COURT FILE NUMBER	2003 07757 ND 1 copy Kept
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
PLAINTIFFS	SYNERGY PROJECTS (DESTINY) LTD. AND SYNERGY PROJECTS LTD.
DEFENDANTS	DESTINY BIOSCIENCE GLOBAL CORP., DESTINY BIOTECH INC. and AAA SELF STORAGE DEPOT INC.
COURT FILE NUMBER	2003 07758
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JUDICIAL CENTRE	EDMONTON
PLAINTIFFS	SYNERGY PROJECTS (DESTINY) LTD. AND SYNERGY PROJECTS LTD.
DEFENDANTS	DESTINY BIOSCIENCE GLOBAL CORP., DESTINY BIOTECH INC and 718721 ALBERTA LTD.
DOCUMENT	**BENCH BRIEF OF SYNERGY PROJECTS DESTINY LTD. FOR THE APPOINTMENT OF A RECEIVER AND TRUSTEE**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Susy Trace DLA Piper (Canada) LLP Barristers and Solicitors Suite 2700, Stantec Tower 10220 - 103rd Avenue NW Edmonton, Alberta T5J 0K4 Phone: 780-429-6831 Email: susy.trace@dlapiper.com Fax: 780-702-4539 File No.: 100021-00007

JUDICIAL CENTRE OF EDMONTON
FILED
MAY 29 2020
Emailed
Clerk of the Court

CPA: 33215289.5

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I. INTRODUCTION

1. Destiny Bioscience Global Corp. ("**Bioscience**") is in the business of performing research and development related to cannabis genetics and cultivation inputs. In relation to this, Synergy Projects Destiny Ltd. ("**SPDL**"), as prime contractor, has partially constructed two projects, the Genetics Lab Project and the Micro Cultivation Project (as hereinafter defined) (together, the "**Projects**"). As a result, Bioscience is indebted to SPDL in the amount of $43,183,440.35 including GST, plus interest, for services, material and work performed on the Projects which, at this time, remain incomplete.

2. Both of the Projects are being constructed on lands leased from third parties. Destiny Biotech Inc. ("**Biotech**"), a wholly owned subsidiary of Bioscience, leases the Nisku Lands (as hereinafter defined) where the Genetics Lab Project is located from 718721 Alberta Ltd. ("**7187**") and leases the Leduc Lands (as hereinafter defined) where the Micro Cultivation Project is located from AAA Self Storage Depot Inc. ("**AAA**").

3. SPDL seeks the appointment of a receiver and manager (the "**Receiver**") of the undertakings, property and assets of Bioscience and Biotech pursuant to section 13(2) of the *Judicature Act*, RSA 2000, c J-2 (the "***Judicature Act***"), section 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "***Bankruptcy and Insolvency Act***") section 65(7) of the *Personal Properly Security Act,* RSA 2000, c.P-7, and the appointment of a trustee (the "**Trustee**") pursuant to section 54(2) of the *Builders' Lien Act,* RSA 2000, c B-7 (the "***Builders' Lien Act***").

4. In the circumstances, and for the reasons submitted in this Brief, SPDL respectfully submits that it is just and convenient for this Honourable Court to appoint a Receiver over the undertakings, property and assets of Bioscience and Biotech and a Trustee pursuant to the *Builders' Lien Act*.

II. ISSUES

A. Is it just and convenient to appoint a Receiver over Bioscience and Biotech;

B. Is it appropriate in the circumstances to appoint a Trustee pursuant to the *Builders' Lien Act*; and

C. If this Honourable Court exercises its discretion to appoint a Receiver, who should be appointed?

III. SPDL'S POSITION

5. SPDL respectfully submits that:

(a) having regard to the circumstances, the appointment of a Receiver over the property, assets and undertaking of Bioscience and Biotech is just, convenient and necessary to protect and preserve the property secured to SPDL and to liquidate such property in a transparent, fair and commercially reasonable fashion;

(b) the appointment of a Trustee under the *Builders' Lien Act* is necessary to protect the interests of the lien claimants in the Projects; and

(c) The Bowra Group ("**Bowra**") ought to be appointed as Receiver and Trustee as it is a well-recognized and respected insolvency firm and is able to deal with the rights of all interested parties in a fair and even-handed manner.

IV. FACTUAL BACKGROUND

A. The Genetics Lab Project

6. Synergy Projects Ltd. ("**SPL**"), as Design-Builder, entered into a Design-Build Stipulated Price Contract 2013 (CCDC 14) dated August 14, 2018, with the Defendant 1825159 Alberta Ltd., now Bioscience, as Owner, (the "**Genetics Lab CCDC 14 Contract**"), in which SPL agreed, among other things, to provide the Design Services for the construction on the Destiny Bioscience Genetics Building and greenhouse (the "**Genetics Lab Project**").

Affidavit of Tim Varughese sworn May 12, 2020 (the "Varughese Affidavit") at para. 10.

7. The Genetics Lab Project, when completed, is intended to be a certified genetics research, development, production, extraction, cultivation, nursery, breeding and distribution facility.

Varughese Affidavit at para. 11.

8. Subsequently, SPL was advised by Bioscience's Chief Executive Officer, Gordon Reykdal ("**Reykdal**"), that in order to obtain financing for the Genetics Lab Project, Bioscience required SPDL and Bioscience to enter into a stipulated (fixed) price contract for the Genetics Lab Project. Accordingly, SPDL, as contractor, entered into a Stipulated Price Contract 2008 (CCDC 2) dated June 1, 2019, with Bioscience as Owner, (the "**Genetics Lab CCDC 2 Contract**"), in which SPDL agreed, among other things, to construct the Genetics Lab Project.

Varughese Affidavit at paras. 12-13.

9. Under the Genetics Lab CCDC 14 Contract, a Contemplated Change Notice #022 regarding "Contract Revision - CCDC 14 to CCDC 2" dated June 17, 2019 was issued by the consultant hired for the Genetics Lab Project, Planworks Architecture Inc. (the "**Consultant**"), at the request of Bioscience, under which the remaining portion of the existing Genetics Lab CCDC 14 Contract was converted to the Genetics Lab CCDC 2 Contract, with the exception of the design portion of the Genetics Lab Project, which remained part of the Genetics Lab CCDC 14 Contract.

Varughese Affidavit at para. 14.

10. The Genetics Lab CCDC 2 Contract superseded all prior negotiations, representations and agreements, either written or oral, relating in any manner to the Genetics Lab Project, including the Genetics Lab CCDC 14 Contract (the Genetics Lab CCDC 2 Contract and the Genetics Lab CCDC 14 Contract are hereinafter collectively referred to as the "**Genetics Lab Prime Contract**").

Varughese Affidavit at para. 15.

11. SPDL estimates that it has completed 45.85% of the work contemplated by Genetics Lab Prime Contract. This percentage is arrived at using the total value of the Genetics Lab Prime Contract as of February 2020 (which amount includes the original contract value, as amended by change orders issued by Bioscience in accordance with the Genetics Lab Prime Contract), which totals $106,832,719.00 (excluding GST). The value of the work completed by SPDL as of February 2020 totals $48,984,008.00 (excluding GST).

Varughese Affidavit at para. 18.

B. ***The Unauthorized Transfer of the Nisku Lease to a Related Party***

12. The Genetics Lab is located on lands legally described as Plan 1124833, Block 1, Lot 1, excepting thereout all mines and minerals with an area of 10.241 hectares (25.31 acres) more of less (the "**Nisku Lands**"). By a written lease agreement dated May 8, 2018, Bioscience leased from the landowner, 718721 Alberta Ltd. ("**7187**"), the Nisku Lands for a term of 15 years, with an option to extend the lease for an additional two terms of five years each (the "**Nisku Lease**"). Bioscience (formerly known as 1825159 Alberta Ltd.) registered upon the Certificate of Title to the Nisku Lands a Caveat in respect of its leasehold interest on the Nisku Lands on November 8, 2018, as instrument number 182 282 195 (the "**Nisku Caveat**").

Varughese Affidavit at paras. 17, 19-20.

13. Subsequently, a Transfer of Caveat was registered on the Certificate of Title to the Nisku Lands on November 15, 2019 as instrument number 192 277 615 (the "**Transfer Caveat**"), in which Bioscience's interest in the Nisku Lease was transferred to Biotech (the "**Unauthorized Transfer**"). Although the Unauthorized Transfer was registered against the Certificate of Title to the Nisku Lands on November 25, 2019, the Unauthorized Transfer is dated December 5, 2018.

Varughese Affidavit at paras. 21-22.

14. Bioscience did not seek the consent of SPDL or SPL to transfer its interest in the Nisku Lease to Biotech. SPDL and SPL only learned of the Unauthorized Transfer after requesting a copy of the Transfer Caveat from the Land Titles office.

Varughese Affidavit at paras. 23-24.

C. ***The Micro Cultivation Project***

15. SPDL, as Design-Builder, entered into a Design-Build Stipulated Price Contract 2013 (CCDC 14) dated March 22, 2019 with Bioscience, as Owner, (the "**Micro Cultivation CCDC 14 Contract**") in which SPDL agreed, among other things, to provide the Design Services to construct the Leduc Micro Cultivation Facility located at Block 5, Lot 2, 65th Avenue, Leduc, Alberta (the "**Micro Cultivation Project**").

Varughese Affidavit at para. 25.

16. Subsequently, SPDL was advised by Reykdal that in order to obtain financing for the Micro Cultivation Project, Bioscience required SPDL and Bioscience to enter into a stipulated (fixed) price contract for the Micro Cultivation Project. Accordingly, SPDL, as contractor, entered into a Stipulated Price Contract 2008 (CCDC 2) dated June 1, 2019 with Bioscience, as Owner, (the "**Micro Cultivation CCDC 2 Contract**"), in which SPDL agreed, among other things, to construct the Leduc Micro Cultivation Project.

Varughese Affidavit at paras. 26-27.

17. Under the Micro Cultivation CCDC 14 Contract, a Contemplated Change Notice #013 regarding "Contract Revision - CCDC 14 to CCDC 2" dated June 14, 2019 was issued by the Consultant, at the request of Bioscience, under which the remaining portion of the existing Micro Cultivation CCDC 14 Contract was converted to the Micro Cultivation CCDC 2 Contract, with the exception of the design portion of the Micro Cultivation Project, which remained part of the Micro Cultivation CCDC 14 Contract. The Micro Cultivation CCDC 2 Contract superseded all prior

negotiations, representations and agreements, either written or oral, relating in any manner to the Micro Cultivation Project, including the Micro Cultivation CCDC 14 Contract (the Micro Cultivation CCDC 2 Contract and the Micro Cultivation CCDC 14 Contract are hereinafter collectively referred to as the "**Micro Cultivation Prime Contract**").

Varughese Affidavit at paras. 28 & 30.

18. SPDL estimates that it has completed 90.6% of the work contemplated by Micro Cultivation Prime Contract. This percentage is arrived at using the total value of the Micro Cultivation Prime Contract as of February 2020 (which amount includes the original contract value, as amended by change orders issued by Bioscience in accordance with the Micro Cultivation Prime Contract), which totals $9,794,577.00 (excluding GST). The value of the work completed by SPDL as of February 2020 totals $8,874,303.00 (excluding GST).

Varughese Affidavit at para. 32

19. The Micro Cultivation Project is located on lands legally described as Plan 1520109, Block 5, Lot 2, excepting thereout all mines and minerals with an area of 0.874 hectares (2.16 acres) more or less (the "**Leduc Lands**"). By a written lease agreement dated January 1, 2019, Biotech leased from the landowner AAA Self Storage Depot Inc., the Leduc Lands for a term of 6 years, with an option to renew the lease for an additional two terms of five years each (the "**Leduc Lease**"). Biotech registered upon the Certificate of Title to the Leduc Lands a Caveat in respect of its leasehold interest on the Leduc Lands on April 28, 2020, as instrument number 202 091 580 (the "**Leduc Caveat**").

Varughese Affidavit at paras. 31, 33-34.

20. At all material times, SPL and SPDL understood that Bioscience and Biotech were the same corporate entity and proceeded on the basis that Bioscience was the lessee of the Leduc Lease. On June 26, 2019, Bioscience provided to SPL and SPDL a Business Plan for Bioscience that represented that Bioscience and Biotech had merged in September of 2018.

Varughese Affidavit at para. 35.

D. ***The Indebtedness, Builders' Liens and Security***

21. Bioscience is indebted to SPDL in the amount of $35,055,669.74 including GST, for services, material and work performed by SPDL on the Genetics Lab Project, plus interest at the rates agreed to in the Genetics Lab Prime Contract (the "**Genetics Lab Project Indebtedness**").

All of the invoices rendered to Bioscience on the Genetics Lab Project have been certified by the Consultant with the exception of the February 2020 invoice and an invoice related to the construction of a greenhouse located on the Nisku Lands.

Varughese Affidavit at paras. 39-40.

22. Bioscience is indebted to SPDL in the amount of $8,127,771.02 including GST, for services, material and work performed by SPDL on the Micro Cultivation Project, plus interest at the rates agreed to in the Micro Cultivation Prime Contract (the "**Micro Cultivation Project Indebtedness**"). All of the invoices rendered to Bioscience on the Micro Cultivation Project have been certified by the Consultant, with the exception of invoices rendered in February of 2020.

Varughese Affidavit at paras. 41-42.

23. On or about October 17, 2019, as continuing and collateral security for payment of all liabilities and obligations of Bioscience to SPDL, Bioscience executed a general security agreement, securing to SPDL all of Bioscience's present and after-acquired personal property (the "**Security Interest**"). The Security Interest is registered at the Alberta Personal Property Registry ("**APPR**"). In addition, after learning about the Unauthorized Transfer of the Nisku Lease to Biotech, SPDL, on or about March 16, 2020, added Biotech as an additional debtor to its APPR registration on March 16, 2020.

Varughese Affidavit at paras. 43-45.

24. On May 4, 2020, Bioscience was served with a Demand Letter and Notice of Intention to Enforce Security by personal delivery to its registered office. On the same date, Biotech was served with a Demand Letter and Notice of Intention to Enforce Security by personal delivery to its extra-provincial registered office.

Varughese Affidavit at paras. 46-47.

25. SPDL and SPL have registered builders' liens against the leasehold interest of Bioscience and Biotech on (i) the Nisku Lands, as well as the landowner's interest on the Nisku Lands and (ii) the Leduc Lands, as well as the landowner's interest on the Leduc Lands. In addition, SPDL and SPL have commenced claims in the Court of Queen's Bench of Alberta against Bioscience and Biotech respecting its builders' lien claims referred to in this Affidavit. The claims have been served upon Bioscience and Biotech.

Varughese Affidavit at paras. 48-50.

E. *Indebtedness owing to other Creditors*

26. By letter from MLT Aikins dated April 29, 2020, ATB Financial ("**ATB**") has demanded payment from Bioscience pursuant to a guarantee given by Bioscience to ATB of the indebtedness of Derrick Concrete Cutting & Construction Ltd. ("**Derrick Concrete**") in the aggregate amount of $2,556,068.04 (plus interest and costs), and has served upon Bioscience a Notice of Intention to Enforce Security (the "**ATB Demand**"). The ATB Demand indicates that Bioscience has also granted to ATB a general security agreement in support of the above referenced guarantee. Moroz is a director and beneficial shareholder of Derrick Concrete.

Varughese Affidavit at paras. 51-53.

27. KV Capital Inc. ("**KV**") has commenced an action against, among others, Bioscience and Moroz, in Court of Queen's Bench file No. 1903-26004 (the "**KV Action**") to collect indebtedness owing to it pursuant to an advance KV made to Bioscience in the amount of $3,003,388.21 on January 18, 2019, though KV has agreed to forbear from taking steps in the KV Action.

Varughese Affidavit at paras. 54.

28. As of May 12, 2020, 39 Builders' Liens have been filed by either SPDL, SPL or sub-contractors who worked on the Genetics Lab Project in accordance with the Genetics Lab Prime Contract on the Nisku Lands. As of the same date, 20 Builders' Liens have been filed by either SPDL, SPL or sub-contractors who worked on the Micro Cultivation Project in accordance with the Micro Cultivation Prime Contract on the Leduc Lands.

Varughese Affidavit at paras. 55-56.

F. *Seizure of Personal Property of Bioscience*

29. On or about April 22, 2020, upon the instruction of KV, a secured creditor of Bioscience, Consolidated Civil Enforcement (the "**Bailiff**") seized all of the personal property of Bioscience, and left the same on a Bailee's Undertaking with Grant Lakan, Operations Manger of Bioscience.

Varughese Affidavit at para. 57.

G. *Loss of Confidence in Management of Bioscience*

30. Bioscience and or Biotech have at least twice since December failed to pay its lease payments owing to the landlord of the Nisku Lands, 7187, on time as agreed to in the Nisku Lease. It is SPDL's understanding that KV paid the December lease payment to 7187 on behalf of

Bioscience, and that Bioscience later reimbursed KV for the lease payment. Bioscience and/or Biotech again failed to pay April's lease payment to 7187 on time as agreed in the Nisku Lease, and 7187 issued a Notice of Default to Bioscience respecting the missed payment. In the Notice of Default, 7187 reserved its right to, among other things, terminate the Nisku Lease.

Varughese Affidavit at paras.63-65.

31. On May 1, 2020, Mr. Moroz personally paid both April's and May's lease payment to 7187, which happened to be 4 days before a Court Application to appoint a receiver over, among others, Bioscience and Biotech, was to be heard by the KV Action, and the same day that responding materials were due to be filed and served by Bioscience and Biotech (among others) in the KV Action respecting that receivership application.

Varughese Affidavit at para. 66.

32. All of the directors of Bioscience have resigned with the exception of Mr. Moroz. All but approximately three employees have either resigned or been terminated. Bioscience has, since at least April of 2019, been attempting to secure financing in an amount in excess of that necessary to cover the costs of construction of the Genetics Lab Project and the Micro Cultivation Project, without success.

Varughese Affidavit at para. 67-69.

V. LAW AND ARGUMENT

A. Should a Receiver be appointed by the Court in the present circumstances?

33. The test for the granting of a receivership order is set out in section 243 of the *Bankruptcy and Insolvency Act* and section 13(2) of the *Judicature Act*, which provide that this Honourable Court is given the authority to appoint a Receiver where it is "just and convenient" to do so.

