidence established that claimants L, G and C had contracted with K Ltd., not S Ltd., and that they were entitled to pursue a lien claim against K Ltd. They were also able to claim a lien, even though they had rented the equipment without an operator, because the Act now permitted a lien claim to be made respecting this equipment.

The companies' claim that no improvement occurred at the site, because the equipment was not used before construction ceased, and that therefore no liens attached, was rejected. There was a great deal of construction activity at the site, and the presence of the claimants' equipment on site added to the ability of the mining programme to go forward. The claimants had supplied materials to an improvement, for the purposes of the Act, when the equipment was placed on the land on which the companies' improvement was made. Materials, as defined by the Act, included movable property intended to become part of an improvement. The claimants established the threshold requirements for the liens, even in respect of equipment not yet installed or actually put into use, when work was halted in May 1993.

Under s. 31(2)(b)(ii) of the Act, the claimants had to preserve their lien claims within 45 days following the abandonment of the contract. The companies' mining programme was not abandoned when work ceased in May 1993, since the owner still believed that financing could be obtained to restart the project, and she communicated this to the claimants. However, it was reasonable to conclude that the project was abandoned on September 30, when the claimants made efforts to remove the equipment from the area. The lien claims of claimants C and G therefore failed because those claimants had waited more than 45 days after

abandonment before attempting to preserve their claims by filing liens against the companies. However, claimants C and G were able to obtain personal judgment against K Ltd. and S Ltd. under s. 63 of the Act, respecting equipment that was irretrievable from the site, and contractual damages for rent owing respecting retrievable equipment.

Claimant L failed to establish that the lien against the mining site also attached to the camp five kilometres away. The supply of the generator could not be seen as part of the same single contract, as the supply of equipment to the mining site and the camp was not sufficiently connected with the mining site that it could be seen as land enjoyed with the mining site for the purposes of the Act.

Claimants B and L established that they had valid liens against K Ltd.'s mining location, and they were able to obtain personal judgment agaisnt S Ltd. Claimant L was also able to obtain personal judgment against the owner respecting the balance owing on the generator supplied to her camp.

Table of Authorities

Cases considered:

Ashwood Development Corp. v. Douglas Rentals Ltd. (1982), 23 R.P.R. 118, 132 D.L.R. (3d) 487, 17 Alta. L.R. (2d) 373 (C.A.) — *considered*

Clarkson Co. v. Ace Lumber Ltd., [1963] S.C.R. 110, 4 C.B.R. (N.S.) 116, 36 D.L.R. (2d) 554 — *considered*

Convert-A-Wall Ltd. v. Brampton Hydro-Electric Commission (1988), 32 C.L.R. 289, 65 O.R. (2d) 385, 30 O.A.C. 200 (Div. Ct.) — *referred to*

Dieleman Planer Co. v. Elizabeth Townhouses Ltd. (1974), [1975] 2 S.C.R. 449, [1975] 2 W.W.R. 752, 20 C.B.R. (N.S.) 81, 3 N.R. 376, 48 D.L.R. (3d) 635 — *considered*

Extender Products Ltd. v. Patrick Harrison & Co. (1989), 35 C.L.R. 8 (Ont. H.C.) — *referred to*

Muzzo Brothers Ltd. v. Cadillac Fairview Corp. (1981), 34 O.R. (2d) 461, 21 R.P.R. 23 (H.C.) — *referred to*

Tage Davidsen Drywall Supplies Ltd. v. Alberta Natural Gas Co. (1991), 46 C.L.R. 233, 82 D.L.R. (4th) 1, 117 A.R. 143, 2 W.A.C. 143 (C.A.) — *referred to*

Wray & Sons Ltd. v. Stewart, [1958] O.W.N. 65 (C.A.) — *referred to*

Statutes considered:

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

s. 1(1)"contractor"*referred to*

s. 1(1)"improvement"*referred to*

s. 1(1)"materials"*considered*

s. 1(1)"owner"*referred to*

s. 1(1)"premises"*referred to*

s. 1(2)*referred to*

s. 14*referred to*

s. 14(1)*referred to*

s. 31*referred to*

s. 31(2)*referred to*

s. 31(2)(b)(ii)*referred to*

s. 31(3)*referred to*

s. 31(3)(b)(i)*referred to*

s. 34*referred to*

s. 36(4)*referred to*

s. 63*referred to*

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 128(4)(g)*referred to*

s. 129(5)*referred to*

Mechanics' Lien Act, The, R.S.O. 1960, c. 233 [rep. by The Mechanics' Lien Act, 1968-69, S.O. 1968-69, c. 65, s. 50]

generally*referred to*

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

generally*referred to*

Mining Act, R.S.O. 1990, c. M.14

generally*referred to*

Rules considered:

Ontario, Rules of Civil Procedure

r. 53.08(a)*referred to*

ACTIONS for enforcement of lien claims and for damages for breach of equipment rental agreement.

Reasons for Judgment. *Stach J.*:

1 In these proceedings four Plaintiffs seek payment for equipment supplied and delivered to a remote mining location in Northwestern Ontario. Their claims are primarily advanced as claims for construction liens, but they also raise contractual issues. These four actions, initially commenced separately, were tried together.

2 The factual and legal issues in this trial are essentially bound up in circumstances which involve:

1) an inadequately funded mining program that was never completed and where construction activity eventually stopped, creating an issue whether the program was "abandoned" within the meaning of the *Construction Lien Act* R.S.O. 1990, c. C.30

2) some equipment supplied to the site was on a rental contract creating an issue whether the equipment, if used on the project at all, was used sufficiently to give rise to a claim for lien under the governing legislation.

3) some of the equipment supplied was large and cumbersome requiring that it be transported as soon as possible over the ice road still in place in March 1993 or risk the possibility that it could not be delivered; weather conditions since 1993 have not permitted construction of another ice road; accordingly options for retrieval of the equipment have been significantly limited.

4) a legal issue whether the time limits for claiming the liens have been adhered to;

5) a mixed question of fact and law as to which of the several defendants interested in the program of mining activity owe a payment obligation for the equipment and, if so, in what amount;

6) a final issue is whether a "camp" property situate five kilometres from the site where the construction activity took place has a sufficient nexus with the [mining] "premises" improved so as to become "lands enjoyed therewith" within the meaning of s. 1(1) of the *Construction Lien Act*.

3 Each of the Plaintiffs claims to be entitled to a construction lien over several contiguous parcels of mining land near the shores of Shoal Lake. The defendant, Sue Dobson, is sued individually along with a number of corporations also interested in the mining program. Sue Dobson (hereinafter referred to as "Dobson") is the common thread connecting all of the corporate defendants; Dobson, in short, is the principal and controlling actor for all of them.

4 Most of the mining lands in question are located in a remote area. They are inaccessible by conventional roads. Water access via barge is possible for approximately eight months of the year depending upon the weight and size of the equipment to be transported. After freeze-up, ice roads may sometimes afford access if weather conditions during a given winter permit *their construction and continued use*. Transportation of supplies into the site can therefore pose considerable difficulty and may be attended by some urgency. Transportation of large and heavy mining equipment can be especially troublesome.

5 The defendant Kenora Prospectors and Miners Ltd. ("Kenora Prospectors"), incorporated in 1928, is a public Ontario corporation with approximately 125 shareholders. It is the registered owner of the mining lands in question. Dobson is its president and chief executive officer. She is also its major shareholder owning 43 percent of the shares. Her spouse owns 7 percent of the shareholding. By virtue of her shareholding and the executive position she held in the company, Dobson had effective control of Kenora Prospectors.

6 In 1987 Dobson incorporated S.D. Exploration Limited ("S.D. Exploration"), an Ontario Company. It too is a defendant and Dobson is also its president. Dobson owns substantially all of its outstanding shares. She is clearly the person in control. She states that the company was incorporated to perform exploration work in the mining industry. Prior to the mining program in question S.D. Exploration was involved in but one small mining contract.

7 S.D. Exploration had no monies on deposit to its credit in any bank accounts in either the 1991 or 1992 calendar years. When Kenora Prospectors' mining program began in 1993, however, S.D. Exploration became the funding vehicle for that program. On January 7, 1995, some months after the events which concern us in this litigation, S.D. Exploration failed to file corporate returns. Dobson claims to be taking steps presently to revive the corporation. She concedes that it has no assets presently and that it has not had any assets for some years now.

8 993059 Ontario Inc. (Ontario Inc.) is an Ontario corporation of which Dobson is the president. Ontario Inc. was specially created as the investment vehicle to facilitate capitalization and eventual funding for the mining program on Kenora Prospectors's lands. Initially, the entire shareholding of Ontario Inc. was owned by Kenora Prospectors. For a brief period in 1992 and 1993, however, the shares of Ontario Inc. were owned by Eastern Stone Products Ltd., an investor trying to earn an interest in a portion of Kenora Prospectors' mining claims.

9 The camp referred to in these proceedings as the "Gold Point Farm Camp" is also situate on the shores of Shoal Lake. This camp is registered in the name of Dobson personally. She claims to be holding it in trust for Suzen Associated Holdings Ltd. of which she is the president, director and the major shareholder.

10 The mining claims are situate in tourist oriented "Sunset Country" and in especially close proximity to the First Nations Territory on Shoal Lake from which the City of Winnipeg also obtains its supply of fresh water. Environmental concerns and their concomitant strict regulatory requirements make it more difficult to attract investors for mining exploration in that area.

11 A modest drilling program in one segment of the mining lands showed promising core samples. Encouraged by the drilling results, Kenora Prospectors acquired the permit necessary for advance exploration under the *Mining Act*. The next stage contemplated by Kenora Prospectors was a mining program which involved driving a *decline ramp* in a zig-zag fashion along the sites where the previous drilling had taken place. This would determine not only whether there was a continuity of ore along the path of the drill holes, but also whether there was a consistency of grade with the sample holes previously drilled. At the

same time a ball mill was to be constructed on a nearby site also owned by Kenora Prospectors. The crusher and conveyor that were to be a part of the ball mill operation would ostensibly permit processing of the ore (derived from driving the decline ramp) as a means of generating still further capital intended to fund subsequent stages of the mining program.

12 Dobson is a dynamic and energetic individual whose personality commands attention. By her own account she is involved "in seven or eight corporations". Not surprisingly, her involvement *in the corporations* which figure into the mining program at issue here is clearly in a dominant role. Her belief in the viability of these mining claims and her will to bring them into successful production are so strong as to be almost palpable. One develops the sense that her faith in the project and her very strong will are the engines which drove many of the developments so material to this litigation. One also forms the impression that her "objectivity" and her "recollection" of conversations and events are all very much shaped by the near Messianic zeal that governs her approach to preserving the mining claims and to moving their development forward.

13 The work permit obtained under the Mining Act by Kenora Prospectors was an essential ingredient in the attempt to attract investors. Dobson was similarly instrumental in attracting investor interest and, ultimately, in creating a joint venture between Kenora Prospectors and Eastern Stone.

14 The financing structure for the mining program is essentially founded in three agreements all completed towards the end of the calendar year in 1992, the Option Agreement (Exhibit 9), the Purchase Agreement (Exhibit 10) and the Operating Agreement (Exhibit 11). Dobson is one of two signatories to each of the Option Agreement and the Purchase Agreement. She is the sole signatory (for three companies, Kenora Prospectors, Ontario Inc. and S.D. Exploration) to the operating agreement.

15 The Operating Agreement between Kenora Prospectors, Ontario Inc. and S.D. Exploration recites that "the parties wish to make provision for the day-to-day operation of the program ..." The terms of that agreement include these:

> 1. *Kenora Prospectors and Ontario shall be jointly responsible for all decisions relating to the operation of the program* and for this purpose shall form a committee consisting of one representative from each of Kenora Prospectors and Ontario. Initially, Ontario's representative shall be Christopher Proud and Kenora Prospectors's representative shall be Suzanna Dobson.
>
> 2. S.D. Exploration *agrees to manage the program subject to the direction of Kenora Prospectors and Ontario, and to retain the services of Barry Dugal as program manager*.
>
> 3. Prior to the commencement of the program, *Kenora Prospectors and Ontario shall establish a detailed mining plan and budget*.
>
> 4. Commencing on January 15, [1993] *Ontario shall advance funds to S.D. Exploration as required ...*
>
> 5. *S.D. Exploration shall establish a bank account for the program ...*

(emphasis mine)

16 As the project manager, Barry Dugal had responsibility for the mining procedure to be adopted and for drawing up its budget. For reasons that were not explained, his involvement in the program was terminated sometime after the end of February 1993. His functions were subsequently taken over by two persons.

17 Each of the Plaintiffs supplied equipment that was actually delivered to the program site either to D-217 (where the portal and decline ramp were being constructed), or to D-148 where a building to house the ball mill and portions of the ball mill itself were under construction.

18 One of the fundamental issues in these proceedings is which of the defendants is responsible for payment of the various contractual claims of the Plaintiffs. The focus of the Plaintiffs was to attempt to place liability on a financially viable defendant, preferably by way of construction lien. The primary defence position was that S.D. Exploration, a company now entirely bereft of assets, was the sole contracting party and that it alone should attract liability.

19 The role that Dobson played in respect of contracting with the individual plaintiffs assumes considerable importance in this litigation. The Court is dubious of the good faith of Dobson, a doubt which arises only in part from her testimony that the initial investment of $500,000 "would not have put a dent in the cost of the decline ramp" and that the exploration program "had no hope of being finished for $500,000."

20 It is essential to refer to the dealings between the parties individually and seriatim, and to make findings of fact.

(a) Dealings Involving Lake of the Woods Electric (Kenora) Ltd. (hereinafter referred to as "Lake of the Woods Electric"

21 This Court accepts as accurate and truthful the evidence of the following employees of Lake of the Woods Electric:

1. the evidence of Norman Matthes that he wanted the guarantee signed by Dobson personally because she was the "kingpin" of the mining operation;

2. the evidence of Cindy Burch, (a secretary-bookkeeper who prepared the guarantee) to the effect that Burch entered the company name of Kenora Prospectors at the top of the document when it was being prepared and that it was later returned to her signed by Sue Dobson without any changes having been made;

3. the evidence of Ed Marciniak that Dobson signed the guarantee in his presence and that, when she did so, all of the blanks on the form were already filled in;

4. the evidence of Donald McDougald, the president of Lake of the Woods Electric, who at a meeting with Dobson in the spring of 1993 wanted to know why there were so many companies involved in his company's dealings with Dobson.

5. that Dobson told McDougald that Kenora Prospectors and S.D. Exploration were all the same operation and that she signed the cheques;

6. that Dobson advised McDougald that she required the name S.D. Exploration to be placed on some of the documentation simply "for bookkeeping purposes" .. "something having to do with the flow of money";

7. the evidence of Dawn Heatherington, office manager of Lake of the Woods Electric, to the effect that "S.D. Exploration" was the company named on the rental agreements at the request of Dobson and that this was done "for her convenience".

(b) Dealings Involving Gordon Kidd

22 Barry Dugal, then project manager for the mining program, approached Kidd in January of 1993 initially with a view to getting quotations on a number of pieces of mining equipment. Ultimately Dugal placed some orders with him. In their discussions Dugal told Kidd he was dealing on behalf of Kenora Prospectors in respect of a "poor boy project". Dugal provided Kidd with specifications for the crusher and the terms they could afford. Dugal instructed Kidd to fabricate the crusher.

23 The first piece of relevant documentation in the Kidd dealings is a *purchase order* indicating that certain material and equipment are to be shipped to *Kenora Prospectors at Shoal Lake Ont. Eventually, Kidd noticed that the cheque in payment was drawn upon S.D. Exploration and he questioned it. Chris Proud told him that "it did not matter which cheque it was .. it would be good*."

24 *As with equipment ordered by the defendants* from other plaintiffs, there was a "big panic" to get Kidd's crusher and conveyor delivered to the site. The equipment was bulky and ponderous and the then existing ice road was by its nature doomed to be short-lived. The equipment supplied by Kidd, including the crusher and conveyor were delivered in March 1993; they were transported to the site via the ice road across Shoal Lake. Upon delivery, however, Kidd was asked to return to the site in approximately 2-3 weeks when the anticipated progress of the mining program at the site would permit installation of the conveyer and crusher. Also on delivery, Dobson asked Kidd to make out the invoice in the name of S.D. Exploration. Dobson

told Kidd that S.D. Exploration would be paying the bills. A few weeks later Kidd was asked to hold off further with the installation of the crusher and conveyer, this time, until additional financing could be arranged.

25 Kidd took part in a meeting at the site on April 30, 1993. Approximately one week later, Dobson told him that the mining program was stopped. She asked Kidd to leave his equipment there, however, saying that additional funding would be obtained and the program would proceed. It is extremely doubtful whether the crusher could have been removed from the site at that time in any event.

26 The Court rejects as implausible and untrue the suggestion by Dobson that Barry Dugal in his capacity as project manager had no authority to bind Kenora Prospectors. Kidd has met the *prima facie* burden upon him to satisfy the court that he made the contracts with Kenora Prospectors. On this factual background the Court is not persuaded by the submission of counsel for Dobson that payment by a third party including the direction by Dobson (to have invoices made up in the name of S.D. Exploration) changes the identity of the contracting parties. The Court finds moreover, that when Dobson asked Kidd to leave his equipment on the site and when she advised him that additional funding would be obtained to secure the continuation of the mining program, she was acting then as an officer of Kenora Prospectors.

(c) Dealings Involving Campbell North (78) Ltd. (hereinafter referred to as "Campbell North")

27 Roland Frederick Campbell one of the corporate officers of Campbell North had several dealings respecting equipment "required" for the mining program at Shoal Lake. His initial contacts were with Barry Dugal with whom he had done business on a satisfactory basis in the past. Dugal told him that he was the mine manager for the project, that he was employed by Kenora Prospectors and Sue Dobson. Dugal told him that a full mining program was to be run at Shoal Lake and that tools and equipment were needed. He assured Campbell that Kenora Prospectors was a viable company.

28 Campbell subsequently received correspondence from Barry Dugal on S.D. Exploration letterhead. Still later, invoices and rental tickets were made out by Campbell North in the name of S.D. Exploration. In addition to other equipment, Campbell North delivered a 40,000 lb. scoop-tram to the Shoal Lake site via ice road in 1993. Like the crusher owned by Kidd, it is unlikely that the scoop-tram is removable from the site unless conditions permit construction of another ice road, conditions which simply have not existed since 1993.

29 Kim Campbell also testified on behalf of Campbell North. Since 1978 Kim Campbell has been its president. He is responsible for the collection of receivables for his company. He too had some dealings in respect of the subject mining program.

30 At the hearing, the Court exercised its discretion under Rule 53.08(a) to permit the reception into evidence of a document which was said to have been sent to Kenora Prospectors by facsimile transmission [the fax]. The fax was dated March 19, 1993. It was addressed to Kenora Prospectors and directed to the attention of Sue Dobson. It reads as follows:

> Re: S.D. Exploration Explorations It is my understanding that S.D. Exploration is a division or part of Kenora Prospectors and Miners. In the event that we are not notified differently this is the way that we will handle it. Meaning, S.D. Exploration Exp. is the same as Kenora Prospectors. Thank you for your valued business. Kim

31 Campbell North's fax machine was an early generation model which did not record the time of transmission or the date. The fax in question is dated March 19, 1993 and the Court accepts the evidence of Kim Campbell that he sent this fax message on that date. The court also finds that in 1993, Kenora Prospectors, S.D. Exploration, and Gold Point Camp could all be reached by facsimile transmission and that, indeed, they all shared the same mailing address and the same fax number. This court finds, also on a balance of probabilities, that Kim Campbell's fax transmission was received by Kenora Prospectors and S.D. Exploration on March 19, 1993.

32 Campbell North delivered the scoop-tram to Shoal Lake on March 26, 1993 and, five days later, delivered a trailer mounted Deutz Genset 150 kilowatt generator. Accordingly, the fax of March 19, 1993 underscores the intention and understanding of Campbell North that it was doing business with Kenora Prospectors.

d) Dealings involving Bestway Security Ltd. (Bestway)

33 The dealings between Bestway and the defendants differ from the previous relationships in that there is no evidence of a history of dealing that would permit the court to conclude either directly or by inference that a contract for the supply of equipment had been made between Bestway and Kenora Prospectors. Whether Bestway has proven a valid lien interest will be considered later in these reasons.

Can the Claims for Lien Succeed?

34 The basic approach to the interpretation of mechanics lien and construction lien statutes is well established:

> [*The Construction Lien Act*] ... constitutes an abrogation of the common law to the extent that it creates, in the specified circumstances, a charge upon the owner's lands which would not exist but for the *Act*, and grants to one class of creditors a security or preference not enjoyed by all creditors of the same debtor; accordingly, while the statute may merit a liberal interpretation with respect to the rights it confers upon those to whom it applies, it must be given a strict interpretation in determining whether any lien claimant is a person to whom a lien is given by it.

(*Clarkson Co. v. Ace Lumber Ltd.* (1963), 36 D.L.R. (2d) 554 (S.C.C.) per Ritchie J. (at p. 558, approving the opinion expressed by Kelly J.A.).

35 In *Clarkson*, for example, Ritchie J. emphasized that Ontario's *Mechanics Lien Act* [1960], did not by its terms expressly permit "renters" of construction equipment to claim lien rights. Amendment to the *Mechanics Lien Act* in Ontario in 1970 altered that statutory framework, however, and Ontario's *Construction Lien Act* [1990] makes it plain that renters of equipment may claim a lien if the equipment is rented without an operator "for use in the making of the improvement". (See the definition of "materials" in section 1 of the Act.)

36 The defendants say that no liens ought to attach in this case because the equipment was not used or installed at the site and the value of the land was not therefore enhanced by its presence.

> *(See Ashwood Development Corp. v. Douglas Rentals Ltd. (1982), 132 D.L.R. (3d) 487 (Alta. C.A.); Extender Products Ltd. v. Patrick Harrison & Co. (1989), 35 C.L.R. 8 (Ont. H.C.) per Kozak L.J.S.C. as he then was).*

37 The defendants say also that there was no supply of materials to an "improvement" as defined by the *Construction Lien Act*. Section 1(1) of the *Act* defines an "improvement" 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 work or part thereof, and "improved" has a corresponding meaning;

38 The position of the defendants is founded upon premises that:

1. the mining program was to have proceeded in a series of stages;

2. a cessation of work halted the program;

3. some of the equipment actually supplied to the site was intended to be used at a later stage in the program;

4. due to the cessation of work, the equipment was either not used or not installed and the value of the land was not enhanced by its presence.

5. in the circumstances there was no "improvement" within the meaning of the Act.

39 This position of the defendants ignores both the considerable amount of construction activity at the site and the manner in which the materials actually supplied to this remote location tie in with the evolution of the project. This court finds on the evidence that there was an improvement in fact and that the presence of the equipment supplied by the plaintiffs added to the ability of the mining program to be moved forward.

40 *Ashwood* (supra) is based upon statutory language in the corresponding Alberta statute which limits more narrowly the availability of liens for equipment rental to such times *while such equipment is used on the contract site*. The corresponding language of the *Ontario statute is* broader. The definition of "materials" under the Ontario statute, for example, includes every kind of movable property *intended to become part of the improvement* and, in the case of equipment rented without an operator, specifically includes *equipment rented for use in the making of an improvement*. Additionally, under section 1(2) of the Ontario statute, "materials" are deemed to be supplied to an improvement when they are placed on the land on which the improvement is being made.

41 Section 14 of the *Ontario Act* sets out how a lien is created:

> 14.(1) A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials.

42 The Court finds on the peculiar facts of this case that the threshold requirements of the Ontario statute have been proved by the plaintiffs even in respect of equipment not yet installed or actually put into use in May 1993 when, due to an ostensibly temporary interruption of the projects's financing, the work was halted.

43 Aspects of Dobson's evidence and that of Scott Roberts sought to undermine the utility or value of some of the rental equipment supplied through allegations that it was variously substandard, defective, otherwise inoperational or ill-suited for the tasks contemplated. The Court finds no factual basis for supporting the various contentions advanced on behalf of the defendants including contentions that the equipment at issue here was unfit for the purpose intended.

Did the Claimants Act Appropriately in Preserving Their Claims for Lien Under s. 31 of the Construction Lien Act?

44 Section 31 of the *Act* states that liens arising from the supply of materials expire within specified time periods unless they are preserved (in this case by registration) under s. 34 of the Act. In the case at bar, the work was not completed. Accordingly, we need not be concerned with notional dates of completion nor with the concept of substantial performance. Section 31(2) establishes the time periods at which, unless preserved, a "contractor's" lien expires. Section 31(3) on the other hand establishes the time periods for preserving the lien of "any other person".

45 The defendants allege that none of the plaintiffs come within the *Act's* definition of "contractor" and that the provisions of s. 31(3)(b)(i) therefore obtain here. The *Act* defines a "contractor" as:

. . . . .

> *a person contracting with or employed directly by the owner or an agent of the owner to supply services or materials to an improvement*;

The *Act* defines "owner" as any person having an interest in premises at whose request and,

> a) on 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.

46 Having regard for this extended definition of "owner", the defence contention that these plaintiffs are not "contractors" cannot be supported. (See, also, *Muzzo Brothers Ltd. v. Cadillac Fairview Corp.* (1981), 34 O.R. (2d) 461 (H.C.) per West L.J.S.C. (as he then was) at 469-471). Accordingly, s. 31(2)(b)(ii) is the applicable statutory provision, with the further result that the plaintiffs must preserve their lien rights within 45 days next following the abandonment of the contract.

47 Not every stoppage of work can be equated with abandonment. Cessation of work and abandonment engage different tests: In *Dieleman Planer Co. v. Elizabeth Townhouses Ltd.* (1974), 48 D.L.R. (3d) 635 (S.C.C.), Judson J. approved the following passage at p. 637:

> ... one must look to the evidence, not to see whether they ought to have abandoned, but to see if they did in fact abandon.
>
> It is clear that work ceased, but in my view, cessation of work and abandonment are not necessarily co-existent. In order to constitute abandonment a cessation of work would have to be permanent in the sense that it was not intended to carry the project to completion ...
>
> > Nowhere throughout the evidence can I discern any intention by anyone able to control the destiny of the project to abandon the improvement, nor was there in fact such an abandonment ... Cessation of work on construction of the uncompleted portion of the improvement ... is only one factor to consider.

48 In the case at bar, active pursuit of the mining program at the site ceased on or about May 2, 1993. The Court concludes however that the program was not abandoned at that point either in fact or in law. Not only did Dobson fail to advise any of the Plaintiffs that the project was at an end, several expressions about the imminent resumption of work on the project are exclusively attributable to Dobson. Dobson's assurances to them are most probably the product of her resolve to have this mining property exploited to its maximum potential and her belief in her ability to accomplish that objective by obtaining additional financing.

49 Although optimism as a characteristic ought not to be too readily blighted, there does come a time when reasonable people ought to conclude that a project is at an end, indeed, in the legal sense of having been "abandoned". In point of fact, some of the plaintiffs appear to have concluded that the project eventually be regarded as abandoned.

50 Mr. Corbett, an impressive and manifestly credible witness testified that he made an aborted attempt in September 1993 to remove the crusher through the use of a barge. Similarly, Roland Campbell removed the much smaller Deutz generator in October 1993, and Mr. Krawicki, the president of the plaintiff Bestway Security Ltd. arranged for his equipment (a rubber-tired loader) to be collected in September 1993. By their actions these Plaintiffs effectively concluded that the mining program was then abandoned.

51 Despite Dobson's determination for the mining program to continue and despite her assurances to the Plaintiffs, the Court holds that it was reasonable for the Plaintiffs, or any of them, to conclude by September 30, 1993 that the work on the improvement had been abandoned. On the peculiar facts of this case, therefore, the parties had a window of 45 days from and after September 30, 1993 to preserve their liens under section 34 of the *Act*.

52 In practical terms, those Plaintiffs with smaller equipment at the site capable of being retrieved by barge ought to have made arrangements for retrieval of that equipment during the time remaining in the shipping season after September 30, 1993.

Which of the Plaintiffs Preserved Their Claim for Lien?

53 It follows from these reasons that the lien claims of the Plaintiffs would expire unless preserved within 45 days from September 30, 1993.

54 From the voluminous documentation filed it appears that liens were filed by each of the Plaintiffs as follows:

1. by Lake of the Woods Electric (Kenora) Ltd. — June 4, 1993;

2. by Campbell North (1978) Ltd. — March 30, 1994;

3. by Gordon Kidd — February 4, 1994;

4. by Bestway Security Ltd. — September 17, 1993.

55 It follows that the claims for lien of Campbell North and of Gordon Kidd must fail on grounds that the liens expired before they were preserved. Nor can the liens of Campbell North and Gordon Kidd find shelter under any other valid and subsisting lien. Under s. 36(4) of the *Act*, only a preserved lien can shelter under another perfected lien.

56 The lien claims of Lake of the Woods Electric (Kenora) Ltd. require further comment.

The Lien Claims of Lake of the Woods Electric

57 It will be recalled that Gold Point Farm Camp, although situate on the shores of Shoal Lake, is approximately five kilometres, as the crow flies, from the mining properties. Lake of the Woods Electric supplied and installed a generator at the Gold Point Farm Camp on March 8, 1993. Thereafter Lake of the Woods Electric supplied equipment to the mining site. Lake of the Woods Electric contends that these dealings ought to be regarded as part of one contract. Secondly, it contends that the Gold Point Farm Camp is sufficiently connected with the mining site so as to be lienable as part of the mining site lien claim because it is "land enjoyed with" the mining site property within the meaning of the term "premises" in s. 1(1) of the *Act*.

58 On the first point, namely, that these transactions be considered as part of one contract, the Court is not persuaded that the evidence before it is sufficient to establish a prevenient arrangement. (See *Tage Davidsen Drywall Supplies Ltd. v. Alberta Natural Gas* (1991), 82 D.L.R. (4th) 1 (Alta. C.A.) per Laycraft C.J.C. at 4.

59 In respect of the second point, it is true that the headquarters for the mining program in 1993 were established at the Gold Point Farm Camp where Dobson had an office from which she directed the projects. The Gold Point Farm Camp site was also used to board workers who were employed at the mining site. Dobson had a telephone and fax machine at the Gold Point Farm Camp that were used as part of the communications centre for the mining project and as the means of contact with Kenora Prospectors and Miners and S.D. Exploration, as well as the Gold Point Farm Camp.

60 The question whether a particular parcel or land is so connected with another as to be "enjoyed therewith" and therefore lienable with it must be decided upon the particular facts and circumstances of individual cases. (*Wray & Sons Ltd. v. Stewart*, [1958] O.W.N. 65 per Laidlaw J.A. at 67 (Ont. C.A.).) In the case at bar the Gold Point Farm Camp had a longstanding and separate history of being independently operated as a tourist resort. Even in 1993 its use by Dobson had its separate aspects. Indeed, the office from which Dobson oversaw the mining operation and where its communications centre was located is but a small component of the overall camp complex. The camp's location, moreover, is geographically removed from the mining sites by several kilometres. Its uses are both separate and severable from the mining location. In these circumstances the Court concludes that the claim of Lake of the Woods Electric for the supply and installation of the generator at the Gold Point Farm Camp site must be advanced independently against the registered owner of that site. As Lake of the Woods Electric did not file a separate lien claim against the Gold Point Farm Camp site, no lien can attach. Lake of the Woods Electric's claim in contract will be dealt with later.

Disposition

(a) the Claims of Bestway Security Ltd. (Bestway)

61 The Court is persuaded that Bestway has established a valid lien against mining location D-148 owned by Kenora Prospectors. (*Muzzo Bros. Ltd. v. Cadillac Fairview Corp.* (1981), 34 O.R. (2d) 461 per West L.J.S.C. as he then was at 470-471.)

62 Bestway's claim for lien is limited to $11,863.02, the rental, without interest, for its rubber-tired loader from April 6, 1993 to September 16, 1993. Bestway is also entitled to personal judgment against S.D. Exploration under s.63 of the Act for $11,863.02 plus interest at the rate of 2% per month (24% per annum) from April 6, 1993 as specified in its rental agreement. (See *Convert-a-Wall Ltd. v. Brampton Hydro Electric Commission* (1988), 65 O.R. (2d) 385 at 396 where the Divisional Court determined that there is no discretion in the court to alter the rate of interest either for pre-judgment or post-judgment purposes where the contract specifies the rate of interest. See also s. 128(4)(g) and s. 129(5) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.)