***Judicature Act*, s. 13(2) [TAB 1]**
***Bankruptcy and Insolvency Act*, s. 243 [TAB 2]**

34. SPDL respectfully submits that this Honourable Court ought to exercise its discretion to appoint a Receiver because it is just, convenient and otherwise appropriate that a Receiver of the undertaking, property and assets of Bioscience and Biotech be appointed.

35. SPDL respectfully submits that the factors which a Court considers strongly indicate that the appointment of a Receiver would be appropriate in the present circumstances. In *Paragon*

Capital, Justice Romaine held that a court may consider numerous factors in determining whether it is appropriate to appoint a receiver, including:

(a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

(b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

(c) the nature of the property;

(d) the apprehended or actual waste of the debtor's assets;

(e) the preservation and protection of the property pending judicial resolution;

(f) the balance of convenience to the parties;

(g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

(h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

(i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

(j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

(k) the effect of the order upon the parties;

(l) the conduct of the parties;

(m) the length of time that a receiver may be in place;

(n) the cost to the parties;

(o) the likelihood of maximizing return to the parties;

(p) the goal of facilitating the duties of the receiver.

***Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Co.* ("*Paragon Capital*"), 2002 ABQB 430 at para. 27, from Bennett, Frank, *Bennett on Receiverships*, 2nd edition, (1995), Thompson Canada Ltd., page 130 (cited by various cases) [TAB 3].**

36. In *BG International,* an applicant who did not have authority to appoint a receiver pursuant to security documents, brought an application to appoint a Receiver under section 13(2) of the

Judicature Act. The Alberta Court of Appeal discussed the test to appoint a Receiver under the *Judicature Act*. The Court held that it must be "just and convenient" to grant a receivership order, and the court will balance the position of both parties. The onus remains on the applicant. The respondent does not need to prove any hardship, and if possible, a remedy short of a receivership should be used.

***BG International Ltd. v. Canadian Superior Energy*, 2009 ABCA 127, at para. 17, as cited in *Strategic Financial Corp. v. 1402801 Alberta Ltd.*, 2012 ABQB 292 at para 14 [TAB 4].**

37. SDPL has the authority to appoint a Receiver pursuant to the terms its general security agreement with Bioscience. Having regard to the factors for the appointment of a receiver listed by Justice Romaine in *Paragon Capital*, SPDL notes that:

SPDL will experience irreparable harm if a receivership order is not granted

(a) it is SPDL's respectful submission that it does not have to prove that it will suffer irreparable harm if a Receiver is not appointed since the appointment of a receiver is authorized by its security agreement. Nevertheless, SPDL submits that the facts of this case strongly support the conclusion that it will suffer irreparable harm if a Receivership Order is not granted;

(b) the Genetics Lab Project and the Micro Cultivation Projection are currently under construction and are at risk of falling into disrepair or being abandoned unless a significant capital injection is received by Bioscience;

(c) the risk to SPDL is significant as it faces a real possibility of multiple legal proceedings from subcontractors whom are owed money for their work, labour and materials supplied to partially build the Genetics Lab Project and Micro Cultivation Project;

(d) if a Receiver is not appointed, SPDL will have no means to realize on the property and repay the significant funds owing to the subcontractors;

A court appointment is necessary to enable the receiver to carry out its duties more efficiently

(e) a court appointed Receiver is necessary as the Receiver will have the protections from liability afforded by the Court Order, allowing the Receiver to address issues relating to the incomplete construction and sale of the Projects in a commercially

reasonable fashion without fear of being subject to liability, so long as the Receiver is not grossly negligent;

(f) a court appointment is necessary to enable the Receiver to carry out its duties more efficiently;

(g) the lands upon which the Projects are built are heavily encumbered by builders' liens and Certificates of Lis Pendens, and therefore judicial assistance is required in order to maximize the value of the assets and facilitate their sale and liquidation;

(h) the Projects have been designed and partially built for the purpose serving the cannabis industry, which industry is heavily regulated by Federal and Provincial governments and a Receiver is best situated to ensure compliance with such regulations.

A Receiver is necessary for the preservation and protection of the property

(i) the appointment of a Receiver is necessary for the preservation and protection of the property secured to SPDL;

(j) the board of directors of Bioscience have all resigned or been terminated, with the exception of Mr. Moroz, and the majority of the employees have been terminated;

(k) Bioscience has failed to meet its obligations generally as they become due;

(l) Bioscience transferred the Nisku Lease to a wholly owned subsidiary, out of the ordinary course of business and without the knowledge or consent of SPDL which could seriously impair SPDL's ability to collect the amounts owing to it;

(m) rent payments for the Nisku Lease have been paid late twice in recent months, and the April and May rent owing in respect of the Nisku Lands was only paid on the eve of an application brought by KV, a secured creditor, against, among others, Bioscience and Biotech, which could give cause to the landlord to terminate the Nisku Lease;

(n) if Bioscience again fails to pay its rent, there is a risk that the landlords may terminate the leases, which would have serious negative impact on ability of SPDL

(or other creditors) to collect any amount of the significant indebtedness owing to it;

(o) as stated above, the cannabis industry is heavily regulated and a Receiver is best situated to ensure compliance with such regulations.

The conduct of the parties favours the appointment of a Receiver

(p) at the time SPDL and Bioscience entered into the general security agreement, Bioscience did not advise SPDL that the leasehold interest in the Nisku Lands where the Genetics Lab Project was located had already been transferred to a related party, Biotech, and the Unauthorized Transfer was not registered against the Certificate of Title to the Nisku Lands until after the general security agreement was granted to SPDL by Bioscience;

(q) Bioscience represented to SPDL and SPL that Biotech and Bioscience had merged, and SPDL and SPL relied upon this representation in agreeing to construct the Projects;

(r) Bioscience has had all of its personal property seized;

(s) Bioscience has been attempting, for more than a year, to secure financing in an amount sufficient to pay SPDL, and to complete the Projects, and has failed to secure such financing;

(t) as a result, the relationship and trust between SPDL and Bioscience has eroded, and SPDL has lost confidence in the ability of Bioscience to secure the necessary financing to pay it or complete the Projects;

(u) a Receivership Order would place all creditors and stakeholders of Bioscience and Biotech on a level and transparent playing field under the administration of this Honourable Court to ensure the consistent and lawful treatment of all stakeholders;

The likelihood of maximizing return to the parties

(v) it is likely that in the circumstances, the value of the Projects will be maximized by establishing a level and transparent process administered by this Honourable Court appointing an independent third party Receiver;

(w) as noted above, Bioscience has been attempting, without success, to secure financing which would allow for the completion of the Genetics Lab Project and the Micro Cultivation Lab Project since at least April of 2019;

(x) neither the lands upon which the Projects have been partially constructed, nor the lease interest of Bioscience and/or Biotech, can be liquidated unless the 39 builders' liens registered against the Nisku Lands and the 20 builders' liens registered against the Leduc Lands are discharged;

(y) the only means for the stakeholders to receive any payment for the significant investment of time, labour and materials to the Projects is to allow for the appointment of a Receiver which would facilitate the commencement and completion of a sales and investment solicitation process for the property;

The effect of the order upon the Bioscience and Biotech will be minimal

(z) the only remaining board member of Bioscience and Biotech is Ed Moroz;

(aa) Bioscience and Biotech are insolvent and do not have the requisite funds to complete the Projects;

(bb) the majority, if not all, of their employees have been terminated;

(cc) all of Bioscience's personal property has been seized and left on a Bailee's Undertaking;

The balance of convenience to the parties favours the appointment of a Receiver

(dd) the balance of convenience is clearly in favour of SPDL. There will be minimal harm to Bioscience and Biotech if a Receiver is appointed since they have ceased making payments to their creditors generally as they become due, have no equity in the property, do not have the requisite funds to complete the Projects, and have little to no employees. Conversely, it is respectfully submitted that SPDL will suffer serious harm if a Receiver is not appointed since Bioscience is unable to pay SPDL the significant amount owing to it, unable to liquidate its assets in the circumstances, has shown a pattern of not paying its lease payments to the Nisku landlord, putting in jeopardy its lease interest (and therefore SPDL's collection prospects), has co-mingled SPDL's security with non-arms length entities, has

allowed its assets to be seized, has lost all but one of its board members and has terminated most of its employees.

38. SPDL respectfully submits that there are no other remedies short of the appointment of a Receiver available to it that will adequately protect its interests. The attempts by Bioscience to work through its financial difficulties have failed. Bioscience has ceased carrying on business and left two construction projects incomplete and several unpaid contractors and subcontractors in its wake. The balancing of the interests of the parties favours SPDL and the appointment of a Receiver.

39. SPDL is of the respectful view that a foreclosure process is not an appropriate alternative in the circumstances because:

(a) in the absence of a Receiver, no one with a remaining interest in the Projects will have the ability or the financial means to ensure all necessary payments, including rent, security, insurance and utilities are paid in a timely manner;

(b) the facilities and the business have been designed and built to compliment each other in providing goods and services to the global cannabis industry, and are therefore best marketed as a package to maximize value for all stakeholders, and this is not possible in a foreclosure process;

(c) ownership of the facilities and the business is separated into different Bioscience corporate entities and a Receiver and manager is best suited to identify, manage and facilitate a sale of these assets;

(d) the facilities are purpose-built for the cannabis industry, are not easily repurposed to service other industries, and therefore require a thoughtful, flexible and targeted sales process to ensure that value is maximized for all stakeholders.

B. Is it appropriate in the Circumstances to Appoint a Trustee pursuant to the *Builders' Lien Act*?

40. Lien legislation is remedial in nature and its purpose is to provide security to the parties who improved the lands for the value of the work done and the materials provided.

***Maple Reinders Inc. v W. Dalton Energy Corp.*, 2007 ABCA 247 at para 31 [TAB 5].**

41. Section 54 of the *Builders' Lien Act* provides that a trustee may be appointed at any time after a statement of claim has been filed. The trustee may be given the power to manage, sell, mortgage or lease the property and to complete or partially complete the improvement, subject to court approval.

***Builders' Lien Act*, s. 54(2) [TAB 6].**

42. The *BLA* does *not* require a lien claimant to have proven the amounts of its lien prior to the appointment of a trustee.

***UPA Construction Group Ltd. Partnership v Lake Placid Properties (Park) Inc.*, 2010 ABQB 675 ("*UPA Construction Group*") at para 77 [TAB 7].**

43. In *UPA Construction Group Ltd. Partnership,* this court discussed the principles to be considered when determining if a trustee should be appointed under the *Builders' Lien Act*:

(a) the appointment of a trustee is an extraordinary remedy;

(b) the court may exercise its discretion to appoint a trustee where, for example:

(i) there is a vacuum in the management,

(ii) the owner has abandoned the lands, or

(iii) the owner is insolvent and is acting irresponsibly.

***UPA Construction Group* at para 76 [TAB 7].**

44. In *Atlas-Gest Inc. v Brownstones Building Corp.*, the court held that a mortgage in arrears where the value of the assets were deteriorating in an economic sense to the detriment of lien claimants, was sufficient grounds for a receiver-manager and trustee to be appointed, notwithstanding that the court was reluctant to characterize the debtor as insolvent on the evidence before it.

***Atlas-Gest v Brownstones Building Corp.*, 1992 OJ No 1674 (OCJ Gen Div) at paras 18 - 24 [TAB 8].**

45. Having regard to the factors for the appointment of a trustee set out in *UPA Construction Group,* SPDL respectfully submits that that it is appropriate in the circumstances to appoint a Trustee in respect of the Projects for the following reasons:

(a) SPDL and SPL have both issued and served statements of claim against Bioscience and Biotech in relation to its lien claims;

(b) several of SPDL's subcontractors have filed liens in respect of the Genetics Lab Project and the Micro Cultivation Project and remain unpaid;

(c) the board of directors of Bioscience, with the exception of Mr. Moroz, have all resigned;

(d) the majority of the employees have been terminated;

(e) construction on the Projects has ceased and both are incomplete;

(f) despite prolonged efforts to secure financing to complete construction of the Genetics Lab Project and the Micro Cultivation Project, such financing has not been obtained;

(g) Mr. Moroz has no proposal in place which would see the lien claimants paid for services and materials rendered on the Genetics Lab Project and the Micro Cultivation Project;

(h) the only potential avenue for recovery for the lien claimants is the sale of the Projects to financially stable parties who are able to complete their construction;

(i) the rent owing in respect of the Nisku Lands remained unpaid for April 2020 until May 1, 2020, and mere days before a receivership application by KV was scheduled to be heard; and

(j) the failure to pay the rent going forward could result in the landlords of the Nisku Lands and the Leduc Lands terminating the leases which would negatively impact the lien claimant's security.

C. If this Honourable Court exercises its discretion to appoint a Receiver and Trustee, what firm ought to be appointed Receiver Trustee?

46. In an application for a Court appointed receiver and trustee, the Court is faced with the task of deciding the appropriate person or firm to be appointed.

47. Notwithstanding that the discretion to select the receiver is that of this Honourable Court, SPDL respectfully submits that consideration ought to be given to the appointment as Receiver of the firm put forward by the primary creditors, in this case, SPDL.

48. The proposition that significant consideration ought to be given to the applicant creditor's proposed receiver is supported by *Confederation Trust*, wherein Justice Borins held that when the receivers proposed by each party posses similar qualities, generally speaking, the receiver proposed by the creditor having carriage of the proceedings should be appointed.

***Confederation Trust Co. v. Dentbram Developments Ltd.* ("Confederation Trust"), 1992 OJ No 3870 (OCJ Gen Div), at para 2 [Tab 9].**

49. Bowra is a well-recognized and respected insolvency firm. It is impartial, disinterested and able to deal with the rights of all interested parties in a fair manner.

VI. CONCLUSION

50. SPDL respectfully submits that:

(a) having regard to the circumstances it is just and convenient to appoint a Receiver of the assets, undertakings and property of Bioscience and Biotech and appropriate to appoint a Trustee in respect of the Projects; and

(b) Bowra be appointed as Receiver and Trustee as it is a well-recognized and respected insolvency firm and is able to deal with the rights of all interested parties in a fair and even-handed manner.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of May, 2020.

DLA PIPER (CANADA) LLP

Per: 

Susy M. Trace
Counsel for Synergy Projects Destiny Ltd.

VII. AUTHORITIES

1. *Judicature Act,* RSA 2000, c J-2, s 13(2)

2. *Bankruptcy and Insolvency Act,* RSC 1985, c B-3, s 243(1)

3. *Builders' Lien Act,* RSA 2000, c B-7, s 54(2)

4. *Paragon Capital Corporation Ltd. v Merchants & Traders Assurance Co.,* 2002 ABQB 430

5. *Strategic Financial Corp. v 1402801 Alberta Ltd.,* 2012 ABQB 292

6. *Maple Reinders Inc. v W. Dalton Energy Corp.,* 2007 ABCA 247

7. *UPA Construction Group Ltd. Partnership v Lake Placid Properties (Park) Inc.,* 2010 ABQB 675

8. *Atlas-Gest v Brownstones Building Corp.,* 1992 OJ No 1674 (OCJ Gen Div)

9. *Confederation Trust Co. v Dentbram Developments Ltd.,* 1992 OJ No 3870 (OCJ Gen Div)

TAB 1

Alberta Statutes
Judicature Act
Part 2 — Powers of the Court (ss. 10-22)

R.S.A. 2000, c. J-2, s. 13

s 13. Part performance

Currency

13.Part performance

13(1) Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation

(a) when expressly accepted by a creditor in satisfaction, or

(b) when rendered pursuant to an agreement for that purpose though without any new consideration.

13(2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

Currency

Alberta Current to Gazette Vol. 116:6 (March 31, 2020)

TAB 2

R.S.C. 1985, c. B-3, s. 243

s 243.

Currency

243.

243(1) Court may appoint receiver

Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

243(1.1)Restriction on appointment of receiver

In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

243(2)Definition of "receiver"

Subject to subsections (3) and (4), in this Part, **"receiver"** means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

243(3)Definition of "receiver" — subsection 248(2)

For the purposes of subsection 248(2), the definition "receiver" in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

243(4)Trustee to be appointed
Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

243(5)Place of filing
The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

243(6)Orders respecting fees and disbursements
If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

243(7)Meaning of "disbursements"
In subsection (6), **"disbursements"** does not include payments made in the operation of a business of the insolvent person or bankrupt.

Amendment History
1992, c. 27, s. 89(1); 2005, c. 47, s. 115; 2007, c. 36, s. 58

Currency
Federal English Statutes reflect amendments current to May 1, 2020
Federal English Regulations are current to Gazette Vol. 154:6 (March 18, 2020)

End of Document

TAB 3

R.S.A. 2000, c. B-7, s. 54

s 54. Appointment of receiver and trustee

Currency

54.Appointment of receiver and trustee

54(1) At any time after a statement of claim has been issued to enforce a lien, any person interested in the property to which the lien attaches or that is otherwise affected by the lien may apply to the court for the appointment of a receiver of the rents and profits from the property against which the claim of lien is registered, and the court may order the appointment of a receiver on any terms and on the giving of any security or without security, as the court considers appropriate.

54(2) At any time after a statement of claim has been issued to enforce a lien, any person interested in the property to which the lien attaches or that is otherwise affected by the lien may apply to the court for the appointment of a trustee and the court may, on the giving of any security or without security, as the court considers appropriate, appoint a trustee

(a) with power to manage, sell, mortgage or lease the property subject to the supervision, direction and approbation of the court, and

(b) with power, on approval of the court, to complete or partially complete the improvement.

54(3) Mortgage money advanced to the trustee as the result of any of the powers conferred on the trustee under this section takes priority over all liens existing at the date of the appointment of the trustee.

54(4) Any property directed to be sold under this section may be offered for sale subject to any mortgage or other charge or encumbrance if the court so directs.

54(5) The net proceeds of any receivership and the proceeds of any sale made by a trustee under this section shall be paid into court and are subject to the claims of all lienholders, mortgagees and other parties interested in the property sold as their respective rights may be determined.

54(6) The court shall make all necessary orders for the completion of the sale, for the vesting of the property in the purchaser and for possession.

54(7) A vesting order under subsection (6) vests the title of the property free from all liens, encumbrances and interests of any kind including dower, except in cases where the sale is made subject to any mortgage, charge, encumbrance or interest.