(b) the Claims of Campbell North

63 The lien claims of Campbell North must fail on grounds that the liens expired before they were preserved. Campbell North shall nevertheless have judgment against Kenora Prospectors and S.D. Exploration under s. 63 of the *Act* as follows:

(1) for the 150 kw Deutz Genset:

a) Rental Price — $2,000.00 per month

b) Rate of Interest — 24% per annum as per contract;

c) Period Claimed — March 31/93 to Oct. 13/93

6 1/2 months @ $2,000.00	$13,000.00
Delivery charge	250.00
G.S.T.	927.50
Repair and Retrieval	$ 5,335.05
Total to Oct. 13, 1993	$19,512.55
Interest to March 1, 1996 at 24% per annum	10,274.74
TOTAL	$29,787.29

(2) for three (3) Secan Jacklegs from March 17 to June 9/93:

2 months @ $900.00	$ 1,800.00
G.S.T.	$ 126.00
Total	$ 1,926.00
Interest as per contract @ 24% per annum to Mar.1/96	$ 1,271.16
TOTAL	$ 3,197.16

(3) for the ST5 Scoop Tram:

a) Rental Price — $3,000.00 per month

b) Rate of Interest — 24% per annum on outstanding balance;

c) Period Claimed — March 26/93 to Feb. 24/94;

11 months @ $3,000.00	$33,000.00
G.S.T.	2,310.00
Repair Invoice #5458	$ 2,538.71
Total as of Feb. 24/94	$37,848.71
Interest @ 24% to Mar. 1/96	$20,587.55
TOTAL	$92,886.47

64 It will be noted in respect of the scoop tram that judgment for the rental is awarded beyond September 30/93, the date of deemed abandonment. Indeed, the terms of Campbell North's rental contract place the obligation to return the scoop tram upon the defendants Kenora Prospectors and S.D. Exploration. The scoop tram was not in fact retrievable prior to February 24, 1994, if at all, and still remains at the site. Campbell North has, however, limited its claim — quite properly in my view — to $33,000.00 the approximate value of the equipment in any event. It is entitled to interest on that amount at the contract rate.

(c) claims of Gordon Kidd

65 The lien claims of Gordon Kidd expired before they were preserved and must therefore fail. Kidd's remaining contractual claims are for rents owing in respect of the compressor @ $900 per month and the crusher @ $4000 per month. The disposition of the contractual claims requires further comment.

66 Unlike the crusher, the evidence does not permit the Court to conclude that the compressor was irretrievable. Accordingly, Kidd ought reasonably to have removed the compressor by October 31, that is to say, within one month following the deemed abandonment of the mining program. Allowing one month's additional rent as the approximate cost of retrieval, Kidd is entitled to judgment against Kenora Prospectors and S.D. Exploration for $7200.00 plus pre-judgment interest dating from April 1, 1993 pursuant to the *Courts of Justice Act*.

67 The Court finds in respect of the crusher that Kidd took reasonable steps through Mr. Corbett, in September 1993 to attempt to remove the crusher by barge. Their inability to remove the crusher at that time and by that means lends additional support to the Court's conclusion that the crusher could not reasonably have been removed from the site at any time after its initial delivery. Accordingly, the Court cannot accept the corresponding defence submission respecting mitigation.

68 Although a plaintiff is disentitled from recovering compensation for loss that could, by taking reasonable action, have been avoided, the circumstances here support the proposition that Kidd acted reasonably: (S.M. Waddams, *The Law of Damages*, Second Edition, Canada Law Book, Toronto, 1995 at para.15.70;)

> In case of doubt, the plaintiff will usually receive the benefit, because it does not lie in the mouth of the defendant to be over-critical of good faith attempts by the plaintiff to avoid difficulty caused by the defendant's wrong. In *Banco de Portugal v. Waterlow & Sons, Ltd.*, Lord Macmillan said:
>
> > Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty ... (ibid, at para.15.140)

69 In the case at bar, counsel for Kidd has prudently conceded that rentals in respect of the crusher cannot accrue indefinitely. He posits that the limit should be set at $65,000., the approximate value of the crusher. The Court agrees. Kidd shall have judgment against Kenora Prospectors and S.D. Exploration in respect of the crusher in the amount of $65,000. plus pre-judgment interest dating from June 1, 1995 in accordance with the Courts of Justice Act.

(d) the Claims of Lake of the Woods Electric

70 Lake of the Woods Electric shall have judgment against Sue Dobson (also known as Suzanna Dobson and Suzanna Dobson-Green) in her capacity as the registered owner of the Gold Point Farm Camp property for *$8,028.50* being the balance owing for the Onan generator supplied to her at that location. The Plaintiff shall have pre-judgment interest on the said sum of $8,028.50 in accordance with the contractual rate @ 2% per month (24% per annum) from March 8, 1993 both before and after judgment.

71 Lake of the Woods Electric shall have judgment against Kenora Prospectors and S.D. Exploration for the following:

(1) for the rental of the 400 kw generator from March 16, 1993 (when supplied) to October 30, 1993 (the date of deemed retrieval):		
7 1/2 months @ $1,833.00/month		$13,747.50
(2) for the rental of the 200 kw generator from March 16/93 (when supplied) to Oct.30/93 (the date of deemed retrieval):		
7 1/2 months @ $2400 plus G.S.T		$19,440.00
less payment received Mar.29/93		-4,529.31
		$14,910.69
(3) soft starts supplied April 16/93 and (subsequently recovered by Lake of the Woods Electric);		$16,994.70
Less 33 1/3% representing salvage value		-5,664.90
		$11,329.80
Plus miscellaneous supply:		
Invoice 38696 (labour)		1,501.21
Invoice 31040 (misc. parts)		202.89
TOTAL		$13,033.90
4) retrieval expenses for 2 large generators:		
Impact Welding (cost of hauling to Clyte Bay Landing)		$ 2,252.23
Low Bed and Trailer (cost of hauling from Clyte Bay Landing to shop)		
– truck – 8 hrs.	600.00	
– 3 men/24 hrs. @ $45/hr.	1,080.00	
Trailer – triaxle rental to		

	haul to shop	200.00

TOTAL		$ 4,132.35

72 In addition to the foregoing Lake of the Woods Electric shall have judgment for interest according to the contract rate @ 2% per month (24% per annum) against Kenora Prospectors and S.D. Exploration as follows:

(a) in respect of item (1) from March 16, 1993;

(b) in respect of item (2) from March 16, 1993;

(c) in respect of item (3) from April 16, 1993;

(d) in respect of item (4) from March 16, 1994;

73 Lake of the Woods Electric has also established a valid construction lien which attaches against Kenora Prospector's ownership interest in mining location D148. The lien is comprised as follows:

(a)	for the rental of the 400 kw generator	$13,747.50
(b)	for the rental of the 200 kw generator	18,000.00
(c)	for the soft starts	11,329.80
(d)	for labour	1,501.21
(e)	for miscellaneous parts	202.89

	TOTAL	$44,781.40

74 At the commencement of trial Lake of the Woods Electric discontinued its action against Bond Gold Canada Inc., The Royal Bank of Canada, Medlee Limited, Olympia Mines Inc. and Machin Mines Inc. The Plaintiff, Gordon Kidd, discontinued against Bond Gold Canada Inc. Additionally, Campbell North discontinued against Bond Gold Canada Inc. and against Sue Dobson. And finally, Bestway Security discontinued against Gold Point Farm Camp, Bond Gold Canada Inc., Sue Dobson a.k.a. Susan Dobson, Olympia Mines Inc., and Machin Mines Inc.

75 The Defendants advanced counterclaims in name and form only. They were not pursued at trial. In my respectful view there ought to be no costs regarding either the discontinued actions or the counterclaims and upon that premise the counterclaims are dismissed without costs.

76 Although only two of the four plaintiffs were found to have valid claims for lien, the plaintiffs were nevertheless substantially successful in these proceedings and in the ordinary course of events should have their costs. If there are compelling reasons (including but not limited to offers to settle) why any or all the plaintiffs should not have their costs, or why the scale of costs should be otherwise than upon a party and party basis, the Court may be spoken to within 14 days following the release of these reasons. Otherwise costs shall be to the plaintiffs.

Actions allowed.

TAB 2

CITATION: Kennedy Electric Limited v. Dana Canada Corporation, 2007 ONCA 664
DATE: 20070927
DOCKET: C45909, C45915

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF the *Construction Lien Act*, R.S.O. 1990, c. C.30

O'CONNOR A.C.J.O., ARMSTRONG and JURIANSZ JJ.A.

BETWEEN:

KENNEDY ELECTRIC LIMITED, R & A INDUSTRIAL CONTRACTORS LTD., EMPIRE TRANSPORTATION LIMITED, HYDRAMEN FLUID POWER LTD., CASSIDY INDUSTRIAL CONTRACTORS LTD., 1480253 ONTARIO INC., c.o.b. as DYNAMIC SYSTEMS, FASTENING HOUSE INC.

Plaintiffs (Appellants)

and

DANA CANADA CORPORATION and RUMBLE AUTOMATION INC.

Defendants (Respondents)

Alfred J. Esterbauer for Kennedy Electric Limited

Irwin A. Duncan and Michael A. van Bodegom for Cassidy Industrial Contractors Ltd.

Christopher A. Chekan for Dana Canada

HEARD: April 25, 2007

On appeal from the judgment of the Divisional Court (Justice John O'Driscoll and Justice Janet Wilson in the majority; Justice Sandra Chapnik in dissent) dated March 14, 2006 with reasons reported at (2006), 50 C.L.R. (3d) 283 (Div. Ct.).

ARMSTRONG J.A.:

[1] The appellants, Kennedy Electric Ltd. ("Kennedy") and Cassidy Industrial Contractors Ltd. ("Cassidy"), registered liens against the property of Dana Canada Corporation ("Dana") in respect of a contract for the design and installation of an assembly line to be used by Dana in the manufacture of Ford truck frames. Killeen J. of the Superior Court of Justice held that the assembly line did not meet the definition of an "improvement" under the *Construction Lien Act*, R.S.O. 1990, c. C.30 (the "CLA"). In the result, he found that the claims of the appellants were not lienable claims and must be discharged.

[2] Kennedy and Cassidy appealed to the Divisional Court. A majority of the Divisional Court (O'Driscoll and Wilson JJ.) dismissed the appeals. Chapnik J., in dissent, would have allowed the appeals.

[3] Kennedy and Cassidy now appeal from the judgment of the Divisional Court. There are two separate appeals but they were argued together before the Divisional Court and before us.

Factual Background

[4] This factual summary is taken from the reasons of Killeen J. In October 2000, the Ford Motor Company entered into an agreement with Dana to build frames for the 2004 Ford F-150 pickup truck. This project was code-named "P221". The annual volume of frames was expected to be approximately 615,000 over a period of eight years. It was agreed that Dana would divide its production between its plant in St. Marys, Ontario and its plant in Elizabethtown, Kentucky.

[5] In order to carry out this contract, Dana arranged for the construction of a 160,000-square-foot addition to its St. Marys plant and for the installation of a custom-designed frame assembly line for the F-150 Ford trucks which were to be in production and ready for sale in September 2003. The trial judge described the building addition as a "flexible generic type of industrial building". It is the assembly line that is at issue in this appeal. Rumble Automation Inc. ("Rumble") was the successful bidder for the design and installation of the assembly line in the new addition to the St. Marys plant as well as a similar assembly line at Dana's plant in Elizabethtown, Kentucky. Rumble is now bankrupt.

[6] The plan was to build the assembly line systems at sites in Oakville and Mississauga where the lines would be tested and then disassembled and transported to St. Marys and Elizabethtown where they would be reassembled and installed.

[7] Rumble carried out much of the work through subcontractors. Part of this work was subcontracted to Kennedy. For the St. Marys plant, it was Kennedy's responsibility to disassemble the line at the build sites and deliver the various parts by 165 transport trucks provided by Empire Transportation Ltd. to St. Marys where Kennedy employees would install the line in the new 160,000-square-foot addition.

[8] Kennedy also operated through subcontractors. It was assisted by Cassidy at the St. Marys plant. The process of disassembling, transporting and reassembling in St. Marys took from the end of September 2002 to early December 2002.

[9] The fully installed assembly line consists of 100 mezzanine platforms and 165 robots. The assembly line is attached to the floor by a system of some 2,000 to 3,000 mechanical and chemical bolts ranging from one-quarter to three-eighths of an inch in width and from six to eight inches in length. The assembly line covers approximately 100,000 square feet of the new addition. It is twenty feet high and weighs approximately 500,000 tons.

[10] The new addition also housed two other assembly lines that were installed by other companies and used to supplement the production of the F-150 truck frame line. These two lines were involved in the electronic painting, waxing and stacking of the F-150 frames.

[11] In December 2002, a dispute arose between Rumble and Kennedy. Kennedy was locked out of the site by Rumble. As a result, Kennedy and its subcontractors, including Cassidy, registered the lien claims at issue in this litigation.

The Judgment at Trial

[12] Justice Haines of the Superior Court of Justice ordered a trial of an issue in this matter. He set out the issue as follows: "whether the work performed by the plaintiff is properly lienable under the *Construction Lien Act*." The trial of an issue proceeded before Killeen J. in January 2004 and his reasons were released on November 26, 2004.

[13] The trial judge started his analysis of the issue before him by reference to s. 14(1) of the CLA which provides:

> 14.(1) A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials.

He then considered the definitions of the terms "improvement" and "land" in s. 1(1) of the CLA:

> "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 any part thereof, and "improved" has a corresponding meaning;
>
> …
>
> "land" includes any building, structure or works affixed to the land, or an appurtenance to any of them, but does not include the improvement[.]

[14] The trial judge conducted a thorough review of the authorities that related to the issue before him. He started by considering the Supreme Court of Canada's approach to the interpretation of the predecessor *Mechanics' Lien Act*, R.S.O. 1960, c. 233. In *Clarkson Co. Ltd. v. Ace Lumber Ltd.*, [1963] S.C.R. 110 at p. 114, Ritchie J. quoted with approval the dissent of Kelly J. in *Ace Lumber Ltd. v. Clarkson Co. Ltd.*, [1960] O.R. 748 at 757-58 as follows:

> With the greatest respect, I am, however, of the opinion that the proper approach to the interpretation of this statute is expressed in the dissenting opinion of Kelly J.A. where he says that:
>
> > The lien commonly known as the mechanics' lien was unknown to the common law and owes its existence in Ontario to a series of statutes, the latest of which is R.S.O. 1960, c. 233. It constitutes an abrogation of the common law to the extent that it creates, in the specified circumstances, a charge upon the owner's lands which would not exist but for the Act, and grants to one class of creditors a security or preference not enjoyed by all creditors of the same debtor; accordingly, while the statute may merit a liberal interpretation with respect to the rights it confers upon those to whom it applies, it must be given a strict interpretation in determining whether any lien-claimant is a person to whom a lien is given by it.

[15] The trial judge also referred to the report of the Attorney General's Advisory Committee on the Draft Construction Lien Act of April 8, 1982 and in particular the definition of the word "improvement" in the proposed legislation:

> The definition of the term improvement has been redrafted to make it clear which types of work on land gives rise to a lien.

> The purpose of the Act is to protect those who contribute their services or materials towards the making of an improvement to a premises. The types of work which constitute an improvement are set out in clauses a and b. While the definition of "improvement" is broad, the Committee has attempted to draft it in such a way that it will be clear that the lien created by the Act applies only in the case of the construction and building repair industries. [Emphasis added by Killeen J.]

[16] The trial judge also cited the decision of this court in *Central Supply Co. (1972) Ltd. v. Modern Tile Supply Co. Ltd.* (2001), 55 O.R. (3d) 783 at para. 15 where Abella J.A. said:

> The purpose of the definition of "improvement", as set out in the *Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act*…was "to protect those who contribute their services or materials towards the making of an improvement to a premises". The report also stressed that while the definition of improvement was a broad one, it was drafted to make it clear that the lien created by the Act applied "only in the case of the construction and building repair industries."

[17] The trial judge also relied upon *Hubert v. Shinder*, [1952] O.W.N. 146 (C.A.). In that case, this court considered whether the repair and installation of laundry equipment in a building was covered by the *Mechanics' Lien Act*. The court held that the laundry machinery was "not part of or an improvement to the building so as to constitute a lien."

[18] The trial judge referred to the judgment of the New Brunswick Court of Appeal in *Beloit Canada Ltd. v. Fundy Forest Industries Ltd.* (1981), 127 D.L.R. (3d) 320 which he found "followed basically the same rationale as the Ontario Court of Appeal did in *Hubert*." In *Beloit*, the court found that a corrugating paper machine which weighed 2,500,000 pounds installed on a concrete foundation in a building but removable from it was not an improvement under the *Mechanics' Lien Act*, R.S.N.B. 1952, c. 142 [now R.S.N.B. 1973, c. M-6].

[19] The trial judge also considered the judgment of Rosenberg J. in *Baltimore Aircoil of Canada Inc. v. Process Cooling Systems Inc.* (1993), 16 O.R. (3d) 324 (Gen. Div.). In that case, Rosenberg J., on a motion for summary judgment, found that the CLA did not apply to the installation of a water tower which was attached to the roof of a building. He found that it was not incorporated into the building. The Court of Appeal reversed the judgment on other grounds.

[20] The trial judge referred to two B.C. cases which he found supported the approach taken in *Hubert*. See *Spears Sales & Service Ltd. v. Westpine Fisheries Ltd.* (1995), 17 C.L.R. 197 (B.C. Co. Ct.), and *Chubb Security Safes v. Larken Industries Ltd.* (1990), 36 C.L.R. 225. He also considered two other B.C. cases which appear to take the opposite tack, but distinguished them on their facts and on the definition of "improvement" in the B.C. *Builders Lien Act*, R.S.B.C. 1979, c. 40 [now S.B.C. 1997, c. 45]. See *Boomars Plumbing & Heating Ltd. v. Marogna Bros. Enterprises Ltd.* (1988), 51 D.L.R. (4th) 13 (B.C.C.A.) and *Deal S.l.r. v. Cherubini Metalworks Ltd.*, [2001] B.C.J. No. 159 (B.C.C.A.).

[21] After reviewing the above authorities, the trial judge made the following findings of fact:

> (i) While the project included the construction of a new addition to the Dana plant in St. Marys which would accommodate the F150 assembly line, the steps taken on the site did not constitute an integrated construction project as alleged by the plaintiffs [appellants].
>
> (ii) Construction of the new addition was subject to the CLA as an improvement on the lands of Dana. The construction of the addition was commenced in December 2001 and completed in July 2002.
>
> (iii) Kennedy was neither involved in the construction of the new addition nor in the connection of the assembly line to the existing building services. These connections were made by other trades independent of the assembly line installation. Kennedy's work and that of its subcontractors related exclusively to the assembly line.
>
> (iv) The chronology of the work performed by Kennedy and its subcontractors was as follows:
>
> 1. Assembly and installation at the build sites from June to September, 2002.
> 2. Demonstration of operability of the line to Ford at the build sites on September 11.
> 3. Tear-down, labelling and packing of the line at the build sites in October and November, 2002.

4. First shipment of line parts from the build sites to St. Marys in October; last shipment to St. Marys in December.

5. Reassembly and installation in St. Mary's between October and December, 2002.

(v) The evidence established that the assembly line can be readily disconnected from the addition with virtually no damage to the addition and its services.

(vi) Dana had a history of moving some of its other assembly lines from one plant to another.

(vii) There are two other independent assembly lines in the new addition that were constructed entirely separately from the Kennedy assembly line by other contractors.

[22] After making the above findings of fact, the trial judge concluded as follows in paragraphs 116 and 117 of his reasons:

> On the evidence, I am driven to conclude that the assembly line for F150 frames cannot be considered as part of integrated construction improvement within the building addition, giving rise to lien rights, nor can it be considered alternatively as a free-standing improvement on its own within the *CLA* having regard to the principles arising from the decisional law in Ontario and the peculiar facts of this case. I conclude that the assembly line installation represented the installation of manufacturing equipment in a building but did not constitute an improvement or part of an improvement within the Act.
>
> In the result, I conclude that the claims of the plaintiffs are not lienable claims and must be discharged.

The Divisional Court

[23] O'Driscoll J., writing for himself and Wilson J. in the Divisional Court, observed that the appellants did not challenge any of the trial judge's findings of fact. He concluded that the trial judge had applied the correct law to his findings of fact and in the result dismissed the appeal.

[24] O'Driscoll J. relied upon two decisions of courts in British Columbia that were also cited by the trial judge. The first case, *Spears Sales & Service Ltd., supra*, involved

the repair of a pumping system in a fish plant. O'Driscoll J. referred to the following excerpt from the reasons for judgment of Boyle Co. Ct. J. at 198:

> Did the pumps become part of the realty? They may have so been intended as between this lessor and this lessee but that is not determinative.
>
> Based in considerable part upon the affidavit filed on behalf of Westpine, my original focus was upon the use of the building and the function of the business in the building. That function has been primarily fish packing. The pumping system is an integral part of that function.
>
> But the question must be answered by looking not to the parties but to the realty. The question is: are the pumps an integral part of the function of the building? The question does not concern the function of the business it houses (although buildings and improvements may function in specific ways to suit a business). The question because of its statutory basis must be answered in strict terms.
>
> In this light this pumping system is not an improvement. Judgment accordingly.

O'Driscoll J. also relied upon the following statement of Wetmore L.J.S.C. in *Chubb Security Safes, supra*:

> Equipment designed and used for the operations of the business within the structure, not integral to that structure, do not thus become "improvements".

[25] Chapnik J., in dissent in the Divisional Court, held that the trial judge had erred in "what he perceived to be the relevant case law." In particular, she found that the trial judge erred in making the following statement at para. 64 of his reasons for judgment:

> There is *appellate authority in Ontario* going back as far as 1952 in Ontario stating that the installation or repair of machinery used in a business operated inside a building does not give rise to lien rights. [Emphasis added by Chapnik J.]

Chapnik J. concluded at para. 55 of her reasons:

> As far as can be determined, there have been only a handful of reported decisions in Ontario since the 1952 decision in *Hubert v. Shinder*, [1952] O.J. No. 23 (C.A.) that even remotely touch on this issue, and they are not at the appellate

> level, nor do they stand for the proposition embraced by the trial judge.

[26] The dissenting judge cited a number of Ontario cases in support of her conclusion that the trial judge proceeded on an erroneous legal premise. See *Re IBL Industries Ltd.* (1990), 80 C.B.R. 20 (Ont. S.C. in Bankruptcy); *Baltimore Aircoil of Canada Inc. v. Process Cooling Systems Inc., supra*; *469804 Ontario Ltd. (c.o.b. Royal Plumbing & Heating) v. Ontario Hospital Association*, [1995] O.J. No. 957 (Gen. Div. – Master Clark); and *Wolfedale Electric Ltd. v. R.M.P.'s Systems Automation & Design Quality in Motion Inc.* (2004), 47 B.L.R. (3d) 1 (S.C.J.).

[27] The dissenting judge also distinguished this court's decision in *Central Supply Co. (1972) Ltd., supra*, on the basis that it dealt with a different issue – whether certain monies constituted trust funds under the CLA. She also concluded that *Hubert v. Shinder* was distinguishable from the case at bar on its facts and on the relevant provisions of the *Mechanics' Lien Act* when compared with the similar provisions in the CLA.

[28] The dissenting judge considered the cases in other jurisdictions cited by the trial judge and concluded that each was distinguishable from the case at bar. See *Beloit Canada Ltd., supra*; *Spears Sales & Service Ltd., supra*; and *Chubb Security Safes, supra.*

[29] It is apparent that the dissenting judge took a different view of the evidence than the trial judge and, in particular, questioned his "undue emphasis on the alleged *portability* of the assembly line components." [Emphasis in original.] In this respect, she said at paras. 101 and 102 of her reasons:

> It appears to me, however, that the learned trial judge placed undue emphasis on the alleged *portability* of the assembly line components, particularly where the evidence indicated that the cost to remove them would be enormous (over $10 million) and given that the intention of the parties was a projection of at least eight years of use. Moreover, the issue of permanence constitutes only one factor to be considered in the determination of whether a claim for lien exists, and permanence itself is a flexible term. See, for example, *Boomars, supra*. [Emphasis in original.]
>
> Finally, by concentrating on the matter of portability, Killeen J. may well have ignored important factors tending to show that the P221 project was viewed by the parties as a whole. For example:

1. The assembly line was included in the Target Agreement between Dana and Ford.
2. Dana issued purchase orders to Stantec to design the industrial building for expansion and to Rumble for the design, build and install of the assembly line on the same date, December 17, 2001. Moreover, though their work proceeded independently and at different times, both arms refer to the P221 Project.
3. Whereas the building expansion involved an expenditure of about $7 million, it cost approximately $44 million to design, build and install the assembly line.
4. The building designed for Dana was designed and built specifically to accommodate the assembly line.
5. All parties including Dana and Stantec knew that the purpose of the new building was to house the assembly line to manufacture frames for the F150 trucks.
6. Though the construction of the building was substantially complete when Kennedy and its subtrades began the installation of the assembly line at St. Mary's, a period of overlap existed where the building was completed and the assembly line was being installed in the St. Mary's plant. Indeed, at page 4 of his judgment, Killeen J. stated:

> The concrete history of the new F150 assembly line starts in the summer of 2002, roughly about the time of substantial performance of the building addition, although it is clear it was always part of the P221 Project or contract as far back as

> 2000. [Emphasis added by Chapnik J.]

[30] Chapnik J. also cited other evidence which she stated may have been ignored by the trial judge. She finished her review of the evidence as follows at para. 107:

> The assembly line, as constructed, was proposed to last about eight years. Its various components were attached to the floor and hooked up to services in a massive and secure manner. In my view, the facts can lead to no other conclusion but that there was such a degree of substantial attachment between the installation and the premises, specifically built for this purpose, that a reasonable person would consider the premises to have been improved as a result of the installation of the assembly line at St. Mary's.

[31] In completing her analysis, the dissenting judge concluded that, "the learned trial judge proceeded on a wrong principle and misapplied the law to the facts when he reached the conclusions he did." Relying on *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, she held that the trial judge's error "amounted to an extricable error in principle" which was subject to appellate review on a standard of correctness.

Kennedy's Appeal

[32] Counsel for Kennedy relies on the dissenting reasons in the Divisional Court and urges us to adopt them. He raises the following specific grounds of appeal:

(i) The trial judge and the Divisional Court majority failed to consider the purpose of the construction lien legislation.

(ii) The courts below erred in failing to find that Kennedy provided services and materials in respect of an improvement and is therefore entitled to lien rights.

(iii) The courts below erred in concluding that there is appellate authority in Ontario to support the proposition that the installation or repair of machinery used in a business operated in a building does not give rise to lien rights under the CLA.

(iv) The courts below erred in finding that the P221 Project assembly line was not sufficiently permanent to be an improvement.

(i) Did the trial judge and the Divisional Court majority fail to consider the purpose of the construction lien legislation?

[33] Counsel for Kennedy submits that the purpose of the CLA is to ensure that the owners of land do not receive the benefit of the labour of persons who performed work on their land but who are not in privity of contract with them without the protection of a construction lien. Counsel makes the general statement that in the absence of a lien right against Dana and given Rumble's bankruptcy, Kennedy is without a remedy.

[34] The courts below were called upon to consider whether on the facts before them, Kennedy and Cassidy were entitled to a lien within the provisions of the CLA. There is nothing that either the trial judge or the Divisional Court majority said in their reasons suggesting that they did not understand the purpose of the legislation. Indeed, the trial judge made specific mention of the purpose of the legislation by referring to the report of the Attorney General's Advisory Committee on the draft legislation and to this court's reasons for judgment in *Central Supply Co.*

(ii) Did the courts below err in failing to find that Kennedy provided services and materials in respect of an improvement and is therefore entitled to a lien?

[35] For convenience, I repeat the CLA definition of improvement. Section 1(1) provides that improvement means:

> (a) any alteration, addition or repair to, or
>
> (b) any construction, erection or installation on, any land, and includes the demotion or removal of any building, structure or works or part thereof, and 'improved' has a corresponding meaning.

[36] Counsel observes that the CLA defines land as including "works" but does not define "works". He then takes the definition of "works" from two legal dictionaries:

> (a) works. 1. A mill, factory, or other establishment for manufacturing or other industrial purposes; a manufacturing plant; a factory. 2. Any building or structure on land. (*Black's Law Dictionary*, 7th ed.)
>
> (b) works…2. Includes all property, buildings, erections, plant, machinery, installations, materials, dams, canals, devices, fittings, apparatus, appliances and equipment… (*Dictionary of Canadian Law*, 2d ed.)

[37] From the above, counsel submits that both definitions of "works" include factories and plants, including the machinery and installations, such as assembly lines, located

inside them. From that he reasons that the F-150 assembly line logically falls within the definition of improvement in the CLA.

[38] In support of this submission, counsel cites *Re A.G. Simpson Co.*, [2002] O.J. No. 262 (S.C.J.). Rumble, who was also a party in that case, had done some removal and demolition of parts of an assembly line and constructed and installed replacement parts. Rumble argued that "the equipment supplied comes within the definition of 'improvement under the Act and may be considered 'works' as that term is used in the definition, thereby entitling it to a lien." However, the court did not decide the issue. It was raised on a summary judgment motion and the motion judge concluded only that there was a genuine issue for trial. The fact that the motion judge found that there was a genuine issue for trial does not decide the issue. I do not find that *Re A.G. Simpson Co.* advances Kennedy's argument.

[39] As indicated above, counsel for Kennedy adopts the approach taken by the dissenting judge in the Divisional Court. In particular, he argues that the evidence at trial established that the assembly line was a "final and permanent structure which was an integral part of the addition." As a result, he submits that the building addition and the assembly line constituted one single "improvement".

[40] Counsel for Kennedy further submits that the case law[1] holds that the following factors are relevant to deciding whether an installation is an improvement:

(a) Does the installation form an integral part of the building's systems or components, notwithstanding that it could be removed?

(b) Was the installation done with "some idea of permanency"?

(c) Is it intended that the installation would remain in place so long as it can be used for its intended purpose or is economically viable?

(d) Is the installation connected to the property's utilities?

---

[1] See *Stacey Heating and Plumbing Supplies Ltd. v. Tamasi* (1988), 65 O.R. (2d) 481 at 490 (H.C.J.), revd on other grounds (1991), 6 O.R. (3d) 341 (C.A.); *Re IBL Industries Ltd., supra*; *469804 Ontario Ltd., supra*; *Boomars Plumbing & Heating Ltd., supra*.

(e) Can the installation be removed as a unit, or could it only be moved in pieces?

(f) Would re-assembling the installation be difficult, and would it depend on a suitable site being available?

(g) Has the building been designed especially to accommodate the item being installed?

[41] Counsel for Kennedy submits that a careful application of the above factors results in a finding that the P221 project constitutes an improvement under the CLA and gives rise to a lien in favour of Kennedy.

[42] Central to the dissenting judge's conclusion and to Kennedy's argument is that the trial judge erred in finding that the assembly line was portable. Indeed the dissenting judge referred to its "alleged portability". In my view, the finding of portability is a finding of fact and therefore on appellate review subject to a standard of palpable and overriding error. I do not agree that the trial judge committed palpable and overriding error in making this finding. There was evidence to support the finding. The assembly line had been built and disassembled before being transported to St. Marys for installation. The assembly line could be readily disconnected from the addition to the plant with no damage to the plant or its services. Moreover, Dana had a history of moving assembly lines from one plant to another. While a different judge may have come to another conclusion on the issue of portability, I am satisfied that it was open to the trial judge to reach the conclusion that he did.

[43] I also wish to address the dissenting judge's observation that the trial judge may well have ignored important factors tending to show that the P221 project was viewed by the parties as an integrated whole. I do not agree. The trial judge's reasons were thorough. He referred to factors that both favoured a finding that the building addition and the assembly were an integrated project and those that pointed in the other direction. In the end, he concluded that the two were not part of a single project. I am satisfied that this finding was open to him on the evidence.

(iii) Did the courts below err in concluding that there is appellate authority in Ontario to support the proposition that the installation or repair of machinery used in a business operated in a building does not give rise to lien rights under the CLA?

[44] In this branch of the argument, counsel for Kennedy, as did the dissenting judge in the Divisional Court, challenges the statement of the trial judge referred to above, which I repeat for the sake of convenience:

> There is appellate authority in Ontario going back as far as 1952 in Ontario stating that the installation or repair of

> machinery used in a business operated inside a building does not give rise to lien rights.

[45] It appears that the dissenting judge in the Divisional Court has taken this statement to mean that there is a line of Court of Appeal cases since *Hubert* in 1952 which stand for the above proposition. There is clearly no such line. Indeed, the trial judge, after citing *Hubert*, referred to the 1981 New Brunswick Court of Appeal case in *Beloit*. He did not refer to any other Ontario Court of Appeal case in support of this proposition. Reading his judgment as a whole, I conclude that the trial judge was saying no more than that the Court of Appeal adopted this proposition in *Hubert* in 1952. The question remains, however, whether the trial judge's assertion is correct insofar as it relates to *Hubert*.

[46] *Hubert* is a ten paragraph judgment. There were three issues in the appeal, only one of which relates to the issue before us. In *Hubert*, the claim for a lien under the *Mechanics' Lien Act*, R.S.O. 1950, related to the connection of laundry machinery to the water and sewage systems of a building. The machinery had originally been installed in the building but had been damaged by fire and had been taken off site for repair. In finding that there was no legitimate claim for a lien, the court said at page 147:

> The appellant next contended that the claims of the respondents Nesbitt and Erskine Smith & Company Limited are not for any work, service or material falling within the provisions of s. 5(1) of the Act. With great respect to the trial judge I am of the opinion that the evidence as to this particular work and the materials supplied does not support his finding that the same were such as to constitute a lien on the interest of the owner in the realty. While the building had been used for laundry purposes and was being so restored following a fire, nevertheless it is manifest from a perusal of the evidence that the work and material of these two claimants do not fall within the section of the Act establishing a lien.
>
> The work and materials supplied by the respondent Nesbitt were performed and supplied jointly if not solely in the rehabilitation of the laundry machinery which had previously been installed in the building and which was damaged by the fire. This work was in the main completed off the premises in question. The claim of the respondent Erskine, Smith & Company Limited was for attaching the laundry machinery to the water and sewage systems already installed in the building on the premises. It was not a part of or an improvement to the building so as to constitute a lien. In this regard I respectfully

> believe the learned trial judge was in error. In my opinion the evidence clearly supports the contention that the materials supplied and the work in the installation of such materials were respectively moveables and work in the installation of moveables and neither could be classed as "used in the making, constructing, erecting, fitting, altering, improving or repairing of" the erection or building in question, as provided in s. 5(1).

[47] Section 5(1) of the *Mechanics' Lien Act* provided:

> …any person who performs any work or service upon or in respect of, or places or furnishes any materials to be used in the making, constructing, erecting, fitting, altering, improving or repairing of any erection, building, railway, land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation, fence, sidewalk, pavement, fountain, fishpond, drain, sewer, aqueduct, road-bed, way, fruit or ornamental trees, or the appurtenances to any of them for any owner, contractor, or subcontractor, shall by virtue thereof have a lien for the price of the work, service or materials.

[48] It is not difficult to distinguish *Hubert* and the other cases relied upon by the trial judge from the case at bar both on the facts and in respect of the relevant statutory provisions where a different statutory provision is in issue. That said, what emerges from the brief reasons of the *Hubert* case is that a mechanics' lien will not arise where the work and materials have been applied in respect of an installation that is moveable (i.e. portable) and not an integral part of the building. A moveable installation does not improve the building in which it is located as it does not become a part of the building.

[49] A useful case that gives support to this approach is the judgment of this court in *A.J. (Archie) Goodale Ltd. v. Risidore Brothers Ltd.* (1975), 8 O.R. (2d) 427 where Howland J.A. said in *obiter* at p. 432:

> In the present case Goodale alleged in its statement of claim a contractual obligation on its part to take apart, remove and transport all the machinery, equipment and chattels from Valve's premises in Dundas to the Richmond Hill lands where they were to be installed. The work of installation might have been sufficiently extensive in scope to constitute improving the plant so as to give rise to a claim for lien. It was only after the evidence was heard by the Master that it was determined that the work was not such as would give rise

> to a claim for lien, but constituted work in the installation of moveables. In this respect it is similar to *Hubert v. Shinder*, *supra*, where a personal judgment was granted in parallel circumstances.

[50] I would hesitate to derive from *Hubert* the general proposition articulated by the trial judge. I think it is too broad. Each case will depend on its facts. In most cases, the installation or repair of machinery used in a business operated in a building, particularly where the machinery is portable, will not give rise to lien rights under the CLA. On the other hand, where machinery is installed in a building for the use of a business and is completely and permanently integrated into the building, a lien claim will arise. However, based on the findings of fact made by the trial judge in this case, it was open for him to find that no lien claim arose.

[51] Counsel for Kennedy submits that the majority of decisions dealing with lien rights in respect of the installation or repair of machinery used in a business support Kennedy's position. He referred to the following cases:

(i) *Re IBL Industries Ltd., supra* – supply of parts for an emission control system;

(ii) *Stacey Heating and Plumbing Supplies Ltd. v. Tamasi* (1988), 65 O.R. (2d) 481 – the installation of two air conditioning units placed on a roof of a building and connected to the duct work;

(iii) *Stirn v. Vancouver Arena Co. Ltd.*, [1932] B.C.J. No. 72 (Co. Ct. Vancouver) – a temporary race track installed in an arena for a six-day bicycle race;

(iv) *V.A.W. Manufacturing Ltd. v. Electric Furnace Products Company Ltd.*, [1984] A.J. No. 892 (Q.B. Master) – the supply of nuclear vane separators and related equipment for an ethylene glycol process-sing plant; and

(v) *Wolfedale Electric Ltd., supra* – electrical work on a scrap shuttle car which enabled a rail system to function.

[52] My review of the above cases and indeed a number of the other cases cited by counsel on both sides of this issue is that they are fact-driven. Whether they fall within the definition of improvement is essentially a fact-finding exercise. While a trial judge must apply the statutory definition of "improvement" to the evidence and he or she is

therefore engaged in deciding a question of mixed fact and law, the factual determination is by far the more significant element in the exercise.

[53] Although I have said that the trial judge's articulation of the law from *Hubert* and other cases is too broadly stated, I do not conclude that he committed reversible error. His detailed review of the evidence and resulting findings of fact support his conclusion that the F-150 assembly line did not meet the definition of an improvement under the CLA. In my view, based on those findings of fact, he was justified in reaching the conclusion that he reached.

(iv) Did the courts below err in finding that the P221 project assembly line was not sufficiently permanent to be an improvement?

[54] This branch of the argument appears to flow directly from the discussion concerning portability. Counsel for Kennedy cites two British Columbia Court of Appeal cases in respect of the permanency factor. In *Boomars Plumbing & Heating Ltd., supra*, the court held that modular units previously used in construction camps and installed on vacant land for use as a motel constituted improvements under the B.C. legislation. The units were installed without any foundation and secured by their own weight. In discussing the issue of permanency, the court said:

> "permanent" is a relative term which does not necessarily involve remaining in the same state and place forever or for an indefinitely long period. It is used in contradistinction to "occasional". If the thing is intended to remain in place so long as it serves its purpose, that satisfies the element of permanency.

[55] In the second case, *Deal S.r.l., supra*, the court held that the supply of moulds that were used to form concrete components for a rapid transit project constituted an improvement and that the material supplier had a right to claim a lien. In addressing the issue of permanency, the court said:

> Moreover, it is clear that the moulds were intended to be in place for at least the duration of the project which, in the context of this case and the purpose of the moulds and the shed, is a substantial time sufficient to satisfy the requirements of the definition.

[56] Counsel for Kennedy submits that the definition of "improvement" in the B.C. statute is narrower than the Ontario definition yet the court was able to find in both the above cases that lien rights attached to these installations.

[57] Counsel for Kennedy also relies on the following excerpt from *Construction Lien Remedies in Ontario* (2d ed.), by Kevin Patrick McGuiness at pp. 62-63:

> Moreover, there is case law which clearly suggests that the permanence of a structure erected or installed is only one of a number of criteria that may be considered in deciding whether a premises has been improved. Thus it has been held that the mere fact that a building or structure may be removed in some way is not in itself sufficient to prevent its construction from being considered to be an improvement. Modern engineering techniques permit virtually every structure to be removed from one site and re-assembled elsewhere. The key question in many cases is to decide whether the installation of a particular thing has caused a sufficient change to be made to the premises so that its installation has enhanced the value, beauty or utility of the premises itself. The fact that the thing installed has not become completely or irreversibly affixed to the land on which it sits is not necessarily conclusive of the question of whether the premises have been improved (although the installation of a fixture will clearly give rise to a lien). The court may also consider whether there is such a degree of substantial attachment between the thing installed and the premises on which the installation was made, that a reasonable person would consider the premises to have been improved as a result of the installation. Although this is a difficult test to satisfy, provided it is satisfied then even a temporary structure may be seen to constitute an improvement. [Footnotes omitted.]

[58] At the risk of repeating myself, what I take from both the B.C. cases and the excerpt from the learned author is that the approach to what is or is not an improvement essentially involves a fact finding exercise.

[59] I would not give effect to this ground of appeal.

Cassidy's Appeal

[60] Counsel for Cassidy raises essentially the same arguments as does counsel for Kennedy. In addition to the many authorities cited by counsel for Kennedy, counsel for Cassidy relies upon a critique of the trial judge's decision contained in a paper by John Margie & Martin Rotterdam, "Recent Developments in Construction Lien Law", presented to the Ontario Bar Association – Continuing Legal Education, October 7, 2005. The authors of the paper give the following critique of the trial judge's decision at pages 6 and 7:

> The *Kennedy* decision is problematic. The main problem is the court's refusal to regard the entire project as an integrated project. While it may very well be true that the building addition that housed the line would not be damaged if the line were removed, the fact is that without the line, the building itself would be useless and be of no value. The building was built for the sole purpose of housing the line. While it would surely constitute an "improvement" with the line in it, it would be nothing but an empty shell without it. There is a world of difference between installing an immensely complex robotic assembly line in a building built specifically for that purpose and repairing and reinstalling washing machines which had been previously installed in a building, as was the case in *Hubert v. Shinder*, the Ontario Court of Appeal case relied upon by the court in *Kennedy*. In *Beloit*, another case relied upon by the court, it was held that there was no evidence that the machine in question was furnished with the intention that it form part of the building. Again, in *Kennedy*, not only was the line supposed to form part of the building, the sole purpose of the building was to house the line. Why then differentiate between the two? Why not treat it as an integrated project?
>
> As for the argument that the line was intended solely to enhance the manufacturing process or used solely for the operation of a business inside the building, is the same not true for the building addition itself? Presumably, any commercial project is built for the operation of a business. What about work done by or on behalf of a commercial tenant? Under standard leases, upon termination of a lease, a tenant has to leave the premises behind as they were when the tenant first moved in. The sole purpose of work done by tenants is to improve the operation of the business conducted inside the building. Should such work therefore generally be unlienable?

[61] When the authors of the above paper say that the main problem is the court's refusal to regard the entire project as an integrated project they are, in effect, saying that the trial judge made an error in his finding of facts. As I have already said, I am satisfied that the trial judge was justified in making such a finding even though another judge may have come to a different conclusion. As an appellate court, we are bound by a long line

of cases, including *Housen*, *supra*, that prevents us from interfering with findings of fact by a trial judge, or indeed findings of mixed fact and law, in cases such as this, unless we can find palpable and overriding error.

[62] I do not agree with the authors of the paper when they say that the building addition would be useless and of no value without the F-150 assembly line. There is simply no evidence to support that conclusion. The suggestion that without the assembly line, the building would be nothing but an empty shell is mere speculation. Dana has been involved in the automobile manufacturing business for many years and is presumably in a position to use the building addition for other purposes if it decides to do so.

[63] In the second paragraph of the above quotation the authors of the paper appear to suggest that the trial judge's theory concerning the lienability of machinery used in a business is too broadly stated. In my view, they carry the analysis beyond the point suggested by the trial judge when they apply it to the building itself. However, as I have said, I accept that the trial judge's theory is too broadly stated. I have also said that in this case, given the findings of fact of the trial judge, I cannot conclude that the trial judge erred in the result.

[64] Counsel for Cassidy advances one additional argument. He submits that the work that Cassidy did in St. Marys is traditionally lienable work and, even though Cassidy did this work as a subcontractor of Kennedy, it should be entitled to a construction lien irrespective of the entitlement of Kennedy.

[65] The lienable work that Cassidy refers to is the supply and installation of 2,000 to 3,000 chemical and mechanical anchors to the floor. In addition, Cassidy painted lines on the floor to establish the location of the assembly line within the building. Counsel further submits that its work physically altered the building and constituted an "improvement" under the CLA.

[66] Counsel for Dana responds to the above argument by referring to the evidence of the president of Cassidy who, in cross-examination at trial, testified that in its subcontract work it neither altered the building nor modified the floor.

[67] In my view, the work carried out by Cassidy was part and parcel of the work carried out by Kennedy and I see no basis to treat it any differently. I would not give effect to this argument.

Disposition

[68] For the reasons above, I would dismiss both appeals.

Costs

[69] I would award costs in favour of Dana for the motions for leave to appeal and the appeals on a partial indemnity scale fixed in the total sum of $18,500 inclusive of disbursements and GST. The appellants shall each be responsible for fifty per cent of the costs.

RELEASED:

"SEP 27 2007" "Robert P. Armstrong J.A."
"DOC" "I agree Dennis O'Connor A.C.J.O."
"I agree R.G. Juriansz J.A."

TAB 3

CITATION: *On Point Ltd. v. Conseil des Écoles Catholiques du Centre Est et al.*, 2023 ONSC 1341
COURT FILE NO.: CV-19-82179
DATE: 2023/03/20

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **OnPoint Group Ltd.**, Plaintiff (Responding party)

and

Conseil Des Écoles Catholiques du Centre Est, Defendant (Moving party)

Ty Corp. Construction, Defendant

and

Multi-Service Restoration and Provision Construction Management Inc., (Intervening Parties)

BEFORE: Justice A. Doyle

COUNSEL: Ronald Peterson, Counsel for the Plaintiff, OnPoint Group Ltd.

Ronald Caza, Counsel for the Defendant, Conseil des Écoles Catholiques du Centre Est

No one appearing for the Defendant, Ty Corp. Construction

Noémie Ducret, Counsel for the Intervening Parties

HEARD: February 6, 2023 at Ottawa

DECISION ON A SUMMARY JUDGMENT MOTION

Overview

[1] This summary judgment motion was brought by the defendant Conseil des Écoles Catholiques du Centre ("CECCE") to determine whether the portable school classrooms ("portables") built by the plaintiff OnPoint Group Ltd. ("OnPoint") are "improvements" within the meaning of the *Construction Act*, R.S.O. 1990, c. C.30, (the "*Act")* and therefore engage the lien provisions of the *Act.*

[2] Given the common questions of law and fact between this proceeding and the CECCE's motion for summary judgment in the intervening parties' file, the court permitted the intervening parties to participate in this hearing pursuant to r. 13.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and on consent of the parties. The intervening parties Multi-Service Restoration ("MSR") and Provision Construction Management Inc. ("PCM") can contribute to this hearing because they built similar portables for the CECCE.

[3] The CECCE also requests that OnPoint's claim be dismissed because there is no basis for a claim for unjust enrichment.

Background

What are Portables?

[4] Generally speaking, portables are buildings located outside the school building which serve as classrooms for teachers and students. They have the following characteristics:

- They have electricity, internet connectivity, ventilation, windows, and insulation in the floor, walls and ceilings;
- They are connected to the school's public announcement system; and
- They do not have washrooms or running water.

[5] As of August 31, 2021, CECCE was the owner of approximately 133 portables that were available to the schools under its control.

[6] Every summer, for the past decades, the CECCE relocates portables depending on the student registration for the upcoming school year.

[7] The CECCE considers several factors when determining the location of the portables including new schools, renovation of a school, expansion of a school and change of school boundaries.

[8] The CECCE must have a good inventory of portables to rapidly respond to changes in student populations and to transfer portables from one school to another or move a portable to storage.

[9] Portables can be transported from one school to another as one unit or in two halves.

OnPoint Portables

[10] On July 26, 2019, the CECCE hired the defendant Ty Corporation ("Ty Corp") to construct and install 14 school portables at the cost of $869,000 plus HST after the original contractor failed to build the portables. Time was of the essence because the school year would commence in September 2019.

[11] CECCE paid Ty Corp the amount of $1,056,048.80 for the portables which included changes to the original contract.

[12] Ty Corp hired OnPoint to build the portables for a contract price of $759,000.

[13] The procurement process for the contract to build portables (2019DIV-063) was initiated in January 2019 and included a defined term for the building and delivery of the portables. The contract provided a schedule with a list of possible destinations for the classrooms. Bidders were asked to provide a price for the delivery of the portables to and around the Ottawa area schools.

[14] OnPoint commenced building the portables in Vars. Another contractor transported the two halves of the portables to the Paul Desmarais school site ("school site").

[15] At the school property, the portables were placed by another contractor arranged by Ty Corp. on a temporary foundation (stilts). Temporary foundations include a paved surface such as a parking lot, an exterior sport field or a courtyard. The portable remained at the temporary foundation until the installer moves it and sets it up on a more permanent base.

[16] OnPoint connected the two halves of the portables and another contractor arranged by Ty Corp. moved them to their final resting spot. The roofing, siding, stairs, landing and window casings were then completed by OnPoint.

[17] The portables are constructed in accordance with plans and specifications prepared by architects and engineers (A100 and S300). The plans are based on construction drawings approved by the City of Ottawa and in accordance with the Ontario Building Code.

[18] The City of Ottawa approved the construction plans and it conducted regular inspections. The work was also regularly inspected by architects and engineers.

[19] Ty Corp did not complete all of the portables required by the contract and CECCE ended their contract with Ty Corp on August 13, 2020.

[20] On September 28, 2020, the CECCE hired MSR to complete the four remaining portables for the amount of $380,000.

[21] OnPoint was not fully paid by Ty Corp, and it filed a lien for $241,123.99 on the property of Paul Desmarais school.

[22] On June 4, 2020, OnPoint obtained judgment against Ty Corp for $241,123.99 plus interest and costs. The total amount outstanding as of June 19, 2022 was $405,265.83.

[23] The CECCE held back certain funds that were due to Ty Corp. The court notes that Luc Poulin, the CECCE's manager of buildings, indicates that the monies were actually held back for a warranty and not for the purpose of complying with the *Act*. In his discovery, Mr. Poulin indicated that it was to make sure that the work was done with the right quality.

[24] Further liens were filed on behalf of Pro-Fuzion Electrik Inc. in the amount of $195,000 and by 10597503 Canada Inc. for $36,880.

PCM Contract

[25] On September 10, 2019, PCM entered into a subcontract agreement with Ty Corp to complete the construction of nine of the 14 portables. PCM and MSR partnered to complete and finance the construction and delivery of the four remaining portables, and agreed to complete future work awarded by the CECCE.

[26] This subcontract concerned the construction of the portables that were not completed by OnPoint.

[27] As of February 2020, PCM has only received $39,000 of the $166,328.30 owed under the PCM contract.

[28] On July 29, 2021, PCM and MSR commenced an action against the CECCE and its representative requesting damages for breach of contract, unjust enrichment and/or breach of duty of good faith and damages for failure to comply with s. 39 of the *Act*.

Position of CECCE

[29] CECCE submits that this an appropriate case for summary judgment because the issue can be determined on the record filed by the parties. Summary judgment will dispose of the total action.

[30] It requests that the lien registered by OnPoint on the Paul Desmarais school be removed because the portables constructed are not improvements within the meaning of the *Act*.

[31] CECCE submits that the jurisprudence supports their position that portables, which are created as temporary solutions to fluctuating increases of student population, are not improvements within the meaning of the *Act*. When a portable is no longer required due to a decrease of student population, it is removed from the property.

[32] In addition, OnPoint has failed to present evidence that there has been unjust enrichment.

Position of OnPoint

[33] OnPoint submits that there is a genuine issue requiring a trial and that material facts are in dispute. The CECCE failed to admit many facts set out in the Request to Admit, including why CECCE held back 10% claiming it was for the purposes of the warranty rather than the *Act* requirements. CECCE failed to provide any evidence of engineers and architects who could have assisted the court with respect to the construction of the portables.

[34] The intent of the *Act* is to prevent owners of land from receiving benefits of buildings erected and work done on their land at their instance without paying. The portables are capital

repair within the meaning of an improvement. It is intended to extend the normal economic life of the land or of the building. It is not maintenance work designed to prevent the normal deterioration of the land, building, structure or works.

Position of the Intervening Parties

[35] The intervening parties are involved in another action which shares similar facts as they relate to the portables built for CECCE. The issues in their case also deal with the question of whether portables are "improvements" under the *Act*.

[36] The portables completed by MSR and PCM in their contract were a result of OnPoint not completing all of their portables in its contract with Ty Corp.

[37] They submit that the portables installed on CECCE school premises have improved the value and productivity of the land and are substantially attached to the premises on which they were installed. A summary judgment should issue finding that the portables built were "improvements" within the meaning of the *Act.*

Legal Framework

Introduction

[38] Construction liens are charges against interests in land and premises and are governed by the *Act*. Construction liens provide contractors and other parties to the contract protection for payment for materials and/or services provided on a construction project.

[39] A review of the legislative framework, the historical developments, external sources and case law is set out below. One of the objectives of the *Act* is to allow those who complete work on a property to make a claim against the property owner, a non-contracting party. However, their work must meet the definition of "improvement" as defined in the *Act.*

[40] As stated in *Scott, Pichelli & Easter Limited v. Dupont Developments Ltd*., 2022 ONCA 757, at paras. 8-9:

> The interpreter's task in statutory interpretation is to discern the legislature's intention in order to give effect to it. The interpreter must attend to text, context, and purpose, to which I now turn: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at paras. 117, 118-124.
>
> The purpose of the *Construction Act* is to protect lien claimants by ensuring that they are compensated for the increase in the value of a property to which their work contributed.

[41] The determination of whether a portable is an 'improvement' is a fact driven exercise. Has there been "value added" to the property?

Legislation

[42] Section 1 of the *Act* reads:

> "improvement" means, in respect of any land,
>
> (a) any alteration, addition or capital repair to the land,
>
> (b) any construction, erection or installation on the land, including the installation of industrial, mechanical, electrical or other equipment on the land or on any building, structure or works on the land that is essential to the normal or intended use of the land, building, structure or works, or
>
> (c) the complete or partial demolition or removal of any building, structure or works on the land; ("améliorations").

Extrinsic Sources

[43] In *Bristol-Myers Squibb Co. v. Canada*, 2005 SCC 26, [2005] 1 SCR 533, at para. 156, the Supreme Court spoke of aids to statutory interpretation:

> It has long been established that the usage of admissible extrinsic sources regarding a provision's legislative history and its context of enactment could be examined. I held in *Francis v. Baker*, at para. 35, that "[p]roper statutory interpretation principles therefore require that all evidence of legislative intent be considered, provided that it is relevant and reliable." Consequently, in order to confirm the purpose of the impugned regulation, the intended application of an amendment to the regulation or the meaning of the

> legislative language, it is useful to examine the RIAS, prepared as part of the regulatory process (see Sullivan, at pp. 499-500). McGillis J. in *Merck 1999*, at para. 51, indicated:
>
> > . . . a Regulatory Impact Analysis Statement, which accompanies but does not form part of the regulations, reveals the intention of the government and contains "…information as to the purpose and effect of the proposed regulation".

[44] In the *Annotated Ontario Construction Act* by Duncan W. Glagol and David Keeshan (Thomson Reuters, 2021) at page S.1 at para. 4, the authors describe the history:

> Since 1896, "materials" have been defined to include "every kind of movable property". Subsection 6(1) of the *Mechanics' Lien Act*, R.S.O. 1980, c. 261 further indicated that, to be the subject matter of a lien, "material" had to "plac[ed] or furnish[ed]….to be used" in an improvement. Courts sought some *nexus* between the materials and the improvement, but often did so in a contradictory manner.

[45] The Official Report of Debates (Hansard) of Tuesday August 3, 2010, of the Standing Committee on Finance and Economic Affairs discussed the amendment made to the *Construction Act* as a result of the Ontario Court of Appeal's decision in *Kennedy Electric Limited v. Dana Canada Corporation*, 2007 ONCA 664, 285 D.L.R. (4th) 466, that the work done in that case was not lienable.

[46] At page F-148 Mr. Ron Johnson, Representative for Council of Ontario Construction Associations (COCA) states:

> This proposed amendment would restore fundamental rights for a great many contractors to get paid monies owed to them for work already completed. Despite the merits of this proposed amendment, it will, however only serve a narrow selection of tradespeople within the construction industry and frankly would only address the symptom of the greater problem confronting Ontario's construction industry. Many contractors are not paid in full for their work, and as a result, are subjected to undue and unjust economic hardship. COCA is hopeful that the government remains open to amending this legislation to include provisions that would further change the Construction Lien Act to include (1) the timely release of holdback monies to contractors and (2) the assurance of the preservation of their lien rights until such monies are paid.

[47] At A-194 Mr. Charles Sousa's questions were: "One is, what impact will the amendment to the definition of "improvement" have on your members? And the other one would be, could you elaborate then on how these amendments would be good for business in Ontario?".

[48] In responding to Mr. Sousa's questions, Mr. Ron Johnson stated:

> The definition of "improvement" is an important amendment and we're not going to minimize the value of that amendment that you guys have put into this bill. It's significant to a number of contractors who work primarily in the electrical or mechanical sectors. It does, however, in terms of the overall package of amendments that you've proposed, fall short on a number of fronts. You have, as a government failed to address the holdback issue, which is of great concern to the broader construction sector.
>
> The definition of "improvement", although valuable, affects a small percentage of those who actually have to utilize the Construction Lien Act. A lot of contractors and various other trades within construction don't really require or need the definition of "improvement" to be changed. It only affects a couple of trades.

[49] In *Conduct of a Lien Action* (Toronto: Carswell, 2012), at p. 26, the author Duncan W. Glahol states:

> While the supply and installation of moveable items such as office furniture will not give rise to a lien, mere attachment to the land does not automatically make a supply lienable. Courts have held that water cooling towers, for example, even though physically attached to the premises, did not give rise to a lien, while a complex air conditioning unit has been held to be lienable, even though it could be removed. Supply and installation of portable structures such as trailers resting on concrete pads without being connected to the land does not give rise to a lien. Until recently, even the supply and installation of massive machines or entire plants weighing millions of tons did not create lien rights if they were neither a component of the building nor consumed in the construction of the building. However, the definition of "improvement" in the Ontario Act was amended in 2010 to include such installations. Presumably, under the new definition , the work held not to be lienable in cases such as Kennedy Electric would be lienable under the new definition. [Footnotes omitted.]

[50] Kevin Patrick McGuiness notes the following in *Construction Lien Remedies in Ontario*, 2nd ed. (Scarborough: Carswell, 1997), , at pp. 62-63:

> Moreover, there is case law which clearly suggests that the permanence of a structure erected or installed is only one of a number of criteria that may be considered in deciding whether a premise has been improved. Thus, it has been held that the mere fact that a building or structure may be removed in some way is not in itself sufficient to prevent its construction from being considered to be an improvement. Modern engineering techniques permit virtually every structure to be removed from one site and re-assembled elsewhere. The key question in many cases is to decide whether the installation of a particular thing has caused a sufficient change to be made to the premises so that its installation has enhanced the value, beauty or utility of the premises itself. The fact that the thing installed has not become completely or irreversibly affixed to the land on which it sits is not necessarily conclusive of the question of whether the premises have been improved (although the installation of a fixture will clearly give rise to a lien). The court may also consider whether there is such a degree of substantial attachment between the thing installed and the premises on which the installation was made, that a reasonable person would consider the premises to have been improved as a result of the installation. Although this is a difficult test to satisfy, provided it is satisfied then even a temporary structure may be seen to constitute an improvement. [Footnotes omitted.]

Case Law

[51] In *Kennedy Electric*, the Ontario Court of Appeal dismissed an appeal where the trial judge held that the work completed was not lienable under the *Act*. Although subsequent amendments to the *Act* would now render this work an "improvement" under the *Act*, the Court of Appeal's analysis provides guidance.

[52] The project in *Kennedy* involved the plaintiff's construction of a new addition to accommodate an F-150 truck frame assembly line which took six months to build. The plaintiff was not involved in the construction of the new addition nor in the connection of the assembly line to the existing building services. These connections were made by other trades independent of the assembly line installation.

[53] The fully installed assembly line consisted of 100 mezzanine platforms and 165 robots. The assembly line was attached to the floor by a system of some 2,000 to 3,000 mechanical and chemical bolts ranging from one-quarter to three-eighths of an inch in diameter and from six to eight inches in length. The assembly line covered approximately 100,000 square feet of the new addition. It was twenty feet high and weighed approximately 500,000 tons.

[54] The new addition also housed two other assembly lines that were installed by other companies and used to supplement the production of the F-150 truck frame line. These two lines were involved in the electronic painting, waxing and stacking of the F-150 frames.

[55] The work of the plaintiff and its subcontractors related to the following:

1. Assembly and installation at the build sites;
2. Demonstration of operability of the line to Ford at the build sites;
3. Tear-down, labelling and packing of the line at the build sites;
4. Shipment of line parts from the build sites; and
5. Reassembly and installation.

[56] The Court of Appeal's review of the trial decision and the leading cases, at paras. 15-20, is instructive:

> The trial judge conducted a thorough review of the authorities that related to the issue before him. He started by considering the Supreme Court of Canada's approach to the interpretation of the predecessor *Mechanics' Lien Act*, R.S.O. 1960, c. 233. In *Clarkson Co. Ltd. v. Ace Lumber Ltd.*, 1963 CanLII 4 (SCC), [1963] S.C.R. 110 at p. 114, Ritchie J. quoted with approval the dissent of Kelly J. in *Ace Lumber Ltd. v. Clarkson Co. Ltd.*, [1960] O.R. 748 at 757-58 as follows:
>
> > With the greatest respect, I am, however, of the opinion that the proper approach to the interpretation of this statute is expressed in the dissenting opinion of Kelly J.A. where he says that:
> >
> > The lien commonly known as the mechanics' lien was unknown to the common law and owes its existence in Ontario to a series of statutes, the latest of which is R.S.O. 1960, c. 233. It constitutes an abrogation of the common law to the extent that it creates, in the specified circumstances, a charge upon the owner's lands which would not exist but for the Act, and grants to one class of creditors a security or preference not enjoyed by all creditors of the same debtor; accordingly, while the statute may merit a liberal interpretation with respect to the rights it confers upon those to whom it applies, it must be given a strict interpretation in determining whether any lien-claimant is a person to whom a lien is given by it.

The trial judge also referred to the report of the Attorney General's Advisory Committee on the Draft Construction Lien Act of April 8, 1982 and in particular the definition of the word "improvement" in the proposed legislation:

> The definition of the term improvement has been redrafted to make it clear which types of work on land gives rise to a lien. The purpose of the Act is to protect those who contribute their services or materials towards the making of an improvement to premises. The types of work which constitute an improvement are set out in clauses a and b. While the definition of "improvement" is broad, the Committee has attempted to draft it in such a way that it will be clear that the lien created by the Act applies only in the case of the construction and building repair industries. [Emphasis added by Killeen J.]

The trial judge also cited the decision of this court in *Central Supply Co. (1972) Ltd. v. Modern Tile Supply Co. Ltd.* (2001), 2001 CanLII 5037 (ON CA), 55 O.R. (3d) 783 at para. 15 where Abella J.A. said:

> The purpose of the definition of "improvement", as set out in the *Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act*…was "to protect those who contribute their services or materials towards the making of an improvement to a premises". The report also stressed that while the definition of improvement was a broad one, it was drafted to make it clear that the lien created by the Act applied "only in the case of the construction and building repair industries."

The trial judge also relied upon *Hubert v. Shinder*, [1952] O.W.N. 146 (C.A.). In that case, this court considered whether the repair and installation of laundry equipment in a building was covered by the *Mechanics' Lien Act*. The court held that the laundry machinery was "not part of or an improvement to the building so as to constitute a lien."

The trial judge referred to the judgment of the New Brunswick Court of Appeal in *Beloit Canada Ltd. v. Fundy Forest Industries Ltd.* (1981), 1981 CanLII 2865 (NB CA), 127 D.L.R. (3d) 320 which he found "followed basically the same rationale as the Ontario Court of Appeal did in *Hubert*." In *Beloit*, the court found that a corrugating paper machine which weighed 2,500,000 pounds installed on a concrete foundation in a building but removable from it was not an improvement under the *Mechanics' Lien Act*, R.S.N.B. 1952, c. 142 [now R.S.N.B. 1973, c. M-6].

> The trial judge also considered the judgment of Rosenberg J. in *Baltimore Aircoil of Canada Inc. v. Process Cooling Systems Inc.* (1993), 1993 CanLII 5496 (ON SC), 16 O.R. (3d) 324 (Gen. Div.). In that case, Rosenberg J., on a motion for summary judgment, found that the CLA did not apply to the installation of a water tower which was attached to the roof of a building. He found that it was not incorporated into the building. The Court of Appeal reversed the judgment on other grounds.

[57] The case of *Spears Sales & Service Ltd*. (1995), 17 C.L.R. 197 (B.C. Co. Ct.) considered whether pumps were an integral part of the function of the building. The court held that this question must be answered in strict terms because it is based on statute. This question did not concern the function of the business it housed, and it was held that the pumping system was not an improvement. The intention of the parties was not determinative.

[58] Wetmore L.J.S.C. in *Chubb Security Safes v. Larken Industries Ltd.* (1990), 36 C.L.R. 225, stated that:

> Equipment designed and used for the operations of the business within the structure, not integral to that structure, do not thus become "improvements".