Currency

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End of Document

TAB 4

2002 ABQB 430
Alberta Court of Queen's Bench

Paragon Capital Corp. v. Merchants & Traders Assurance Co.

2002 CarswellAlta 1531, 2002 ABQB 430, 316 A.R. 128, 46 C.B.R. (4th) 95

PARAGON CAPITAL CORPORATION LTD. (Plaintiff) and MERCHANTS & TRADERS ASSURANCE COMPANY, INSURCOM FINANCIAL CORPORATION, 782640 ALBERTA LTD., 586335 BRITISH COLUMBIA LTD. AND GARRY TIGHE (Defendants)

Romaine J.

Judgment: April 29, 2002
Docket: Calgary 0101-05444

Counsel: Judy D. Burke for Plaintiff
Robert W. Hladun, Q.C. for Defendants

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.a General principles

Headnote

Receivers --- Appointment — General

Ex parte order was granted in 2001 appointing receiver and manager of property and assets of two of defendant companies, including certain assets pledged by those companies to plaintiff creditor — Defendants brought application to set aside, vary or stay that order — Application dismissed — Evidence at time of ex parte application provided grounds for believing that delay caused by proceeding by notice of motion might entail serious mischief — Evidence existed that assets that had been pledged to plaintiff as security for loan were at risk of disappearance or dissipation — Plaintiff did not fail to make full and candid disclosure of relevant facts in ex parte application — Security agreement provided for appointment of receiver — Conduct of primary representative of defendants contributed to apprehension that certain assets were of less value than was originally represented to plaintiff or that they did not in fact exist — Balance of convenience favoured plaintiff.

Table of Authorities

Cases considered by *Romaine J.*:

Bank of Nova Scotia v. Freure Village on Clair Creek, 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]) — referred to

Canadian Urban Equities Ltd. v. Direct Action for Life, 73 Alta. L.R. (2d) 367, 68 D.L.R. (4th) 109, 104 A.R. 358, 1990 CarswellAlta 60 (Alta. Q.B.) — referred to

Edmonton Northlands v. Edmonton Oilers Hockey Corp., 147 A.R. 113, 23 C.P.C. (3d) 49, 15 Alta. L.R. (3d) 179, 1993 CarswellAlta 224 (Alta. Q.B.) — referred to

Hover v. Metropolitan Life Insurance Co., (sub nom. *Metropolitan Life Insurance Co. v. Hover*) 237 A.R. 30, (sub nom. *Metropolitan Life Insurance Co. v. Hover*) 197 W.A.C. 30, 1999 CarswellAlta 338, 46 C.P.C. (4th) 213, 91 Alta. L.R. (3d) 226 (Alta. C.A.) — referred to

RJR-MacDonald Inc. v. Canada (Attorney General), 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 60 Q.A.C. 241, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.) — referred to

Royal Bank v. W. Got & Associates Electric Ltd., 17 Alta. L.R. (3d) 23, 150 A.R. 93, [1994] 5 W.W.R. 337, 1994 CarswellAlta 34 (Alta. Q.B.) — referred to

Royal Bank v. W. Got & Associates Electric Ltd., 1997 CarswellAlta 235, 196 A.R. 241, 141 W.A.C. 241, [1997] 6 W.W.R. 715, 47 C.B.R. (3d) 1 (Alta. C.A.) — referred to

Royal Bank v. W. Got & Associates Electric Ltd. (1997), 224 N.R. 397 (note), 216 A.R. 392 (note), 175 W.A.C. 392 (note) (S.C.C.) — referred to

Schacher v. National Bailiff Services, 1999 CarswellAlta 32 (Alta. Q.B.) — referred to

Swiss Bank Corp. (Canada) v. Odyssey Industries Inc., 30 C.B.R. (3d) 49, 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List]) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 244 — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

Generally — referred to

R. 387 — considered

APPLICATION by defendants to set aside, vary or stay order appointing receiver.

***Romaine J.*:**

INTRODUCTION

1 On March 20, 2001, I granted an *ex parte* order appointing a receiver and manager of the property and assets of Merchants & Traders Assurance Company ("MTAC") and 586335 British Columbia Ltd. ("586335"), including certain assets pledged by MTAC and 586335 to Paragon Capital Corporation Ltd. MTAC, 586335 and the other defendants in this action brought an application to set aside this *ex parte* order. I declined to set aside, vary or stay the *ex parte* order and these are my written reasons for that decision.

SUMMARY

2 The *ex parte* order should not be set aside on any of the grounds submitted by the Defendants, including an alleged failure to establish emergent circumstances, a lack of candour or any kind of non-disclosure or misleading disclosure by Paragon. Hearing the motion to appoint a receiver and manager *de novo*, I am satisfied that the receivership should continue on the terms originally ordered, and that the Defendants have not established that a stay of that receivership should be granted.

FACTS

3 On March 15, 2000, Paragon loaned MTAC $2.4 million. The loan was for a term of six months with an interest rate of 3% per month, and matured on September 15, 2000. MTAC was to make interest-only payments to Paragon in the amount of $72,000.00 per month.

4 The purpose of the loan was to allow MTAC to acquire 76% of the shares of Georgia Pacific Securities Corporation ("Georgia Pacific"), a Vancouver-based brokerage business. That transaction was completed. As security for the loan, MTAC pledged the following:

a) an assignment of all of the property of MTAC and 586335, including the Georgia Pacific shares;

b) a general hypothecation of the shares of Georgia Pacific owned by MTAC;

c) a power of attorney granted by MTAC to Paragon appointing an agent of Paragon to be the attorney of MTAC with the right to sell and dispose of any shares held by MTAC;

d) an assignment of mortgage-backed debentures;

e) an assignment of a $200,000 US term deposit, which was stated to be held in the trust account of a lawyer by the name of Jamie Patterson;

f) $250,000 to be held in trust by Paragon's counsel; and

g) $986,000 in an Investment Cash Account at Georgia Pacific.

Paragon filed a General Security Agreement executed by MTAC by way of a financing statement at the Personal Property Registry on March 15, 2000. In addition, Paragon obtained personal guarantees of the loan from Garry Tighe, Insurcom Financial Corporation, 586335 and 782640 Alberta Ltd.

5 The loan was not repaid and, pursuant to the terms of the General Security Agreement, Paragon appointed a private receiver in January, 2001.

6 Subsequently, the parties entered into discussions resulting in a written Extension Agreement. The Extension Agreement acknowledged the balance outstanding under the loan on January 9, 2001 of $2,629,129.99 with a then per diem rate of $2,528.28 and acknowledged delivery of numerous demands and a Notice of Intention to Enforce Security pursuant to Section 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended

7 MTAC agreed pursuant to the Extension Agreement that all monies due and outstanding would be repaid by February 22, 2001. If the funds were not repaid, Paragon would be at liberty to enforce its security and take all steps it deemed necessary to collect the debt. MTAC agreed it would not oppose Paragon's realization of its security, including the appointment of a receiver over its assets, and that it would, if requested, work with Paragon and any person designated by Paragon to attempt to realize on the value of the Georgia Pacific shares in a commercially reasonable manner.

8 Pursuant to the terms of the Extension Agreement, the shares of Georgia Pacific owned by MTAC were delivered to counsel for Paragon.

9 It was also a term of the Extension Agreement that a discontinuance of the pending action would be filed and the appointment of the private receiver would be revoked. Both of these actions were undertaken by Paragon.

10 The loan was not repaid by February 22, 2001. As of June 26, 2001, $2,850,192.62 was outstanding. Paragon issued a new Statement of Claim on March 2, 2001. On March 16, 2001 counsel for MTAC, Insurcom, 782640, 586335, and Tighe filed a Statement of Defence and served it upon Paragon's counsel.

11 On March 20, 2001, Paragon applied for and was granted an *ex parte* order appointing Hudson & Company as receiver and manager of all of the assets and property of MTAC and 586335, including, specifically, the mortgage-backed debentures, $986,000 in a cash account, $200,000 in trust with a lawyer, the $250,000 paid to Paragon's counsel and the Georgia Pacific shares. The application was made in private chambers, and no court reporter was present. However, counsel for Paragon made his application based on affidavit evidence of Mr. Hudson and others and supported by a written "Bench Brief", all of which has been disclosed to the Defendants. All of the above-noted facts and additional information contained in the affidavits and Bench Brief were disclosed to me at the time of the *ex parte* application.

ANALYSIS

Should the ex parte receivership order have been granted?

12 Rule 387 of the *Alberta Rules of Court* provides that the court may make an *ex parte* order if it is satisfied that the delay caused by proceeding by notice of motion might entail serious mischief. The applicant must act in good faith and make full, fair, and candid disclosure of the facts, including those that are adverse to his position: *Hover v. Metropolitan Life Insurance*

Co. (1999), 237 A.R. 30 (Alta. C.A.) at paragraph 23, referring to *Royal Bank v. W. Got & Associates Electric Ltd.* (1994), 150 A.R. 93 (Alta. Q.B.), at 102-3; (1997), 196 A.R. 241 (Alta. C.A.); leave to appeal granted (S.C.C.).

13 The Defendants submit that there was no urgency requiring an *ex parte* application. There was, however, affidavit evidence that led me to believe that the assets of MTAC and 586335 that had been pledged as security for the loan to Paragon were at risk, and that mischief could occur if an *ex parte* order was not granted.

14 There was, by way of example, evidence that the mortgage-backed debentures were not what they seemed.

15 There was evidence that Mr. Hudson had been advised by Mr. Tighe that his intention was to pay out the Paragon loan by transactions involving Georgia Pacific. Without elaborating on the status of Georgia Pacific at the time, as it is not a party to this litigation, the evidence with respect to potential activities involving this company was troubling, and justified a concern that the shares that comprised this asset may be at risk.

16 Further, Mr. Hudson deposed that Mr. Tighe was at first agreeable to Mr. Hudson and Paragon's counsel speaking to various parties, including officers of Georgia Pacific and Deloitte & Touche, to gather information. However, he withdrew that consent when Mr. Hudson and Paragon's counsel were actually in Vancouver, intending to speak to those parties.

17 There were also concerns arising over whether or not there actually was $200,000 held in trust by Mr. Patterson, who had ceased practising law and left the country.

18 There was evidence that the shares of Insurcom Financial Corporation, one of the guarantors of the Paragon loan, had been halted in trading and that the $986,000 that was supposed to be held in a Georgia Pacific cash account as security for the Paragon loan was missing.

19 The Defendants also submit that Paragon and its counsel and the proposed receiver failed to be candid and make full disclosure of the facts in the application. However, it is clear from the affidavits filed and from the Bench Brief that the disclosure given at the time of the *ex parte* order was extensive. It included reference to the fact that the proposed receiver, Mr. Hudson, had previously been appointed a private receiver for Paragon under the loan documentation, and that he and Paragon's counsel had been involved in negotiating and finalizing the Extension Agreement. In addition, counsel to Paragon disclosed that a defence to the Statement of Claim had been filed by counsel for the Defendants, and described the nature of the defences. I cannot find that there was any breach by the applicant for the *ex parte* order of its obligation of candour and frankness.

20 In hindsight, it is regrettable that the application did not take place in open chambers so that a record would be available. However, on the basis of the strength of the evidence before me, including evidence of the loan documentation and events that had transpired since the loan was put in place, together with the extensive affidavits and Bench Brief, I was satisfied that there was a reasonable basis on which I could hear the application on an *ex parte* basis. I was satisfied that there was reasonable apprehension of serious mischief and risk of disappearance or dissipation of assets. These concerns included the concern of interference with the activities of a regulated firm in a sensitive industry, where third party rights may well be affected. I therefore chose to exercise my discretion to grant the order *ex parte*, as is "within the prerogative of a judge to do in Alberta under our rules": *Canadian Urban Equities Ltd. v. Direct Action for Life*, [1990] A.J. No. 253 (Alta. Q.B.) at pages 7 and 8.

21 The *ex parte* order contains the usual provision allowing any party to apply on two clear days notice for a further or other order. The Defendants' right to bring their position before the court on very short notice was therefore reasonably protected. The Notices of Motion seeking orders to set aside or stay the *ex parte* order were not filed until May 8, 2001, and the motions were heard on their merits at the earliest time available to counsel to the parties and the court.

Should the receiver and manager appointed under the ex parte order been precluded from acting in this case due to conflict?

22 This issue is moot, given that on June 8, 2001 an order was granted replacing Hudson & Company as receiver and manager with Richter Allen and Taylor Inc. This was done with the consent of all parties other than the Defendants, who objected to the

replacement, while continuing to maintain that Hudson & Company had a conflict. The Defendants make the same complaint about counsel to the former receiver and manager, who did not continue as counsel for the new receiver.

23 Despite the complaint of conflict of interest, the Defendants have not raised any evidence that the former receiver and manager or its counsel preferred Paragon to other creditors, or failed in a receiver's duty as a fiduciary or its duty of care, other than to submit that the receiver should not have been granted the power in the *ex parte* order to sell the assets covered by the order. This power of sale was, of course, subject to court approval, and also subject to review at the time the application was heard on its merits. It was not exercised during the time the *ex parte* order was in place, and representations were heard on its propriety for inclusion in the affirmed receivership order. While there may have been a potential for conflict in Hudson & Company's appointment, there is no evidence that Hudson & Company showed any undue preference to Paragon while serving as a receiver, or failed in its duties as receiver in any way.

24 The Defendants also submit that the Bench Brief used by Paragon's counsel in making the application for the *ex parte* order showed that such counsel was not impartial, but acted as an advocate on this application. Paragon's counsel did indeed advocate that a receiver should be appointed by the court, as he was retained to do, and there was nothing improper in him doing so. I have already said that full disclosure was made of the material facts in that application, including the previous involvement of both the proposed receiver and Paragon's counsel in this matter.

25 I therefore find that there was nothing wrong or improper in the appointment of Hudson & Company as receiver or in Paragon's previous counsel acting as receiver's counsel, or in their administration of the receivership. It may be preferable to avoid an appearance of conflict in these situations, but a finding of conflict or improper preference requires more than just the appearance of it. In situations where it is highly possible that the creditors will not be paid out in full, the use of a party already familiar with the facts to act as receiver may be attractive to all creditors. I note that it is not the creditors who raise the issue of conflict in this case, but the debtors.

Should the ex parte order now be set aside?

26 The general rule is that when an application to set aside an *ex parte* order is made, the reviewing court should hear the motion *de novo* as to both the law and the facts involved. Even if the order should not have been granted *ex parte*, which is not the case here, I may refuse to set it aside if from the material I am of the view that the application would have succeeded on notice: *Edmonton Northlands v. Edmonton Oilers Hockey Corp.* (1993), 15 Alta. L.R. (3d) 179 (Alta. Q.B.) (paragraphs 30 and 31).

27 The factors a court may consider in determining whether it is appropriate to appoint a receiver include the following:

> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
>
> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

k) the effect of the order upon the parties;

l) the conduct of the parties;

m) the length of time that a receiver may be in place;

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

p) the goal of facilitating the duties of the receiver.

Bennett, Frank, *Bennett on Receiverships*, 2nd edition, (1995), Thompson Canada Ltd., page 130 (cited from various cases)

28 In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry: *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088 (Ont. Gen. Div. [Commercial List]), paragraph 12.

29 It appears from the evidence before me that the Georgia Pacific shares may be the only asset of real value pledged on this loan. Shares are by their nature vulnerable assets. These shares are in a business that is itself highly sensitive to variations in value. At the time of the application, the business appeared to have been suffering certain financial constraints. The business is situated in British Columbia, and regulated by the Investment Dealers Association of Canada and other entities, giving additional force to the argument of the necessity of a court-appointed receiver. I also note the possibility that there will be a sizeable deficiency in relation to the loan, increasing the risk to Paragon as security holder.

30 The conduct of Mr. Tighe, the primary representative of the Defendants, supports the appointment of a receiver. Although the Defendants submit that the assets that are the subject of the order are secure, there is troubling evidence that the mortgage-backed debentures appear to have questionable value, that the $200,000 that was supposed to be in Mr. Patterson's trust account does not exist, that the Georgia Pacific cash account that was supposed to contain $986,000 is not actually a cash account at all, but rather a trading account. Mr. Tighe's affidavits and cross-examination on affidavits do little to clear-up these matters, and instead add to the apprehension that these assets are of less value than represented to Paragon or that they in fact do not exist.

31 The balance of convenience in these circumstances rests with Paragon, which is owed nearly $3 million. There is no plan to repay any of this indebtedness, and no persuasive evidence that the appointment would cause undue hardship to the Defendants. As stated by Ground, J. in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.*, [1995] O.J. No. 144 (Ont. Gen. Div. [Commercial List]) at paragraph 31, the appointment of a receiver always causes some hardship to a debtor who loses control of its assets and risks their sale. Undue hardship that would prevent the appointment of a receiver must be more than this usual unfortunate consequence. Here, any proposed sale of an asset by the receiver must be brought before the court for approval and its propriety and necessity will be fully canvassed on its merits.

32 I am satisfied that the order appointing a receiver and manager should continue to stand on the same terms as the initial order.

Should the order be stayed?

33 To be granted a stay of an order pending appeal, an applicant must establish:

a) that there is a serious issue to be tried on appeal;

b) that the applicant would suffer irreparable harm and no fair or reasonable redress would be available if the stay is not granted; and

c) that the balance of convenience is in favour of granting the stay after taking into consideration all of the relevant factors.

RJR-MacDonald Inc. v Canada (Attorney General) (1994), [1994] S.C.J. No. 17 (S.C.C.); *Schacher v. National Bailiff Services*, [1999] A.J. No. 599 (Alta. Q.B.).

34 On the issue of whether there is a serious issue to be tried, the Defendants have filed a defence to the claim raising several issues, the major one being that the effective rate of interest under the loan exceeds 60% and is therefore usurious. Affidavit evidence purporting to indicate such an illegal rate of interest was filed and served on Paragon the day before this application was heard. Counsel for Paragon submitted that the evidence is defective on its face, but I was not able to make a determination of that question on the basis of the sworn evidence before me. Another factor affecting this issue is that Paragon has brought an application for summary judgment, which had not been heard at the time of this application. Given my decision on the second and third parts of the test, I have assumed that there is a triable issue relating to the loan and, therefore, to the appointment of a receiver, despite the uncertainty existing at the time of the application.