[59] In *Boomars Plumbing & Heating Ltd. v. Marogna Bros. Enterprises Ltd.* (1988), 51 D.L.R. (4th) 13 (B.C.C.A.), the court held that modular units previously used in construction camps and installed on vacant land for use as a motel constituted improvements under the B.C. legislation. The units were installed without any foundation and secured by their own weight. In discussing the issue of permanency, the B.C. Court of Appeal said:

> "permanent" is a relative term which does not necessarily involve remaining in the same state and place forever or for an indefinitely long period. It is used in contradistinction to "occasional". If the thing is intended to remain in place so long as it serves its purpose, that satisfies the element of permanency.

[60] In *Deal S.r.l. v. Cherubini Metal Works Limited*, 2001 BCCA 49, 84 B.C.L.R. (3d) 179, the court held that the supply of moulds that were used to form concrete components for a rapid transit project constituted an improvement and that the material supplier had a right to claim a lien. In addressing the issue of permanency, the court said:

> Moreover, it is clear that the moulds were intended to be in place for at least the duration of the project which, in the context of this case and the purpose of the moulds and the shed, is a substantial time sufficient to satisfy the requirements of the definition.

[61] In *520271 Ontario Inc. v. Guest*, 2006 CarswellOnt 8868 (S.C.), the court held that although electrical work completed benefited the lease holder's interest by making the premises more conducive to a veterinary practice, it did not increase the value of the property and was not a lienable interest.

[62] In *Hank's Plumbing and Gas Fitting Ltd. v. Stanhope Construction Ltd*. (1978), 18 A.R. 417, the plaintiff performed work on modular homes that were constructed at the defendant's factory. The Alberta District Court held that the plaintiff's services were not lienable because the modular homes had "all the attributes of a chattel, and no 'interest in land' could be passed to a purported lienor under the *Builders' Lien Act*." The homes were essentially finished in the factory, left the factory in two pieces and were assembled at their ultimate destination. The plaintiff only performed work on the homes in the factory.

[63] Key to the court's conclusion was the fact that the owner of the homes could direct where the home would be installed. In other words, the homes had no connection to specific land and could be moved at the owner's direction.

[64] The court found that the *Builders' Lien Act* did not apply because a completed unit was purchased, and the location of the home was in the purchaser's sole discretion. The court placed substantial emphasis on the fact that when the work was completed there was no certainty as to where it was going to be located: at para. 11. The court noted that the defendant purchaser testified that they believed they "bought a finished product": at para. 13.

[65] The same conclusion was reached by the Ontario Supreme Court's bankruptcy division in *Inesco Ltd (Trustee of) Re.*, [1986] O.J. No. 2153. *Inesco* concerned portable schoolrooms which were fully constructed off-site and delivered finished to the site. The portable schoolrooms were found to be self-contained units capable of being moved from place to place and thus, resembled chattels. At para. 3, Hollingworth J. stated:

> In the normal course the schoolrooms would have been assembled by the debtor and moved to a site stipulated by the Board. In the normal course the schoolrooms were delivered completely finished and installed in cement blocks which rest on cement pads. With one exception the schoolrooms were not manufactured for a specific site. The debtor was notified of the site by the Board prior to installation. The schoolrooms included equipment necessary to hydro hook-up but the actual hook-up was done by the Board. The schoolrooms had no water or sewage facilities and finally the schoolrooms are basically self-contained units which can be moved from place to place like a house trailer or a mobile home.

[66] The court referred to the definition of improvement within the meaning of s. 8 of the *Construction Lien Act*, S.O. 1983, c. 6. Under s. 8, an improvement was defined as follows:

> i. any alteration, addition or repair to, or
>
> ii. any construction, erection or installation on,
>
> iii. any land, and includes the demolition or removal of any building, structure or words or part thereof, and 'improved' has a corresponding meaning;

[67] Hollingworth J. found that the classrooms were not installations on any land or otherwise an improvement as defined in the *Construction Lien Act* because of their portability. The portable classrooms were assembled in one location and then moved to a site stipulated by the school board. They were not generally manufactured for a specific site. Normally, the classrooms were delivered finished and installed on cement blocks which rested on cement pads. The classrooms were self-contained units which could be moved from place to place like a house trailer or a mobile home.

[68] In *Aspen Lumber v. Depner*, 1980 CarswellAlta 207, 16 R.P.R. 109 (Q.B.), at para. 6, the Alberta Court of Queen's Bench found that "[s]ervices performed off the lands can be the subject of a lien." In this case, a contractor supplied lumber that was used to make prefabricated condominium sections (i.e., framing). The contractor cut the lumber at its own factory, while the building of the sections was completed at another factory. The court held that the contractor of the prefabricated framing sections of the building was entitled to a lien because the frames were not chattels. Rather, the court found that the structures were manufactured specifically for the land; had the sections been assembled on the lands, the contractor would have been entitled to a lien.

[69] The court held that the contractor was entitled to a lien, notwithstanding the fact that the contractor supplied services off-site and that the framing was constructed off-site. The court distinguished the facts from the earlier *Hank's Plumbing* case on the basis that (a) *Hank's Plumbing* dealt with true chattels that were not affixed to the land, while (b) in this case, the prefabricated sections were manufactured with the specific land in mind.

[70] In *U.S. Steel Inc., Re,* 2016 CarswellOnt 12275, the court found that the installation of black soil and flowers, and removal of weeds and dirt was within the definition of "improvement" because the services were intended to alter, enhance, or add to the land (at paras. 14-16).

[71] In *Pollet's Electrical Services Ltd. v. The Guarantee Company of North America* (1974), 5 Nfld. & P.E.I.R. 579 (Sup. Ct. A.D.), the court found that an asphalt plant was not a chattel and hence was lienable under the *Mechanics' Lien Act.*

[72] In *Hubert v. Shinder,* 1952 CarswellOnt 197 (C.A.), the Ontario Court of Appeal held that the trial judge erred in finding that work and materials used for the rehabilitation of laundry machinery were an improvement to the building. The work and materials were moveables and were not "used in the making, constructing, erecting, fitting, altering, improving or repairing of" the erection or building in question as required by s. 5(1) of the *Mechanics' Lien Act*: at para. 8.

[73] In *3726843 Canada Inc. v. 879115 Ontario Ltd.,* 2005 CanLII 11205 (Ont. S.C.), Glithero J. found that the product purchased was moveable, reconfigurable and would form part of the brokerage property but not part of the building. He noted the following at paras. 25-26:

> There are many cases that have considered the degree of annexation of the material to the building and whether or not that made the material lienable. I think those cases make it clear that the use of a few screws to fasten material will generally not be determinative, nor will electrical wiring. Rather one must consider the circumstances of the particular case, the nature of the material, the application of the material within the particular business and the particular building, and determine whether in all of those circumstances the materials were intended and acted as an improvement to the building, or on the other hand, as an improvement and integral aspect of the business conducted therein.
>
> In my opinion the moveable walls/furniture system supplied here did not constitute a lienable improvement. I accept Benninger's evidence that he

> intended it to be a portable piece of his real estate business office plant. While the plaintiff seeks to stress the effort and expense that would be required to disassemble and move it, it was sold in part based on those features. The onus of proving that the material supplied constituted a lienable improvement lies on the plaintiff. I am not so satisfied, and find the opposite to be the case.

Discussion

No genuine issue requiring trial

[74] The court finds that this is an appropriate case for summary judgment.

[75] Rule 20.04 (1) reads:

> (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.

[76] As stated in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 49, there is no genuine issue requiring a trial when the court is able to reach a fair and just determination on the merits of the motion. This will be the case where the process (1) allows the court to make necessary findings of fact; (2) allows the court to apply the law to the facts; and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[77] A responding party is required to put his best foot forward by setting out relevant evidence with specific facts and coherent evidence supporting the assertion that there is a genuine issue for trial. One cannot simply assert a bald denial.

[78] The court has had the benefit of numerous affidavits with attached exhibits of documentary evidence.

[79] The parties' testimonies at discoveries, as set out below, have enabled the court to make findings, weigh the evidence and draw reasonable inferences from the evidence.

[80] The court finds that the issues of whether the portables are "improvements" within the meaning of the *Act* or whether there has been unjust enrichment are not genuine issues requiring a trial.

Are the portables 'improvements'?

Introduction

[81] The Ontario Court of Appeal in *Kennedy* stated that whether or not a person is entitled to a lien should be strictly construed and that the intention of the *Act* was to include only building construction and building repair industries.

[82] For the reasons fully explained below, the court finds that the portables constructed for Paul Desmarais School are improvements within the meaning of the *Act* because:

- OnPoint completed the portables on the school site;
- The final destination of the portables was known to the parties thereby there was a connection to the school site;
- CECCE regularly held back 10% of funds advanced to Ty Corp.; and
- The portables enhanced the value of the school.

[83] OnPoint has met its onus is to prove the that it had provided a lienable supply. (see *Toronto Zenith Contracting Limited v. Fermar Paving Limited, The Corporation of the City of Barrie*, et. al., 2016 ONSC 4696, at para. 25.)

[84] The definition of "improvement" in s. 1(1) of the *Act* includes "essential to the normal or intended use of the land".

[85] The meaning of "improvement" in Black's Law Dictionary, 5th ed., (1979), at p. 682 is:

> A valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital and intended to enhance its value, beauty or utility or to adapt it for new or further purposes.

[86] Here, the portable has a purpose and it is *essential* to accommodate an increase of student population and demographics. In this way, the school can provide education to students. If the portables are not built, the school cannot accommodate these students under their current structure.

[87] Meaning of "normal" in Black's dictionary:

> Opposed to exceptional; that state wherein anybody most exactly comports in all its parts with the abstract idea thereof, and is most exactly fitted to perform its proper functions, is entitled "normal."

[88] A portable is built to accommodate CECCE's student enrolment fluctuations which is part of their normal operations.

[89] It bears repeating that a construction lien on land, which is subject to the lien, is land that has been improved (which is generally capital in nature meaning that there is some permanence) by the work of others and that it would be unfair to permit the owner of that land to benefit from the increased value in the land without paying something (holdback or monies in trust). If the lien is found to be valid and the owner has not paid, then the ultimate remedy is that the land is sold.

[90] Therefore, when a subcontractor supplies equipment to a contractor, without a specific land on which it is to be used, then no lien rights arise. The subcontractor however has a potential claim against the contractor.

[91] If the supply is made to a specific land and is of some permanence, then the subcontractor may have a lien right.

[92] The factor of whether a supply is permanent is an important consideration in determining whether the supply is an improvement. However, the fact that it can be removed from a site is not the sole consideration as stated by Mr. McGuiness in *Construction Lien Remedies* in Canada as most things can be removed from a site.

[93] The original procurement process of CECCE did not specify where the portables would be located. In this case, OnPoint completed the portables on the school site and OnPoint was aware of the portables' final destination at the time of the finalization of the building of them portables.

[94] Even though OnPoint was aware of the transient nature of the product that it was supplying, CECCE's lands were improved in its functionality (to permit more students to attend the school) and consequently an increase in value to the land. This is so even though the portables will no longer be used at the school as a new wing is being added to the school.

[95] In *Inesco*, Hollingworth J. found that the classrooms were not installations on any land or an improvement because of their portability. In that case, the portable classrooms were assembled in one location and then moved to a site stipulated by the school board and were not manufactured for a specific site. In that case, the classrooms were delivered finished and installed on cement blocks which rested on cement pads.

[96] The court notes that *Inesco* was an application by the trustee for directions as to whether certain proceeds of sale were trust monies pursuant to s. 8 of the *Act*. The case was not defended, and the court did not have the benefit of hearing opposing and fulsome arguments on this issue.

[97] The court will review the intention of the parties, the construction of the portables and the building features of the portables. Included in this discussion are the following details: integration into an existing building; whether the structure is marketed on the basis of its portability and the nature of the material.

Intention of the parties

[98] The contract between CECCE and Ty Corp. and the verbal contract between Ty Corp. and make no reference to the *Act*, lien rights or holdbacks under the *Act*. The parties did not contemplate lien rights in the contract.

[99] The objective of the portables is to meet the fluctuations in student populations as the portables are temporary solutions and serve a purpose for an undefined time.

[100] The portables were to remain the CECCE's property, and the CECCE did not intend for the portables to be leased or to be returned to the contractor or OnPoint.

[101] Luc Poulin (Directeur du Service des immobilisations du Conseil Scolaire de District Catholique du Centre-Est de l'Ontario), a manager with the CECCE, stated at the examination for discovery of September 14, 2022, that the CECCE considers the portables to be temporary installations.

[102] From 2021 to 2022, the CECCE moved three portables. In the school year 2022-2023, it moved 11 portables. The portables built by OnPoint, and which are the subject of this litigation, are in the process of being moved and Paul Desmarais will be expanding its school structure.

[103] The portables were commenced being built in Vars by the original contractor to the contract with CECCE but that it did not complete the contract. CECCE then contracted with Ty Corp. to complete the contract.

[104] The contract did not contemplate a retention of 10% holdback which is only required for lienable services. CECCE retained holdback for any portable-related work and this would suggest that CECCE was effectively operating on the basis that the portables were a lienable supply. CECCE indicated that it was done to ensure quality of the work but further details were not provided.

[105] Regarding holdback, the *Act* provides that:

> **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 or been satisfied, discharged or otherwise provided for under this Act. R.S.O. 1990, c. C.30, s. 22 (1); 2017, c. 24, s. 17 (1), 66.

[106] Pursuant to the *Act*, payments may be made, without jeopardy, on a contract, or subcontract up to 90% of the price of the services or materials that have been supplied under the contract or subcontract unless, prior to making payment, the payer had received written notice of the lien. Once the payer has received notice, they must hold back the full amount of the lien.

[107] Originally, CECCE retained 10% as a hold back of $34,483 and it incrementally increased to $112,750.20 as 10% of the payments to Ty Corp.

[108] In fact, Luc Poulin, stated that normally before monies are paid out after the receipt of the certificate of payment there is a review of the land abstract to determine if liens had been registered. However, this was not done regularly on this project. (See Mr. Poulin's answer to Q239 of his discovery of June 2, 2022).

[109] Dominique Diotte, the project manager of CECCE, overseeing this project made four payments to Ty Corp. after two liens were registered on title.

[110] The court finds that this points to an inference that CECCE was operating on the basis that it was a lienable supply.

[111] In my view, the fact that a specific school is not specified in the procurement is not dispositive.

[112] Another consideration with has some relevance is section 20(1) of the *Act* which states:

> **20** (1) Where an owner enters into a single contract for improvements on more than one premises of the owner, any person supplying services or materials under that contract, or under a subcontract under that contract, may choose to have the person's lien follow the form of the contract and be a general lien against each of those premises for the price of all services and materials the person supplied to all the premises. R.S.O. 1990, c. C.30, s. 20 (1); 2017, c. 24, s. 72.

[113] Here, there is contractual clause that allows the school to direct where to install them, and they were installed. Also, s. 20(1) allows an owner to enter a single contract for improvements on more than one premises, and a person supplying services or materials may choose to have general lien against all.

[114] Given the above findings, this factor is weighs in favour of finding that the portables are improvements under the *Act.*

Construction

[115] Portables have an inherent impermanence about them as they can be removed from a school site.

[116] OnPoint had a verbal contract with Ty Corp to construct and install portables for Ottawa schools and a second set for Paul Desmarais school in Stittsville.

[117] The commencement of the construction of the portables was in Vars and completed on school site.

[118] Also, some of the change orders between Ty Corp. and CECCE indicate the school's name but this is not consistent amongst all the change orders. However, it does show that there was a recognition of the final destination of the portables.

[119] The assembled school portables were delivered from a field on the school site to the part of the school site where they were anchored on 16 concrete pillars. The concrete pads are 24 inches by 24 inches by 8 inches deep, and they are buried in the ground to create a footing to bear new concrete block piers. Two concrete blocks, which are 8 inches by 8 inches and 16 inches deep, are then installed and anchored into the concrete pad with 10-metre dowel and block cores fully grouted together. The wood beam for the portable is anchored to these concrete blocks.

[120] The classroom portables were placed on a specially designed support system prepared by the engineering firm WSP in drawings A100 and S300.

[121] The ground below the classrooms is dug up and gravel is placed in the hole and compacted to 125 KVA, which is more than the normal compaction requirements.

[122] On top of this compacted base, footings are placed. The cement footings also exceed Building Code hardness requirements and, in fact, are harder than cement sidewalks. That does not mean that the portable then becomes an improvement

[123] On top of the footing is a cement pier. The classrooms are secured to the ground by connecting duckbill anchors at each pier and footing.

[124] These supports are specifically designed by WSP, the engineers for these classrooms. A wooden skirt is then placed around the classroom base. There are no wheels under the classrooms.

[125] The school portables are solidly attached to concrete pillars which are partly buried underground.

[126] The portables are also anchored with four duckbill earth anchors which are buried underground at a minimum of 6 feet below finished concrete.

[127] Once the portable is placed on the required concrete pillars, it is anchored into the land.

[128] Portables are built with hydro masts which are wired into hydro poles to receive power like a house. The electrical systems are attached for the duration of the installation to the hydro supply at the place of delivery.

[129] I have considered the following building features:

- A portable contains one classroom;
- Portables have floors, walls, windows and ceilings;
- Stilts were put in the ground to support the structures as shown in drawing A-101;
- Portables have electricity, heating, air ventilation system, insulation and stairs leading to two different entrance doors but no running water or bathrooms; and
- Portables have blackboards and/or whiteboards, lighting systems and storage space.

[130] The portables are used for staff and students to have access to the internet, the school public announcement system and Wi-Fi.

[131] The cement footings remain in the ground after the portable is removed. This is contrasted with foundations built for building structures that go around the perimeter and are dug at least 4 feet deep. These cement footings (or "piliers" as described by CECCE) do not demonstrate a permanence and enhancement to the property.

[132] In his examination for discovery, Moe Berjawi is OnPoint's President and sole owner since 2017 and his brother Hassan Berjawi is operations manager.

[133] In July 2019, OnPoint had three full time employees and it hired two or three other employees for this project about a week after the project started.

[134] During the construction, OnPoint had continuous contact with architects and engineers and there were regular inspections and approvals from the City of Ottawa. Also, the construction included:

- Gravel compacted to 125kVPA
- Concrete at 35MPA (the Building Code requirements are 32 MPA);
- Footings at 120KPA (the Building Code requirements are 75 KPA);
- Wooden skirts inserted around the portables;
- Duck bill anchors; and
- Electrical wire from the portables to provide hydro-electricity.

[135] The portables are not on wheels.

[136] At his discovery, Mr. Berjawi also testified that:

- There was some urgency to the construction because the CECCE had a deadline for the portables to be built for the students in time for the beginning of the upcoming school year;

- Two employees from Ty Corp also worked on building the portables; and

- The portables being built by OnPoint were transported from Vars to Paul Desmarais school in Stittsville by a flatbed tow truck. The transportation was arranged and completed by a third party.

[137] Mr. Berjawi's answers below set out the construction process.

> Q 580 – You were not responsible for making arrangements to have those portables delivered to the schools where they were going to be installed?
>
> A – No.
>
> Q 581 – You were not responsible, once those portables were delivered to a school in halves, to put those two halves together?
>
> A – Not at other schools, no, but at Stittsville, yes.
>
> Q 582 – Okay. But Stittsville was a site that was obtained where you could actually do the building of the portables. Correct?
>
> A – No, the portables were actually – some of them were actually installed there.
>
> Q 583 – Just so that I'm clear; you said that you completed 10 portables in Stittsville. Was this at a school?
>
> A – Yes.
>
> Q 584 – What school? What was the name of the school?
>
> A – Paul-Desmarais, École catholique Paul Desmarais.
>
> Q 585 – Just so I'm clear, 10 incomplete portable classrooms were delivered from Vars to Paul Desmarais, and you completed those at Paul Desmarais?
>
> A – Yes.
>
> Q 602 – Now, just so we are clear, is it your evidence that you, OnPoint – some of the portables, you put the two halves together. Is that your evidence?
>
> A – Yes.
>
> Q 603 – Okay. You will agree with me that at no point did you install that portable where it was supposed to go in the schoolyard, where it would be used as a portable classroom.

A – Correct.

Q 604 – Now, your firm had nothing to do with either the transportation or the installation of any of these portable classrooms to a site outside of the Paul Desmarais.

A – Correct.

Q 605 – And, then, at Paul Desmarais school, you finished the building of these portable schools, but you were not involved in the actual installation of the school, where it would physically rest, to be used by the students?

A – Correct.

[138] The portables were moved to the field at the school site, and the two halves were put together on the field.

Q 862 – So, you came in and you finished the work on the portables in the parking lot. Someone else then took those portables, they installed them and put them together in the field, where they were to be, and you came in after – you being OnPoint – and you did the finishing touches that you described to me earlier.

A – yes.

[139] In the field, they were put on stilts as this was a temporary location for the portables.

[140] Mr. Berjawi's answer at Q 865 regarding the stilts was:

A – There were metal stilts that were manufactured to support the temporary work of the portables. So, they had a wider base, and then we had, approximately – I don't recall how many, but one at each corner and one in the middle. So maybe six to eight.

[141] Documents filed including from Marc Zion for the intervenors which built similar portables show that:

- Drawing NO. SK2, page 3 show 24x24x8 inches concrete pads buried in the ground to create a footing to bear new concrete block piers. This is completed for each portable.

- Two concrete 8x8x16 inches concrete blocks are then installed and anchored into the concrete bed with 10 metres dowel and block cores fully grouted together. The wood beam for the portable is anchored to these concrete blocks.

- The portables are solidly attached to concrete pillars, which are partly buried underground.

- Portables are also anchored with four duckbill earth anchors which are buried underground a minimum 6 feet below the finished concrete.

[142] In response to Mr. Zion's affidavit, Mr. Luc Poulin, manager at the CECCE stated that cement pillars and duckbill earth anchors can remain even if a portable is moved to allow another portable to be put in its place. Since the cement pillars are mostly above ground, and hence exposed to cold and hot temperatures, it is important that the cement be of the highest quality.

[143] The duckbill anchors are also known as hurricane anchors. These are installed because the portables have minimal attachment to the ground, and they prevent damage from hurricanes, tornadoes or strong winds.

[144] Luc Poulin's evidence at his discovery confirms that:

- There was no foundation on the portables;

- The CECCE sometimes uses the word "classe mobile" or "portative";

- He did not call them footings in his examination;

- The supports are not in any certain depth in the soil, the support is on the surface;

- He would not admit that 120 KPA is more than the building code requirements and did not know that normally the bearing capacity for footings and foundations of a house is only 100 KPA;

- He called the stilts "des petit piliers temporaires" and did not wish to call them footings;

- Duck bill pipe anchors are not necessary for permanent structures but are for portables;

[145] Mr. Poulin stated that the portables are not anchored on “des piliers de béton”, rather they are “deposée sur des piliers de béton et l’ancrage se fait au sol avec ce qu’on appelle des ancrages métalliques avec une tige de file de fer… Ils sont supportés sur le sol. Il n’y a pas d’ancrage, les piliers ne sont pas ancrés au sol… Le plan démontre une installation qui peut être sous le niveau du sol, mais dans la pratique, ils peuvent être déposés par-dessus le sol si en autant la capacité portante, elle est suffisante”.

[146] The undertaking from the CECCE’s architect, Vincent Renaud, explained that the portables are assembled on a field or school yard “sur des petits piliers temporaries [pier] en ciment. Ce ne sont pas des ‘footings’”.

[147] He stated that “Footings fait référence à une fondation en béton. Sur les dessins pour l’installation (l’onglet 10), tout peut être décrit comme la ‘fondation’. Une semelle ponctuelle (footing) c’est-à-dire un seul bloque de ciment, est la partie horizontale sur laquelle repose le pilier bloque de ciment (pier) qui est la partie verticale sur le dessin.”

[148] As stated earlier, OnPoint joined the two halves of the portables on the school site. OnPoint completed the finishing touches to the portables once they were installed in their final location.

[149] Removal of a portable is not at simple task and requires machinery and trucks. It is expensive, but according to Mr. Poulin it is not as expensive as paying for a new portable to be built.

[150] The construction of the portables is a factor which weighs in favour of a finding that the portable was an improvement.

The Installation

[151] The transportation and installation of the remaining portables was completed by another contractor. OnPoint completed some of the finishing work, including the installation of stairs and window casings, on the school site supports the lien but they knew they could and likely to be

moved from site to site. The details of the installation confirm that OnPoint was aware of the mobility of the portables.

[152] In my view, the concept of the lien is rooted in adding value or utility to the land. There is a direct connection/attachment between the work performed to construct and erect/install the portables and enhancing the utility of the school. The portables were partially built on-site and positioned on concrete pads, with servicing done.

[153] It seems to me that if the supply of pre-fabricated stairs, doors or windows (*i.e.,* manufactured/built off-site and delivered to the site for installation) is a lienable supply, then the work for the portables should be "construction, erection or installation on the land"

[154] The installation of the portables involves the following:

- If the portable will be located on grass or gravel, then the workers need to prepare the base by digging this out and replacing it with an embankment made of crushed rocks;
- Install cement pillars (OnPoint called them 'footings');
- Place the portables on the cement pillars;
- Arrange for an electrician to connect the portable to the school's electrical system;
- Install the skirt around the portable and paint the skirt to block access to underneath the portable;
- At times, a school property may already have portables and the pre-existing portables may need to be moved to allow the installation of new ones; and
- When a portable is transferred to another destination, the cement pillars are removed and the surface is returned to its original state.

[155] This factor weighs in favour of finding that the portable is an improvement.

Building Features

[156] Ultimately, the case law on modular prefabricated structures suggests that the availability of lien rights on prefabricated modular buildings turns on the nexus between the structure and its

connection to the specific lands. Specifically, the court should consider whether the portable (a modular prefabricated structure) that was built with no particular end destination or that can be moved around at will is a chattel.

[157] If a structure is manufactured with no particular end destination in mind, it is considered a chattel that can be moved around at will. However, lien rights will exist where the structure is manufactured for specific land or in respect of a specific construction project.

[158] Pursuant to the nexus test, the supply of services or materials will give rise to lien rights where the construction parties and, particularly, the owner considers the subject services or materials necessary for the completion of the project, as well as where the services or materials benefit the majority of the contractors and subcontractors.

[159] The portable adds utility to the school. It enables the school to receive further student population without the expense of expanding the school building.

[160] This factor weighs in favour of a finding that the portables are improvements

Conclusion

[161] In conclusion, the court finds that the portables built for the Paul Desmarais School are improvements and are lienable.

[162] As stated by McGuiness above: “Modern engineering techniques permit virtually every structure to be removed from one site and re-assembled elsewhere.”

[163] The mere fact that it is moveable is only one consideration.

[164] In my view, the installation of the portable has caused a sufficient change so that its installation has enhanced the value and utility of the school itself.

[165] As discussed above, the fact that the portable had not become completely or irreversibly affixed to the land on which it sits is not necessarily conclusive of the question of whether the premises have been improved.

[166] The court has considered that there is some attachment to the premises as described above. A reasonable person would consider the premises to have been improved as a result of the installation of the portables.

[167] The intent of the *Act* and its predecessors is designed to ensure subcontractors as those involved here, can be paid for their services and allows them to seek relief by a specific process set out in the *Act* against the owner. The owner is responsible to holdback 10% under the Act. In this case, CECCE did holdback certain funds although it may not be 10% paid to Ty Corp.

[168] At para. 42 in *Kennedy*, the Court of Appeal considered as an important fact that the assembly line had been built and disassembled before being transported to the location for installation. It also commented that: "[w]hile a different judge may have come to another conclusion on the issue of portability, I am satisfied that it was open to the trial judge to reach the conclusion that he did."

[169] In *3726843 Canada Inc. v. 879115 Ontario Ltd.,* the court could review "all of those circumstances the materials were intended and acted as an improvement to the building, or on the other hand, as an improvement and integral aspect of the business conducted therein."

[170] *Boomers* is distinguishable as the modular units were not intended to be moved on a regular basis. The modular units improved the land as the motel was functioning only because of the modular units.

[171] In *Hanks*, a plumber completed the work. The work did not have a connection to the land but only to the modular company's construction inventory and the plumber was not entitled to a lien. Therefore, although the modular company would have a lien, the supplier of the plumbing would not. The plumbing supplier did not have the intention of improving that specific land. The similarities in this case is that CECCE could direct Ty Corp to place the portables wherever CECCE wanted.

[172] In *Aspen Lumber*, there was a supply of specific condominium sections for a specific condo project and there was an improvement of land and it increased the value of the land. It was

constructed for a specific site to someone in the construction chain and added value of some permanence to the land.

[173] The portables were intended for a particular school and were intended to be an important aspect of what CECCE was in the business of doing and their obligation to do, that is, educating children.

[174] CECCE argued that they could not possibly check title registries on a regular basis to ensure liens are not registered by subcontractors when there is construction of portables on their properties. Why should CECCE be relieved from this duty that is imposed on any owner requiring work on their premises? In this particular case, CECCE knew the destination of the portables built by OnPoint as they were being constructed on the school property. There is a connection to the lands. Also, all land registry title is accessible on line through Terraview by authorized persons and therefore searching title is not an onerous task .

[175] OnPoint has satisfied its onus to show that it had a lienable interest.

Unjust Enrichment

[176] Unjust enrichment requires:

- That CECCE was unjustly enriched;
- At OnPoint's deprivation; and
- There is no juridical reason for the enrichment.

[177] OnPoint has not put its best foot forward and marshalled the evidence that support their claim for unjust enrichment and its legal requirements.

[178] The court can make appropriate findings and apply the law based on the complete record before it.

[179] OnPoint's claim for unjust enrichment is dismissed because:

- The CECCE has not been enriched but on the contrary it was in a position of loss vis-a-vis Ty Corp as after the termination of the contract with Ty Corp, the CECCE had to incur another $380,000 plus HST to buy four further portables.

- The CECCE contracted with Ty Corp. A contract between an owner and a general contractor is considered a juristic reason: see *Tremblay v. 1839563 Ontario*, 2020 ONSC 1316, at paras. 56-57; *J. Lepera Contracting Inc. v. Royal Timbers Inc.*, 2016 ONSC 2909 (Div. Ct.), at paras. 37-40. The CECCE had no obligation towards OnPoint.

[180] Accordingly, this claim is dismissed.

Costs

[181] OnPoint, as the successful party, is presumptively entitled to costs.

[182] If the parties cannot agree on the issue of costs, OnPoint must provide their two-page costs submissions along with any offers to settle and bill of costs by April 3, 2023. The intervenors must provide their two-page costs submissions along with any offers to settle and bill of costs by April 17, 2023. The CECCE must provide their two-page submissions along with any offers to settle and bill of costs by May 1, 2023. OnPoint and the intervenors may provide their one-page reply by May 8, 2023.

Justice A. Doyle

Date : March 20, 2023

CITATION: *OnPoint Ltd. v. Conseil des Écoles Catholiques du Centre Est et al.*, 2023 ONSC 1341
COURT FILE NO.: CV-19-82179
DATE: 2023/03/20

ONTARIO

SUPERIOR COURT OF JUSTICE

RE: **OnPoint Group Ltd.**, Plaintiff (Responding party)

and

Conseil Des Écoles Catholiques du Centre Est, Defendant (Moving party)

Ty Corp. Construction, Defendant

and

Multi-Service Restoration and Provision Construction Management Inc., (Intervening Parties)

BEFORE: Justice A. Doyle

HEARD: February 6, 2023 at Ottawa

DECISION ON A SUMMARY JUDGMENT MOTION

Justice A. Doyle

Released: March 20, 2023

TAB 4

No. C884076
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

HEARD IN THE COUNTY COURT OF VANCOUVER
PURSUANT TO SECTION 23 OF THE COUNTY COURT ACT

BETWEEN:	
CHUBB SECURITY SAFES and RACAL-CHUBB CANADA INC.	**REASONS FOR JUDGMENT**
PLAINTIFFS	**OF THE**
AND:	**HONOURABLE JUDGE WETMORE**
LARKEN INDUSTRIES LTD., KENNETH CASPAR OLMA and WILLIAM LAURIE STEEN	**(IN CHAMBERS)**
DEFENDANTS	

Counsel for the Plaintiffs: James R. Iida, Esq.

The Defendant Larken Industries was unrepresented.
The Defendants Kenneth Caspar Olma and William Laurie Steen appeared in person.

Place and Date of Hearing: Vancouver, British Columbia
September 12, l989 and
January 4, 1990.

The defendant Larken Industries was retained by First City Trust to supply and install a safe and cash drawer, *inter*

alia, in premises leased by First City Trust in Kelowna. This was accomplished by the purchase of a safe and cash drawer from the plaintiff. The installation was completed and the defendant company paid by First City Trust.

The payment went into the general accounts of the defendant company. The plaintiff was not paid by Larken, which has now apparently become insolvent.

The plaintiff sues the two personal defendants as directors of Larken, alleging their liability under the trust provisions of the **Builders Lien Act**. The resolution turns on whether these chattels became improvements to the leasehold interest of First City Trust in the premises.

Improvement is defined in s. 1 of the **Builders Lien Act**:

> "improvement" includes anything made, constructed, erected, built, altered, repaired, or added to, in, on or under land, and attached to it or intended to become a part of it, and also any clearing, excavating, digging, drilling, tunnelling, filling, grading or ditching of, in, on or under land.

Many cases were cited. I propose to deal only with **Boomars Plumbing & Heating et al. v. Marogna Bros. Enterprises Ltd. 27 B.C.L.R. (2d) 305**, because this decision deals with the relevant

case law and deals with considerations most proximate to the case at bar.

Before that, however, a description of those articles supplied to the premises is required. The safe is 57 3/4" high, 31 3/4" wide and 35 1/2" deep. It weighs over two tons. There are alarm wires attached which are connected to a 24 hour monitoring system in an entirely separate building operated by the plaintiffs. It is not, nor was it designed to fit into a constructed cubicle or walled areas within the leased premises. The photographs exhibited to the affidavit of Robert Geddes shows the safe, in situ, in what appears to be an equipment and storage area in the premises. Immediately to the left are cupboards or filing cabinets, opposite the safe is some sort of communications or computer monitor which has no connection with the safe. In fact, the safe is, on the evidence, a standard model of the plaintiffs, clearly designed as a free standing unit unto itself. The side walls are finished and enamelled, as is the front. I point this out to distinguish this sort of safe from the sort designed to be inserted into a cast or concrete receptacle constructed within the building itself. The only connections to the building are to the floor by its own weight and the alarm wire which is within conduit and proceeds to a box behind the safe attached to the wall. This box presumably is attached to wires that proceed within the structure to the offices of the monitoring system.

The cash drawer is simply a removable drawer which fits into a space on a counter. I assume it is in fact removed after business hours and placed in the safe.

Boomars Plumbing Case:

I have concluded that case is distinguishable from the case at bar and I propose to examine the various considerations expressed by Esson J.A. (as he then was) in that decision.

In **Boomars**, an area of land was prepared with excavations, roads, sewerage, building foundations to receive from a tenant a number of preconstructed motel units. The lease was for a short term, with renewal options, and specifically provided the buildings were removable by the tenant on termination.

Commencing at p. 309, Esson J.A. discusses the many items of land preparations required. "The list goes on and on." At p. 314 he specifically abstains from basing his judgment on the whole project, but leaves this open:

> "Under the language of the statute, a question might arise as to what, in this case, was the 'anything' which was erected. It is arguable that 'anything' includes the entire motel project, i.e., not only the buildings but the 2.8 acres of land, much of which was used or at least intended to be used as a parking lot for the motel. On that view, the work done on Marogna's account for site preparation might be considered part of the

> 'improvement'. However, the primary submission is that the improvement comprised the buildings and, as I am satisfied that the plaintiffs rightly succeeded on this basis, it is unnecessary to consider whether they could have succeeded on a broader basis."

It is to be noted the trial judge did regard the whole project and its potential for permanence as "bolstering his conclusion that the buildings were improvements" (p. 312).

In the case at bar, the tenant apparently was responsible for the interior fittings for their business. There were no special "site preparations" by the landlord to accommodate this safe and indeed it was anticipated it would be removed if and when the tenancy finally terminated. Mr. Roy, a vice-president of First City Trust, deposes in paragraph 4, "That in the event of our relocation to other premises, both the cash drawer and the Ulysses #4620 (the safe) would be relocated, together with our furniture."

It is clear therefore in so far as the owners were concerned, it was never intended this safe was to be installed so as to render the building as a whole one that henceforth would have incorporated within its structure a security fixture of a safe in the same sense as a building has within its design a walk-in safe depository. As to the **Boomar** case in so far as site preparations giving the residual owner the option of operating the building as

one with continuing housing or a safe in the case at bar, see the comments of Esson J.A. at top of page 314.

On the other aspect I have commented upon above, "the intention of the owners" is not by any means conclusive. As the **Boomar** case points out, the law of fixtures, vis-a-vis tenant and landlord is not what the **Builders Lien Act** defines as improvements. The statute encompasses "anything...added to land and attached to it or intended to become part of it..." It is only the latter part of the definition "or intended to become part of it", that the intent of the owners is perhaps definitive.

In considering the phrase "attached to it", it is appropriate to be guided by the comment of Martin J.A. quoted in **Boomar** at page 313: "The whole object under this act is to prevent the owner of lands, whatever his estate in them, from getting the labour and capital of others without compensation." That phrase, of course, refers to the owners getting labour and capital to the land itself, not simply the use of things upon the land, but things that by their nature appear to be attached to the land.

The test then is objective, would the reasonable supplier in supplying a chattel and placing it upon the land conclude he was supplying and installing that item for the enhancement of the land or simply for the use or convenience of a user of the land? It is

in this respect that the elements of the method of attachment, the degree to which the land (and for this purpose land means buildings as well) has had to be adapted to accommodate the item, and the permanence must be weighed.

The cases do show that an object can be attached by its own weight. It is apparent, however, that is not conclusive simply because of its weight. For example, an electrical device of modest weight for heating may be either attached or not. If that device is attached to ducts supplying heat to the whole structure, it is not due to its weight but its attachment to other vital features of the structure which renders it an improvement. A free standing piano of very great weight, even if it has a built-in music light plugged into the wall, is clearly not an improvement to the land. Indeed, a safe in a safe merchant's showroom is simply inventory, not an improvement to the building, even if it was electrically connected to show its alarm features to prospective customers.

Weight then is but one element in determining attachment.

The method of attachment to the objective observer can include weight, but other indicia of attachment to land are more persuasive. Has the land (building) been designed to especially accommodate the item is perhaps more reliable. I have previously given the example of the walk-in depository type of safe.

The degree of apparent permanency as part of the structure lies at the heart of this consideration, quite aside from the intentions of the owner.

It is the degree of attachment, sewers, etc., together with its apparent relative permanency which appear to be factors in the conclusion in **Boomar**.

The only indicia of attachment to the land in the case at bar are the weight of the safe and the wires attached to it which go to the exterior of the building to another location in another building.

If the weight and bulk were of such immensity that the building was in essence built around it, the problem would be more difficult. Here, however, the safe was transported to the existing structure and placed on the office floor. The alarm wires do not attach the safe itself. They are simply a feature of the equipment, just as a light standard does not become a fixture simply by being plugged into the wall or a bulky computer base or telephone being a fixture because it is plugged into a system of transmission lines from and to elsewhere.

The safe is readily removable from the premises, leaving then no indicia of permanency. There is nothing in the design of

the building itself to lead to a rational conclusion that this safe is an integral part of the structure as an operating building. It is only indicative of the actual business being carried on currently in the building.

Each case in this field must be judged on its own facts. I have concluded the objective observer supplying this item to this business within this building would conclude he was supplying an object of no different character than a heavy office desk or computer. Equipment designed and used for the operations of the business within the structure, not integral to that structure, do not thus become "improvements".

Because I have concluded the chattels supplied are not improvements to the realty, the **Builders Lien Act** has no application. Therefore, the claims against the defendants Olma and Steen are dismissed with costs against the plaintiff.

The plaintiff has also sued Larken Industries Ltd. This is simply a claim for goods supplied. The plaintiff is entitled to judgment and costs against that defendant.

D. T. Wetmore, C.C.J.

Vancouver, British Columbia
January 9, l990.

TAB 5

Boehmers, A Division of St. Lawrence Cement Inc. v. 794561 Ontario Inc. et al.

[Indexed as: Boehmers v. 794561 Ontario Inc.]

21 O.R. (3d) 771
[1995] O.J. No. 304
Action No. C19236

Court of Appeal for Ontario,
Grange, Labrosse and Abella JJ.A.
February 14, 1995

Construction liens -- Priorities -- Subsequent advance under mortgage loses priority if advance made while perfected lien registered even if lien later vacated -- Construction Lien Act, R.S.O. 1990, c. C.30, s. 78.

Mortgages -- Priorities -- Construction lien -- Subsequent advance under mortgage loses priority if advance made while perfected lien registered even if lien later vacated -- Construction Lien Act, R.S.O. 1990, c. C.30, s. 78.

R was a mortgagee financing construction of an improvement of real property. By error, the fourth advance of R's $252,000 loan was made when a construction lien was registered against the title to the mortgaged property. R paid money into court, and the lien was vacated. Subsequently, other lien claimants registered liens. In an action under the Construction Lien Act, the trial judge considered the effect of s. 78(4) of the Act on the priority position of R's mortgage. Section 78(4) provides that a mortgage 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 after the time when the first lien arose, unless at the time when the advance was made there was a preserved or

perfected lien against the premises. The trial judge held that, as a result of the effect of s. 78(4) of the Act, R had lost priority for the fourth advance as against all the subsequent lien claimants. This judgment was affirmed by the Divisional Court; with leave, R appealed to the Court of Appeal.

Held, the appeal should be dismissed.

Per Labrosse and Abella JJ.A.: The trial judge was correct in his analysis of the relevant sections of the Act. From a practical point of view, no undue burden is being placed on the mortgagee, which could have proceeded in accordance with the Act. Had the lien been removed under the procedures under the Act before the advance, no issue of priority could have arisen.

Per Grange J.A. (dissenting): It was argued that, at the time of the advance, R lost the Act's protection for its advance. That might be true as against the then registered lien, but that lien is gone. 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 subsequent lienholders came into existence.

Cases referred to

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

Statutes referred to

Construction Lien Act, 1983, S.O. 1983, c. 6, s. 80(4) -- now R.S.O. 1990, c. C.30, s. 78(4)
Construction Lien Act, R.S.O. 1990, c. C.30, s. 78(4)
Mechanics' Lien Act, R.S.O. 1970, c. 267, s. 14(1)
Mechanics' Lien Act, R.S.O. 1980, c. 261, s. 15(1)

APPEAL from a judgment of the Divisional Court affirming a

judgment of Killeen J. (1993), 14 O.R. (3d) 781, 105 D.L.R. (4th) 473 (Gen. Div.), determining priorities under the Construction Lien Act, R.S.O. 1990, c. C.30.

Ronald B. Moldaver, Q.C., for appellant, Royal Life Insurance Co. 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.

LABROSSE and ABELLA JJ.A.: -- This is an appeal with leave, from the judgment of the Divisional Court dismissing an appeal from the trial judge's determination of the priorities under the Construction Lien Act, R.S.O. 1990, c. C.30 (the "Act").

The facts are carefully set out in the reasons of the trial judge, reported at (1993), 14 O.R. (3d) 781, 105 D.L.R. (4th) 473. 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 centered 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.

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.

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 registered 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.

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.

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.

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.

The appeal is dismissed with costs.

GRANGE J.A. (dissenting): -- What happened here was that the mortgagee (Royal Life Insurance Company of Canada -- "Royal") made an advance on the mortgage of $252,759 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 and, on appeal, by the Divisional Court 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.

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.

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;

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.

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.

There seems little doubt that prior to the enactment of s. 80(4) (now 78(4)) in 1983 [Construction Lien Act, 1983, S.O. 1983, c. 6] 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 [reported 127 D.L.R. (3d) 142, 39 C.B.R. (N.S.) 203], 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 [R.S.O. 1980, c. 261]:

> 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.

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.

The trial judge has said [p. 793]:

> 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).

In Waynco, Saunders J. said:

> 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.

In my opinion, as I have said, it may now, under the new section (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.

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 6

Boehmers, A Division of St. Lawrence Cement Inc. v. 794561 Ontario Inc. et al.

[Indexed as: Boehmers v. 794561 Ontario Inc.]

14 O.R. (3d) 781
[1993] O.J. No. 1805
Action No. 2382/91

Ontario Court (General Division),
Killeen J.
July 23, 1993

Construction liens -- Substantial completion -- Deemed completion provisions of Act not applying to subcontracts -- Construction Lien Act, R.S.O. 1990, c. C.30, s. 2(3).

Construction liens -- Priorities -- Subsequent advance under mortgage loses priority if advance made while perfected lien registered even if lien later vacated -- Construction Lien Act, R.S.O. 1990, c. C.30, s. 78.

Mortgages -- Priorities -- Construction lien -- Subsequent advance under mortgage loses priority if advance made while perfected lien registered even if lien later vacated -- Construction Lien Act, R.S.O. 1990, c. C.30, s. 78.

The provisions of the Construction Lien Act that deem a contract completed or that deem services or materials to be last supplied do not apply to subcontracts.

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

If a mortgagee who is providing financing for an improvement by a mortgage that is registered before any construction liens makes a subsequent advance when there is a perfected construction lien, the advance loses its priority to the registered lien and to all subsequent liens; this loss of priority results even if the perfected lien is vacated before the subsequent liens are registered. A subsequent advance in the face of a perfected lien gives lien claimants a priority over the advance similar to the holdback priority.

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

Other cases referred to

Anron Mechanical Ltd. v. Valantori Construction Ltd. (1990), 43 C.L.R. 220 (Ont. H.C.J.); Horsman Brothers Holdings Ltd. v. Lee (1985), 12 C.L.R. 145 (B.C.C.A.); Norwon Electric Sault Co. v. Ross (1984), 47 O.R. (2d) 794, 7 C.L.R. 1 (H.C.J.)

Statutes referred to

Construction Lien Act, 1983, S.O. 1983, c. 6
Construction Lien Act, R.S.O. 1990, c. C.30, ss. 1(1) "contract", "contractor", "improvement", "price", "subcontract", "subcontractor", 2(1), (3), 5(1), 8(1)(a), (b), 14(2), 31(2), 32, 33, 44, 76, 78(1), (2), (3), (4), (6), (8), 80(4)
Land Titles Act, R.S.O. 1990, c. L.5
Mechanics' Lien Act, R.S.O. 1970, c. 267, s. 14(1)
Mechanics' Lien Act, R.S.O. 1980, c. 261, s. 1(3)
Registry Act, R.S.O. 1990, c. R.20

Authorities referred to

Jackett, Construction of Statutes, 2nd ed. (1983), p. 89
Kirsh, H., and McGuiness, K., Annotations to Norwon Electric Sault Co. v. Ross (1984), 7 C.L.R. 1, pp. 2-4
Macklem, D., and Bristow, D., Construction and Mechanics Liens in Canada, 5th ed. (Toronto: Carswell, 1985), p. 251
Macklem, D., and Bristow, D., Construction and Mechanics Liens

in Canada, 6th ed. (Toronto: Carswell, 1990), c. 6-41
McGuiness, K., Construction Lien Remedies in Ontario (1983), p. 149
Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act (1982), pp. 180-81
Swybrous, W., "Contractors and the Construction Lien Act" in Kirsh, ed., The Construction Lien Act: Issues and Perspectives (Toronto: Carswell, 1989), pp. 118-19

ACTION under the Construction Lien Act, 1983, S.O. 1983, c. 6.

D.W. Snider, for plaintiff.

T. Van Klink and T.D. Little, for defendant, Royal Life Insurance Co. of Canada.

A. Szemenyei, for Del-Ko Paving & Construction Co. Ltd.

J.W. McLeish, for Co-Fo Concrete Forming Construction Ltd., Development Engineering (London) Ltd., Solmar Painting Inc., and Capital C Construction Ltd.

M. Stambler, for 638559 Ontario Ltd.

KILLEEN J.: -- 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.

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

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.

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.

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.

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	$959,878.00	
2.	Nov. 27/89	$226,247.00	
3.	Jan. 8/90	$420,461.00	$1,606,586.00
	Jan. 25/90	Moffatt Lien	
4.	Feb. 2/90	$252,759.00	$252,759.00
	Feb. 6/90	Moffatt Lien vacated	
5.	Feb. 28/90	$294,358.00	

6. March 26/90	$264,520.00		
7. May 9/90	$274,662.00		
8. June 1/90	$151,193.00		
9. June 22/90	$274,326.00	$1,259,059.00	
July 13/90	Wonnacott Lien		
10. July 23/90	$217,680.00		
11. Aug. 16/90	$201,805.00	$419,485.00	
Aug. 28/90	Wonnacott Lien vacated		
12. Sept. 28/90	$159,370.00		
13. Nov. 23/90	$199,742.00	$359,112.00	
	TOTAL ADVANCES	$3,897,001.00	

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

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

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

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

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:

> 2(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.

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.

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.

Mr. Van Klink then referred to subcontractors' liens. He pointed out that the triggering events for 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.

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.

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.

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.J.), where Cusinato J. stated, in an obiter passage, that, in his view, s. 2(3) should apply to both the main contract and subcontracts.

Cusinato J.'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.

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.

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".

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 the contract; ("contrat")

> "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")
>
> . . . . .
>
> "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 an agent of the owner but who supplies services or materials to the improvement under an agreement with the contractor or under the contractor with another subcontractor; ("sous-traitant")

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 [Mechanics Lien Act, R.S.O. 1980, c. 261]. This reference can only relate to the general contract.

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.

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

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.

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 purposes 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.

There is, in fact, strong internal evidence within s. 2(1) and (3) 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; ("amlioration", "amlior")

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 (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.

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 in used in s. 2(1)(b). This, again, reinforces the view that no part of s. 2 was aimed at subcontracts.

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".

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.

One final but important point can be made here. Section 1(1) defines "prices" as meaning "the contract or subcontract price". yet s. 2(3)(a), which includes part of the formula establishing deemed completion, speaks of "1 percent 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)?

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.

For example, in Macklem and Bristow's Construction and Mechanics Liens in Canada, 5th ed. (Toronto: Carswell, 1985), we find that the authors are quite emphatic in their view that s. 2(3) cannot apply to subcontracts. 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.

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.

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.

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.

In the 1990 sixth edition of their monumental work, Macklem and Bristow seem still to be of the view reflected in the fifth edition although they note the contrary obiter view in Trane at c. 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.

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 Kirsh ed., The Construction Lien Act: Issues and Perspectives (Toronto: Carswell, 1989), at pp. 118-19:

> 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 and was deemed to be complete and the lien time of that subcontractor or sub-contractor 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 if 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.

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

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

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.

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.

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.

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 Wonnacott 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.

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.

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 Wonnacott 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.

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;

78(4) Subject to subsection (2), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that was registered prior to the time when the first lien arose in respect of an improvement, has priority, in addition to the priority to which it is entitled under subsection (3), over the liens arising from the improvement, to the extent of any advance made in respect of that conveyance, mortgage or other agreement after the time when the first lien arose, unless,

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

(b) prior to the time when the advance was made, the person making the advance had received written notice of a lien.

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.

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.

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.

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--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.

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).

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, "[e]xcept 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."

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.

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.

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.

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 Wonnacott liens from title.

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 the 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.

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.

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, R.S.O. 1990, c. R.20, and the Land Titles Act, R.S.O. 1990, c. L.5. 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.

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 advances nos. 5-9 and 12-13 as it does for advances 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.

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' 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

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 Wonnacott liens were registered.

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(1) of the predecessor Mechanics Lien Act, R.S.O. 1970, c. 267, and the case law thereunder.

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.

On this issue, Mr. Van Klink relied on the Divisional Court decision in Waynco Ltd. v. Terrace Manor Ltd. (1981), 21 R.P.R. 258, 127 D.L.R. (3d) 142.

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. 262-63:

> 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.

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 the old 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.

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.

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.

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. 180-81 of the report the committee comments as follows, in part:

> 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.

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.

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).

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.

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), 47 O.R. (2d) 794, 7 C.L.R. 1 (H.C.J.), including the annotations of Harvey Kirsh and Kevin McGuiness at pp. 2-4 [C.L.R.].

C. The postponement agreements

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).

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

> 78(8) Despite subsections (4) and (6), where a preserved or perfected lien is postponed in favour of the interest of some

other person in the premises, that person shall enjoy priority in accordance with the postponement over,

(a) the postponed lien; and

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

but nothing in this subsection affects the priority of the liens under subsections (2) and (5).

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.

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

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.

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 v. Valantori Construction Ltd. (1990), 43 C.L.R. 220 (Ont. H.C.J.), and Horsman Brothers Holdings Ltd. v. Lee (1985), 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.

In summary, then, the priority scale 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 advances 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 advances 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

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.

Judgment accordingly.

TAB 7

CITATION: Cam Moulding & Plastering Ltd. v Dupont Developments Ltd., 2018 ONSC 3126
COURT FILE NO.: CV-13-494453 and CV-14-496630
DATE: May 17, 2018

ONTARIO

SUPERIOR COURT OF JUSTICE

3126

B E T W E E N:	)	
	)	
Cam Moulding & Plastering Ltd.	)	A. Conte for plaintiff
	)	Fax: 866-543-3165
	)	
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
Dupont Developments Ltd., The Rose and Thistle Group Ltd., Florence Leaseholds Limited, Beatrice Leaseholds Limited and ADA Leaseholds Limited	)	M. Handler for defendants Florence, Beatrice and Ada
	)	Fax: 905-265-2235
	)	
	)	
Defendant	)	
Gentry Environmental Systems Ltd.	)	A. Conte for plaintiff
	)	Fax: 866-543-3165
	)	
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
Dupont Developments Ltd., The Rose and Thistle Group Ltd., Florence Leaseholds Limited, Beatrice Leaseholds Limited and ADA Leaseholds Limited	)	M. Handler for defendants Florence, Beatrice and Ada
	)	Fax: 905-265-2235
	)	
	)	
Defendant	)	

Heard: January 11, 2018, April 10, 11, 12 and 13, 2018

Master C. Albert

[1] Who has priority: two unpaid lien claimants or the mortgagee? For the lien claimants to succeed, the court must find that the actual value of the premises on September 11, 2012[1], being the date when the first lien arose, was less than the amount advanced under the mortgage prior to that date. For the mortgagee to succeed the mortgagee must prove that the value of the land was at least $6.5 million on September 11, 2012 and that the entire first mortgage was advanced prior to that date.

[2] The mortgagee's position is that the mortgagee advanced $6.5 million on September 10, 2012 pursuant to a vendor take back first mortgage (the "VTB mortgage"), and on that date the value of the lands exceeded $6.5 million. They rely on multiple offers to purchase to establish the value of the property as of that date.

[3] The lien claimants' position is that they have priority over the first mortgagee because:

a) the property had no value on September 11, 2012 due to contamination;

b) alternatively the value of the property on September 11, 2012 was between $5,650,000 and $6 million, or

c) in the further alternative, no funds were advanced under the VTB mortgage because, unlike an institutional mortgage, no funds changed hands.

[4] For the reasons that follow this court finds that the mortgagee's interest has priority over the lien claimants' interests and that the mortgagee is entitled to the funds held in court.

I. Relevant facts

[5] Defendants Florence Leaseholds Limited, ADA Leaseholds Limited and Beatrice Leaseholds Limited ("FAB") acquired 1485 Dupont Street (the "Property" or "1485 Dupont") in the Junction Triangle area of the City of Toronto on December 12, 1963. They held the Property for almost 50 years until 2012, when they agreed to sell it for $8 million to The Rose and Thistle Group Ltd., ("RAT"). The parties executed an agreement of purchase and sale ("APS") on June 15, 2012. RAT assigned the APS to a company incorporated for the specific purpose of taking title, Dupont Developments Ltd. ("Dupont"). The transaction closed on September 10, 2012 with the purchase price made up of $1.5 million in cash and the VTB mortgage in favour of FAB for $6.5 million, being the balance of the purchase price, registered on title[2] immediately after registration of the transfer of title.

[1] As discussed later in these reasons the first lien arose when work started on September 11, 2012
[2] Instrument AT3123491

[6] Throughout FAB's ownership the premises had been used for commercial purposes, with light industrial and commercial uses. There is a 90,000 square foot, two storey building on the one acre site. From 1995 until 2011 the premises had been leased and used as a dry cleaning operation known as Creeds Dry Cleaning. When Creeds gave notice of its intention to vacate the premises FAB decided to sell the property.

[7] Jack Brudner, a retired lawyer, managed the property through his company Millwood Management Limited ("Millwood"). Mr. Brudner was the main witness for FAB, providing evidence of the background and history of the site and the events surrounding the sale of the property in 2011 to 2012 (the "First Sale") and again in 2014 to 2015 (the "Second Sale").

[8] As a dry cleaners Creed's used chemicals that contaminated the property. Adjacent to the property are other properties used for purposes that caused groundwater contamination. It is not in dispute that the property that is the subject of this litigation was contaminated.

[9] Leading up to the sale to RAT, FAB marketed the property privately. It was not actively marketed through a listing but nevertheless several offers were presented to Mr. Brudner from September 2011 through June 2012. Mr. Brudner obtained opinions from three realtors for the purpose of ascertaining an appropriate sale price for the property. He took these opinions into account in negotiating the First Sale.

[10] The realtors that he approached and their recommendations as to sale price as set out int heir reports are:

a) John Morrison of Morrison Royal LePage Real Estate Services Ltd.: $4.5 to $4.8 million;

b) Ryan Thomson of Colliers International: between $5 and $6.5 million; and

c) Tim Novak of Avison Young: $8.9 to $9.5 million.

[11] It is significant that the recommended sale prices vary widely, with a $5 million swing between the lowest and the highest.

[12] None of the three opinions provided to Mr. Brudner in 2011 as to sale price were based on professional appraisals. The realtors approached their recommendations from multiple perspectives taking into account factors such as the intended use by a prospective purchaser, the commercial income generated by the property at the time, and other factors.

[13] The authors of these three reports did not testify at trial and their recommendations as to sale price are of no probative value on the issue of the actual value of the property. However, the opinions that they provided to Mr. Brudner are relevant to his conduct in negotiating the sale. Armed with this information and the vast disparity in opinions as to an appropriate sale price, Mr Brudner went to the market to see what price he could achieve for the property.

[14] FAB also owned the property across the street at 299 Campbell Avenue. Initially FAB proposed to sell the two properties together as a package, with separate APS but conditional on

the purchaser buying both properties. Ultimately FAB decided to sell the two properties separately.

[15] Without FAB actively listing the properties for sale, Mr. Novak of Avison Young presented several APS to Mr. Brudner during the period from September 2011 to May 20, 2012. The proposed sale prices in these offers ranged from $7.7 million to $8.4 million. Each APS was unique and contained different conditions and financing options.

[16] The APS presented to FAB in 2011 and 2012 are summarized as follows:

[17] Offer #1: The first APS was dated September 26, 2011 for $8 million for 1485 Dupont from 2164599 Ontario Inc. Ultimately it did not proceed. According to Mr. Brudner the purchaser could not afford to purchase both properties.

[18] Offer #2: The second APS was dated November 29, 2011 for $7.7 million for 1485 Dupont from 2086361 Ontario Inc., in trust. This is referred to by the parties as the "TAS" offer. Because Mr. Brudner was negotiating the first APS at the time, he had not responded to an earlier offer from TAS but when Offer #1 fell through, TAS presented its offer of $7.7 million for 1485 Dupont and $2.8 million for 299 Campbell. The offers were linked and conditional for a due diligence period. FAB accepted the offers in November 2011. The parties extended the due diligence period and TAS remained hesitant regarding 1485 Dupont. By email dated March 15, 2012 Mr. Brudner notified TAS that FAB would release TAS from the 1485 Dupont property. TAS closed the 299 Campbell APS in April 2012.

[19] Offer #3: The third APS was dated March 12, 2012 for $7.7 million for 1485 Dupont from 1782604 Ontario Limited. This is also referred to as the "Pearl offer", wherein Mr. Pearl was seeking to tie up the property so that he could find an interested buyer and act as agent for the ultimate purchaser who would actually close the transaction. In fact, it was Mr. Pearl who introduced RAT to the property. At trial both parties offered guesses as to why the third APS did not result in a firm deal and closing. The lien claimants guessed that it was due to contamination. FAB guessed that it was due to financing. Neither guess is admissible or of any probative value.

[20] Offer #4: The fourth APS was dated May 1, 2012 from Ehrlich Samuel Properties Inc. for $8.4 million for 1485 Dupont. There were conditions attached to the APS and FAB did not sign it back because just prior doing so FAB received an unconditional offer from RAT.

[21] Offer #5: The fifth APS dated June 8, 2012 was from RAT for $8 million for 1485 Dupont. The parties negotiated back and forth regarding structure, financing terms, and price. Ultimately, after Mr. Brudner asserted to Norma Jean Walton, principal of RAT, that he had received competing offers and if she wanted the property she had to present a strong offer, RAT submitted an unconditional offer to purchase the property "as is where is", with a VTB of $6.5 million and the balance in cash on closing. FAB formally signed back the APS on June 15, 2012.

[22] RAT closed on the transaction on September 10, 2012, taking title through Dupont Developments Ltd. The transfer to Dupont was registered as instrument AT313490 on September 10, 2012 at 10:20 a.m.

[23] Immediately thereafter, also at 10:20 a.m. on September 10, 2012, the first mortgage in favour of FAB was registered as instrument AT313491, specifying principal of $6.5 million and a five year term to September 5, 2017 with a 4.5% interest rate. The full amount of the VTB mortgage had been applied to the purchase price on closing.

[24] After closing RAT retained OHE Consultants to perform Phase One and Phase Two environmental assessments, including the drilling of bore holes beginning September 11, 2012. RAT also undertook repairs and renovations with a view to achieving higher commercial rents. Cam and Gentry are two suppliers of services and materials during this period of repairs and renovations.

[25] According to Mr. Brudner, all of the offerors had been advised of the contamination issue. The lien claimants' experts, engineer Michael Grayhurst and geologist Albert Maddalena, and FAB's expert appraiser Robert Robson, all testified that so long as the purchaser maintained the existing commercial uses there would be no requirement to remediate the contamination, other than venting to address air quality issues[3]. The lands could not be redeveloped for residential uses without a rezoning and, in that event, an environmental Record of Site Condition ("RSC") would be required. Remediation would be necessary to obtain an RSC.

[26] Ms Walton testified that RAT was in the business of buying and rehabilitating distressed or, in her words, "broken" properties and rehabilitating them. RAT was particularly interested in "brownfield" properties, that term referring to properties with environmental contamination issues. Ms Walton was straightforward and forthright in her testimony, including evidence about her personal financial and professional failures. I find that she is a credible witness and her evidence is reliable.

[27] RAT had purchased over 30 distressed or broken properties in the Greater Toronto Area ("GTA") in the five or so years leading up to this APS with a view to rehabilitating them. She testified that when she considered 1485 Dupont she anticipated contamination because of the dry cleaning use, and then when she moved forward with her research on the property she obtained copies of various reports[4] and items of information that confirmed contamination. She was fully aware of the contamination issue when, on behalf of RAT, she prepared and submitted the APS for $8 million.

[28] RAT was in business with Dr. Bernstein, known as the "diet doctor" and also an investor in real estate. Their relationship began with Dr. Bernstein advancing funds for RAT's purchases of distressed properties in the GTA initially as a mortgagee. Subsequently their relationship morphed into a partnership on multiple properties with both parties investing funds to acquire the properties.

[29] In or about November 2013 a group of 29 companies owned or controlled by Dr. Bernstein and known as "Dr. Bernstein Diet Clinics Ltd." or "DBDC Investment (property identifier) Ltd." applied for a receivership order, resulting in the order of November 13, 2013 of Justice Newbould (the "Receivership Order ") appointing Schonfeld Inc. Receivers + Trustees to

[3] According to expert geologist Albert Maddalena
[4] Including the TIL report summary

manage a number of properties, including 1485 Dupont. The Receivership Order stayed the mortgagee rights of FAB. The receiver authorized Mr. Brudner's management company, Millwood, to act as day-to-day manager of 1485 Dupont.

[30] RAT, owner of approximately 30 properties at the time of the Receivership Order, was a sophisticated purchaser of commercial property in the GTA with a special focus on brownfield properties. It is clear that RAT is knowledgeable about contaminated commercial properties and the impact of contamination on property value.

[31] At the time of the Receivership Order renovations that RAT had initiated after closing were ongoing. Suppliers of services and materials had not been paid and six of them registered construction liens ("CL"), as follows:

a) CL#1: Gentry Environmental Systems Ltd. ("Gentry") registered a CL on November 15, 2013 for $269,967.16 as instrument AT3455085;

b) CL#2: Cam Moulding & Plastering Ltd. ("Cam") registered a CL on November 18, 2013 for $73,800.00 as instrument AT3456333;

c) CL#3: Norel Electric Ltd. registered a CL on November 22, 2013 for $248,631.00 as instrument AT3460372;

d) CL#4: Abaco Glass Inc. registered a CL on December 4, 2013 for $139,000.00 as instrument AT3470428;

e) CL#5: Titan Plumbing Ltd. registered a CL on December 6, 2013 for $89,899.39 as instrument AT3472102; and

f) CL#6: Ground Force Environmental Inc. registered a CL on December 19, 2013 for $242,551.74 as instrument AT3483969.