35 With respect to irreparable harm, the Defendants submit that company assets are being tied up while the order is in force, and that therefore no payments are being made, allowing liabilities to inflate. The main assets that are the subject of this order are assets that were already pledged as security for the loan to Paragon and therefore no irreparable harm can be said to arise from this factor. The Defendants also submit that irreparable harm has been, and continues to be done to, Georgia Pacific's assets as a result of the order. The order affects only the Defendants' shares in George Pacific, and counsel for the Defendants does not represent Georgia Pacific. No objection to the order has been taken by Georgia Pacific itself, although management for Georgia Pacific is aware of the receivership. There is no evidence that the order is responsible for any harm to Georgia Pacific, aside from harm that may have arisen from the Defendants' precarious financial situation and the current status of this regulated business with the IDA.

36 The balance of convenience in this case favours Paragon. The only asset that appears to have any real value at this stage in the proceedings is the shares in Georgia Pacific, an asset that is vulnerable by its nature, in a highly regulated business carried on in another jurisdiction. The order serves to maintain the status quo of that asset and prevent mischief caused by the possibility of illegal or imprudent manipulation or interference with the affairs of Georgia Pacific.

37 Finally, the Defendants submit that, if a stay is not granted, the order be varied to maintain the status quo of the three major assets. By requiring court approval of a sale of any of the assets, the right of the Defendants to argue their position on a sale at an appropriate time is reasonably protected.

38 I therefore decline to grant a stay, or to vary the order as granted.

39 If the parties are unable to agree on the matter of costs, they may be spoken to.

Application dismissed.

Footnotes

1 Alta. Reg. 390/68.

2 See rule 37.07(3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

3 R.S.C. 1985, c. B-3. See rule 77 of the *Bankruptcy and Insolvency Rules*, C.R.C. 1978, c. 368.

4 (1992), 126 A.R. 276 (Alta. Prov. Ct.) at 286.

5 *John Doe v. Canadian Broadcasting Corp.*, [1993] B.C.J. No. 1875 (B.C. S.C.).

6 *Imperial Broadloom Co., Re* (1978), 22 O.R. (2d) 129 (Ont. Bktcy.).

7 (2001), 25 C.B.R. (4th) 194 (Ont. C.A.) at 196.

8 (1997), [1997] A.J. No. 373 (Alta. C.A.) at para. 21.

9 (1954), 273 P.2d 399 (Id. S.C.) at 404.

10 [1999] O.J. No. 864 (Ont. Gen. Div. [Commercial List]) at para. 6.

11 R.S.C. 1985, c. C-36.

12 Para. 20.

* Associate in the Insolvency and Restructuring Group of Torys LLP. The author wishes to thank Sean Keating, student-at-law, for his invaluable research assistance in the preparation of this annotation.

TAB 5

2012 ABQB 292
Alberta Court of Queen's Bench

Strategic Financial Corp. v. 1402801 Alberta Ltd.

2012 CarswellAlta 1845, 2012 ABQB 292, [2013] A.W.L.D. 610, 221 A.C.W.S. (3d) 852

Strategic Financial Corp., Plaintiff and 1402801 Alberta Ltd., Defendant

T.F. McMahon J.

Heard: April 27, 2012
Judgment: May 2, 2012
Docket: Calgary 1201-03137

Counsel: Sean F. Collins, Walker W. MacLeod, for Plaintiff
Christopher D. Simard, for Defendant
Josef G.A. Kruger, Q.C., for 571764 Alberta Ltd., Newel Post Developments Ltd.
Travis Lysak, for Proposed Receiver, Price Waterhouse Cooper

Subject: Insolvency; Property
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Headnote
Bankruptcy and insolvency --- Receivers — Appointment
Numbered company 140 Ltd. owned abandoned property and building — S Corp. held first mortgage on property — N Ltd. had previously owned property and retained encumbrance against title — Numbered company 571 Ltd. was lessee of building and lease was registered against title — Registered instruments of N Ltd. and 571 Ltd. were postponed by first mortgage — First mortgage was in default and despite demands made by S Corp. no payment was forthcoming — S Corp. brought application to appoint receiver-manager for property — N Ltd. and 571 Ltd. opposed application — Application granted — Building had health and safety issues and 140 Ltd. did not have $2 million required to finance remedial work — Both N Ltd. and 571 Ltd. were in significant litigation with 140 Ltd., which was at deadlock — Without injection of capital building would deteriorate further — It was not apparent how N Ltd. or 571 Ltd. would be damaged by appointment of receiver-manager — As no evidence was provided as to appraised value of property, it could not be determined if receiver-manager's priority charge would jeopardize remaining competing interests — Given that property, particularly building, was in state of disrepair and litigation between interest holders was progressing slowly, appointment of receiver-manager was required — It was just and convenient to appoint receiver-manager to protect and preserve property.
Table of Authorities
Cases considered by *T.F. McMahon J.*:
BG International Ltd. v. Canadian Superior Energy Inc. (2009), 2009 CarswellAlta 469, 2009 ABCA 127, 53 C.B.R. (5th) 161, 71 C.P.C. (6th) 156, 457 A.R. 38, 457 W.A.C. 38 (Alta. C.A.) — referred to
Paragon Capital Corp. v. Merchants & Traders Assurance Co. (2002), 2002 CarswellAlta 1531, 2002 ABQB 430, 316 A.R. 128, 46 C.B.R. (4th) 95 (Alta. Q.B.) — followed
Statutes considered:
Judicature Act, R.S.A. 2000, c. J-2
s. 13(2) — considered

APPLICATION by mortgagee corporation to appoint receiver-manager for property.

***T.F. McMahon J.*:**

1 The Plaintiff, Strategic Financial Corp. ("Strategic Financial"), applies for the appointment of a Receiver-Manager for land and a building known as the Barron Building in downtown Calgary, Alberta. The building is 11 storeys in height and is vacant but for a movie theatre which is not currently operating. The Defendant, 1402801 Alberta Ltd. ("140"), owns the land and building. When it purchased the land in 2008, it assumed a first mortgage in the principle amount of $16 million. Strategic Financial now holds that mortgage by assignment from a prior holder.

2 Both Strategic Financial and 140 are controlled by one Riaz Mamdani who is also a director of both companies. 140 is separately represented on this application and, while consenting to it, does not advocate for or against the appointment of a Receiver-Manager.

3 The application is opposed by Newel Post Developments Ltd. ("Newel Post") and 571764 Alberta Ltd. ("571"). Newel Post was the previous owner of the building. It retains an encumbrance against title pursuant to a development agreement. 571 is the lessee of the theatre premises which lease is registered against the title. Both the registered instruments of Newel Post and 571 have been postponed to the first mortgage held by Strategic Financial. There are also second and third mortgages held by companies related to Strategic Financial.

4 The first mortgage of Strategic Financial is in default and remains outstanding in the approximate amount of $14.340 million as at March 1, 2012 with interest accruing thereafter. Newel Post and 571 argued that the first mortgage may not be in default but the only evidence on this application is clear. 140 is in default in making the required interest payments as well as a $5 million dollar payment in principle due January 19, 2012. As a result of that default, Strategic Financial made demand for payment of the entire amount as it was permitted to do under the terms of the mortgage. No payment was forthcoming.

5 The uncontradicted evidence is that the theatre premises have health and safety issues including asbestos being present and an absence of an operating sprinkler system. 140 has no other assets to finance remedial work which it estimated to cost $2 million.

6 There is significant litigation between the parties which has created an effective deadlock. 571 and 140 are in litigation regarding the lease and their respective obligations under it. Newel Post and 140 are in litigation regarding the encumbrance held by Newel Post against the title. Without an injection of capital, the building will remain vacant and deteriorate. Litigation costs will continue to mount.

Respondent's position

7 The essential position of Newel Post and 571 is that the applicant Strategic Financial can not meet the just and convenient test having regard to the principles stated in authorities such as *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127 (Alta. C.A.). Newel Post and 571 say that they will be damaged further by the appointment of a Receiver-Manager, though just how is not clear. The Receiver-Manager will be obliged to act in the best interests of all the interest holders so far as he is able.

8 The authorities do say that a lesser remedy should be searched for. The remedy suggested by Newel Post and 571 is that the shareholder of 140 should inject additional money into the company in order to remediate the building. However that is not an appropriate remedy, though it may be a solution. A non-party shareholder can not be compelled to inject money into a corporate litigant merely to avoid the appointment of a Receiver-Manager.

9 Newel Post and 571 then say that the land could be transferred to Strategic Financial which has the wherewithal to effect repairs. Once again, however, that's not an alternate remedy to the appointment of a Receiver-Manager.

10 A main complaint raised by 571 is that its litigation with 140, if it continues, would be funded by the Receiver-Manager who would then have a priority charge against the building. I have no evidence as to the appraised value of the land and building and so have no means of determining if such a charge would jeopardize anyone.

11 Lastly, Newel Post and 571 invite this court to pierce the corporate veil and regard the Plaintiff and the Defendant as one entity, personified by their controlling shareholder. There is in my view no basis for that approach here. There is no evidence of wrong-doing or deliberate conduct to injure the respondents, or of a shareholder treating the body corporate as though its property belongs to him personally. This is merely a case of one corporation in default in its debt to a related corporation, which is secured against the debtor's property and so is subject to enforcement.

Decision

12 The Court has jurisdiction to grant this relief pursuant to section 13(2) of the Judicature Act, RSA 2000, c J-2:

> An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

13 As well, the First Mortgage expressly provides for the appointment of a Receiver by article 26:

> It is declared and agreed that at any time and from time to time when there shall be default under the provisions of this mortgage, the Mortgagee may at such time and from time to time and with or without entry into possession of the Land or any part thereof, appoint a receiver or a manager or a receiver and a manager of the Land or any part thereof and of the rents and profits thereof and with or without security, and may from time to time remove any receiver and appoint another in his stead and that, in making any such appointment or removal, the Mortgagee shall be deemed to be acting as the agent or attorney for the Mortgagor. Such appointment may be made at any time either before or after the Mortgagee shall have entered into or taken possession of the Land or any part hereof.

14 The Alberta Court of Appeal addressed the issues in BG International at para. 17:

> In particular, the chambers judge must carefully balance the rights of both the applicant and the respondent. The mere appointment of a receiver can have devastating effects. The respondent referred us to the statement in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. C.J. G.D.) at para. 31:
>
> > [31] With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business sold. The situation in this case is no different.
>
> This quotation does not reflect the law of Alberta. Under the Judicature Act, it must be "just and convenient" to grant a receivership order. Justice and convenience can only be established by considering and balancing the position of both parties. The onus is on the applicant. The respondent does not have to prove any special hardship, much less "undue hardship" to resist such an application. The effect of the mere granting of the receivership order must always be considered, and if possible a remedy short of receivership should be used.

15 Some of the factors to consider in the appointment of a Receiver have been collected and repeated by this Court in *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430 (Alta. Q.B.).

16 On the evidence before me, the disrepaired state of the building and the ongoing litigation between the interest holders strongly supports the need for a Receiver-Manager to protect and preserve the building until further court order. All those issues must be resolved before the building's value can be enhanced so the interest holders can maximize their return. It is therefore just and convenient that a Receiver-Manager be appointed to protect and preserve the property in question until further court order. The Receiver-Manager will have security for its fees and disbursements and monies properly borrowed in the course of the receivership. The parties may apply within 15 days to address the specific terms of the order if need be. Costs may also be addressed.

Application granted.

End of Document

TAB 6

2007 ABCA 247
Alberta Court of Appeal

Maple Reinders Inc. v. Eagle Sheet Metal Inc.

2007 CarswellAlta 994, 2007 ABCA 247, [2007] A.W.L.D. 3133, [2007] A.W.L.D. 3134, 160 A.C.W.S. (3d) 219, 284 D.L.R. (4th) 249, 404 W.A.C. 133, 412 A.R. 133, 62 C.L.R. (3d) 170, 76 Alta. L.R. (4th) 215

Maple Reinders Inc. (Respondent / Applicant) and W. Dalton Energy Corp. (Appellant / Respondent) and Eagle Sheet Metal Inc., Wolseley Canada Inc., Allied Projects Ltd., Westglas Insulation Ltd., Crane Canada Inc., Johnson Controls Inc., Emco Limited and E.H. Price Limited (Not Parties to the Appeal / Respondents)

E. Picard, C. Hunt, P. Martin JJ.A.

Heard: June 14, 2007
Judgment: July 25, 2007
Docket: Calgary Appeal 0601-0144-AC

Proceedings: affirming *Maple Reinders Inc. v. Eagle Sheet Metal Inc.* (2006), 393 A.R. 375, 62 Alta. L.R. (4th) 383, 54 C.L.R. (3d) 186, 2006 ABQB 150, 2006 CarswellAlta 217 (Alta. Q.B.); affirming *Maple Reinders Inc. v. Eagle Sheet Metal Inc.* (2005), 2005 CarswellAlta 2067 (Alta. Master)

Counsel: W.D. Goodfellow, Q.C. for Appellant
S.H. Leitl, M. Vernon (Student-at-Law) for Respondent

Subject: Contracts; Corporate and Commercial
Related Abridgment Classifications
Construction law
IV Construction and builders' liens
IV.3 Owner
IV.3.d Agency situations
IV.3.d.i General principles
Construction law
IV Construction and builders' liens
IV.8 Payment of moneys into court
IV.8.c Effect of posting security
IV.8.c.i General principles
Headnote
Construction law --- Construction and builders' liens — Owner — Agency situations — General principles
Eight sub-subcontractors registered builders' liens on project property — Sub-subcontractor D Corp.'s lien was for $26,340 — Contractor commenced application to establish lien fund under s. 27(3) of Builders' Lien Act — Owner wrote letter authorizing contractor to set lien fund and act as its agent — Agreement was reached between contractor and seven lienholders, excluding D Corp., on proper amount of lien fund equal to 10 per cent holdback — Master found that contractor could establish lien fund pursuant to owner's authorization — Master fixed D Corp.'s entitlement to pro rata share of lien fund in amount of $7,417.70 — D Corp. unsuccessfully appealed master's decision — D Corp. appealed — Appeal dismissed — Contractor was entitled to act as owner's agent under s. 27(3) of Act — Act contemplated owner being able to appoint agent — There was no policy reason why owner should be prohibited from appointing agent to act on its behalf — It was logical that contractor would have carriage of litigation arising from liens since contract with owner obliged contractor to remove any builders' liens.

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

Eight sub-subcontractors registered builders' liens on project property — Sub-subcontractor D Corp.'s lien was for $26,340 — Following contractor's application, master ordered that contractor could pay security into court pursuant to s. 48(1) of Builders' Lien Act equal to total of eight lien claims plus 15 per cent for costs — Contractor commenced application to establish lien fund under s. 27(3) and to pay lien fund into court as replacement for s. 48(1) security previously posted — D Corp. cross-applied, seeking full amount of its lien from s. 48(1) security — Agreement was reached between contractor and seven lienholders, excluding D Corp., on proper amount of lien fund equal to 10 per cent holdback — Master fixed D Corp.'s entitlement to pro rata share of lien fund in amount of $7,417.70 — D Corp. unsuccessfully appealed master's decision — D Corp. appealed — Appeal dismissed — Notwithstanding s. 48(1) application, parties still had recourse to other provisions of Act, including s. 27, to sort out remaining matters — Distribution to D Corp. should be determined on pro rata basis taking account of previously settled lienholders' claims — Outcome sought by D Corp. for full claim would undercut policy objective of encouraging settlement — Any other result would potentially make owner liable for greater amounts than limit of liability found in s. 25 of Act.

Table of Authorities

Cases considered by *C. Hunt J.A.*:

Alternative Fuel Systems Inc., Re (2004), 2004 ABCA 31, 2004 CarswellAlta 64, 47 C.B.R. (4th) 1, 236 D.L.R. (4th) 155, (sub nom. *Remington Development Corp. v. Alternative Fuel Systems Inc.)* 346 A.R. 28, (sub nom. *Remington Development Corp. v. Alternative Fuel Systems Inc.)* 320 W.A.C. 28, 24 Alta. L.R. (4th) 1, [2004] 5 W.W.R. 475 (Alta. C.A.) — referred to

Arctic Distributors Ltd. v. Nordine (1984), 1984 CarswellBC 59, 52 B.C.L.R. 110, 7 C.L.R. 21 (B.C. Co. Ct.) — considered

Bell ExpressVu Ltd. Partnership v. Rex (2002), 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 166 B.C.A.C. 1, 271 W.A.C. 1, 18 C.P.R. (4th) 289, 100 B.C.L.R. (3d) 1, 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — referred to

Benny Haulage Ltd. v. Carosi Construction Ltd. (1996), 1996 CarswellOnt 5238, (sub nom. *Benny Haulage Ltd. v. Hamilton-Wentworth Roman Catholic)* 33 C.L.R. (2d) 44 (Ont. Master) — referred to

Blueline Stucco Ltd. v. Discovery Reach Developments Ltd. (1998), 1998 CarswellBC 1832, 40 C.L.R. (2d) 267, 23 C.P.C. (4th) 43 (B.C. Master) — referred to

Ferro Corp., Re (1982), 1982 CarswellAlta 987 (Alta. Master) — considered

Greenshields v. R. (1958), [1959] C.T.C. 77, 17 D.L.R. (2d) 33, [1958] S.C.R. 216, 1958 CarswellQue 29 (S.C.C.) — referred to

Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — considered

Kappeler Masonry Corp. v. Winston Hall Nursing Homes Ltd. (2001), 2001 CarswellOnt 2730, 12 C.L.R. (3d) 65 (Ont. S.C.J.) — referred to

Lloydminster Roman Catholic Separate School District No. 34 v. Border City Transit Mix (1980) Ltd. (1988), 57 Alta. L.R. (2d) 146, 87 A.R. 391, 29 C.L.R. 93, 1988 CarswellAlta 12 (Alta. Master) — referred to

Maple Reinders Inc. v. Eagle Sheet Metal Inc. (2005), 2005 CarswellAlta 2067 (Alta. Master) — referred to

Maple Reinders Inc. v. Eagle Sheet Metal Inc. (2006), 393 A.R. 375, 62 Alta. L.R. (4th) 383, 54 C.L.R. (3d) 186, 2006 ABQB 150, 2006 CarswellAlta 217 (Alta. Q.B.) — referred to