[32] Four of the six lien claims were settled by the receiver, leaving only the Cam and Gentry lien claims as challenging FAB for priority. On May 31, 2017 Gentry filed for bankruptcy with Scott, Pichelli & Easter Limited appointed as bankruptcy trustees. On August 10, 2017 the registrar in bankruptcy granted an order for Gentry to continue this action.

[33] The Cam lien claim: Cam registered a construction lien for $73,800.00 on November 18, 2013 as instrument AT3456333 and registered a certificate of action as instrument AT3476270 on December 11, 2013. Timeliness of the Cam lien claim is not in issue.

[34] Cam admits receiving payment on April 12, 2017 of $3,141.15 from the receiver in the distribution following the sale of the property. That payment is a payment on account of the principal of the lien claim and is applied to reduce the lien claim amount to $70,658.85.

[35] The Gentry lien claim: Gentry registered a construction lien for $269,967.16 on November 15, 2013 as instrument AT3455085 and registered a certificate of action as instrument AT3509428 on January 30, 2014. Timeliness of the Gentry lien claim is not in issue.

[36] Gentry admits receiving payment on April 27, 2017 of $11,490.58 from the receiver in the distribution following the sale of the property. That payment is a payment on account of the principal of the lien claim and is applied to reduce the lien claim amount to $258,476.58. The receiver also paid Gentry $50,000.00 to start the HVAC system. That payment is discussed in these reasons under the heading "calculation issues".

[37] The receiver maintained the VTB mortgage in good standing through to February 4, 2014 but thereafter the mortgage went into default and the receiver took steps to sell the property under the receivership beginning in May 2014, listing it with CBRE Limited. According to CBRE's reporting letter of December 9, 2014 addressed to Mr. Brudner and describing activity during the listing period of May 9, 2014 to November 9, 2014, CBRE received four offers:

a) Offer #1: $9 million, conditional;

b) Offer #2: $9 million;

c) Offer #3: $8.75 million from Firm Capital Corporation Limited;

d) Offer #4: $6.75 million.

[38] CBRE reported that it did not follow up on the second, third and fourth offers because the receiver "lost control" of the property, referring to the October 9, 2014 order of Justice Patillo lifting the stay imposed by the Receivership Order in respect of 1485 Dupont and granting leave for mortgagee FAB to sell the property. FAB initiated power of sale proceedings.

[39] Mr. Brudner testified that in August 2014, prior to the order of Justice Patillo, and after Firm Capital had made the offer listed above as Offer #3, Firm Capital approached Mr. Brudner to buy FAB's $6.5 million VTB mortgage for $6.3 million. According to Mr. Brudner, as corroborated by emails, FAB had disclosed and Firm Capital was aware of the contamination issues on the property. The sale of the mortgage did not close because of the unresolved priority issue, presumably the issue as between the mortgagee and the lien claimants that is the subject of the present litigation.

[40] On March 9, 2015 FAB initiated power of sale proceedings under the VTB that the receiver had let lapse into default. The notice of sale provides that the amounts owing under the mortgage as of March 2, 2015 total $6,932,463.44 with additional interest accruing at the per diem rate of $845.69 thereafter. The notice of sale was served on Dupont, RAT, all lien claimants and the receiver.

[41] FAB received five offers pursuant to the power of sale proceedings as follows[5]:

[42] APS #1: October 31, 2014 for $6.8 million from Thombar Property Management Inc. in trust for a corporation to be formed ("Thombar");

[43] APS #2: February 23, 2015 for $7 million from Thombar;

[5] described in the Robson report, exhibit 9

[44] APS #3: February 24, 2015 for $6.7 million from Epicurus Capital in trust for a corporation to be formed;

[45] APS #4: February 24, 2015 for $7.5 million from Sancus Properties Limited in trust for a corporation to be formed. Ms Walton is a principal of Sancus and by this offer she was attempting to re-acquire the property. This fact suggests that despite the contamination issues the property was worth the price offered; and

[46] APS #5: March 5, 2015 for $7.5 million from Thombar in trust for a corporation to be formed and ultimately incorporated as 1485 Dupont Inc., unconditional and including a VTB first mortgage (the "2015 VTB") in favour of FAB for $5.5 million. By vesting order of Justice Newbould dated May 11, 2015 in file CV-13-10280-00CL (the "Vesting Order") the court approved the sale, including all calculations, and the sale closed on May 20, 2015 with Thombar assigning the agreement and the owner taking title as 1485 Dupont Inc.

[47] I note that Thombar, ultimately the successful purchaser, had submitted three offers, increasing the price each time. FAB accepted Thombar's third offer. A principal of Thombar, Andrew Thomson, testified at trial that Thombar purchased the property knowing about the contamination issues and prepared to initiate clean-up remediation. Thombar carried out renovations and improvements and continues to operate the property as a successful, fully leased-up commercial property, reporting to the Ministry of the Environment ("MOE") annually as to the ongoing steps taken (particularly as to venting) to maintain the property as a safe property for environmental purposes for its continued and current commercial uses. Mr. Thomson presented as a credible and forthright witness and I find that his evidence is reliable.

[48] Mr. Thomson further testified that on August 3, 2017 Thombar fully paid out the 2015 VTB first mortgage that had been taken out to finance the Second Sale and replaced it with an institutional first mortgage from the Bank of Montreal for $10 million. Mr. Thomson testified that the 2015 power of sale proceedings allowed him to buy the property at a reduced, distressed sale price and Thombar got a "real bargain" on the property.

[49] Both Mr. Thomson and Ms Walton testified that in their experience in purchasing real estate, receivership and power of sale proceedings stigmatize a property and allow a purchaser to acquire a property at a bargain or reduced price. Ms Walton speaks from her personal experience regarding the receivership sale of RAT's many properties.

[50] Mr. Thomson further testified that in 2017 Thombar received an unsolicited offer to purchase 1485 Dupont for $25 million. Thombar rejected the offer because the property is a solid, income producing property and the partners were not prepared to sell it.

[51] In April 2015, prior to the Second Sale, FAB had obtained an appraisal report from Lebow, Hicks Appraisal Inc. Pursuant to Mr. Brudner's instructions the appraisal reflects the market value of the property as of March 2015 as if it were not affected by contamination. The appraisal reports the market value as of that date and subject to those limitations as $7.8 million. No one from Lebow, Hicks Appraisal Inc. testified at trial. Thereafter, Justice Newbould approved the sale for $7.5 million.

[52] FAB asks the court to draw the inference that the $300,000.00 difference between the appraised value of $7.8 million for uncontaminated property and the approved sale price of $7.5 million accounts for the contamination factor. FAB further asserts that the resulting $7.5 million sale price is not the actual market value as of May 2015 because the power of sale proceedings, the unfinished renovations, the construction liens and other factors depressed the price. FAB asserts that the actual value as of the date of the court approved sale (May 11, 2015) was greater than $7.5 million. Given my analysis and findings the factual issue of the actual value of the property in May 2015 need not be decided. Had that issue required determination I would have agreed with FAB on this issue.

II. Analysis

(a) Environmental contamination and use of property

[53] Much of the evidence at trial concerned contamination on the property. The source of the contamination was twofold: contamination from the uses on site, particularly the dry cleaning use, and contamination migrating to the site from neighbouring or nearby sites.

[54] All of the witnesses other than the lien claimants testified that it is common knowledge to anyone familiar with real estate that dry cleaners use chemicals and that a dry cleaning use will likely give rise to contamination and the need to remediate a property. Knowing that a property has been used as a dry cleaners will alert any prospective purchaser to the issue.

[55] Robert Robson, an appraiser and holder of a Diploma in Civil Engineering Technology from Ryserson Polytechnical Institute in 1970, was retained by FAB as an expert witness. He prepared a report and testified at trial. He opined that "it is common knowledge that properties occupied by dry cleaning operations often experience contamination of the underlying soil and groundwater. Purchasers of industrial/commercial properties in Toronto are typically well informed …" He cited an article published in The Globe and Mail on February 14, 2011 titled "*Toxic Dry-Cleaning Chemical is Canada's Top Eco-Villain"*. He considered all of the prospective purchasers of 1485 Dundas to have been well-informed or well advised, acting in what they considered to be their best interests.

[56] Mr. Robson is of the opinion that the presence of contamination does not necessarily mean that there is unacceptable risk or that remediation is required. Whether remediation is required, in his words, "is based on the intended use of the property. Generally, when a property is used wholly or partly for an industrial or commercial use, a Record of Site Condition[6] ("RSC") is required only before the use is changed."

[6] A Record of Site Condition ("RSC") is a document issued by the provincial government recording that the lands are environmentally suitable for the proposed use. A RSC is required when changing the use of a property from commercial to residential uses. A RSC is not required when continuing ongoing commercial and industrial uses.

[57] The unequivocal and corroborated evidence at trial is that an RSC, which would not be available for this property without remediation, was not required for the subject property to continue to be used for commercial and light industrial uses. Both RAT in 2012 and Thombar in 2015 intended to continue the commercial and light industrial uses.

[58] Ms Walton and Mr. Thomson both testified that the quantum of the offers submitted by RAT and Thombar is based on continuing the current uses for the property. Thombar has continued the commercial uses of the property through to the present day.

[59] As part of its due diligence, TAS (2011 – 2012 Offer #2) retained Toronto Inspection Limited ("TIL") to conduct environmental testing, including bore holes for soil and groundwater samples on site. TIL prepared a report dated February 9, 2012 identifying contamination on both of FAB's properties (1485 Dupont and 299 Campbell) and recommending further investigation. FAB's environmental engineer Tony Missiuma of Golder Associates received a copy of the TIL report in February 2012 and Mr. Brudner received it from Golder in March 2012. No one from TIL, TAS or Golder testified at trial.

[60] After closing on September 10, 2012 RAT retained OHE Consultants to perform a Phase One environmental assessment. OHE issued a report on October 19, 2912, recommending a Phase Two environmental assessment. OHE conducted a Phase Two environmental assessment and issued its report on June 6, 2013.

[61] The lien claimants called Michael Grayhurst of OHE as a witness at trial, relying on his expert opinion as a "participant expert". That term was coined in the decision of the Court of Appeal in *Westerhof v Estate of William Gee* 2015 ONCA 206, wherein an expert who provided a report in a context other than for the purpose of the litigation before the court was characterized as a participant expert and allowed to proffer opinions without complying with rule 53.03.

[62] OHE determined in its 2012 and 2013 reports that there were soil impacts on the property under the building footprint, and groundwater impacts throughout the property including trichloroethylene. Ms Walton testified that when she submitted RAT's APS she had expected trichloroethylene contamination from the dry cleaning operation. She had prior experience with acquiring lands that had been used by dry cleaners. She factored that issue into the price that RAT offered for the property.

[63] OHE, in its Phase Two report, noted that "the level of environmental contamination identified in the Phase Two ESA would not preclude the continued commercial use of the property in any way. Ongoing attention should be paid to the issue of building air quality with respect to the identified presence of subsurface contamination". In other words, so long as the property continued to be used for commercial purposes, contamination was not an issue. That the property could be used successfully as a commercial property is borne out by the evidence of trial witness Mr. Thomson, a principal of the current owner of the property. Following receipt of the OHE Phase Two report RAT initiated remediation efforts. Thombar subsequently addressed air quality issues with venting and ongoing monitoring.

(b) Offers and other evidence of value

[64] The parties agree that the onus is on FAB to establish the value of the property on the date the first lien claim arose. The parties also agree that RAT closed its purchase on September 10, 2012 and hired contractor OHE to begin Phase Two ESA work the day after closing, on September 11, 2012. On that basis the relevant date is September 11, 2012.

[65] FAB's position is that the multiple offers to purchase the property in 2011 to 2012 and again in 2014 to 2015, and Firm Capital's offer to purchase the mortgage in 2014, provide sufficient evidence of the value of the property for the court to make a finding that the value of the property for purposes of section 78(3) of the Act was at least $6.5 million on September 11, 2012.

[66] The offers and first mortgages, described in detail earlier in these reasons, are summarized in the following chart:

#	**Date**	**Amount**	**Notes**
1	September 26, 2011	$8 million	Cash
2	November 29, 2011	$8 million	VTB
3	March 12, 2012	$7.7 million	VTB
4	May 1, 2012	$8.4 million	VTB
5	June 8, 2012	$8 million	RAT APS Closed September 10, 2012 Title: Dupont Developments Ltd. VTB 1st to FAB
6	2014	$9 million	CBRE
7	2014	$9 million	CBRE
8	2014	$8.75 million	CBRE
9	2014	$6.75 million	CBRE
10	August 2014	$6.3 million	Firm Capital offer to buy VTB
11	October 31, 2014	$6.8 million	Thombar APS #1
12	February 23, 2015	$7 million	Thombar APS #2
13	February 24, 2015	$6.7 million	Epicurus Capital
14	February 24, 2015	$7.5 million	Sancus Properties Limited (Ms Walton's new company)
15	March 5, 2015	$7.5 million	Thombar APS #3 Closed May 20, 2015 May 11, 2015 Vesting Order Title: 1485 Dupont Inc. VTB $5.5 million 1st to FAB
16	August 3, 2017	$10 million	Bank of Montreal 1st mortgage
17	2017	$25 million	Unsolicited offer to purchase

RAT's APS is evidence of actual value

[67] Mr. Brudner, in an effort to maximize the sale price in 2012, played the offers against each other. This practice is not uncommon when marketing real estate. Regarding RAT's initial APS, in his negotiations with Ms Walton Mr. Brudner told Ms Walton that if she did not sweeten RAT's offer, RAT would not succeed in acquiring the property. Whether Ms Walton knew that the other offers were conditional was not elicited in evidence at trial. Concerned that she might lose the deal Ms Walton presented an unconditional offer of $8 million on behalf of RAT.

[68] Ms Walton testified clearly and unequivocally that in structuring RAT's 2012 APS she was aware of the contamination issue and factored it into the purchase price. Ms Walton submitted an "as is" offer with full knowledge that the property was a "broken" or distressed property with contamination issues. RAT was in the business of dealing with such properties.

[69] Ms Walton, educated as a lawyer and businessperson with an LLB and an MBA, performed an analysis prior to presenting RAT's APS. Ms Walton projected significant profits even in the face of a purchase price of $8 million and the need for some remediation. Her projections were based on retaining the historic and ongoing uses commercial and light industrial uses for the property. Unfortunately RAT lost the property, not because RAT had paid too much but rather because the property was swept up in the group of approximately 30 properties that went into the receivership triggered by RAT's real estate partner, Stanley Bernstein, who had financed RAT's real estate acquisitions initially as mortgagor and subsequently as a partner. RAT was in default on other properties and Dr. Bernstein caused a receivership that swept into the proceedings all of the properties owned by RAT and its related companies, including 1485 Dupont.

[70] There is no evidence of any collusion or fraud as between RAT and FAB, or any of their principals, in arriving at the $8 million purchase price. Nor is there any evidence that RAT and FAB are in any way related. They are not. RAT's $8 million offer was an arm's length offer made by a willing purchaser who had researched the property and was experienced in dealing with brownfield properties.

(c) Expert evidence of value of the property when the first lien arose

[71] The *Construction Lien Act* is framed in terms of "actual value" at the time the first lien arose. The relevant date is September 11, 2012.

[72] The court has held that actual value and market value are equivalent (See: *W.A. Baker Surveying Inc. v Hassan* 1993 CarswellOnt 850 at para 16). In *W.A. Baker* the court applied section 78(3) of the Act and defined actual value as "the price that would likely result from negotiations between a willing vendor and a willing purchaser". Applying that definition to the case before me, I must consider whether FAB was a willing vendor and whether RAT was a willing purchaser. I find that they were, and that they negotiated a price, with more than one proposed price and structure forming part of their negotiations, in an environment where FAB was entertaining other offers in the same price range at and around the same time. Applying that definition, the actual value of the property would be the price agreed upon as between FAB and

RAT in June 2012 and the price for which they closed the transaction on September 10, 2012. There is no evidence to suggest that the actual value or the market value changed between the date of the offer and the date of closing.

[73] Justice Burnyeat in *Burnaby/New Westminster Assessor, Area 10 v Haggerty* 1997 CarswellBC 1453 at para 8, citing authorities set out in that paragraph, defined actual value and market value as "the value a willing buyer would pay and a willing vendor would accept". In that case, concerning tax assessment, the Appeal Board below had only taken into account what a prudent purchaser would pay and had ignored consideration of the price at which a willing vendor would sell. The court determined that by ignoring this significant factor the Appeal Board had erred in law. The court further determined that the Appeal Board had factored in a reduction for remediating contamination without any evidence that there was a risk associated with the contamination and a demand to reduce the price to factor in the cost of remediation.

[74] The lien claimants in the present case ask the court to discount the value of the property to account for the cost of remediation. The evidence regarding 1485 Dupont is that the property could continue its commercial and light industrial uses without remediation. As in the *Burnaby/New Westminster* case, there is no evidence that RAT and the other potential purchasers in 2011 and 2012 were unaware of the contamination and failed to take the cost of remediation into account, or that remediation was in fact required. The evidence is to the contrary: (i) Mr. Brudner had disclosed to potential purchasers the information available to him regarding contamination and (ii) remediation was not required to continue commercial and light industrial uses.

[75] Despite the lien claimants' repeated reliance on the test as one of what a "prudent" purchaser would do, I am not persuaded that this is the applicable test. Rather, the test is as stated in the *Burnaby/New Westminster* decision: what is the price at which a willing buyer would buy and a willing seller would sell a property.

[76] Multiple definitions of market value are set out in the Canadian Uniform Standards of Professional Appraisal Practice ("CUSPAP") at sections 16.14.3, suggesting that market value has many variables.

[77] The lien claimants rely on opinion evidence of Grant Uba of Altus Group, a real estate appraiser, retained for the purpose of quantifying what a reasonable sale price would have been in 2012 for a "prudent purchaser" to pay.

[78] One problem with Mr. Uba's approach is that he did not ascertain the appraised value of the property. Rather, his retainer was confined to providing an opinion of the "reasonable sale price". He specifically states in his report that his opinion cannot be relied upon as an appraised value of the property. The lien claimants did not obtain a full appraisal report because of cost: an appraisal would been far more costly than an opinion of sale price. The problem with taking the less costly route is that the expert's opinion is unhelpful to the court in determining the actual value of the property for purposes of section 78(3) of the Act.

[79] In arriving at his opinion of sale price Mr. Uba made many assumptions, including extraordinary assumptions, and relied on information provided to him by others. He admitted that he did not test the assumptions and information he relied on to ascertain its veracity.

a) Mr. Uba did not contact and interview the parties who had signed APS between October 2012 and June 2013. Had he done so he could have ascertained the reason each prospective purchaser had not completed the purchase. Instead, he assumed that they did not close the transaction because of contamination. He had no basis for this assumption. Mr. Uba admitted that there are many reasons why a purchaser may walk away from a transaction during the conditional period. Examples include financing, finding a better property elsewhere and not finding the right investment partners.

b) Mr. Uba did not obtain and review the 2009 TIL environmental report.

c) Mr. Uba assumed that RAT did not know about the contamination and did not take it into account in the purchase price offered, notwithstanding that he knew that RAT had purchased other properties including contaminated brownfield sites. He did not take into account that RAT had factored contamination into the price it offered. Instead, he assumed that RAT's price should have been lower to account for remediation costs.

d) Mr. Uba used as his starting point the actual 2015 sale price paid pursuant to a distress sale (the power of sale) and then deducted what he assumed as the cost to remediate (without testing his assumptions for veracity) and further deducting four years of increases in the Toronto real estate market (which he assumed to be between 16% and 24%). He relied on the five APS submitted in 2014 and 2015, ignoring a significant market factor: it was a power of sale proceeding. He concluded that the 2012 price paid by RAT was inflated because the 2014 to 2015 power of sale offers were lower.

e) Mr. Uba estimated that the sale price should have been between $5,650,000 and $6,000,000 but he repeatedly qualified that his opinion was not an opinion of the property's value.

[80] Mr. Uba admitted that if he had been retained to appraise the value of the property he would have done a far more extensive analysis. In the case of the report he prepared and the conclusions he reached for purposes of this trial, he did not abide by the voluminous, extensive and detailed CUSPAB guidelines and standards that must be followed when appraising property value.

[81] Mr. Uba admitted that he did not follow CUSPAP standards for appraising property because he had not been retained by the lien claimants to appraise the property and therefore CUSPAP did not apply. Nevertheless, the lien claimants seek to rely on his opinion of sale price as if it were the appraised value of the property. It is not.

[82] According to CUSPAP at section 2.26, reliance on extraordinary assumptions, if inaccurate, could materially impact opinions and conclusions. Mr. Uba admitted that he made multiple extraordinary assumptions that he failed to disclose in his report and that his conclusions could be flawed if the extraordinary assumptions he relied on are not correct.

[83] Included in the extraordinary assumptions is reliance on information provided to him by way of memo from the lien claimants' counsel and not independently verified by him as to accuracy. Mr. Uba relied on untested hearsay evidence that he improperly accepted as fact. In Mr. Uba's words "I accepted and relied on (the memo) at face value. I assumed all facts were correct". Mr. Uba admitted under cross-examination that it was a mistake to rely on the memo.

[84] Another extraordinary assumption relied on by Mr. Uba was opinions of others as to the cost of remediation: he accepted these opinions at face value without independent verification.

[85] Mr. Uba assumed that no institutional lender would finance a contaminated property yet the evidence[7] shows that in 2017 the Bank of Montreal financed the subject property for $10 million. Had Mr. Uba taken the simple step of searching title he would have discovered the Bank of Montreal mortgage.

[86] Another basis for rejecting Mr. Uba's opinion of sale price is his erroneous assumption that the price should be based on converting the property to a residential condominium use, requiring a rezoning and an RSC, which would require remediation. Mr. Uba made a wrong assumption. RAT was renovating the property to continue its commercial uses, not to convert it to residential use. The subsequent purchaser, Thombar, continued the commercial use of the property successfully, increasing the rent revenues significantly without changing the use of the property.

[87] Section 7.6.3 of the CUSPAP[8] provides that in respect of retrospective opinions of value "data subsequent to the effective date may be considered as confirmation of trends evident at that date." Mr. Thomson testified that in continuing the commercial uses he has taken steps to maintain venting to preserve air quality, with annual environmental inspections. Remediation steps have been minimal and contamination did not prevent the Bank of Montreal from advancing a $10 million institutional first mortgage in 2017.

[88] In summary, Mr. Uba relied on multiple untested and unproven assumptions, many of which were incorrect. His report and his opinions are of no probative value to the court. He did not follow the standards required by CUSPAP to appraise the value of a property. Mr. Uba's opinion is not an opinion of the value of the property. His evidence is unhelpful to the court in determining the value of the property for purposes of applying section 78(3) of the Act.

[89] FAB relies on the expert report of Robert Robson, principal of the appraisal firm Robson Associates Inc. He did not provide an appraised value for the property. Rather, he critiqued Mr. Uba's report. The courts have cautioned against the utility of an expert report tendered solely for the purpose of critiquing the report of another party's expert.

[7] Mr. Thomson's oral evidence and the abstract of title
[8] Exhibit 10, volume 2, tab KK, page 612

[90] Mr. Robson, in his report, outlines the intrinsic components of determining whether a sale is for market value, relying on the definitions set out in the CUSPAP at section 16.14.3 (iv).

[91] Mr. Robson reviewed the APS and concluded that the value of the property between September 2011 and June 2012 was within the range of prices offered in the five APS, placing the value of the property between $7.7 million at the low end and $8.4 million at the high end. All of the offers were made by willing buyers to FAB, a willing seller.

[92] Mr. Robson challenges Mr. Uba's findings on several grounds. Firstly, he compares Mr. Uba's analysis and report with the requirements under CUSPAP and opines that what Mr. Uba has done is provide an opinion of value but called it an opinion of sale price without performing the requisite steps required to appraise the market value of the property. The court does not need Mr. Robson's opinion to reach the same conclusion.

[93] Secondly, Mr. Robson opines that Mr. Uba has completely ignored the impact of power of sale proceedings on market price. According to Mr. Robson property sold under distress power of sale conditions will sell at a depressed price, below market price. Also, when Thombar purchased the property in 2015 it was in a state of demolition requiring substantial renovation work, since the prior purchaser had been in the middle of renovations when placed into receivership. Mr. Uba relied on the 2015 sale price to Thombar as his starting point. Mr. Robson opines that Mr. Uba's approach is predicated on the assumption that the 2015 power of sale price was at market value in 2015. That assumption is not proven. Consequently Mr. Uba's calculation, based upon a false assumption, is flawed. Again, the court does not need Mr. Robson's opinion to reach the same conclusion.

[94] The lien claimants argue that a large VTB is evidence of an inflated sale price. There is no evidence to support that assertion. Vendor take-back financing is a typical and frequently used vehicle for financing a sale. Trial evidence corroborates that VTB financing is typical in lands affected by contamination. Once remediation is either underway or complete a VTB can be replaced by institutional financing, as was the case for this property in 2017.

[95] I accept as more reliable evidence of the value for the property in 2012 the actual APS prices in 2012 by prospective purchasers and the actual APS tendered by a willing buyer and accepted by a willing seller in 2012. The range of prices in those APS is from $7.7 million to $8.4 million. The range of prices offered in the period from 2014 to 2015 is from $6.75 million to $9 million in circumstances of a distress sale arising from receivership and power of sale proceedings.

[96] Taking the actual offers made by willing buyers and the two offers accepted on the First Sale and on the Second Sale by FAB as a willing seller, I find that the value of the property was more than the $6.5 million VTB on September 11, 2012. The best evidence of value is the RAT APS for $8 million.

(i) Priorities: Applying the test

[97] Section 78(1) of the *Construction Lien Act* provides:

> (1) Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises.

[98] Subsection 78(3) of the Act provides:

> (3) Subject to subsection (2)[9], and without limiting the effect of subsection (4)[10], all conveyances, mortgages or other agreements affecting the owner's interest in the premises that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent of the lesser of,
>
> a. The actual value of the premises at the time when the first lien arose; and
>
> b. The total of all amounts that prior to that time were,
>
> i. Advanced in the case of a mortgage, and
>
> ii. Advanced or secured in the case of a conveyance or other agreement.

[99] Subsections 78(1) and (3), read together, create a priority in favour of lien claimants over the interests of mortgage lenders for all purposes unless one of the exceptions applies.

[100] Mortgages registered prior to a lien claim are an exception. A lien claimant does not have priority over a prior registered mortgage where the amount advanced under the mortgage was not more than the value of the property when the first lien arose.

[101] A lien claimant's priority rights are a creature of statute. Lien claimants are entitled to be protected and to be paid for their supply of services and materials in priority to lenders who advance money to fund the improvement. The mischief that subsection 78(3) of the *Construction Lien Act* was designed to address in the case of competing priorities was the over-financing of a property to defeat a lien claimant's priority rights. In other words, if a lender finances the property for more than its value, the lender is only protected up to the value of the property.

[102] The parties agree that the relevant date is September 11, 2012 when RAT's first workers began their supply of services and materials. According to the Phase Two ESA report[11] OHE drilled bore holes on September 11 and 12, 2012.

---

[9] Subsection 78(2) applies to building mortgages to finance construction, which liens arising the improvement financed by the mortgage have priority. The VTB was not a building mortgage.
[10] Subsection 78(2) applies to subsequent advances of prior mortgages. In the present case the entire principal of the mortgage was applied to the purchase price. There were no subsequent advances. Subsection 78(4) does not apply and neither party relies on subsection 78(4).
[11] exhibit 10, tab M

[103] If the value of the property on September 11, 2012 was less than the $6.5 million VTB, then the lien claimants have a priority to the extent of the difference between the actual value of the property on that date and $6.5 million. If the value of the property on September 11, 2012 was at least $6.5 million then the mortgage takes priority over the lien claims.

[104] The burden of proof rests with FAB to prove that they fall within the exception. (See: *Boehmers v 794561 Ontario Inc*., 1995 CanLII 660 (Ont.C.A.) affirming the trial decision at (1993) 14 O.R. (3d) 781; followed in *Re Jade-Kennedy Development Corporation* 2016 ONSC 7125 at para. 54).

[105] To fall within the exception FAB must prove that:

a) the $6.5 million VTB was "advanced" on September 10, 2012, and

b) the value of the property on September 11, 2012 was at least $6.5 million.

Did FAB advance $6.5 million under the VTB?

[106] The *Construction Lien Act* is remedial legislation, changing the common law to allow suppliers of services and materials priorities that would not otherwise exist. As remedial legislation, the Act must be strictly construed for the purposes of determining whether the lien claimant qualifies for its protection, but once qualified the Act should be liberally construed to confer the benefits to which lien claimant is entitled (See: Macklem and Bristow, *Mechanics Liens Acts in Canada*, at pp. 8-9, as cited by the Divisional Court in *Ken Gordon Excavating Ltd. v Edstan Construction Ltd*. 1981 CanLII 1750 at page 7). It is not in dispute that Cam and Gentry registered and preserved their liens in accordance with the requirements of the Act and that there lien claims are valid.

[107] The issue in the *Ken Gordon* case at the Divisional Court level was largely concerned with the first test: whether the lien claimant had taken the proper steps to qualify as a lien claimant for the protection of what was then the *Mechanics Lien Act.* The passages relied on by the lien claimants in the present case are obiter, the court having determined that the funds in issue had not been mortgage advances. The case was appealed to the Court of Appeal and then to the Supreme Court of Canada ([1984] 2 S.C.R 280), wherein the court determined that the mortgage had been a building mortgage and that funds had been advanced after the lien claimants had given notice of their lien claims. The *Ken Gordon* series of cases is not helpful in determining the issue of value.

[108] The lien claimants rely on *Re Jade-Kennedy Development Corporation* 2016 ONSC 7125 at paragraph 67 regarding a collateral mortgage, arguing that a vendor takeback mortgage is the same as a collateral mortgage and that no funds are advanced under a VTB. I disagree. A collateral mortgage is a form of guarantee: the funds secured by a collateral mortgage are not called upon unless there is default by the borrower under the principal lending instrument to which the mortgage is collateral. No funds are advanced under a collateral mortgage until there is default under the principal mortgage.

[109] In contrast, a VTB is the principal mortgage under which funds are advanced. It is not collateral to any other mortgage or lending instrument. But for the VTB in this case RAT could not have completed the transaction. The VTB financed the purchase to the extent of $6.5 million of the purchase price and the entire mortgage was advanced on September 10, 2012, with the balance of the purchase price paid in cash. *Re Jade-Kennedy Development Corporation* does not apply.

Was the value of the property on September 11, 2012 at least $6.5 million?

[110] The lien claimants argue that FAB has failed to prove that the value of the property on the date the first lien arose was at least $6.5 million. Counsel argues that RAT was an imprudent purchaser and as such the actual purchase price is not evidence of market value.

[111] The lien claimants assert that RAT was not a prudent purchaser because RAT submitted a firm rather than a conditional offer, whereas the other offers had been conditional. Ms Walton explained her reasons for doing so: Mr. Brudner told her he was considering another offer that was conditional. Ms Walton had significant experience in purchasing distressed brownfield properties. She knew that by presenting a firm offer RAT would have the best chance of beating a conditional offer.

[112] Ms Walton had prepared financial projections to support RAT's $8 million APS. Unfortunately, the receivership triggered by other investments intervened. Ms Walton was so sure of her projections regarding the property that she formed another company and bid on the property again in 2015 when it was released from the receivership for FAB to sell it under power of sale. The financial projections of the successful 2015 purchaser, Thombar, corroborate that Ms Walton's projections for the property as a viable commercial property were reasonable. These facts corroborate that RAT was not an imprudent purchaser.

[113] The lien claimants rely on the 1998 case of *Park v Royal Bank of Canada* 1998 CanLII 14660 for the proposition that in 1998 obvious contamination where the cost to remediate was unknown reduced the value of the land to zero. Justice Brockenshire wrote that he could not imagine a prudent purchaser not investigating the cost to remediate.

[114] The lien claimants argue that *Park* applies*:* RAT is not a prudent purchaser because RAT failed to investigate the cost to remediate and the lands had a value of zero. The *Park* case is distinguishable. In the past 20 years considerable progress has been made regarding contaminated lands and remediation. Furthermore the *Park* case is distinguishable on its facts. In *Park* remediation was required to sell the property. In the present case remediation was not required and the land was occupied and could continue to be used for commercial purposes without remediation. All that was required was venting to maintain air quality. Knowledge about remediation in 1980 was far less than it was in 2012 when contamination from dry cleaning chemicals could be ascertained and, if required, remediated and costs ascertained, and at the same time the property could continue to be used for commercial purposes. There is no evidence that the subject property had a value of zero in 2012. What may have been frightening about

contamination to Justice Borckenshire in 1980 due to factors that were unknown when the *Park* case was decided is not frightening today (or in 2012) because these factors are now known or ascertainable.