Noranda Exploration Co. v. Sigurdson (1975), [1976] 1 S.C.R. 296, [1975] 5 W.W.R. 83, 53 D.L.R. (3d) 641, 3 N.R. 512, 1975 CarswellBC 125, 20 C.B.R. (N.S.) 215, 1975 CarswellBC 282 (S.C.C.) — referred to

Northern Electric Co. v. Frank Warkentin Electric Ltd. (1972), 27 D.L.R. (3d) 519 (Man. C.A.) — considered

Pauli v. ACE INA Insurance (2004), 8 C.C.L.I. (4th) 13, [2004] I.L.R. I-4280, 2004 ABCA 84, 2004 CarswellAlta 178, 346 A.R. 263, 320 W.A.C. 263, 30 Alta. L.R. (4th) 205, [2004] 10 W.W.R. 623 (Alta. C.A.) — considered

R. v. Kelly (1992), [1992] 4 W.W.R. 640, 73 C.C.C. (3d) 385, 9 B.C.A.C. 161, 19 W.A.C. 161, 92 D.L.R. (4th) 643, 68 B.C.L.R. (2d) 1, 137 N.R. 161, [1992] 2 S.C.R. 170, 14 C.R. (4th) 181, 1992 CarswellBC 154, 1992 CarswellBC 906 (S.C.C.) — referred to

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 50 C.B.R. (3d) 163, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd.*

(Bankrupt), Re) 221 N.R. 241, *(*sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, *(*sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006 (S.C.C.) — referred to

Sun Gro Horticulture Canada Ltd. v. Abe's Door Service Ltd. (2006), 63 Alta. L.R. (4th) 1, 53 C.L.R. (3d) 170, 397 A.R. 282, 384 W.A.C. 282, 2006 CarswellAlta 1067, 2006 ABCA 243, 273 D.L.R. (4th) 295 (Alta. C.A.) — referred to

West v. 620693 Alberta Ltd. (1995), 173 A.R. 103, 1995 CarswellAlta 691 (Alta. Master) — considered

Statutes considered:

Builders' Lien Act, R.S.A. 2000, c. B-7

Generally — referred to

s. 1(b) "contractor" — considered

s. 1(f) "lienholder" — considered

s. 1(j) "owner" — considered

s. 1(l) "registered lienholder" — considered

s. 1(n) "subcontractor" — considered

s. 18 — considered

s. 18(1) — considered

s. 18(2) — considered

s. 18(3) — considered

s. 18(4) — considered

s. 18(6) — referred to

s. 18(6)(b) — considered

s. 25 — considered

s. 25(b) — considered

s. 27 — referred to

s. 27(3) — considered

s. 44 — considered

s. 48 — considered

s. 48(1) — considered

s. 48(2) — considered

s. 48(3) — referred to

s. 48(4) — referred to

s. 61 — considered

s. 61(5) — considered

Builders' Lien Act, R.S.A. 1970, c. 35
Generally — referred to

s. 15(1) — considered

s. 35 — referred to

s. 35(2) — considered
Mechanics' Lien Act, S.A. 1906, c. 21
Generally — referred to

s. 25 — referred to

s. 26 — referred to

APPEAL by sub-subcontractor from judgment reported at *Maple Reinders Inc. v. Eagle Sheet Metal Inc.* (2006), 393 A.R. 375, 62 Alta. L.R. (4th) 383, 54 C.L.R. (3d) 186, 2006 ABQB 150, 2006 CarswellAlta 217 (Alta. Q.B.), affirming Master's decision to establish builders' lien fund.

***C. Hunt J.A.*:**

Introduction

1 This appeal raises issues about the operation of the *Builders' Lien Act*, R.S.A. 2000, c. B-7 ("*BLA*"). Specifically, it concerns whether an owner can appoint an agent to apply to establish a lien fund, and the relationship between the lien fund and a previously-posted security bond. It also puts in issue the correct amount of the lien fund in this case, and whether the remaining lienholder's entitlement is its *pro rata* share of the fund when considered with those of lienholders who previously settled, or the full amount of its claim.

2 The appeal is dismissed.

Facts

3 The Calgary Health Region ("CHR") leased property from Canadian Property Holdings (Alberta) Inc. in order to construct a Pharmacy Central Production Facility ("PCPF"). In April 2002, the CHR entered into a contract with Maple Reinders Inc. ("Maple"), a general contractor, for the construction of the PCPF. The CHR is the "owner" of the project, as defined in section 1(j) of the *BLA*.

4 The same month, Maple entered into a subcontract with Eagle Sheet Metal Inc. ("Eagle") for mechanical work. Eagle entered into eight sub-subcontracts. One of the sub-subcontractors, the appellant W. Dalton Energy Corp. ("Dalton"), agreed to supply and install a humidification system for the sum of $66,340. The other sub-subcontractors are not parties to this appeal, having previously settled their claims as more fully described below.

5 Dalton supplied the labour, materials and equipment required. It received a payment from Eagle of $40,000, leaving $26,340 outstanding. Maple posted a certificate of substantial completion on the project in September 2002. In November 2002, when Eagle failed to complete its subcontract, Maple terminated the subcontract. Eagle subsequently went out of business and has no assets.

6 Throughout November and December of 2002, the eight sub-subcontractors registered builders' liens against the PCPF title totalling $198,376. Dalton's lien was for $26,340.

7 On December 20, 2002, following Maple's application, a Master ordered that Maple could pay security into court pursuant to section 48(1) of the *BLA* and that, upon such payment, the liens would be discharged. Maple posted $228,132.40, which included the total of the eight lien claims plus 15% for costs.

8 In April 2003, Maple applied to establish a lien fund under section 27(3) and to pay the lien fund into court as a replacement for the section 48(1) security previously posted. Dalton cross-applied, seeking the full amount of its lien from the section 48(1) security. The Master adjourned both applications and ordered that all lienholders prove their claims in a Special Chambers hearing.

9 On August 5, 2003, CHR wrote a letter to Maple, authorizing Maple to set the lien fund and act as its agent for the purpose of section 27(3) of the *BLA*: A.B. E143

10 In December 2003, Maple agreed with seven of the eight lienholders (excluding Dalton) to establish a lien fund in the amount of $55,039.71, being equivalent to the 10% holdback required under the subcontract between Maple and Eagle. Dalton insisted it was entitled to full payment of its $26,340 lien claim rather than a *pro rata* share of the lien fund.

11 On December 19, 2003, Maple applied to distribute $47,622.16 to the seven consenting lienholders on a *pro rata* basis. The Master authorized the distribution as satisfaction of all rights of those lienholders and authorized Maple to replace the original section 48(1) security with a lien bond in the amount of $30,291, representing Dalton's unproven lien claim of $26,340 plus 15% costs. When Maple paid the $30,291 lien bond into court, the court released the original $228,132.40 lien bond.

Decisions Below

12 The applications that had been adjourned in April 2003 were heard in May 2005 by Master Waller: *Maple Reinders Inc. v. Eagle Sheet Metal Inc.* (2005), [2006] A.W.L.D. 1864 [2005 CarswellAlta 2067 (Alta. Master)]. Dalton argued that Maple, as general contractor, had no right to apply to establish the lien fund. Dalton also asserted that once funds are paid into court and liens discharged pursuant to section 48, a lienholder whose lien has been removed has no access to the builders' lien fund but only to the posted security. According to Dalton, subsequent lienholders, on the other hand, can claim only against the lien fund and not against the security.

13 Master Waller rejected Dalton's first argument at A.B. F26:

> The owner of the project, Calgary Health Region, through its nominee corporation, was alive to this very issue and provided the general contractor with a letter authorizing Maple to act as its agent pursuant to section 27(3) of the *Act*. ... The solution was a practical one, and one in keeping with business principles in a business-oriented statute. There was no formal assignment of the owner's rights, but nonetheless, I am satisfied that the general contractor can establish a lien fund pursuant to the owner's authorization.

14 He also disagreed that there are two distinct funds available to discrete groups of lienholders, concluding at A.B. F31 *ff*:

> ... Dalton's position fails to recognize the interplay between section 18 and 48 of the *Builders' Lien Act*. ... the posting of section 48 security should not cause the liability of an owner to exceed the 10 percent statutory limit.

15 Master Waller fixed Dalton's entitlement to the *pro rata* share of the lien fund in the sum of $7,417.70.

16 Dalton's appeal to the Court of Queen's Bench was dismissed by Mahoney J.: *Maple Reinders Inc. v. Eagle Sheet Metal Inc.*, 2006 ABQB 150, 393 A.R. 375 (Alta. Q.B.). He accepted the amount of the lien fund set by Master Waller. He concluded at para. 68:

> ... Maple was entitled, as agent for the owner CHR, to make the application under s.27(3) (payment from the lien fund) to set the lien fund. Security paid under s.48(1)(a) (lien removal) can be later substituted for by the lien fund as this is the maximum liability of the owner under the *Act*. Dalton is only entitled to its *pro rata* share of the lien fund.

17 The following discussion focusses on the major lien fund, as no issue concerning a minor lien fund arises here.

Issues

18 Three main issues are raised on appeal:

> 1. Can an owner appoint a contractor as its agent for the purposes of applying to establish a lien fund under section 27(3) of the *BLA*?
>
> 2. Is a lienholder whose lien was removed from title following posting of section 48 security entitled to claim only against that security?
>
> 3. If a lienholder has a claim against the lien fund after section 48(1) security has been posted, did the decisions below set the lien fund at the correct amount? Is Dalton entitled to its *pro rata* share of the fund or to its full claim?

Standard of Review

19 This appeal raises questions of statutory interpretation that are reviewable on a standard of correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.) at para. 8; *Pauli v. ACE INA Insurance*, 2004 ABCA 84 at para. 5, 346 A.R. 263 (Alta. C.A.).

Legislation

20 The applicable provisions of the *BLA* are as follows:

> **Definitions**
>
> 1. In this Act,
>
> . . . . .
>
> (b) "contractor" means a person contracting with or employed directly by an owner or the owner's agent to do work on or to furnish materials for an improvement, but does not include a labourer;
>
> . . . . .
>
> (f) "lienholder" means a person who has a lien arising under this Act;
>
> . . . . .
>
> (j) "owner" means a person having an estate or interest in land ...
>
> . . . . .
>
> (l) "registered lienholder" means a lienholder who has registered a statement of lien in the appropriate land titles office and includes a lienholder who has registered a statement of lien that has been removed pursuant to section 27 or 48(1);
>
> . . . . .
>
> (n) "subcontractor" means a person ... who is not a contractor but is contracted with or employed under a contract;
>
> . . . . .
>
> **Major lien fund**
>
> 18(1) Irrespective of whether a contract provides for instalment payments or payment on completion of the contract, an owner who is liable on a contract under which a lien may arise shall, when making payment on the contract, retain an amount equal to 10% of the value of the work actually done and materials actually furnished for a period of 45 days from
>
> > (a) the date of issue of a certificate of substantial performance of the contract, in a case where a certificate of substantial performance is issued, or
> >
> > (b) the date of completion of the contract, in a case where a certificate of substantial performance is not issued.
>
> . . . . .

(2) In addition to the amount retained under subsection (1) or (1.1), the owner shall also retain, during any time while a lien is registered, any amount payable under the contract that has not been paid under the contract that is over and above the 10% referred to in subsection (1) or (1.1).

(3) ... when a lien is claimed by a person other than the contractor, it does not attach so as to make the major lien fund liable for a sum greater than the total of

> (a) 10% of the value of the work actually done or materials actually furnished by the contractor or subcontractor for whom and at whose request the work was done or the materials were supplied giving rise to the claim of lien, and
>
> (b) any additional sum due and owing but unpaid to that contractor or subcontractor for work done or materials furnished.

(4) ... when, in respect of liens to which this section applies, there is more than one lien claim arising from work done or materials furnished for and at the request of the contractor or the same subcontractor, they do not attach so as to make the major lien fund liable in their cumulative total for a sum greater than the total of

> (a) 10% of the value of the work actually done or materials actually furnished by the contractor or subcontractor, as the case may be, and
>
> (b) any additional sum due and owing but unpaid to that contractor or subcontractor for work done or materials furnished.

. . . . .

(6) If a contractor or subcontractor defaults in completing the contractor's or subcontractor's contract, the major lien fund

. . . . .

> (b) when distributed, shall be distributed in the manner prescribed by section 61.

. . . . .

Liability of owner

25 An owner is not liable under this Act for more than

. . . . .

> (b) the major lien fund, where a minor lien fund does not arise under section 23.

. . . . .

Payment from lien fund

. . . . .

27(3) When a statement of lien has been registered, the owner or a mortgagee authorized by the owner to disburse the money secured by a mortgage may

> (a) by interlocutory application in any proceedings that have been commenced to enforce a lien, or
>
> (b) on application by originating notice,

give security for or pay into court the amount of the major lien fund, the minor lien fund, or both, as the case may be.

. . . . .

Lien as charge against money

44 Notwithstanding section 43, if the court has ordered that a lien be removed under section 27 or 48(1) the lien, as a charge against the money paid into court or the security given, does not cease to exist by reason that

> (a) a certificate of lis pendens is not registered in the appropriate land titles office, or
>
> (b) an action has not been commenced within 180 days from the date that the lien is registered.

. . . . .

Lien removed

48(1) The court may, on application by originating notice, order that the registration of a lien be removed from the title to the land concerned

(a) where security is given or payment is made into court for

(i) the amount of the claim,

(ii) the maximum amount for which the lien may properly attach under section 18(3) or (4) or 23(3) or (4), or

(iii) such lesser amount as the court determines,

and any costs that the court may fix,

(b) where the relevant lien fund has been paid out under this Act, or

(c) on any ground not referred to in clause (a) or (b) as the court considers proper.

(2) Money paid into court or any security given under subsection (1)

(a) stands in place of the land,

(b) is subject to the claims of the person whose lien has been removed, and

(c) shall not affect the amount required to be retained under section 18(1) or (1.1) or 23(1) or (1.1).

. . . . .

Application of money realized

61(5) Each class of lienholders, as between themselves, rank without preference for their several amounts and the portion of the money available for distribution to each class shall be distributed among the lienholders in that class proportionately according to the amounts of their respective claims as proved.

Objects of the BLA

21 The purpose of lien legislation is to create a mechanism allowing lienholders to enforce their liens at a minimal expense and in a procedurally uncomplicated manner: David I. Bristow, Q.C., et al., *Construction Builders' and Mechanics' Liens in Canada*, 7th ed., looseleaf (Toronto: Carswell, 2005) ("Bristow"). Although lien legislation aims to balance the interests of owners and those who supply owners with labour and materials, it also seeks to prevent prejudice against owners: *Noranda Exploration Co. v. Sigurdson* (1975), [1976] 1 S.C.R. 296 (S.C.C.), at 302. In other words, it is intended to take account of the interests of both owners and those who make improvements upon the lands of an owner.

22 Mahoney J. gave the following useful overview of the *BLA* at paras. 29-41 of his judgment:

[29] A lienholder, under s. 1(f), is a person who has a lien arising under the *Act*. A registered lienholder, s. 1(l), is a lienholder who has registered a statement of lien in land titles and it includes a lienholder who has had their lien removed in accordance with s. 27 (payment from the lien fund) or s. 48(1) (lien removal). When someone does work on the property, a lien arises. A person to whom payment is due or will become due can register a lien against the title of the owner's property. This is based on the equitable principle that an owner should not be unjustly enriched by another's work. The owner's liability, however, is not unlimited. Section 25 (liability of the owner) states that the owner is liable for the total of the major and minor lien fund (or only the major lien fund if there is no minor lien fund). This is consistent with the principle outlined by the Supreme Court in *Noranda Exploration Co.*.

[30] A lien fund is the major lien fund, the minor lien fund or both: s. 1(g). The definition of major lien fund, found in s.1(h), refers to the amount that must be retained prior to the issuance of a certificate of substantial performance according to s. 18(1) and 18(1.1) (major lien fund) plus any amount payable under the contract. The regimen of a major and minor lien fund provides a practical method to set the owner's lien fund liability for the major portion of the project (major fund) while still making provision for funds (minor fund) to cover lien claims for finishing work and materials that need doing after the major work is done.

[31] Under s. 18(1) (major lien fund), an owner is required to holdback 10% of the value of the work actually done and the materials actually furnished. In addition, s. 18(2) requires that during any period when a lien is registered, the owner must also holdback any amount payable under the contract that has not been paid. In short, if all payments are made by the owner throughout the contract, the owner must holdback 10% of the value of the contract.

[32] Section 18(3) states that when a lien is claimed by someone other than the contractor, the lien fund is liable only for the sum of 10% of the value of the work actually done or the materials actually furnished, and any additional sum that is due and owing but unpaid to the contractor or subcontractor that requested the work. As a result, a lien by a sub-subcontractor does not have access to the full lien fund.

[33] Under s. 27(3) (payment from the lien fund), if a lien has been registered, the owner may make an application to pay into court the amount of the major lien fund, the minor lien fund or both. Security paid under s. 27 discharges the owner from any further liability in respect of liens and it stands in place of the land and allows for the liens to be removed from title.

[34] An owner can establish the major lien fund once the contractor has issued a certificate of substantial performance: s. 1(h), s. 24(major and minor lien fund). In Ferro, Master Funduk stated, at para. 8, that the *Act* establishes a "lien fund, not lien funds", and as a result, setting the lien fund is a one time occurence. Accordingly, the owner cannot discharge any liens under s. 27(3) (payment from lien fund) until near the end of the project, after the certificate of substantial performance has been issued.

[35] There is another method for discharging a lien against the property. Section 48(1) (lien removed) allows an application to be made to obtain an order removing a lien from the title of the property. The court can make this order if security is paid into court for either: (a) the full amount of the claim; (b) the maximum amount for which the lien may attach under s. 18 (major lien fund) (or s. 23 in the case of a minor lien fund); or (c) any lesser amount the court sees as fit, plus any costs. The money paid into court stands in place of the land, is subject to the claims of the persons whose liens were removed, but it does not affect the amount required to be retained under s. 18 or s. 23. Unlike s. 27 (payment from the lien fund), a contractor can apply under s. 48 and it is not a one time, final clearing of liens as in s. 27.

[36] The *Act* provides streamlined method for enforcing a lien: s. 49-59. This method of enforcement applies whether the security paid into court is under s. 27(3) (payment from lien fund) or s. 48(1) (lien removal): *102528 Holdings Ltd. v. McCrae* (1981), 36 A.R. 100 (Alta. Q.B.) at para. 17.

[37] Section 49(1) (enforcement of lien) requires the enforcement of a lien be commenced via the issuing of a statement of claim. Section 49(6) declares that the procedure in adjudicating such claims shall be of a summary character. Section 50(parties to proceedings) states both parties named in the statement of claim and all registered lienholders are parties to the proceedings. The definition of "registered lienholder" in s. 1(l) includes both those with liens on title and those who have discharged their liens under either s. 27(payment from lien fund) or s. 48(1) (lien removal). Basically this forms a class action on behalf of all lien claimants. Section 56(consolidation of actions) allows for the consolidation of actions regarding liens involving the same property.

[38] Section 52(time for filing defence) allows a defendant to serve a notice to prove lien on any lienholder. This requires the lienholder to file an affidavit giving the particulars of the lien. The *Act* requires the plaintiff to make a pre-trial application: s. 53(1). Section 53(3) allows the court at the pre-trial application to determine the matter summarily, direct a trial of a

particular issue, direct the matter to a full trial or authorize examinations for discovery. The court may also order the sale of the property, s. 53(3)(d). If the claim is not resolved in pre-trial, it will proceed to trial: s. 57.

[39] Section 54 allows for the appointment of a receiver and trustee to collect rents and profits, to manage, sell mortgage or lease the property, or to complete the improvement to the property. An application under this section can be made by "any person interested in the property to which the lien attaches or that is otherwise affected by the lien".

[40] If a lien is not discharged under either s. 27 or s. 48, and it is proven, the land may be sold to satisfy the lien: s. 59. Obviously, if security is paid into court, there is no need to take the drastic measure of selling the property. Under s. 60, the proceeds from the sale of the land are paid into court to the credit of the action.

[41] The money obtained from the sale of the land, a receivership or trusteeship is paid into court to be distributed according to s. 61: s. 61(2) (application of money realized). Similarly, s. 18(6) (major lien fund) states that the major lien fund is to be distributed according to s. 61. Section 61(5) states that each class of lienholders, as between themselves, rank without preference. Under that section, the money available for distribution to each class is to be distributed among the lienholders proportionally according to the amounts of their respective claims as proved.

Analysis

1. Can an owner appoint a contractor as its agent for the purpose of applying to establish a lien fund under section 27(3) of the BLA?

23 Dalton relies on section 27(3) (which refers only to an "owner or a mortgagee authorized by the owner") to argue that an owner cannot appoint an agent to give security for or pay into court the amount of a lien fund. It says this language precludes an application to establish a lien fund by anyone other than the two parties (owner and authorized mortgagee) specifically mentioned in the section. If the language is too narrow, argues Dalton, the Legislature ought to remedy the problem, not the courts.

24 Principles of legislative interpretation require that words of a statute be read contextually so as to give effect to the purpose and overall intention of the legislation: *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para. 21; *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at para. 26; *Sun Gro Horticulture Canada Ltd. v. Abe's Door Service Ltd.*, 2006 ABCA 243 at para. 11, 397 A.R. 282 (Alta. C.A.). When interpreting legislative provisions, a court must pay attention to the scheme of the statute and the intention of the legislature: *Alternative Fuel Systems Inc., Re*, 2004 ABCA 31 at para. 46, 346 A.R. 28 (Alta. C.A.). It is a cardinal rule for the interpretation of all statutes that they be construed, when possible, so they do not lead to an absurdity: *Greenshields v. R.*, [1958] S.C.R. 216 (S.C.C.), at 227. Dalton's highly technical argument fails to accord with these established principles.

25 The definition of "contractor" in section 1(b) refers to an "owner" or an "owner's agent". This suggests that the *BLA* contemplates an owner being able to appoint an agent. Although the Legislature might have added the term "or agent" to every place in the *BLA* where the term "owner" appears, this would have resulted in clumsy and unduly wordy drafting.

26 More importantly, Dalton is unable to suggest any policy reason why an owner should be prohibited from appointing an agent to act on its behalf. On the other hand, the CHR's letter appointing Maple as its agent itself underscores the efficacy of its appointment of Maple: their contract obliged Maple to remove any builders' liens. To do this, it was logical that Maple rather than the CHR would have carriage of litigation arising from the liens.

27 Agency has been defined as the relationship that exists between two persons, where one person, the agent, is considered in law to represent the other, the principal, in such a way as to be able to affect the principal's legal position in respect of third parties: G.H.L. Fridman, *The Law of Agency*, 7th ed. (London: Butterworths, 1996) at 11; *R. v. Kelly*, [1992] 2 S.C.R. 170 (S.C.C.), at 183-4. In effect, the agent becomes its principal. Dalton's argument completely ignores the essential purpose of an agency arrangement: to have the agent stand in the shoes of the principal.

28 Dalton's reliance on *Ferro Corp., Re*, [1982] A.J. No. 259 (Alta. Master) is ill-placed. *Ferro Corp., Re* dealt with whether a contractor or subcontrator can apply to establish a lien fund, holding that only an owner has this right. It did not deal with the agency issue. The logic underlying the decision (that the *BLA* imposes liability on the owner and not on contractors or subcontractors) does not apply here. The fact that the owner's agent is permitted to apply to establish a lien fund does not detract from the owner's overall liability. It merely permits someone authorized by the owner to act on its behalf in establishing the lien fund.

29 In summary, there is nothing in law or logic to support Dalton's position. Maple was entitled to act as the owner's agent under section 27(3).

2. Is a lienholder whose lien was removed from title following posting of section 48 security entitled to claim only against that security?

30 Dalton makes a number of arguments to support its position that once security has been posted under section 48(1), any lienholders whose liens are discharged have recourse only to that security and not to any lien fund subsequently established. I agree generally with the reasons given by Master Waller and Mahoney J. for rejecting this argument.

31 The *BLA* is intended to provide a seamless web of remedies to lienholders, whether or not section 48(1) security is posted. Lien legislation is remedial in character; its purpose is to secure the parties entitled to its benefits for the value of work done and materials supplied: Bristow. In my view, the *BLA* does not contemplate two separate litigation tracks. The purpose of posting section 48(1) security is, as discussed in the courts below, to permit funds to continue to flow to a construction project notwithstanding that liens have been filed while construction is still ongoing. Dalton's interpretation would undermine the general purpose of the *BLA*.

32 There are many provisions in the *BLA* that support the conclusion that section 48(1) operates in concert with the lien fund. A good starting point is section 25, which limits an owner's liability "under this *Act*" to the amount of the major lien fund. Dalton's interpretation would potentially make the owner liable for amounts greater than the lien fund, the maximum amount of which is determined by the formulae in section 18. The words "in this *Act*" in section 25 signal that no provisions (including section 48(1)) should be interpreted in such a way as to increase the liability of an owner beyond that arising from the formulae for the major lien fund set out in section 18.

33 Next, section 48(1) gives the court a number of choices in deciding how much security should be paid into court. It does this primarily because an application for section 48(1) security is not time-limited. A lien can be filed whenever it arises according to section 10, which may be long before a certificate of substantial completion has been posted and at a time when the appropriate amount of the lien fund cannot yet be determined. If a lien is filed while the project is in mid-stream, section 48(1) provides a convenient method for securing the lienholder's claim without embroiling the owner and others in litigation when their energies should be focussed on completing the project. The court has the flexibility to take account of the particular circumstances and set the security at an amount that is enough, but not more than enough, to cover the claim.

34 The court's decision as to the amount of the section 48(1) security — and its posting — does not end the matter. Although it ensures the lienholder that there is money available to pay its claim (whatever its amount may ultimately be), neither the validity of the claim nor its amount are determined at that point. Paragraphs 6 and 7 of Master Floyd's December 20, 2002 order (which authorized the discharge of the liens on posting of the security) recognized this, by noting that the security was not an admission as to the validity of the claims and that the parties were at liberty to make further applications to the Court. After an application has been made under section 48(1), a party can require the lienholder to prove its lien by filing an affidavit containing particulars of the lien (sections 48(3) and (4)). To put the matter simply, notwithstanding a section 48(1) application, parties still have recourse to other provisions of the *Act* (including sections 18 and 27) to sort out remaining matters. Section 48(1) does not stand in isolation from the rest of the *BLA*. Nor does it weaken it.

35 A further indication that the various enforcement mechanisms are intended to work in tandem and not isolation is section 18(6), which, by incorporating section 61(5), requires the distribution of a lien fund on a *pro rata* basis when a contractor or

subcontractor has defaulted. Section 48(1) does not contain its own directions for paying money from the security posted while the project is ongoing. But there must be rules for resolving differences that may arise concerning claims that resulted in the posting of section 48(1) security. It is only logical that other parts of the *BLA* that are not specifically excluded (see eg section 44, which makes certain technical requirements in the *BLA* inapplicable once a lien is discharged under section 27 or 48(1)) will apply to liens discharged under section 48(1).

36 Another provision showing the interplay between the various parts of the *BLA* is the definition of "registered lienholder" in section 1(l). It includes a lienholder whose lien has been removed under section 48(1). This is a further indicator that sections 18 and 48(1) must be interpreted to work together.

37 The history of the *BLA* also supports the view that there are not two litigation or financial tracks for lienholders. The original legislation (the *Mechanics' Lien Act*, S.A. 1906 c. 21 ("*MLA*")) did not provide for a lien fund. However, it contained two sections (25 and 26) permitting a lien to be discharged upon the posting of security. The notion of a lien fund did not appear until 64 years later: *Builders' Lien Act*, S.A. 1970 c. 14 ("1970 *BLA*"). Its section 15(1) set out a formula for calculating the amount of the lien fund. The provision for posting security remained (as section 35). The 1970 *BLA* followed on the heels of an inquiry to assess the effectiveness of the legislation: Report of the Commissioner, Public Inquiry under the *Public Inquiries Act* into the adequacy of the provisions of the *Mechanics' Lien Act*, 1960, dated November 1967. Its author opined at page 74:

> I think that there is merit in the view that the proper provision would be that the only holdback required by the Act would be the owner's holdback, and that the owner's holdback would constitute a fund to which all lienholders would look for satisfaction of their claims.
>
> [Emphasis added]

This history does not support Dalton's suggestion that lienholders whose liens are discharged after the posting of security are meant to be treated differently than other lienholders by being paid the full amount of their claim from the security.

38 Dalton's arguments to the opposite effect must be rejected. It relies on cases from other jurisdictions where the legislation is not necessarily the same or where the point at issue was different from the one raised in this case: *Blueline Stucco Ltd. v. Discovery Reach Developments Ltd.*, 40 C.L.R. (2d) 267, [1998] B.C.J. No. 1883 (B.C. Master); *Benny Haulage Ltd. v. Carosi Construction Ltd.* (1996), 33 C.L.R. (2d) 44 (Ont. Master). On the other hand, there is jurisprudence that supports the view I take on the interaction between sections 48(1) and 18: *Kappeler Masonry Corp. v. Winston Hall Nursing Homes Ltd.* (2001), 12 C.L.R. (3d) 65 (Ont. S.C.J.); *Lloydminster Roman Catholic Separate School District No. 34 v. Border City Transit Mix (1980) Ltd.* (1988), 87 A.R. 391, 57 Alta. L.R. (2d) 146 (Alta. Master).

39 Dalton also asserts that the history of recent amendments to section 48(2) supports its position. I do not agree. The wording was changed in 1985 to make reference to "the claims of the person whose lien has been removed". The previous language, found in section 35(2) of the 1970 *BLA*, referred to "the claim of all persons for liens". Dalton argues that this wording was intended to respond to an inequity created by the decision in *Northern Electric Co. v. Frank Warkentin Electric Ltd.* (1972), 27 D.L.R. (3d) 519 (Man. C.A.). But that case concerned legislation that did not provide for a lien fund. It held that a claimant whose lien had been discharged after the posting of security had no further claim against the land or proceeds of its sale. The relationship between *Northern Electric* and the present language of section 48(2) is unclear. Dalton's factum, at para. 46, referred to the work of a committee that preceded the 1985 amendments. Its report, however, was not part of Dalton's authorities. Nor does the debate in Hansard at the time the 1985 amendments were introduced shed any light on what motivated the amendments to the then section 35(2): Alberta, Legislative Assembly, *Alberta Hansard* (31 May 1985) at 1266 *et seq.*

40 In summary, Dalton's attempt to bifurcate the section 48(1) security from the lien fund runs counter to the purpose and operation of the *BLA*.

3. If a lienholder has a claim against the lien fund after section 48(1) security has been posted, did the decisions below set the Eagle lien fund at the correct amount? Is Dalton entitled to its pro rata share or its full claim?

41 Dalton's factum contains some suggestion that the Master used the wrong number in establishing the Eagle lien fund. Master Waller stated at F30 that the amount of the lien fund was agreed among the parties. Notwithstanding this comment in his reasons, Dalton's list of nine errors in its notice of motion appealing Master Waller's order does not mention the amount of the lien fund. At para. 67 Mahoney J. accepted the amount of the lien fund set by Master Waller. Dalton again took no issue with that amount in its Notice of Appeal which lists five specific errors. Given this, any issue about the amount of the lien fund will not be pursued further.

42 The remaining issue is whether Dalton is entitled to the full amount of its claim from the lien fund ($26,340) or only its *pro rata* share after taking account of the seven other liens previously discharged ($7,417.70). Section 18(6)(b) of the *BLA* provides that if a subcontractor defaults, the major lien fund is to be distributed in the manner prescribed by section 61. Section 61 generally describes how funds from a sale of the liened property are to be distributed. Of note is section 61(5), which essentially requires a *pro rata* distribution among "each class of lienholders". Should the distribution to Dalton be determined on a *pro rata* basis taking account of the previously settled lienholders claims, or should Dalton be treated as the only lienholder and thereby entitled to its full claim? There are three reasons for concluding that the former result should govern this case rather than the latter.

43 First, this approach finds support in cases where only one lienholder has proceeded to trial. In *Arctic Distributors Ltd. v. Nordine* (1984), 7 C.L.R. 21, 52 B.C.L.R. 110 (B.C. Co. Ct.), it was held that when the last lienholder goes to trial, he must share the holdback with all other successful lienholders on a *pro rata* basis. To similar effect are a number of other cases cited in *Nordine*. Similarly, in *West v. 620693 Alberta Ltd.* (1995), 173 A.R. 103 (Alta. Master), three out of nine lienholders contested the amount of the fund, but each was entitled to a *pro rata* share.

44 Second, the outcome sought by Dalton would undercut the policy objective of encouraging settlement. If the last lienholder received more than its *pro rata* share, it would be irrational for anyone to settle. This result would increase litigation and discourage the summary resolution of claims, which is one the *BLA*'s main objectives.

45 Third, any other result would potentially make the owner liable for greater amounts than the limit of liability found in section 25 of the *BLA*, namely, the amount of the major lien fund. The other lienholders settled on the basis of their *pro rata* share. To now award Dalton more than its *pro rata* share would increase the owner's liability beyond the major lien fund by the difference between Dalton's full claim and its *pro rata* share. This is obviously contrary to the thrust of the *BLA*.

46 To support its position, Dalton also makes various arguments about the scope of previous orders. None of these arguments has merit.

Conclusion

47 The appeal is dismissed. CHR was entitled to appoint Maple as its agent for the purposes of the *BLA*. Dalton is limited to its *pro rata* share of the lien fund, which is the amount set by Master Waller.

***E. Picard J.A.*:**

I concur.

***P. Martin J.A.*:**

I concur.

Appeal dismissed.

TAB 7

2010 ABQB 675
Alberta Court of Queen's Bench

UPA Construction Group Ltd. Partnership v. Lake Placid Properties (Park) Inc.