[115] As explained earlier in these reasons I reject the lien claimants' evidence of value, tendered through Mr. Uba's opinion evidence of "sale price".

[116] The lien claimants argue in the alternative that the price of the services and material supplied by the lien claimants increased the value of the property by the value of the services and materials supplied. On that basis they submit that the court should calculate the value by deducting the cost of services and materials supplied after the 2012 sale from the 2015 sale price to arrive at the value prior to the date of the first work in September 2012.

[117] The lien claimants calculate the cost of all services and materials supplied as in the $2 million range, calculated by adding the amounts paid to contractors to the total of all of the lien claims registered after the sale to RAT[12]. Deducting that amount from the 2015 sale price of $7.5 million would result in a pre-renovation amount of $5.5 million. On that basis the lien claimants argue that the value of the property in September 2012 was not more than $5.5 million.

[118] The flaw in the lien claimants' argument is that the starting point has not been proven to be the actual value of the property in 2015. The experts who testified opined that a power of sale proceeding depresses the sale price.

[119] In my opinion the best evidence of value on the date the first lien arose is the evidence of the APS's submitted in 2011 to 2012 in amounts ranging from $7.7 million to $8.4 million and in particular the offer made by RAT as a willing purchaser to FAB as a willing seller, the parties being at arm's length. The evidence of value is corroborated by events that transpired subsequently and related earlier in these reasons.

[120] For these reasons I find that the value of the property as of September 2012 was at least $6.5 million and that the actual sale price of $8 million is evidence of the actual value of the property for purposes of section 78(3) of the Act.

(ii) Is a VTB "advanced" on closing?

[121] The lien claimants argue that in the case of a VTB no funds are advanced and consequently for purposes of section 78(3) of the *Construction Lien Act* no funds have been advanced. The argument requires the court to accept that a lender in the case of VTB financing has a lesser priority than an institutional lender provides a bank draft or a certified cheque or electronically transfers funds to finance the purchase.

[122] A VTB is the facility by which funds required to purchase a property is lent by the seller to the buyer promises to repay the principal of the mortgage plus interest in accordance

[12] The total of all registered lien claims was $1,063,849.29.

with the terms of the mortgage. An institutional mortgage is the same: the bank or financial institution lends money in return for interest and return of principal in accordance with the terms of the mortgage. The only difference is that an institutional lender is in the business of financing property whereas a VTB lender is usually a private lender.

[123] Often when a VTB is involved in financing the property is riskier or the borrower for whatever reason, cannot access institutional funds. In this case the evidence of Ms Walton, who arranged the VTB on behalf of RAT in 2012, and the evidence of Mr. Thomas, who arranged VTB financing when the property was sold under power of sale in 2015, was similar. VTB financing was required because of the contamination issue and the time required to renovate and attract commercial tenants. Ms Walton testified that RAT commenced its Phase Two environmental assessment immediately upon closing with the intention of carrying out whatever remediation was required to continue the commercial uses on the property. Mr. Thomson testified that remediation in the form of venting for air quality purposes was undertaken in 2015 and continues pursuant to annual inspections to the satisfaction of the institutional lender, the Bank of Montreal, the mortgagee brought in to replace the VTB financing in 2017.

[124] I find that for purposes of section 78(3) of the *Construction Lien Act* a VTB is the same as an institutional mortgage. In the present case the VTB mortgage was fully advanced to fund the purchase price, with an additional cash payment making up the balance. Had FAB not advanced the full face value of the VTB RAT would not have had sufficient funds to close the transaction on September 10, 2012.

[125] I reject the lien claimants' argument that a VTB is the same as a collateral mortgage. It is not. A collateral mortgage is a form of guarantee. No funds are advanced under a collateral mortgage unless the principal borrower defaults under the principal lending instrument.

[126] I find that FAB advanced $6.5 million to RAT on September 10, 2012 pursuant to a mortgage to finance the purchase of the property.

(iii) Calculations

Are the lien claimants entitled to any of the funds held in court?

[127] Justice Patillo, by order dated October 9, 2014, lifted the receivership stay[13] in respect of the property at 1485 Dupont and granted leave for FAB as mortgagee to sell the property to enforce its mortgage remedies through power of sale proceedings. The sale to Thombar was approved by vesting order of Justice Newbould dated May 11, 2015 (the "Vesting Order") in Commercial Court action CV-13-10280-00CL, with the purchaser being 1485 Dupont Inc., the sole-purpose company formed by Thombar's principals to take title.

[13] Order of Justice Newbould dated November 5, 2013

[128] The Vesting Order required a portion of the proceeds of sale to be paid into court pending a determination of priorities as between the first mortgagee and the lien claimants in the lien actions. The amount to be paid into court pursuant to the Vesting Order was the lesser of:

a) the total of the face value of all six preserved lien claims plus the lesser of $50,000.00 or 25% for costs, calculated as $1,289,524.14; and

b) $608,119.43, being the cash proceeds of sale after applying all expenses permitted by the Vesting Order.

[129] As a result of this calculation $608,119.43 was paid into court out of the proceeds of sale. A portion of that fund was released following settlement of four of the lien claims, leaving only the CAM and Gentry lien claims as challenging FAB's priority.

[130] The lien claimants argue that at most FAB as mortgagee has priority to the extent of $6.5 million, and that any other expenses claimed by FAB as arising from the receivership and the power of sale proceedings do not stand in priority to the lien claimants' claims.

[131] FAB filed an accounting statement of the net proceeds of sale under the Vesting Order[14]. Mr. Brudner testified as to the costs and expenses listed in the accounting statement. Justice Newbould approved these items implicitly in the Vesting Order at paragraph 4 wherein he defined net proceeds of sale as including the charges and expenses that are listed in the accounting statement. Nevertheless the lien claimants seek to go behind the accounting statement in these lien proceedings.

[132] As a result of the Vesting Order the amount paid into court was $608,119.43 on account of all of the lien claims then outstanding. The sum of $608,119.43 was calculated and determined in the Commercial Court receivership proceedings. It is not for this lien court to go behind the calculation.

[133] For the VTB mortgagee to be made whole under the VTB that triggered the power of sale proceedings, FAB would be entitled to the entire balance of the monies paid into court, unless the lien claimants have a priority claim by reason of the *Construction Lien Act*. For the reasons given, I find that the lien claimants do not have a priority claim over FAB as first mortgagee. There are no funds remaining after payment of the VTB mortgage and the fees, charges and expenses approved by reason of the Vesting Order.

[134] On that basis the entire balance remaining in court out of the $608,119.43 paid into court from the proceeds of sale is payable to FAB, FAB being the mortgagee with a proven priority to the lien claims of CAM and Gentry.

Should payments by the receiver be deducted from the principal amount of the lien claims?

[14] Exhibit 2, tab 7

[135] Another calculation issue concerns the Gentry lien claim. FAB argues that $50,000.00 paid to Gentry by the receiver in December 2013 to connect the HVAC system at the request of the receiver should be deducted from the amount claimed in the lien claim. I disagree. The sum was paid for a specific extra that arose after the lien claim had been registered. It is not properly deducted from the balance remaining in the lien claim.

[136] As previously noted, the distribution made in April 2017 by the receiver to creditors that include CAM and Gentry is properly credited to the lien claims and should be deducted from the lien claims, leaving the balance of the unpaid CAM lien claim as $70,658.85 and the balance of the unpaid Gentry lien claim as $258,476.58. However, given my findings regarding the priority issue, this calculation is moot.

III. Conclusion

[137] I conclude that for purposes of section 78(3) of the *Construction Lien Act* the FAB mortgage registered on September 10, 2012 was registered prior to the date that the first lien arose and has a priority over the liens of CAM and Gentry. The funds remaining in court as proceeds of the sale that resulted from power of sale proceedings under the VTB are payable out of court to FAB together with accrued interest.

IV. Costs and Report

[138] This trial will resume on Thursday May 24, 2018 at 10:00 a.m. for the purpose of fixing costs and finalizing the report.

[139] The parties should attempt to resolve the issue of costs themselves. If the parties cannot resolve the issue of costs, the court will hear submissions as to costs on May 24, 2018.

[140] Counsel for the defendants shall prepare a Report, in draft, for review by the plaintiffs and the court at the attendance on May 24, 2018.

_____

Master C. Albert .

Released: May 17, 2018

CITATION: Cam Moulding & Plastering Ltd. v Dupont Developments Ltd. 2018 ONSC 3126
COURT FILE NO.: CV-13-494453 and CV-14-496630
DATE: May 17, 2018

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Cam Moulding & Plastering Ltd.

Plaintiff

- and -

Dupont Developments Ltd., The Rose and Thistle Group Ltd., Florence Leaseholds Limited, Beatrice Leaseholds Limited and ADA Leaseholds Limited

Defendants

Gentry Environmental Systems Ltd.

Plaintiff

-and-

Dupont Developments Ltd., The Rose and Thistle Group Ltd., Florence Leaseholds Limited, Beatrice Leaseholds Limited and ADA Leaseholds Limited

Defendants

REASONS FOR JUDGMENT

Master C. Albert

Released: May 17, 2018

TAB 8

2000 CarswellOnt 2959
Ontario Superior Court of Justice

Avenue Structures Inc. v. Pacific Empire Development Inc.

2000 CarswellOnt 2959, [2000] O.J. No. 3272, 4 C.L.R. (3d) 42, 99 A.C.W.S. (3d) 20

In the Matter of the Construction Lien Act, R.S.O. 1990, c. C.30 (as amended)

Avenue Structures Inc., Plaintiff and Pacific Empire Development Inc.
Bank of China (Canada) and Excelsus Development Inc., Defendants

Sandler Master

Heard: May 16 and 17, 2000
Judgment: August 23, 2000
Docket: CLA96-CU-1O1828

Counsel: *J.B. Berkow* and *Orie H. Niedviecki*, for plaintiff and other lien claimants.
D.I. Bristow, Q.C., for defendant Bank of China (Canada).

Subject: Contracts; Corporate and Commercial

Headnote

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

Bank held two mortgages against land on which construction project was being built — Twenty lien claimants asserted priority over mortgages under s. 78(3) of Construction Lien Act — Bank's mortgages constituted prior mortgages within s. 78(3) of Act as mortgages were registered in 1993 and first lien claim arose on December 2, 1994 — Extent of priority of bank as mortgagee over 20 lien claimants under s. 78(3) was directed to be tried as preliminary issue — Sole issue to be tried was actual value of premises when first lien arose — Counsel agreed that value was clearly less than total amount of all amounts advanced before December 1, 1994 — Property had market value as of December 1, 1994, of $1,479,500 — Extent of bank's priority on its mortgages was $1,479,500 — Construction Lien Act, R.S.O. 1990, c. C.30, s. 78(3).

Table of Authorities

Cases considered by *Master Sandler*:

Fellowes, McNeil v. Kansa General International Insurance Co. (1998), 40 O.R. (3d) 456, 37 C.P.C. (4th) 20 (Ont. Gen. Div.) — referred to

Fenwick v. Parklane Nurseries Ltd. (1996), 32 C.L.R. (2d) 25 (Ont. Gen. Div.) — referred to

Interamerican Transport Systems Inc. v. Canadian Pacific Express & Transport Ltd. (November 29, 1995), Doc. 4353/83 (Ont. Gen. Div.) — referred to

Statutes considered:

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

Pt. IV — referred to

s. 1(1) "owner" — referred to

s. 39(2) — referred to

s. 62(3) — referred to

s. 65 — referred to

s. 78 — considered

s. 78(2) — considered

s. 78(3) — considered

Rules considered:

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

R. 54.09(2) — referred to

R. 54.09(3) — referred to

R. 54.09(5) — referred to

TRIAL of issue of extent of priority of mortgagee over lien claimants.

***Master Sandler*:**

Introduction

1 These reasons are being written to rule on one issue that was directed by me to be tried as a preliminary issue. That issue is the extent, if any, of the priority of the Bank of China as mortgagee, under two mortgages which it has against certain land on which a construction project was being built, over about 20 lien claimants. The priority relied upon by the bank is created by s. 78(3) of the *Construction Lien Act*.

2 Before turning to analyze the specific issue, I think it is necessary to explain how this issue comes to be tried before me.

3 The owner of the land in question is 842432 Ontario Inc. ("842432"). The land, originally, was in two adjoining parcels at a corner, one parcel known as 2095 Brimley Road and the second parcel known as 4430-38 Sheppard Avenue East. The Brimley Road parcel, being 0.94 acres, was purchased in August 1989 for $700,000. The Sheppard Avenue parcel, being 0.784 acres, was purchased in November 1989 for $5 million, with $2 million cash being paid down and a vendor take-back mortgage for $3 million. The total acreage of the two parcels, which, since 1989, has been one site, is 1.714 acres or 74,661 sq. ft.

4 The defendant Pacific Empire Development Inc. ("Pacific Empire") is a related company to the registered owner, 842432. Some of the lien claimants in their actions named 842432 as the owner, whereas other lien claimants named Pacific Empire as the owner. For the purposes of the trial of this issue, I can treat Pacific Empire and 842432 as one and the same. Neither company defended the lien actions.

5 In 1989, when these lands were acquired by the owner, they had a commercial/industrial zoning designation which allowed retail and office development with a maximum density of 0.40 times the area of the lot. The owner spent approximately three years in efforts to rezone this property, and, finally, some time in 1993, obtained an increase in density to 1.6 times the area of the lot, which allowed a building size equal to four times the existing coverage. This meant that the owner would now be able to build what it wanted to build, namely, a 4-storey shopping mall to contain retail and restaurant space on levels 1 and 2, and office space on levels 3 and 4, with a 3-level underground parking garage for 431 cars. The project came to be known as the "Pacific Centre." The detailed formation of the plans for this project occurred in 1992 and 1993, during a severe downturn in the general economy, and in the Toronto real estate economy and market in particular. The evidence shows that the commercial real estate market in the Toronto area at this time was "weak."

6 The defendant bank initially became involved with this project in mid-1993. The bank placed a first mortgage on the land for $2,750,000 in May 1993, followed by a further second mortgage for $2,900,000 in December 1993. These two mortgages were put on as additional security for loans previously made by the bank to its customer Lilee-Chu Investments Inc. and to the related companies Pacific Developments and 842432, or to service a new line of credit for this customer (see Exhibit 76, Tab 7). Later, in 1994, the bank decided to further finance the project with a capital loan of $6 million and a construction loan of

$13 million. The capital loan of $6 million was advanced on October 20, 1994, and was used by the customer to pay off a prior indebtedness owing by the customer to the bank. This was really just a refinancing of existing loans. On November 3, 1994, a mortgage of $30 million was registered by the bank against this property, and this was to further secure existing loans *and* to secure a loan for the future financing of the construction.

7 Construction started in early 1995, and continued until late October or early November 1995, when the bank stopped financing the project for reasons that are still not clear to me. There was some evidence from Peter Wong, a former bank employee, who testified before me on May 13, 1999, under subpoena by the lien claimants, that there was, at least, suspicions by senior management of the bank about improper dealings between one of its employees, who was responsible for this customer and its loans, and the customer. The terms of the bank's loan, as set out in its commitment letter of November 30, 1993 (Exhibit 76, Tab 11), had apparently not been met, and yet large advances had been made, and the bank feared for its loans. As of December 1995, the bank was owed over $15 million on its loans, and, as of May 1996, the customer's overdraft was over $3 million, for a total indebtedness of just over $19,000,000 (see Exhibit 76, Tab 20).

8 When the financing stopped, the owner-developer could not pay the trades and construction ceased in about January 1996, and the liens started to be registered. The first lien was registered January 29, 1996, and the last lien was registered March 15, 1996. In all, there are 21 lien claimants, of which 14 or 15 contracted directly with the owner-developer and 6 or 7 are subcontractors of one or more of these 14 or 15 contractors. The *face value* of all the liens is about $3,387,700, although none of the liens have as yet been proved by the respective lien claimants. (One lien claimant, Sun Sing Construction, whose lien claim was $337,777, has advised me that it will not be proving its lien in these proceedings, and I have noted in my procedure book that this lien is to be discharged.) Therefore, the face value of the current existing liens is just over $3 million, but some of the subcontractors' liens might be included in the claims of some of the contractors' liens.

9 The judgment of reference (in the Dymin Steel action) is dated May 1, 1996, and the first pre-trial took place before me on June 28, 1996. I was then advised that the owners, 842432 and Pacific Empire, had not defended. I was told that the project was only partially completed, and was not useable, and had been abandoned by the owners. (This construction has remained in this uncompleted and unused state for over four years. Eventually, the municipality revoked the building permit, in February 1999, and then issued a demolition order in June 1999, although the bank appealed that order. I have not been advised of the final result of that appeal. In 1997, there was some talk of the bank selling the project to a purchaser who would build a hotel/retail office complex, and so the site was rezoned by the municipality in September 1997 to permit such a use. The property remains listed for sale at an asking price of $2,990,000. Any purchaser will probably have to demolish the existing partially completed structure, and this factor will probably affect the sale price.)

10 It appeared to me at this first June 1996 pre-trial that the main issues were the extent, if any, of the bank's priority for its first two mortgages under s. 78 of the Act over the lien claimants' claims *and* whether the bank was an "owner" within the meaning of that term in s. 1(1) of the Act.

11 If the bank was an "owner," it would be responsible for 100% of, at least, the various "contractors" claims, and would have a statutory holdback liability to the various subcontractor lien claimants.

12 Even if the bank was not an "owner," there remained the question of the priority of its three mortgages, being for $2,750,000, $2,900,000, and $30 million. (Since it seems to be accepted by all parties that the *current* value of the land is somewhere between a low of $1.5 million and a high of $3 million, the bank's third mortgage of $30 million becomes irrelevant, since the most that likely will be realized on a sale is a gross of about $3 million, less sale expenses such as real estate commission and legal fees, etc., so the net proceeds of sale will not likely even cover the bank's first mortgage of $2,750,000.) But, under s. 78(2), if any of the bank's mortgages were taken with the intention of securing the financing of the improvement (the so-called "building mortgage"), the liens would have priority over any such mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner under Pt. IV. If the value of all work done is found to be $8 million (which is a reasonably approximately accurate figure but not yet actually established), then the lien claimants would have priority to the extent of about $800,000 (10%), because the owners (842432 and Pacific Empire) never actually held back any holdback amounts for the lien claimants,

i.e., a complete deficiency. Thus, the first $800,000 (±) of any proceeds of sale would be paid, pro rata, to those lien claimants who can establish proper liens for their proper amounts in priority to the bank's mortgages.

13 Even if s. 78(2) does not apply, because the bank's first two mortgages are found *not* to be "building mortgages," then, under s. 78(3), these two mortgages, because they were registered "prior to the time when the first lien arose" (that is, were registered in May and December 1993, with the first lien arising, as has now been agreed to by the parties, *after* December 1, 1994), would have priority over the liens to the extent of the lesser of (a) the actual value of the "premises" (a defined term) as of December 1, 1994, or (b) the total of all amounts that, prior to December 1, 1994, were advanced under these mortgages. The evidence shows that as of December 1, 1994, the bank had advanced $6 million (see Exhibit 76, Tab 20, also marked Exhibit 53). The actual value of the "premises" as of December 1, 1994, was, as all parties agree, clearly less than $6 million so the bank's priority, under s. 78(3), would be equal to the *actual value of the "premises" as of December 1, 1994*.

14 So, at the pre-trial on June 28, 1996, I consolidated all 21 (at that time) lien actions, retitled the consolidated proceedings as *Avenue Structures v. Pacific Empire Development Inc. and Bank of China (Canada)*, since Avenue Structures Inc. had the largest lien claim by far at $1,031,000, and gave carriage of the consolidated proceedings to Mr. Berkow, who acts for Avenue Structures as well as Malfar Mechanical ($49,719), Mistyk Welding ($514,412) and Interior Connection ($68,810). I then ordered that the issues of the "bank-as-owner," and the priority issues under s. 78(2) and 78(3), were to proceed first, with the resolution of the various issues of the timeliness and quantum of the 21 lien claims being postponed to be resolved at a later date. The thinking was that *if* the bank was found *not* to be an "owner," and *if* the first two mortgages were found *not* to be "building mortgages," and *if* the value of the "premises" as of December 1, 1994, was found to be $5 million as the bank was contending then, keeping in mind that the then (June 1996) current gross value of the "premises" was thought to be $3 million, the lien claimants would get nothing, and thus, there was no point in scrutinizing the timeliness and quantum of each lien. As I have noted earlier, the face value of the lien claims is just over $3 million. It was thought that if the lien claimants as a group were successful on any of these preliminary issues, there would be some money "in the pot" and it might then make sense to resolve any disputed lien claims. But, if there was to be no money, or only a few cents on the dollar, then a careful screening of each of the 21 lien claims would not really make economic sense.

15 I gave further directions in connection with the prosecution of the said preliminary issues, and I required the various lien claimants to supply Mr. Berkow with details of their current claims and supporting documentation, and for the subcontractors to clarify whether their claims were included in their respective contractors' liens, or were in addition to the 14 or 15 contractors' claims.

16 There were further construction lien pre-trials on September 17, 1996, January 10, June 13, and October 10, 1997, April 24, August 21, and September 4, 1998, and April 30, 1999, at which various directions were given for the conduct and trial of the preliminary issues.

17 The trial started on May 10, 1999, and continued on May 11, 12, 13, and 14. I heard the evidence of several of the lien claimants, and the evidence of a former bank employee, Peter Wong. All this evidence was directed to the "bank-as-owner" issue. Only five trial days had been scheduled, based on counsel's original estimate, but on May 14, it became clear that much more trial time would be required, so a further 20 days were scheduled for February 14 through 24, 2000, and May 15 through June 1, 2000, the earliest times that were available to all of myself, Mr. Bristow and Mr. Berkow. (The trial restart date was later changed to February 21, 2000.)

18 On February 18, 2000, I held a case conference/trial management conference at the request of both counsel. There had been some recent developments about what issues were now going to be pressed by Mr. Berkow, counsel with carriage. He was now of the view that the "bank-as-owner" issue should be dropped, and his personal clients, Avenue Structures and Mystik Welding, had given him such instructions, but he was concerned about how he was to deal with the remaining lien claimants, and also with his client, Interior Connection, with whom he had lost contact. I then gave certain directions.

19 I held another case conference/trial management conference on March 9, 2000, where I gave further directions as to how the problem of dropping the "bank-as-owner" issue was to be handled. I scheduled a further conference for April 18, to allow

any opposing lien claimants to attend and make submissions. On April 18, counsel for the bank appeared, as did counsel for lien claimants Metric Mechanical and Wesco Distribution, neither of whom was opposed to the dropping of the "bank-as-owner" issue. No other lien claimant appeared. I therefore made an order striking out paras. 16 and 17 of the Avenue Structure statement of claim (the bank-as-owner allegations), and ordered that this issue would not be pursued when the trial resumed on May 15th. I ordered that the only remaining issue between the lien claimants and the bank would be the priority issues under s. 78, as pleaded in paras. 1 through 15 of Avenue's statement of claim. I further ordered that following such ruling, I would, at a later date, if necessary, deal with the timeliness and quantum of the lien of each lien claimant who still intended to pursue its lien claim.

20 On May 3, 2000, I held another trial management conference where I directed that the trial of the "priority issue" would now take place on May 16, 17, and 18, and Mr. Berkow was to let Mr. Bristow know by May 11 as to what specific sections of s. 78 he was relying on.

21 When the trial started on May 16, it was made clear to me by both counsel that the allegation by the lien claimants that the bank's first two mortgages of May 6, 1993, and December 21, 1993, were "building mortgages" within s. 78(2) was being dropped, and that it was now agreed that any advances thereunder were not made to finance the "improvement" on the land in question, and therefore, the issue about any deficiency in holdbacks required to be retained by the owner under Pt. IV had disappeared.

22 The only priority claim that was now being asserted by the lien claimants was under s. 78(3). It was agreed between counsel that the bank's two mortgages of May 6, 1993, and December 21, 1993, were "prior" mortgages within s. 78(3). It was also agreed that the first lien arose, at the earliest, on December 2, 1994. So, the only issue to be tried was what was "the actual value of the premises at the time . . . the first lien arose," since it was agreed by both counsel that this value was clearly *less than* the total amount of all amounts advanced prior to December 1, 1994, which, as I have noted earlier, was $6 million. (That $6 million was advanced on October 20, 1994 - see Exhibit 53.)

23 The current value of the "premises" is somewhere between a low of $1.5 million dollars (the amount of a recent conditional offer that was received by the bank, but which did not close), and a high of $2,860,000 (as of September 1, 1999, as appraised in Exhibit 76, Tab 23, Mr. Atkin's report), or, perhaps, the listing price of $2,990,000, as of November 1999. Mr. Berkow believes that the *current value* is *possibly* over $3 million, but agrees that it is *less than* the $6 million (plus) that is owed by the owners/borrowers to the bank, part of which is secured by the mortgages of May 6 and December 21, 1993.

24 This current value becomes important, because if I were to sell the premises under s. 65 of the Act in order to actually realize cash proceeds for distribution among the lien claimants, and if the *net* proceeds to be received are, say, $2.5 million, then the bank's priority claim to these proceeds would be $1,345,000, *if* I accept the lien claimants' valuation by Mr. Atkin of $1,345,000 as of December 1, 1994, leaving $1,155,000 for distribution among about $3 million of lien claims (not yet proven). If the *net* proceeds of sale to be received are, say $2 million, then, again accepting the lien claimants' valuation, the bank's priority would be $1,345,000, leaving $655,000 for distribution amongst $3 million in lien claims. If the net proceeds of sale are $1.5 million dollars, and again accepting the lien claimants' valuation of $1,345,000, there would be $165,000 (all less carriage costs and other legal costs) for distribution among $3 million of lien claims. In other words, as the *current value* goes down, the amount available for the lien claimants goes *down*.

25 But, *if* I accept the bank's valuation at $5.2 million as at December 1, 1994 (see Mr. Kovacs' report - Exhibit 76, Tab 19), the bank's priority would be far in *excess* of everyone's view of the current value, that is, what a court sale under s. 65 of the Act would bring as net proceeds of sale. If I accept this valuation, the lien claimants would get nothing. In fact, if Mr. Kovacs' report is found to be wrong, and the valuation as of December 1, 1994, is found to be, say, only $3 million (rather than $5.2 million), then the lien claimants *will still get nothing* after a sale, even *if* the current *gross* value is $3 million.

26 It is only if I accept the lien claimants' valuation at $1,345,000, as of December 1, 1994, and a future sale brings *net* proceeds *above* $1,345,000, that the lien claimants will start to receive any money on account of their claims. Net proceeds of sale at, say, $2 million would produce $655,000 of cash available for distribution to the lien claimants after the bank's priority claim of $1,345,000 is paid out. If the lien claimants' claims are subsequently proven at $3 million (an estimated figure), this

would mean the lien claimants would receive $655,000 × 100 - $3,000,000 = 22 cents on the dollar. This case shows the practical problems with the remedy of a lien under the *Construction Lien Act* during a period of generally falling real estate values or where some particular factor or event causes a fall in the value of specific property against which the liens are registered.

27 The above possible gross amounts for distribution to the lien claimants do not take into account Mr. Berkow's carriage costs and the legal costs of other counsel for the other lien claimants which would have to be paid out of the net proceeds of sale. So it can be seen that my decision on this preliminary issues of the value of the land as of December 1, 1994, is only the beginning of many issues that need resolution. I will also need to decide the validity of each lien claim and the quantum of each claim. Then I will have to sell the land and deal with gross and net sale proceeds. Then I will have to deal with carriage costs and other costs, including the bank's costs if they are successful on the valuation/priority issue. So I am a long distance away from actually paying out any money to any of the lien claimants. But resolution of the valuation/priority issue is a necessary first step and so I now turn to address this issue.

The Valuation/Priority Issue - What was the actual value of the premises as of December 1, 1994?

28 At the opening of the hearing on May 16, counsel filed a joint document book that contains all the documents that are relevant to the valuation/priority issue. This book is marked Exhibit 76 and has 23 tabs. The key documents are the following: the two deeds transferring the two parcels to 842432 Ontario Inc. in 1989 (Tabs 1 and 3); the credit application by the borrowers (including 842432) for the bank loans (Tab 7); the two mortgages to the bank dated May 6th and December 21, 1993 (Tabs 8 and 14); the credit facility agreement with the borrowers, dated November 30, 1993 (Tab 11); the credit application for the $19 million line of credit, dated September 27, 1994 (Tab 15), which is an important document and shows the situation just a few months before the crucial date of December 1, 1994; the credit facility letter for $19 million dated September 30, 1994 (Tab 16); and a letter from the bank dated June 7, 1996, outlining details of the three mortgages of the bank, and advances made thereunder, given in response to a s. 39(2) *Construction Lien Act* demand for information (Tab 20).

29 In addition to these important documents, the fundamental documents are the appraisal report of Mr. Kovacs, the bank's expert, dated October 8, 1999 (Tab 19), and the appraisal report of Mr. Atlin, the lien claimants' expert, dated November 2, 1999 (Tab 23).

30 Finally, there is an earlier appraisal report of Mr. Kovacs, dated March 8, 1993, made at a time when the bank was considering extending credit facilities to the borrowers (Tab 6).

31 Both parties agree that the relevant date for the valuation is December 1, 1994, and that the valuation is to proceed as if the land was vacant, that is, the state of the land at the time the first lien arose, that is, when the first work was done. And I agree with Mr. Bristow's submission that one must look at the conditions and knowledge that existed at that time, and in making the valuation, one ignores what happened subsequently. I agree that "actual value" means "market value," which means the most probable price that a property would bring in a competitive and open market, under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably. The approach to market value is well set out on p. 3 of the Atlin report, and p. 1 of the October Kovacs report (following the letter of transmittal and sketches and other miscellaneous material).

32 Mr. Atlin at trial, and in his report, says the value is $1,345,000. Mr. Kovacs, at trial and in his October 1999 report, says the value is $5.2 million. (Mr. Kovacs in his March 1993 report said the value of the property was $5.5 million, which date was one year and nine months before the critical date of December 1, 1994. This earlier appraisal of Mr. Kovacs was apparently the basis for the bank agreeing, in November 1993, to make the loans it did, leading to its mortgages in 1994 and its advances in 1995).

33 Mr. Atlin's qualifications are found at Appendix "A" to his report. He is an accredited member of the Appraisal Institute of Canada (AACI). He has been an appraiser since 1980 with Stewart, Young & Mason Limited, now known as Stewart, Young, Hillesheim & Atlin Limited of which he is the president. He has an impressive list of qualifications as an appraiser.

34 Mr. Kovacs' qualifications are set out in Addendum "F" to his report. He received his AACI designation in 1989. He has been an appraiser since 1975. He worked for Royal Trust/Royal LePage from 1975 until 1993. In 1993, he became a partner in Wagner, Andrews and Kovacs Limited, his current position. He also has an impressive list of qualifications.

35 So, the question must be asked as to why these two very qualified appraisers have so diametrically opposed views as to the value of this property as of December 1, 1994?

The Atlin Report

36 Mr. Atlin's report is 47 pages long and has 6 Appendices. He describes (at pp. 5-6) the ownership and legal history of the property and the current municipal assessment and realty taxes. He next gives a regional description (pp. 8-10), and a neighbourhood description (pp. 11-13), and a site description (pp. 13-14). He next deals with land use controls, i.e., zoning (pp. 15-16). He then describes the improvements, i.e., the existing state of incomplete construction (p. 17), and details the proposed development (pp. 18-19).

37 He then sets out a market overview (pp. 20-24) which is critically important. In summary, the 1980s, leading up to 1989 (when "842432" purchased the site for $5.7 million), was a period of a dramatic rise in real estate prices and economic expansion. In 1990, 1991, 1992, and 1993, the real estate market changed dramatically, with an over-supply of property and a weak demand. Office vacancy rates rose sharply. The Greater Toronto office market in 1994 was in a "dismal state." The absorption and vacancy rates in the Metro Toronto East office market in 1993 and 1994 were at record lows, although 1994 was a little better than 1993 (see p. 21). The retail market and, therefore, the demand for retail store space, fell dramatically in the period 1990 through 1994 (see p. 23).

38 Mr. Atlin then deals with the fundamental concept of "Highest and Best Use" at pp. 25-27. He deals with what uses are (i) legally permissible, (ii) physically possible, (iii) financially feasible, and (iv) maximally productive. His conclusion, for the date of December 1, 1994, reads as follows:

> There was clearly no immediate demand for office development as at December 1994. Rent and vacancy rates were at such levels that office development was unaffordable. However, the site's zoning and location do lend themselves to such a use. *Thus, office/retail development to the scale suggested by the development proposal is a highest and best used choice over the long term, but not feasible as at the effective date*. (my emphasis) The property's location is also viable for retail uses consistent with the limited activity in the marketplace. Thus, an immediate highest and best use choice would be to amend the zoning provisions, eliminating the office component obligation, and developing the site with a retail use. (See p. 26.)