2010 CarswellAlta 2133, 2010 ABQB 675, [2010] A.W.L.D. 5143, [2010] A.W.L.D. 5149, [2010] A.W.L.D. 5150, [2010] A.W.L.D. 5151, [2010] A.W.L.D. 5152, [2010] A.W.L.D. 5153, [2010] A.J. No. 1247, 194 A.C.W.S. (3d) 727, 71 C.B.R. (5th) 36, 98 C.L.R. (3d) 275

UPA Construction Group Limited Partnership (Plaintiff) and Lake Placid Properties (Park) Inc. (Defendant) and IBI Group L.P., IBI Group Management Partnership and the said IBI Group L.P. and IBI Group Management Partnership Carrying on Business under the firm name and style of IBI Group and the said IBI Group, Peter Bull Architect & Associates Ltd., Stephen Shawcross Consulting Ltd., Peter Moore Consultants Inc., Beinhaker Design Services Ltd., Beinhaker Developments Ltd., David Thom, David M. Thom Architect Ltd., Ross Hayes Design Services Architect Limited, Keith Sallaway Architect Ltd. and the said Peter Bull Architect & Associates Ltd., Stephen Shawcross Consulting Ltd., Peter Moore Consultants Inc., Beinhaker Design Services Ltd., Beinhaker Developments Ltd., David Thom, David M. Thom Architect Ltd. Ross Hayes Design Services Architect Limited and Keith Sallaway Architect Ltd., carrying on business under the firm name and style of IBI Group Architects Engineers and the said IBI Group Architects Engineers, IBI General Partner Trust and IBI Group Limited and the said IBI General Partner Trust and IBI Group Limited Carrying on Business under the firm name and style of IBI Group L.P., Daniel Arbour & Associates, Partnership/Daniel Arbour & Associes, S.E.N.C., Beinhaker Design Services Ltd., Ewen S. Fisher Management Inc., R.a. Mcnally Consultants Inc., Lee Sims Consulting Ltd., Thom Design Services Ltd., Ross Hayes Design Services Limited, Levine Consultants Ltd., M. Blumberg Design Services Ltd., Scott Stewart & Associates Limited, Randy M. Grimes Enterprises Ltd., Alistair Baillie Services Limited, E. A. Patton Design Services Inc., IBI Group Associate Partners Limited, Stephen Shawcross Consulting Ltd., J. D. Sims Technical Services Limited, Peter Moore Consultants Inc., Paul Lavallee Technical Services Inc., Ian D. Oliver and Associates Limited, Peter Zurawel Design Services Ltd., Eagleston Design Services Ltd., Tissa Desilva & Associates Ltd., Dha Design Group Inc., T. J. Mcintyre Design Group Ltd., Bart Cima Consulting Canada Ltd., Bebenek Associates Incorporated, Peter Bull Architect & Associates Ltd., Piel Consulting Canada Ltd., Schibuola Consultants Canada, Inc., Baillie 2004 Trust, Lavallee 2004 Trust, Zurawel 2004 Trust, Cima 2004 Trust, Piel 2004 Trust, Schibuola 2004 Trust, Chow 2004 Trust, IBI Group Realty, Michael Pankiw & Associates Ltd.,1564416 Ontario Limited, David Chow Consultant Services, Inc., D.E. Phillips Design Services Inc., 3096500 Nova Scotia Company, 3096494 Nova Scotia Company, 3096498 Nova Scotia Company, 3096501 Nova Scotia Company, 3096496 Nova Scotia Company, 3096495 Nova Scotia Company, 3096497 Nova Scotia Company, 3102454 Nova Scotia Company, N. A. Irwin Consulting Limited, 6464220 Canada Inc., and the said Daniel Arbour & Associates, Partnership/Daniel Arbour & Associes, S.E.N.C., Beinhaker Design Services Ltd., Ewen S. Fisher Management Inc., R.A. Mcnally Consultants Inc., Lee Sims Consulting Ltd., Thom Design Services

Ltd., Ross Hayes Design Services Limited, Levine Consultants Ltd., M. Blumberg Design Services Ltd., Scott Stewart & Associates Limited, Randy M. Grimes Enterprises Ltd., Alistair Baillie Services Limited, E. A. Patton Design Services Inc., IBI Group Associate Partners Limited, Stephen Shawcross Consulting Ltd., J. D. Sims Technical Services Limited, Peter Moore Consultants Inc., Paul Lavallee Technical Services Inc., Ian D. Oliver and Associates Limited, Peter Zurawel Design Services Ltd., Eagleston Design Services Ltd., Tissa Desilva & Associates Ltd., Dha Design Group Inc., T. J. Mcintyre Design Group Ltd., Bart Cima Consulting Canada Ltd., Bebenek Associates Incorporated, Peter Bull Architect & Associates Ltd., Piel Consulting Canada Ltd., Schibuola Consultants Canada, Inc., Baillie 2004 Trust, Lavallee 2004 Trust, Zurawel 2004 Trust, Cima 2004 Trust, Piel 2004 Trust, Schibuola 2004 Trust, Chow 2004 Trust, IBI Group Realty, Michael Pankiw & Associates Ltd., 1564416 Ontario Limited, David Chow Consultant Services, Inc., D.e. Phillips Design Services Inc., 3096500 Nova Scotia Company, 3096494 Nova Scotia Company, 3096498 Nova Scotia Company, 3096501 Nova Scotia Company, 3096496 Nova Scotia Company, 3096495 Nova Scotia Company, 3096497 Nova Scotia Company, 3102454 Nova Scotia Company, N. A. Irwin Consulting Limited, 6464220 Canada Inc. Carrying on Business under the firm name and style of IBI Group Management Partnership and the said IBI Group Management Partnership (Third Parties); the IBI Group (Plaintiff) and Lake Placid Developments Inc. and Lake Placid Properties (Park) Inc. (Defendants); Agra Foundations Limited (Plaintiff) and Upa Construction Group Limited Partnership And Lake Placid Properties (Park) Inc. (Defendants)

Master J.B. Hanebury

Heard: September 23, 27, 28, 2010
Judgment: October 29, 2010
Docket: Calgary 0801-13532, 0901-11757, 0801-14945

Counsel: J. Gary Greenan for Agra Foundations Limited
Jean C. van der Lee, Q.C. for UPA Construction Group Limited Partnership
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Peter R.S. Leveque for IBI gROUP
Shane K. McGurk for Placid Properties (Park) Inc., Lake Placid Developments Inc.

Subject: Contracts; Corporate and Commercial; Civil Practice and Procedure; Immigration; Insolvency
Related Abridgment Classifications
Business associations
V Legal proceedings involving business associations
V.3 Practice and procedure in proceedings involving corporations
V.3.q Costs
V.3.q.viii Security for costs
V.3.q.viii.D Grounds
V.3.q.viii.D.2 Impecuniosity
Construction law
IV Construction and builders' liens
IV.1 Right to lien
IV.1.a Nature, purpose and history of lien
Construction law

IV Construction and builders' liens
IV.1 Right to lien
IV.1.b When lien arising
Construction law
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IV.5 Services and materials for which liens available
IV.5.e Architectural services
Construction law
IV Construction and builders' liens
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IV.10.e Determining amount of lien
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IV Construction and builders' liens
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IV.10.j Sale and distribution

Headnote

Construction law --- Construction and builders' liens — Services and materials for which liens available — Architectural services
Owner of property hired general contractor to construct condominiums on land — General contractor subcontracted part of work and owner hired architects for project — General contractor had not been paid so it terminated contract and subcontractors, and work ceased — Lien claimants brought applications for, inter alia, declaration that their liens were valid — Applications granted in part — Owner disputed architects' right to file lien because it claimed that drawings were insufficient and number of stages were never completed — At very least, some work done by architects was lienable — Construction had started, excavation was dug, shoring was put in place, and crane had been installed with support pad; it could not be said that absolutely none of architects' work was lienable — Quantum of architects' lien to be determined at trial.

Construction law --- Construction and builders' liens — Practice on enforcement of lien — Determining amount of lien — General principles
Owner of property hired general contractor to construct condominiums on land — General contractor subcontracted part of work and owner hired architects for project — General contractor had not been paid so it terminated contract and subcontractors, and work ceased — Lien claimants brought applications for, inter alia, declaration that their liens were valid — Applications granted in part — Owner challenged quantum of general and subcontractors' liens, and challenged architects' entitlement to lien claim — With respect to general and subcontractors' liens, there were number of disputes that could not be determined on summary basis; questions regarding quantum and set off referred to trial — With respect to architects' lien, owner disputed its right to file lien because it claimed that drawings were insufficient and number of stages were never completed — At very least, some work done by architects was lienable — Construction had started, excavation was dug, shoring was put in place, and crane had been installed with support pad; it could not be said that absolutely none of architects' work was lienable — Quantum of architects' lien to be determined at trial.

Construction law --- Construction and builders' liens — Right to lien — When lien arising
Owner of property hired general contractor to construct condominiums on land — General contractor subcontracted part of work and owner hired architects for project — General contractor had not been paid so it terminated contract and subcontractors, and work ceased — Lien claimants brought applications for, inter alia, declaration that their liens were valid — Applications granted in part — Owner challenged quantum of general and subcontractors' liens, and challenged architects' entitlement to lien claim — With respect to general and subcontractors' liens, there were number of disputes that could not be determined on summary basis; questions regarding quantum and set off referred to trial — With respect to architects' lien, owner disputed its right to file lien because it claimed that drawings were insufficient and number of stages were never completed — At very least, some work done by architects was lienable — Construction had started, excavation was dug, shoring was put in place, and crane had been installed with support pad; it could not be said that absolutely none of architects' work was lienable — Quantum of architects' lien to be determined at trial.

Construction law --- Construction and builders' liens — Right to lien — Nature, purpose and history of lien

Construction law --- Construction and builders' liens — Practice on enforcement of lien — Sale and distribution
Appointment of receiver or trustee — Owner of property hired general contractor to construct condominiums on land — General contractor subcontracted part of work and owner hired architects for project — General contractor had not been paid so it terminated contract and subcontractors, and work ceased — Lien claimants brought applications for, inter alia, appointment of receiver or trustee under Builder's Lien Act for sale of lands — Application adjourned and lien claimants granted leave to file further information — Section 54 of Act indicates that appointment of receiver is for purpose of collection of rent or profits from lands — There were no rents or profits to collect, therefore, appointment of receiver was inappropriate — Statements of claim had been issued so statutory condition for consideration of appointment of trustee had been met — While appointment of trustee might have been appropriate, there was no information about who would be appointed as trustee.
Business associations --- Legal proceedings involving business associations — Practice and procedure in proceedings involving corporations — Costs — Security for costs — Grounds — Impecuniosity
Appointment of receiver or trustee — Owner of property hired general contractor to construct condominiums on land — General contractor subcontracted part of work and owner hired architects for project — General contractor had not been paid so it terminated contract and subcontractors, and work ceased — Lien claimants brought applications for, inter alia, order for security for costs — Applications granted in part — Application was brought by lien claimants as defendants to counterclaim of owner — Review of evidence supported owner's contention that counterclaims were so intertwined with claims that to require security for costs could have had effect of denying it right to raise its defences to those claims — Insofar as lien claimants sought security for costs in relation to their defences to counterclaims, applications were dismissed.

Table of Authorities

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Atlas-Gest Inc. v. Brownstones Building Corp. (1992), 2 C.L.R. (2d) 275, 26 R.P.R. (2d) 233, 1992 CarswellOnt 608 (Ont. Gen. Div.) — referred to

Birkholz Construction Ltd. v. Multican Marketing Corp. (1987), 1987 CarswellAlta 519, 83 A.R. 398 (Alta. Master) — considered

Calgary Masonry Supplies v. Sather Allen Holdings Ltd. (1994), 16 Alta. L.R. (3d) 297, 148 A.R. 148, [1994] 4 W.W.R. 425, 1994 CarswellAlta 23 (Alta. Q.B.) — referred to

Canbar West Projects Ltd. v. Sure Shot Sandblasting & Painting Ltd. (2010), 91 C.L.R. (3d) 268, 2010 CarswellAlta 1003, 2010 ABQB 372, [2010] 11 W.W.R. 461, 28 Alta. L.R. (5th) 201 (Alta. Q.B. [In Chambers]) — followed

City Paving & Maintenance Ltd. v. Intercoast Lumber Alberta Ltd. (1982), 41 A.R. 538, 1982 CarswellAlta 464 (Alta. Master) — considered

Ernst & Young Inc. v. Central Guaranty Trust Co. (1999), 1999 CarswellAlta 585, 34 C.P.C. (4th) 286, 247 A.R. 190, 1999 ABQB 488 (Alta. Q.B.) — considered

Fairfield Project Ltd. Partnership v. Pacific Western Coastal Constructors Ltd. (2008), 2008 CarswellBC 196, 2008 BCSC 135, 72 C.L.R. (3d) 150 (B.C. S.C.) — referred to

Heritage Station Inc. v. Professional Stucco Inc. (2010), 2010 ABQB 399, 2010 CarswellAlta 1254 (Alta. Master) — referred to

Hett v. Samoth Realty Projects Ltd. (1977), 1 R.P.R. 257, 1977 CarswellAlta 58, 3 Alta. L.R. (2d) 97, 4 A.R. 175, 76 D.L.R. (3d) 362 (Alta. C.A.) — considered

Horizon Pacific Contracting & Sunrooms Inc. v. Katz (2006), 2006 CarswellBC 951, 2006 BCSC 602, 54 C.L.R. (3d) 312 (B.C. Master) — referred to

John Barlot Architect Ltd. v. Ross (2007), 2007 CarswellAlta 377, 2007 ABQB 181, 62 C.L.R. (3d) 246, 79 Alta. L.R. (4th) 396, 420 A.R. 231 (Alta. Q.B.) — considered

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Lansdowne Equity Ventures Ltd. v. Alsa Road Construction Ltd. (2009), 2009 CarswellAlta 653, 79 C.L.R. (3d) 125, 2009 ABQB 273 (Alta. Master) — followed

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Phoenix Piston Hydraulics Inc. v. Echo Valley Farms Inc. (1996), 44 Alta. L.R. (3d) 283, 1996 CarswellAlta 830 (Alta. Master) — considered

Pleasantview Homes Ltd. v. Chand (2005), 2005 BCSC 1235, 2005 CarswellBC 2048, 35 R.P.R. (4th) 46 (B.C. S.C.) — referred to

Poppies International Inc. v. International Hasco Trading Co. (2008), 2008 ABQB 531, 2008 CarswellAlta 1136, 95 Alta. L.R. (4th) 292, 59 C.P.C. (6th) 370, 458 A.R. 356 (Alta. Master) — referred to

Porta-Test Inc. v. Montenay-Birwelco Inc. (1991), 1 C.P.C. (3d) 201, 83 Alta. L.R. (2d) 343, 123 A.R. 38, 1991 CarswellAlta 204 (Alta. Master) — referred to

Q West Van Homes Inc. v. Fran-Car Aluminum Inc. (2008), 46 C.B.R. (5th) 177, 2008 BCCA 366, 2008 CarswellBC 1967, 83 B.C.L.R. (4th) 349, 73 C.L.R. (3d) 1, 298 D.L.R. (4th) 605, 259 B.C.A.C. 252, 436 W.A.C. 252 (B.C. C.A.) — referred to

Raimond Fung Architect Ltd. v. Dr. Jeremy Chai Professional Corp. (1992), 1 C.L.R. (2d) 114, 1992 CarswellAlta 438 (Alta. Master) — considered

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Statutes considered:

Builders' Lien Act, R.S.A. 2000, c. B-7

Generally — referred to

s. 1(h) "major lien fund" — considered

s. 48 — referred to

s. 49(6) — considered

s. 53 — referred to

s. 54 — considered

s. 61 — referred to

Business Corporations Act, R.S.A. 2000, c. B-9

s. 254 — referred to
Municipal Government Act, R.S.A. 2000, c. M-26
Generally — referred to
Rules considered:
Alberta Rules of Court, Alta. Reg. 390/68
Generally — referred to

R. 93(2) — considered

R. 593 — pursuant to

APPLICATIONS by lien claimants for declaration that their liens were valid, appointment of receiver or trustee, and order for security for costs.

***Master J.B. Hanebury*:**

1 These three applications relate to builders' liens registered against the title to a property in the Mission area of Calgary. A condominium project was to be constructed but the project stalled, leaving a large excavation. There have been ongoing issues with the stability of the excavation and the surrounding lands in light of water infiltration. Counsel acknowledged that residents in an adjacent building had been evacuated from their suites since June, 2010, due to concerns about the stability of their building. At the time this matter was heard the site was subject to a City of Calgary order under the *Municipal Government Act* that the excavation be filled in due to a failure to comply with earlier orders.

2 Three lien claimants filed actions, all defended by the owner, Lake Placid Properties Inc. (LPPI), who has also counterclaimed in all actions. In one action LPPI has also issued third party proceedings against the architects. The actions have not been consolidated.

3 The lien claimants seek a declaration that their liens are valid, the appointment of a receiver or trustee under the *Builder's Lien Act*, R.S.A. 2000 c. B-7, the sale of the property, and an order for security for costs.

4 LPPI argues that the project is in its present state due to the incompetent work undertaken by the lien claimants and the resultant loss of its financing.

5 LPPI filed cross-applications seeking a determination of the amount of the lien fund, directing the owner to pay the determined amount into court and the discharge of the liens. In the alternative it asked for a trial of an issue to determine the amount of the lien fund. These cross-applications were withdrawn at the commencement of argument and have not been considered further.

6 Voluminous materials were filed by the parties. LPPI filed affidavits by Tristen Spronken, Jared Smith of JASA Engineering, Robert Kunder of Dominion Construction Company Inc., John Vlooswyk of Building Envelope Engineering Inc., and two affidavits by Kevin Brookes. The first listed documents filling two binders and the second consisted of two binders of materials and more than 1,000 pages of documents.

Legal Principles

7 Before detailing the facts, it is useful to set out the legal principles behind such applications.

8 The Alberta Court of Appeal considered the purpose of the *Builder's Lien Act* in *Maple Reinders Inc. v. Eagle Sheet Metal Inc.*, 2007 ABCA 247 (Alta. C.A.). Lien legislation is remedial in nature and its purpose is to provide security to the parties who improved the lands for the value of the work done and the materials provided. Security can be posted to stand instead of the lands to enable an owner to discharge the liens from the title and continue with the improvements to the lands. The posting of funds determines neither the validity of the lien holder's claim, nor its amount.

9 The *Act* provides a mechanism to allow lien holders to enforce their liens at a minimal expense and in a procedurally uncomplicated manner. It is intended to take account of both the interests of owners and those who make improvements upon the owner's lands.

10 A court should first attempt to resolve lien claims summarily: *Builders' Lien Act*, s. 49(6); *Canbar West Projects Ltd. v. Sure Shot Sandblasting & Painting Ltd.*, [2010] A.J. No. 614 (Alta. Q.B. [In Chambers])

11 However, if the claims are complex or there are serious factual issues in dispute, the Court will direct the claims to discovery and trial. A lien claim will not be dismissed or adjudicated before a proper trial of the action except in the clearest of cases: *Lansdowne Equity Ventures*, para. 16, citing *Birkholz Construction Ltd. v. Multican Marketing Corp.*, [1987] A.J. No. 537 (Alta. Master).

12 The question to be considered when determining if the matter can be decided summarily is whether there are triable issues between the parties: *La Rive Developments Inc. v. Metro Glass Products Ltd.*, [2010] A.J. No. 527 (Alta. Master) para. 10; *Lansdowne Equity Ventures Ltd. v. Alsa Road Construction Ltd.*, [2009] A.J. No. 482 (Alta. Master) paragraphs 15, 16.

13 For example, a declaration that the lien is valid will not be granted where there is conflicting affidavit evidence between the parties as to the adequacy of the work performed pursuant to the contract: *City Paving & Maintenance Ltd. v. Intercoast Lumber Alberta Ltd.*, [1982] A.J. No. 923 (Alta. Master).

14 When the court comes to the conclusion that there is a right to a lien but the amount is in dispute, unless it is "plain and obvious" that the amount of the claim is improper, the court should not order a reduction in the amount of the security to be posted in place of the lien: *Fairfield Project Ltd. Partnership v. Pacific Western Coastal Constructors Ltd.*, 2008 BCSC 135 (B.C. S.C.), para. 13; *Strand Lakeside Resort Corp. v. Septra Projects Ltd.*, 2007 BCSC 1917 (B.C. S.C.), para. 5; *Horizon Pacific Contracting & Sunrooms Inc. v. Katz* (2006), 54 C.L.R. (3d) 312 (B.C. Master), *Q West Van Homes Inc. v. Fran-Car Aluminum Inc.*, 2008 BCCA 366 (B.C. C.A.); *Pleasantview Homes Ltd. v. Chand*, 2005 BCSC 1235 (B.C. S.C.).