39 Mr. Atlin then continues, on pp. 28-31, to consider various approaches employed in the valuation of real estate and concludes that the Direct Comparison Approach is the only appropriate approach in this case. At pp. 32-34, Mr. Atlin reviews nine comparable sales, three after and six before the valuation date. He concludes that the site had a unit value of $18 per S.F., and with 74,662 S.F, the value, as rounded, was $1,345,000. He also said this site should be considered to have a Floor Space Index (F.S.I) of 0.40, which translates to ($18 per S.F ÷ 0.40 =) $45 per S.F. F.S.I. This density of 0.40 is not what is legally permissible, which is much higher at 1.65, but, rather, what Mr. Atlin thinks is economically feasible.

40 Lastly, Mr. Atlin also values the site as of September 1, 1999, and gives the vacant land a value of $820,000, and the improvements a value of $2,040,000, for a total value of $2,860,000.

The Kovacs' Report

41 An introduction is at pp. 1-4. Next follows a market overview, pp. 5-7. Then follows the property description section, pp. 8-18, including the general area description, a site description, a description of the land use controls, a description of the improvements, and his view as to highest and best use, which Mr. Kovacs concludes was the proposed development itself, being a 4-storey condominium retail/office complex. Next follows the valuation section at pp. 19-33, including the four available valuation methods, and the ones he used here, being the Direct Comparison Approach and the Land Residual Method, to be found at pp. 20-25 and 26-32 respectively, and his final value estimate at p. 33. There follows seven Addenda, "A" through "G."

42 In Mr. Kovacs' direct evidence, he testified about the importance of the mix of population in this area, since one can assess demand for commercial space by knowing the users. He spoke about the pressure of Chinese immigration from Hong Kong,

and their interest in owing commercial condominium properties, and how the Brimley-Sheppard area was an important one for Chinese business and customers. He also testified about the two most important factors for commercial development, being the permitted zoning and the permitted density. He testified that a density coverage of 1.65 is much more valuable than one of 0.40, and that even if an owner only built to a 0.40 coverage, the potential higher density had a value even if not immediately used. He disagrees with Mr. Atlin that this condominium/retail office development was not economically feasible. He felt that building a one-level retail strip mall like the other developments in the area, as Mr. Atlin recommended, would have been an underdevelopment.

43 In cross-examination, he agreed that the office market was weak, and that this project was to be about 60% office space, and that the office vacancy rate was high. He also agreed that, as of December 1994, there had not been $17 million worth of sales of units in this development, but only $2 million, and that these sales were all retail units, and there had been no office unit sales. (The sales are detailed on p. 29 of his report). The said $17 million figure was the level of sales that had to be achieved by the developer before it could obtain most of the loan money - see Tab 15, p. 4, and Tab 16, p. 3 - but for some unexplained reason, the bank failed to insist on this protection.

44 Mr. Kovacs also agreed that the Land Residual Method of valuation is assumption driven, and that if any of the assumed numbers are wrong, this can fundamentally affect the valuation. He also agreed that he did not use the Land Residual Method in his March 8, 1993, valuation (Tab 6).

Mr. Atlin's Review of Mr. Kovacs' Report

45 Mr. Kovacs concludes in his October report (pp. 17-18) that the highest and best use of this land, in December 1994, was, in fact, the very proposed development itself, being a 4-storey condominium retail/office complex with 33% of the space being retail space, 44% being office space, and the balance, 23%, being a mix of retail and office space, and with 70% of the space being on the second, third and fourth floors. Mr. Atlin disagrees with this view. He emphasizes the difference between a legally permissible and physically possible use, on the one hand, and a financially feasible use on the other - see his report, at pp. 25-26. He concludes that because there was no immediate demand for condominium office development, in December 1994, the office/retail development, to the scale proposed by the planned development, was not economically feasible in December 1994, although it was the highest and best use over the long term. The property's location and attributes were financially viable for retail uses like the other one-storey retail developments in the area, with a density of 40% or 0.40.

46 Mr. Kovacs, at pp. 24-25 of his report, came up with a F.S.I. rate of $42.50 per S.F., and took 100% of the developable gross floor area, 123,197 S.F., and arrived at a value of $5,100,000. Mr. Atlin testified that you cannot equate the same value per S.F. to both the ground floor retail space, and the upper level retail and the upper level office space. He said that at-grade retail space is vitally important and drives the value of any development. He disagrees with Mr. Kovacs using his $42.50 F.S.I. rate for *all* 123,190 S.F. of rentable space. Mr. Atlin's dollar per S.F. rate of $45 is not materially different from Mr. Kovacs' rate of $42.50. He just differs on how such rate is to be applied. Mr. Kovacs uses an F.S.I. of 1.65. Mr. Atlin, by contrast, uses an F.S.I. of 0.40. This produces a rate of $45 per S.F., F.S.I., or, putting it another way, $18 per S.F. for 74,662 S.F. of land area - see p. 35 of the Atlin report. This is really the core of the disagreement between the approach of Mr. Atlin and Mr. Kovacs.

47 (F.S.I. means "Floor Space Index" and is a density designation. It means "buildable space," i.e., both legally and physically buildable space, and financially viable buildable space. A 100,000 S.F. site (area), with a 0.40 (allowable and viable) density coverage, would equal a 0.40 F.S.I, and would result in a building of 40,000 S.F. The same site (100,000 S.F. area), with a 1.65 density (allowable and viable), would result in a building of 165,000 S.F. Any density over 0.50 must result in a multi-level development. Land can be priced at either dollars per S.F. or dollars per S.F. F.S.I. In this case, $18 per S.F. of land area (74,662 S.F.) equals $45 per S.F. F.S.I ($18 ÷ 0.40).)

48 Also, Mr. Atlin testified that the Land Residual Method, used as an alternative method by Mr. Kovacs (at pp. 26-32 of his report), producing a value of $5.3 million, is an inappropriate valuation method for use in this case. This method is good for determining the feasibility of a development, but is not the right approach for ascertaining market value. Every element of the valuation, from the gross revenues to the development costs, is based on assumptions that are very problematic, and any

error in any assumption can have a large impact on the bottom line value. I accept Mr. Atlin's opinion that the Land Residual Method is not the appropriate valuation method to be used in this case.

Other Observations

49 1. This property was purchased in 1989 for $5.7 million and 1989 was the top of the real estate market. The evidence shows that the commercial real estate market was at its lowest in 1993 and 1994. It defies ordinary logic that this particular property's value only fell from $5.7 million to $5.2 million from 1989 to 1994, whereas it is well-known and the evidence shows that commercial and residential property in the Greater Toronto Area generally fell in value anywhere from 20% to 50% and sometimes more.

50 2. The property was assessed for realty taxes by the Provincial Assessment Department at $733,000 as of June 30, 1996. It is true that as of this date there was a derelict abandoned building on the site, but since the municipal assessment is based on 1996 market value, it is of some use in deciding what the December 1994 value was.

51 3. Further, one of the protections that the bank had in its lending commitment of September 30, 1994 (Tab 16), was that there had to be evidence of sales of at least $17 million to bona fide arm's length purchasers, with deposits of not less than 30%. In fact, as of January 1, 1996, only 19% of the overall space had been presold or preleased, and no office space whatsoever had been presold or preleased. On p. 29 of Mr. Kovacs' report, Tab 19, it shows 11 units sold on the ground floor (first level) and 8 units sold on the first floor (second level) for the total of $2 million, far below the $17 million requirement in the bank's commitment letter. These sales figures are as of early 1996, and strongly support what Mr. Atlin says about the office and retail market in and around 1994 (at pp. 20-24), and about the financial feasibility of the proposed use (at pp. 25-26), and about what the *feasible* F.S.I was in 1994, being 0.04 and not 1.65. Obviously, the bank wanted to tie sales and leasing performance to its loans, so that the borrowers could prove the financial viability of the project. There is no explanation given as to why the bank chose to overlook this protection.

52 4. Further, the fact is that this project failed. The bank had lent, by November 1995, about $7.2 million for construction costs (see Tab 20), and a total of about $15.4 million in loans (excluding the $3.6 million overdraft), and decided, in early 1996, to stop further financing. Presumably, one of the factors in such a decision was the poor sales and leasing results, as reflected in the Morassutti Group report dated January 8, 1996 (see p. 19 of Atlin's report). The bank, for some unexplained reason, did not insist on the protection it had of $17 million in sales and leasing before loan money would be advanced. This failure of the project supports Mr. Atlin's negative view as to this projects' financial feasibility, and undermines the reliability of Mr. Kovacs' valuation.

53 5. Further, Mr. Atlin disagreed with Mr. Bristow's suggestion, in cross-examination, that the second floor retail space in this development was as good and valuable as the first floor retail space, and that this project was comparable to the multi-level development at the Eaton Centre.

54 6. Further, the evidence of Mr. Atlin shows that this location at Brimley and Sneppard was quite different from the Chinese developments on Highway No. 7 in Richmond Hill.

55 7. Further, the densities of Mr. Atlin's comparables are all under 0.048, except the extremely successful Times Square project at Highway No. 7 and Leslie Street in Richmond Hill, sale No. 8, which still only had an F.S.I. of 0.56. All of Mr. Kovacs' comparables had an F.S.I. of 0.40 or under - see p. 22 of Tab 19.

56 8. Mr. Kovacs was hired by the bank in early 1993 to do a valuation for the purpose of considering whether to lend money on this project: see Tabs 6, 7, 10, 11, 15, 16, 17. He valued the vacant land at $5.5 million and the completed project at $29 million. Commitments were made in 1994, and money was advanced in 1995. But in early 1996, the bank "pulled the plug" and the project failed. The bank is now at risk of losing most of its loans, and more, if it has to share the equity in this property with the lien claimants. Mr. Kovacs in now called upon to give his opinion as to value as of December 1, 1994, just 1 year and 9 months after his valuation date in his March 1993 report. Mr. Kovacs is in a somewhat uncomfortable position. He can hardly admit that he was wrong in March 1993. He has a very strong interest in making his valuation for December

1994 consistent with his valuation of March 1993. This interest, and his previous involvement, and the risks he faces if he gives any other opinion, in my view cast some doubt on his objectivity as an expert witness and the role he is supposed to play: see *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456 (Ont. Gen. Div.); *Fenwick v. Parklane Nurseries Ltd.* (1997), 32 C.L.R. (2d) 25 (Ont. Gen. Div.); *Interamerican Transport Systems v. Canadian Pacific Express & transport Ltd.* (November 29, 1995), Doc. 4353/83 (Ont. Gen. Div.), Feldman J., Toronto (1995), 59 A.C.W.S. (3d) 413 (Ont. Gen. Div.), 67 pp. (otherwise unreported to my knowledge).

57 9. The evidence (and common sense) tells me that the location and the permitted use of a commercial site are very important factors in its value. But also important is the permitted density, or coverage. But one must distinguish between legal density and financially viable density. A higher permissible density sometimes does not make financial sense, and developers do not have to build to the allowable density, and would not do so if the higher density does not make financial sense based on the economic factors, including a present demand for the space to be built. In some cases, a higher legal density, which will allow for future expansion when purchaser/tenant demand would justify such expansion, does make a property more valuable. In this case, Mr. Atlin chose to give *no value* to the factor of the *permissible* density of 1.65, which would have allowed for future development. He felt that an F.S.I. of 0.40 was the financially viable upper limit for this site, even though the legally permitted density was 1.65 (On the other hand, Mr. Kovacs felt that an F.S.I of 1.65 was financially viable as of December 1994, and so his valuation was based on the *full developable* gross floor area of 123,197 S.F. at his price of $42.50 per S.F.)

Conclusion

58 I prefer the approach and logic and independence of Mr. Atlin over that of Mr. Kovacs. However, I am troubled that Mr. Atlin has chosen not to take into account at all the higher permissible density of 1.65 that the developer had obtained for this site after three years of effort, and which was far in excess of the 0.40 density for most of the other commercial property in the area. Mr. Atlin admits that this increased density would allow for future development and expansion, even if such intensive development was not financially viable as of December 1994. And this future potential is clearly worth something, as Mr. Bristow forcefully argues. In my view, something should be added to Mr. Atlin's valuation for this future potential, and an addition of 10% seems to be appropriate on all the evidence before me. I have therefore increased Mr. Atlin's valuation by $134,500 and find this property had a market value, as of December 1, 1994, of $1,479,500.

59 Now that the extent of the bank's priority on its mortgages is known, being $1,479,500, counsel can contact me to fix a further hearing to determine how I am to proceed from this point on. Am I to sell the property and see whether net sale proceeds in excess of $1,479,500 are recoverable? And does it make sense to begin a detailed evaluation of each lien? Or, should this process wait until after it is determined what the net sale proceeds are, to see if such an inquiry is worth the cost? And what about carriage costs and the costs of the proceedings to date? It seems to me that on the question of valuation, the lien claimants have had far more success than the bank. I will await a request from counsel before fixing a further hearing date. Perhaps with this issue decided, some sort of "deal" can be struck as between the bank and the lien claimants, and as between all the various lien claimants, inter se. (I am prepared to issue a formal Interim Report, if asked, to permit either party to have my decision reviewed, under s. 62(3) and R. 54.09(2), (3), and (5).)

Order accordingly.

TAB 9

COURT OF APPEAL FOR ONTARIO

CITATION: Ontario Wealth Management Corporation v. Sica Masonry and General Contracting Ltd. , 2014 ONCA 500
DATE: 20140626
DOCKET: C57967/M43450

Strathy J.A. (In Chambers)

In the matter of Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, C. B-3, as amended; Section 101 of the *Courts of Justice Act*, R.S.O. 1990 C.C. 43, as amended; and Section 68(1) of the *Construction Lien Act*, R.S.O. 1990, C.30 as amended

BETWEEN

Ontario Wealth Management Corporation

Responding Party (Respondent)

and

1713515 Ontario Limited

Responding Party (Respondent)

and

Sica Masonry and General Contracting Ltd.

Moving Party (Appellant)

Jason A. Schmidt, for the moving party

David P. Preger and Michael J. Brzezinski for the responding party, SF Partners Inc. (court-appointed receiver for 1713515 Ontario Limited)

Amy Lok for responding party, Ontario Wealth Management Corporation

Heard: April 10, 2014

On motion from the order of Justice Hugh K. O'Connell of the Superior Court of Justice, dated October 18, 2013.

Strathy J.A.:

[1] The threshold question on this motion is whether this court should grant the moving party an extension of time to appeal from the motion judge's order determining a priorities dispute between a mortgagee and a construction lien claimant. The motion judge held that the mortgage of the respondent, Ontario Wealth Management Corporation ("Ontario Wealth"), had priority over the construction lien of the moving party, Sica Masonry and General Contracting Ltd. ("Sica"). He directed the Receiver of the property owner to disburse the balance of the proceeds of sale of the mortgaged property to Ontario Wealth. Sica wishes to appeal on the basis the motion judge incorrectly interpreted the priority scheme in s. 78 of the *Construction Lien Act*, R.S.O. 1990, c. C.30 (*CLA*).

[2] Rule 31(1) of the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368, provides that a notice of appeal must be filed within ten days after the day of the order appealed from or within such further time as a judge of this court stipulates.

[3] Sica's notice of appeal was filed 28 days after the order was made – that is, 18 days late. In the meantime, the Receiver had disbursed the proceeds of sale in accordance with the court's order.

[4] If an extension is granted, Sica seeks a declaration that it has an appeal as of right to this court. Alternatively, it seeks leave to appeal.

[5] When the motion was heard, there was no signed and entered order before the court. The appeal lies from the order, not from the reasons: see *Re Bearcat Exploration Ltd.*, 2003 ABCA 365, at para. 13. The formal order must be before an appellate court, because it is the correctness of the disposition, and not the reasons, which is in issue: see *Re Smoke* (1989), 77 C.B.R. (N.S.) 263 (Ont. C.A.).

[6] I agreed to hear the parties' submissions and reserved judgment on the motion on the understanding that the parties would take out the formal order. That has now occurred.

[7] For the reasons that follow, the motion for an extension of time to appeal is dismissed. Although that disposes of the matter, leave to appeal is required in any event and I would not have granted leave.

A. BACKGROUND FACTS

[8] The Walton Hotel in Port Hope, Ontario ("the Property") has been under renovation for use as a boutique hotel.

[9] On April 11, 2007, 1713515 Ontario Ltd. ("1713") purchased the Property for $339,623.

[10] On the same date, the Property was mortgaged to Crombee Construction Ltd. for $830,000.

[11] The project was refinanced on November 10, 2008. Ontario Wealth took a first mortgage on the Property for $1.23 million. Between November 2008 and December 2009, Ontario Wealth made advances on the mortgage totalling $1.191 million. The initial advance was for $500,000. The motion judge found that, of that advance, $457,117.75 was applied to re-finance the Crombee mortgage.

[12] Sica is a general contractor that worked on the Property between January 12, 2009 and March 18, 2010. On April 8, 2010, Sica registered a construction lien on the Property. Its priority claim relates to a deficiency of $123,947 in the holdback which it claims 1713 was required to retain.

[13] Sica perfected its lien in June 2010 by registering a certificate of action against the Property and issuing a statement of claim against 1713. The claim asserted that Sica's lien had priority over Ontario Wealth's mortgage, because the mortgage was taken with the intention of securing financing of an improvement.

[14] On September 1, 2010, SF Partners was appointed Receiver and Trustee of 1713. On May 16, 2012, the Receiver sold the Property for $600,000.

[15] The Receiver brought a motion seeking directions regarding the distribution of the proceeds of sale, given the competing priority claims of Sica and Ontario Wealth.

[16] The motion judge released his endorsement on October 18, 2013. He held at para. 52 that Ontario Wealth's mortgage had priority over Sica's lien and that "The Receiver may remit the balance of the funds under its administration to Ontario Wealth Management Corporation."

[17] The Receiver remitted the balance of the funds to Ontario Wealth three days later, on October 21, 2013.

[18] Sica served its notice of appeal on November 15, 2013.

B. THE *CONSTRUCTION LIEN ACT*

[19] The priority of the parties' respective claims depends upon the terms of s. 78 of the *CLA*. Under that provision, liens arising from an "improvement" have priority over mortgages, unless one of the exceptions in the section applies. There is an exception in s. 78(3) for mortgages registered prior to the time when the first lien arose in respect of an improvement.

[20] Section 78(2) provides that where a mortgagee takes a mortgage to secure the financing of an "improvement", liens arising from that improvement have priority over the mortgage, and over any mortgage taken to repay the original

mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner.

[21] The relevant subsections provide:

> 78(1) Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises.
>
> (2) Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered.
>
> (3) Subject to subsection (2), and without limiting the effect of subsection (4), all conveyances, mortgages or other agreements affecting the owner's interest in the premises that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent of the lesser of,
>
> > (a) the actual value of the premises at the time when the first lien arose; and
> >
> > (b) the total of all amounts that prior to that time were,
> >
> > (i) advanced in the case of a mortgage, and
> >
> > (ii) advanced or secured in the case of a conveyance or other agreement.
>
> (4) Subject to subsection (2), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that was registered prior to the time when the first lien arose in respect of an improvement, has priority, in addition to the priority to which it is entitled

under subsection (3), over the liens arising from the improvement, to the extent of any advance made in respect of that conveyance, mortgage or other agreement after the time when the first lien arose, unless,

> (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or
>
> (b) prior to the time when the advance was made, the person making the advance had received written notice of a lien.

(5) Where a mortgage affecting the owner's interest in the premises is registered after the time when the first lien arose in respect of an improvement, the liens arising from the improvement have priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV.

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

> (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or
>
> (b) prior to the time when the advance was made, the person making the advance had received written notice of a lien.

[22] The interpretation of s. 78 depends on the meaning of the word "improvement", as defined in s. 1(1) of the *CLA:*

> "improvement" means, in respect of any land,

> (a) any alteration, addition or repair to the land,
>
> (b) any construction, erection or installation on the land, including the installation of industrial, mechanical, electrical or other equipment on the land or on any building, structure or works on the land that is essential to the normal or intended use of the land, building, structure or works, or
>
> (c) the complete or partial demolition or removal of any building, structure or works on the land.

C. THE DECISION BELOW

[23] The motion judge held that Ontario Wealth's initial advance fell within s. 78(3) of the *CLA*, and therefore had priority over Sica's lien. Separate and distinct advances under a single mortgage intended for different purposes should be afforded separate and distinct priority treatment under the *CLA*: *Royal Bank of Canada v. Lawton Developments Inc.* (1994), 16 O.R. (3d) 450 (Gen. Div), rev'd on other grounds (1996), 27 O.R. (3d) 417 (C.A.). Ontario Wealth agreed to take a mortgage with the dual intention of financing the repayment of the existing Crombee mortgage and renovating the Property. It advanced $457,117.75 to refinance that mortgage. This was a non-construction advance and therefore a "prior advance" within s. 78(3) of the *CLA*, rather than s. 78(2). Prior advances that are not taken with the intention of securing the financing of an improvement take priority over subsequent liens under s. 78(3).

[24] The motion judge rejected Sica's argument that although its own lien arose after registration of Ontario Wealth's mortgage, its work related to an earlier

improvement and the first lien in respect of that improvement arose before the mortgage was registered. The motion judge found that Sica's improvement did not relate to an earlier contract involving prior lien claimants, although it may well have related to the same project.

[25] The motion judge therefore directed that the Receiver remit the balance of the proceeds to Ontario Wealth and the order so provides.

D. SHOULD AN EXTENSION OF TIME BE GRANTED?

[26] The overarching principle is whether the justice of the case requires that an extension be granted. The relevant factors may include:

> (a) whether the applicant had a *bona fide* intention to appeal before the expiration of the appeal period;
>
> (b) the length of and explanation for the delay in filing;
>
> (c) any prejudice to the responding parties caused by the delay; and
>
> (d) the merits of the proposed appeal.

See *Howard v. Martin*, 2014 ONCA 309; *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131, 114 O.R. (3d) 636. See also *Braich (Re)*, 2007 BCCA 641.

[27] There is no evidence that Sica formed an intention to appeal prior to the expiry of the appeal period. It did not inform the Receiver of its intent to appeal until it served the notice of appeal. The length of the delay was not inordinate, although Sica has not offered any explanation for it.

[28] Sica submits that the delay has not caused any significant prejudice to the Receiver, given that the Receiver did not wait until the expiry of the appeal period before distributing the funds to Ontario Wealth. The Receiver does not point to specific prejudice, but it contends that the appeal is moot.

[29] I am not persuaded that the appeal has any merit. The only evidence before the motion judge was the Receiver's third report. Sica filed no evidence on the motion. The motion judge made the following critical findings of fact:

> I agree with the position of Ontario Wealth. When Ontario Wealth came onto the scene, there were no construction liens on title. They had been vacated or discharged. They were not something for which Ontario Wealth was bound.
>
> I accept therefore that Ontario Wealth advanced the original $500,000 to pay out the Crombee mortgage. That advance was for payout of the land portion of the mortgage and not improvements.
>
> I therefore agree with Ontario Wealth that section 78(3) of the CLA is applicable. The advance of Ontario Wealth takes priority over any lien claim in favour of Sica.
>
> …
>
> In any event, there is no evidence before me that the improvement undertaken by Sica related to any of the same improvements undertaken prior to Ontario Wealth coming on board in November 2008. In this regard I note that Sica claims for contractual undertakings for the period January 12, 2009 – March 28, 2010, for which it registered its lien in April 2010.

[30] While Sica contends that the motion judge erred in finding that its work did not relate to improvements financed by the Crombee mortgage, the motion judge

found that there was no evidence to support that conclusion. The appeal is, at its core, fact-based, and the moving party has identified no palpable or overriding error in the motion judge's findings of fact.

[31] The Receiver submits that the appeal is moot because it distributed all of the funds in reliance on the order below. It relies on *National Life Assurance Co. of Canada v. Brucefield Manor Ltd.*, [1999] O.J. No. 1175 (C.A.). The brief endorsement in that case indicates that it was an appeal from an order for sale. A motion for a stay was dismissed, the sale closed, a vesting order was made and the proceeds of sale were distributed. This court held that that the order was spent and quashed the appeal.

[32] The Receiver submits it had no obligation to satisfy itself that Sica would not appeal the order before distributing the funds. Where there is no automatic stay of an order, a losing party is well-advised to seek a stay pending appeal: *Regal Constellation Hotel Ltd. (Re)* (2004), 71 O.R. (3d) 355 (C.A.), at para. 49.

[33] The Receiver had no notice, prior to the expiration of the time to appeal, that the moving party intended to appeal the order. Section 195 of the *BIA* provides for a stay of proceedings pending appeal, but no request was made for a stay of execution pending the filing of a notice of appeal. The funds have been disbursed and the operative parts of the order are spent. Receivers are entitled to act on

the advice they receive from the court. It would not be fair to revisit the issue when the funds are out of the Receiver's hands.

[34] In all the circumstances, the justice of this case does not require an extension of time. The application to extend the time to appeal is dismissed.

E. LEAVE TO APPEAL

[35] It is unnecessary to consider the application for leave to appeal. However, as the parties made submissions on the issue, I will indicate that, in my view, leave to appeal is required and I would not have granted leave.

[36] The parties agreed that the appeal route is governed by s. 193 of the *BIA*: see *Impact Tool & Mould Inc. (Receiver of) v. Impact Tool & Mould Inc. (Trustee of)*, 2013 ONCA 697; *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 41 O.R. (3d) 97 (C.A.), at para. 13, leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 372; L.W. Houlden, G.B. Morawetz and Janis Sarra, *Bankruptcy and Insolvency Law of Canada*, loose-leaf (2009-Rel. 5), 4th ed. (Toronto: Carswell, 2013) vol. 3 at p. 7-106; Donald J.M. Brown, Q.C., *Civil Appeals*, loose-leaf (June 2013) (Toronto: Carswell, 2013) vol. 1 at para. 2:1120. See also *Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Ltd.*, 2013 ONCA 769, 118 O.R. (3d) 161 on the paramountcy of the *BIA*.

[37] Section 193 provides:

> 193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
>
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;
>
> (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
>
> (e) in any other case by leave of a judge of the Court of Appeal.

[38] An appeal lies to this court as of right in the circumstances described in s. 193(a) to (d) of the *BIA*. In all other cases, leave must be sought from a single judge under s. 193(e).

[39] Rule 31(2) of the *Bankruptcy and Insolvency General Rules* provides that where an appeal is brought under s. 193(e), the notice of appeal must include the application for leave. This rule was not observed in this case

[40] The appeal does not involve future rights, other cases in the bankruptcy proceedings or the granting or refusal of a discharge. The issue therefore is whether there is an appeal as of right under s. 193(c) or whether leave is required under s. 193(e) and, if so, whether leave should be granted.

[41] Based on this court's decision in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, and the decision of the New Brunswick Court of Appeal in *Royal Bank of Canada v. Profor Kedgwick Ltd.,* 2008 NBCA 69, 299 D.L.R. (4th) 727, s. 193(c) is to be narrowly construed and restricted to cases where the appeal directly involves property exceeding $10,000 in value. While the practical effect of the motion judge's decision is that Ontario Wealth will receive proceeds of sale exceeding $10,000 and Sica will not, this results not from the decision itself but from the reality that there are insufficient funds in the estate to repay both creditors. As in *Pine Tree Resorts*, there is no dispute as to the *value* of the claims at issue or the proceeds of sale. Thus, I would follow the reasoning in *Pine Tree Resorts* and in *Profor Kedgwick* and hold that the appeal does not directly involve property which exceeds $10,000 in value.

[42] The issue before the motion judge was simply a matter of which claim had priority. This is the daily fare of judges in bankruptcy proceedings. To provide an appeal as of right from such decisions would negate the court's gatekeeping function under s. 193(e) and would tie up bankruptcy proceedings in interlocutory appeals over routine issues.

[43] The exercise of granting leave to appeal under s. 193(e) is discretionary and must be exercised in a flexible and contextual way: *Pine Tree Resorts*, at para. 29. The prevailing considerations are whether the proposed appeal:

(a) raises an issue of general importance to the practice in bankruptcy/insolvency matters or the administration of justice as a whole;

(b) is *prima facie* meritorious;

(c) would unduly hinder the progress of the bankruptcy/insolvency proceedings.

The parties agree that the appeal would not unduly hinder the proceedings, so the analysis turns on the answer to the first two questions.

[44] For the reasons set out above, I am not persuaded that the proposed appeal is meritorious.

[45] I am also not convinced that this appeal raises an issue of general importance to the practice of bankruptcy and insolvency given that it turns on the motion judge's very specific and central findings of fact that the mortgage funds were advanced prior to Sica's involvement, all construction liens had been discharged, and Sica's improvement did not relate to the earlier contract.

[46] I would not therefore have granted leave to appeal even if the notice of appeal had been served in time.

F. DISPOSITION

[47] The application for an extension of time is dismissed. If the parties are unable to resolve costs, they may make written submissions. The respondents' submissions shall be served and filed with the Registrar within 15 days. The

moving party may have 15 days to respond. The submissions shall not exceed 5 pages in length, exclusive of the costs outline.

"G.R. Strathy J.A."

TAB 10

Mining Act, RSO 1990, c M.14

Application of *Construction Act*

171 (1) Except as provided in this Act, the *Construction Act* applies to mines, mining claims, mining lands and connected works. 2017, c. 24, s. 78 (1).

Registration of lien

(2) Where the lands and mining rights have not been patented, the registration provided for in the *Construction Act* shall be in the office of the recorder. R.S.O. 1990, c. M.14, s. 171 (2); 2017, c. 24, s. 78 (2).

Lien where claim for wages

(3) When the claim is for wages in connection with a mine, mining claim, mining lands or works connected therewith, in addition to the rights and remedies afforded by the *Construction Act*, the claimant has a lien upon any other property of the owner in or on such mine, mining claim, mining land or works for a sum not exceeding thirty days wages, and this claim may be enforced under that Act. R.S.O. 1990, c. M.14, s. 171 (3); 2017, c. 24, s. 78 (2).

Cancellation of claim

(4) When the Tribunal is satisfied that a claim for lien recorded as provided in this section is not made in good faith or is made for some improper purpose or where the owner is unduly embarrassed thereby, the Tribunal may make an order cancelling the lien upon such terms as to security or otherwise as it deems proper. R.S.O. 1990, c. M.14, s. 171 (4); 2017, c. 8, Sched. 17, s. 7 (1, 24).

Lien on unpatented lands

(5) A lien upon unpatented land does not affect the rights of the Crown. R.S.O. 1990, c. M.14, s. 171 (5).

TAB 11

Construction Lien Act, RSO 1990, c C.30

This version is not the latest.

Past version: in force between May 1, 2007 and Oct 24, 2010

Interpretation
Definitions
1. (1) In this Act,

...

"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; ("améliorations", "amélioré")

TAB 12

Construction Act, RSO 1990, c C.30

Consolidation Period: From September 1, 2021 to the e-Laws currency date.

Last amendment: 2021, c. 4, Sched. 3, s. 20.

Note: On a day to be named by proclamation of the Lieutenant Governor, clause (b) of the definition of "home buyer" in subsection 1 (1) of the Act is amended by striking out "the issuance under the *Ontario New Home Warranties Plan Act* of a certificate of completion and possession" and substituting "the issuance of material prescribed for the purpose of this clause by the regulations made under the *Protection for Owners and Purchasers of New Homes Act, 2017*". (See: 2017, c. 33, Sched. 2, s. 76 (1))

"improvement" means, in respect of any land,

(a) any alteration, addition or capital repair to the land,

(b) any construction, erection or installation on the land, including the installation of industrial, mechanical, electrical or other equipment on the land or on any building, structure or works on the land that is essential to the normal or intended use of the land, building, structure or works, or

(c) the complete or partial demolition or removal of any building, structure or works on the land; ("améliorations")

Priority over mortgages, etc.

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

Building mortgage

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

Prior mortgages, prior advances

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

improvement have priority over the liens arising from the improvement to the extent of the lesser of,

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

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

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

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

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36 and IN THE MATTER OF THE BUSINESS CORPORATIONS ACT, S.B.C. 2002, c. 57 and IN THE MATTER OF THE PLAN OF COMPROMISE AND ARRANGEMENT OF PURE GOLD MINING INC.

No. S-228723
Vancouver Registry

Petitioner

IN THE SUPREME COURT OF BRITISH COLUMBIA
Proceeding Commenced at Vancouver

BOOK OF AUTHORITIES

GLAHOLT BOWLES LLP
Barristers and Solicitors
141 Adelaide Street West, Suite 800
Toronto, Ontario, M5H 3L5

BRENDAN BOWLES LSO No.: 42802I
brendanbowles@glaholt.com
JOHN PAUL VENTRELLA LSO No.: 64269R
johnpaulventrella@glaholt.com

Tel. No.: 416.368.8280
Fax. No.: 416.368.3467

Lawyers for the Application Respondent,
SCR Mining and Tunnelling L.P.