15 The lien fund establishes the maximum amount of the owner's liability under the *Act.* This sum may be different than the amount the owner is ultimately liable for in contract.

16 There is a major lien fund and a minor lien fund. There is no minor lien fund in this case. The major lien fund is defined in s. 2(h) of the *Act* and it provides that the fund is made up of two parts: ten percent of the value of the work actually done and materials actually furnished (the holdback), and the amount payable under that contract over and above the ten percent (the amount payable).

17 Owners sometimes defend lien claims and seek a set-off on the basis that the work was improperly done or shoddy or the materials provided were faulty. The *Rules of Court* require a set-off to be pled by way of a counterclaim, not as a defence to the main action: *Alberta Rules of Court*, rule 93(2).

18 In coming to a determination of the amount of the owner's liability under the *Act*, LPPI submitted that the case law has held that the *amount payable* can be adjusted to take into account the set-off claimed by the owner. The mandatory ten percent *holdback* cannot be reduced: *Lloydminster Roman Catholic Separate School District No. 34 v. Border City Transit Mix (1980) Ltd.* (1988), 57 Alta. L.R. (2d) 146 (Alta. Master) p. 153; *Calgary Masonry Supplies v. Sather Allen Holdings Ltd.*, [1994] A.J. No. 37 (Alta. Q.B.), para.25, *Heritage Station Inc. v. Professional Stucco Inc.*, 2010 ABQB 399 (Alta. Master). A review of the case law appears to support this contention.

19 In summary, a lien is a special remedy available to suppliers and tradespeople that offers security either against the lands or a fund posted to replace the lands. When a fund is to be posted to replace the security given against the lands, the amount posted should not be reduced unless it is plain and obvious that it is improper. The security against the lands, or the fund posted, is made up of the holdback and the amount payable. The claim of the owner for a set-off can only reduce the amount payable,

not the holdback. The validity and amount of the lien claims should be determined summarily, where it is fair to do so. If there is a genuine issue for trial, a summary determination is not appropriate.

Facts

20 LPPI hired UPA Construction Group Limited Partnership (UPA) as the general contractor to construct a condominium development on the lands. It, in turn, subcontracted part of the below grade work to Agra Foundations Limited (Agra). LPPI hired the IBI Group as the architect for the project. All of the parties agree that the site was prone to water issues as it appears the planned below grade parking area interfered with the existing water table.

21 Work commenced and the site was excavated and shoring put in place. The problems with the excavation and the ingress of water came to a head in July, 2008, and the parties met and discussed a solution whereby work could proceed.

22 In September, 2008, UPA had not been paid part of some of its pay applications and all of pay application #14. It issued two notices of default and then terminated the contract on Sept. 22, 2008. It terminated its subcontractors and work ceased. UPA says its actions were pursuant to the terms of the contract. All subcontractors left the site and the dewatering equipment was removed. Problems with the ingress of water continued. The liens in issue were filed.

23 In 2009, LPPI decided to change the project to a boutique hotel and hired a new architectural firm and a new contractor and commenced some work. Again it failed to pay all of its obligations and further liens were filed. Those liens are not part of this application and apparently are not in dispute.

24 There are presently 11 liens on title with a face value of almost $5,000,000.00.

25 The City of Calgary became increasingly concerned about the stability of the site and the risk of sinkholes. As earlier noted the occupants of a neighbouring building were evacuated in June and have not been able to return to their suites.

26 A series of three *Municipal Government Act* orders were issued, with dates by which certain work at the site had to be undertaken. The last order required the site to be filled in. The court was advised that this order is under appeal.

27 The evidence filed makes it clear that LPPI has no funds. It was apparently a "one project" company, a not unusual situation for developments of this type, and its latest financial statement shows approximately $7,000,000.00 more in liabilities than in assets. However, this year it paid off the mortgage registered against the title to the liened lands.

28 No funds have been paid into court for the removal of any of the liens in contention and, as noted, there is no application to set the lien fund.

29 The three lien claimants seek to have their liens found valid and the amounts of their liens established. In the alternative they ask that their claims be referred to trial if no summary disposition can be made. They also seek security for costs and the appointment of a receiver or trustee to sell the lands.

30 There was an updated appraisal of the property filed by LPPI when this matter was heard. It valued the lands with the existing excavation at $7,550,000.00, and suggested a year would be required to sell the property.

31 The lien claimants contest the validity of the appraisal noting that it is predicated on a number of questionable assumptions, for example: all plans and municipal approvals are in place; work will commence on the property without delay; and, the integrity of the structure and the validity of the cost estimates for the completion of the underground parking structure are confirmed.

32 LPPI does not argue that the UPA and AGRA liens are invalid, it merely contests the amounts. It does argue that the architect, the IBI Group, is not entitled, either in whole or in part, to a lien claim, and contests the amount of its lien.

33 While LPPI raised a number of issues to argue that the liens should not be allowed in the amounts claimed, its primary argument relates to the alleged faulty construction of the excavation which it says resulted in repairs and failures that affected

the timing and the costs of the project, and ultimately caused the loss of its financing. The termination of the contract by UPA and the removal of the dewatering pumps exacerbated the situation. It has not attributed a specific amount of the damages it claims to each of the lien claimants.

Analysis

UPA Lien

34 UPA's lien was orignally for $2,155,000.00, but at the application it provided an updated amount. It backed out the lien claim of Agra to avoid any claim of "double-dipping" as Agra was making its own claim. It also removed the loss of profit and demobilization costs it had originally included and provided a credit for a refund of the crane insurance. All of these charges had been objected to by LPPI. Its amended claim, including interest but exclusive of costs, is $1,453,524.00.

35 While this amendment dealt with some of LPPI's objections, LPPI still argues that the management fee was incorrectly calculated and the project completion level, upon which the fee was based, was overstated. It also alleges that it was invoiced by UPA for services and work furnished by Narra Construction and it has been advised by a principal of Narra that it did not perform any work for UPA. In response to UPA's claim that the monies invoiced were for a deposit required under the Narra contract, LPPI says that UPA has not produced a copy of the deposit agreement.

36 LPPI alleges that there are funds owing for the cancellation of subguard insurance which should have been terminated by UPA with a refund paid to LPPI.

37 LPPI argues that Pay Application #15 was not received and did not comply with the requirements of the contract as there was no concurrent statutory declaration or substantiation of the costs.

38 As to the site itself, LPPI argues that UPA improperly terminated the contract and caused the de-watering pumps to be immediately removed from the site. This required LPPI to incur the costs of new pumps and damaged the site.

39 UPA responds that it has a lien that is valid and it is for a valid amount. It says that no credible evidence was adduced to indicate the claimed amount is not due.

40 It says that the real reason for the failure of LPPI to pay its outstanding invoices is a lack of funds, not a problem with the invoices. For example, it notes that the payment of pay application # 14 was refused on the basis that it had to be approved by the architect, a process that had not previously been required. The architect approved the invoice as submitted, in the amount of $580,402.19, and still it remains unpaid. Pay application #15, UPA says, was provided in its production and remains unpaid.

41 UPA also reviews some of LPPI"s contentions and argues that the evidence does not support them.

42 This court cannot weigh the evidence and make final determinations. That is to be done by a trial judge. There are a number of points in dispute between the parties that cannot be determined on a summary basis. The question of whether all of the amount claimed by UPA is proper, and what, if any reduction, should be allowed in light of the set-offs claimed by LPPI is referred to trial.

43 UPA has amended its lien to exclude those amounts to which it is clearly not entitled. Should funds become available to stand in place of the lien, the amount to be furnished is set at $1,453,524.00 as of September 30, 2010, with an allowance for ongoing interest and costs.

Agra Lien

44 Agra provided shoring design plans for the project, which were changed during the course of construction. The company placed 321 piles at the site in the spring and summer of 2008, and employed subcontractors for certain aspects of construction.

45 Agra acknowledges that the site was a difficult site, being below the water table and the soil conditions were problematic. Ongoing dewatering was required which caused voids and sunken holes in adjacent lands. However, says AGRA, as problems arose, it dealt with them.

46 After work on the site stopped Agra and LPPI tried to resolve matters between them as LPPI wanted the balance of the shoring work completed. No agreement was reached and another company was retained to complete the work. Subsequently there was a collapse which resulted in a sinking of an adjacent roadway.

47 Agra provided an update of its lien claim. It is seeking $733,504.22 to September 30, 2010, plus interest and costs.

48 Agra argues that its lien is valid and the only reason it remains unpaid is the financial situation of LPPI. It points to the fact the company was a "one-project" company. It relies on the financial statements, the list of payables for the summer of 2008, its inability to satisfy the conditions of its lender, including the need for pre-sales, and the lack of any other credit facility.

49 LPPI responds that the failures and subsequent repairs to the excavation were at least in part Agra's fault. It says that there had been significant discussions among the parties about who would pay for the shoring failures and repairs. It alleges that Agra and UPA made a side deal for chargebacks to which LPPI was not privy and the arrangement did not cover the actual costs incurred as a result of Agra's alleged incompetence.

50 LPPI was and is in financial difficulty. However, that difficulty does not mean that Agra is entitled to the amount of its lien when there is a genuine issue to go to trial. A trial is necessary to determine if the entire amount claimed by Agra is proper, and what, if any, reduction should be allowed in light of the set-offs claimed by LPPI. The question of the liability for the problems with the stability of the excavation cannot be determined summarily.

51 Therefore, the amount of the lien claim of Agra is referred to trial, with the amount to be furnished in lieu of the lien set at $733,504.22.00 as of September 30, 2010, with an allowance for ongoing interest and costs.

IBI Group Lien

52 LPPI disputes the right of the IBI Group to even file a lien, arguing that the services provided do not support a lien. If the IBI Group is entitled to a lien, LPPI says that the evidence of IBI's representative should not be accepted as to the amount of the lien. Finally it argues that it has a defence and a right of set-off to the lien claim advanced.

53 The IBI Group has claimed against both LPPI, the company incorporated to own the project, and its affiliate, Lake Placid Developments Inc. It says that it entered into an agreement with Lake Placid Developments Inc. to provide architectural and construction oversight and administration services in respect of the project. The companies are referred to by IBI as "Lake Placid".

54 The IBI Group says it developed conceptual designs, assisted in obtaining the development permit, developed architectural drawings, provided specifications, and obtained a building permit for the parkade. It then assisted the Lake Placid in obtaining an excavation permit. It says that discussions were held about changes to reduce construction costs and changes were then made to the design.

55 Construction started in September, 2007. The IBI Group provided some of its drawings to Agra and the two worked together to develop the design for the foundation.

56 Revised drawings were provided and these drawings were labelled "construction". The IBI Group says that by May, 2008, it had completed the architectural work necessary for Lake Placid to obtain a building permit for the above-grade construction.

57 The IBI Group states that further revisions were requested by the owner and additional revised construction drawings and plans were prepared in November, 2008. The tendering process commenced for concrete, windows, drywall, elevators and mechanical and electrical systems.

58 The IBI Group states that it attended site meetings, oversaw the early stages of construction, reviewed certain progress draws and arranged for surveys to be conducted.

59 By January, 2008, Lake Placid began defaulting on its payments. In March 2009, it announced that it would not be proceeding in line with the original design and intended to redevelop the project as a luxury boutique hotel. The IBI Group had not been paid and would not undertake the work. A new firm of architects was hired.

60 The IBI Group filed a lien in the amount of $508,405.93.

61 Lake Placid argues that the lien of the IBI Group is invalid as the work done is not lienable. It says that a number of the stages referred to by the IBI Group were never completed by it and the drawings were insufficient for the owner to commence the tendering process.

62 An architect's services do not need to be physically performed upon the improvement to give rise to a lien, however they must be directly related to the process of construction: *Hett v. Samoth Realty Projects Ltd.* (1977), 3 Alta. L.R. (2d) 97 (Alta. C.A.). The fact that no supervision has been undertaken is irrelevant: *Peter Hemingway Architect Ltd. v. Abacus Cities Ltd.*, [1980] 6 W.W.R. 348 (Alta. C.A.).

63 The court is under an obligation to assess the type of work done and the purpose of the work to ensure it was directly related to the actual process of construction: *John Barlot Architect Ltd. v. Ross*, 2007 ABQB 181 (Alta. Q.B.). The work must be an integral and necessary part of the actual physical construction of the project, as distinguished from mere development work: *Leduc Estates Ltd. v. IBI Group* (1992), 1 Alta. L.R. (3d) 369 (Alta. Q.B.).

64 An owner cannot escape liability for a lien merely because he chooses not to use the plans: *Lambur Scott Architects Ltd. v. 404577 Alberta Ltd.* (1993), 142 A.R. 241 (Alta. Master), *Lambur Scott Architects Ltd. v. 413643 Alberta Ltd.* (1993), 140 A.R. 85 (Alta. Master). Similarly, he can not avoid a lien if he decides to retain someone else to prepare different plans: *Raimond Fung Architect Ltd. v. Dr. Jeremy Chai Professional Corp.* (1992), 1 C.L.R. (2d) 114 (Alta. Master).

65 A lien claimant cannot shelter non-lienable work under a lien filed for lienable work. In calculating the lien amount, the sheltered work is to be valued at "nil": *John Barlot Architect Ltd. v. 413481 Alberta Ltd.*, 2010 ABCA 51 (Alta. C.A.).

66 This case law indicates that at the very least, some of the work done by the IBI Group is lienable. Construction had started, the excavation was dug, shoring was put in place, and a crane had been installed with a support pad. It cannot be said that absolutely none of the IBI Group's work was lienable. Therefore the IBI Group was entitled to file a lien. However, a trial judge needs to assess the evidence of the parties to determine what, if any, reduction should be made to the amount of the lien.

67 Lake Placid argues that the evidence of Mr. Shawcross, the affiant on behalf of the IBI Group, should not be considered as he had no personal knowledge of the matter nor did he state the source of what information he had. Such an affiant cannot provide evidence for the final determination of a matter: *Woodbend Holdings Ltd. v. Home Hardware Stores Ltd.*, 2009 ABQB 432 (Alta. Q.B.).

68 On an interlocutory application of this kind the court is entitled to look at all of the evidence. While the lien claims are not yet consolidated, counsel advised that they would be, and on that basis the applications were heard together. The essential portions of Mr. Shawcross's evidence can also be found in the evidence of other parties to the proceedings.

69 In any event, the determination of the amount of the lien has been referred to a trial judge. As there has been no final determination of the amount of the lien, this argument has not been further considered.

70 The IBI Group is entitled to a lien with the amount to be determined at trial. The amount to be furnished in lieu of the lien is set at $634,250.00 as at Sept. 30, 2010, with an allowance for ongoing interest and costs.

Appointment of a Receiver or Trustee

71 The parties ask that a receiver or a trustee be appointed to sell the lands.

72 Section 54 of the *Act* indicates that the appointment of a receiver is for the purpose of the collection of rent or profits from the lands. There are none to collect in this case. The application to appoint a receiver is inappropriate.

73 The *Act* provides that a trustee may be appointed at any time after a statement of claim has been filed. The trustee may be given the power to manage, sell, mortgage or lease the property and to complete or partially complete the improvement. The exercise of these powers is subject to court approval.

74 At the court's request the parties provided case law dealing with the appointment of a receiver. The cases provided were not on point with the present situation: *Royaledge Industries Inc. v. Perma-Roof Ontario Ltd.* (1991), 2 O.R. (3d) 488 (Ont. Gen. Div.) [hereinafter Royaledge]; *Atlas-Gest Inc. v. Brownstones Building Corp.* (1992), 26 R.P.R. (2d) 233 (Ont. Gen. Div.).

75 However, *Royaledge* is of some assistance as it discusses the principles to be considered when determining if a trustee should be appointed. The appointment of a trustee is an extraordinary remedy. The court may exercise its discretion to appoint a trustee where, for example: there is a vacuum in the management; the owner has abandoned the lands; or, the owner is insolvent and is acting irresponsibly.

76 The court refused to appoint a trustee of land in *Royaledge* as there was no danger of the project and services installed deteriorating, other than in the usual and ordinary course. There was no evidence that the owner was acting irresponsibly in a way that would imperil the claimant's security. Furthermore, the court found that the fact that the completion of the project was at risk did not necessarily mean that the lien claimant's security was at risk.

77 In this case, statements of claim have been issued so the statutory condition for the consideration of the appointment of a trustee has been met. The Alberta *Act* does not require that a lien claimant have proven the amount of its lien prior to the appointment of a trustee. In this case, the owner has acknowledged that it cannot claim a set-off against the holdback amount. There is, therefore, some amount owing under the *Act* pursuant to these liens.

78 The owner in this case is, on its own financial records, insolvent. Only minimal work has gone on at the site since September, 2008, and apparently the parties who undertook that work were also not paid and have liened the property. The site has been subject to successive city orders, including the last requiring it to be filled in by November 15, 2010. The result of the appeal of that order is unknown. A neighbouring building has been evacuated and remains so.

79 The facts in this situation suggest that the appointment of a trustee might be appropriate. However, there is no information about who would be appointed as trustee nor evidence of the trustee's consent to the appointment. There is no evidence as to what the trustee's powers would be or a plan for their exercise. What would the listing price be for the property? While the lien claimants poked holes in the appraisal of the owner, they provided no appraisal of their own. How would the property be sold, particularly in light of the looming threat that the City may take independent action? Would it be better to list it with a realtor or proceed by some form of auction? Would the trustee have the power to deal directly with the City? Who will cover the trustee's costs until they can be recouped from a sale?

80 The lien claimants argue, and I agree, that the appointment of a trustee can be handled in stages. However, a trustee cannot be appointed in a vacuum. The lien claimants have not provided the information necessary for the consideration of their application. Their application is adjourned and they have leave to file further information, should they so choose.

Security for Costs

81 The lien claimants also sought an order for security for costs, both pursuant to rule 593 and the *Business Corporations Act* R.S.A. 2000 c. B-9, s. 254. The application is brought by the lien claimants as defendants to the counterclaim of LPPI and by IBI as a defendant to a third party notice.

82 The lien claimants argue that the financial statements are clear that LPPI is insolvent and cannot pay its debts. They argue that the payment of their costs is at risk.

83 However, a lien claimant is in a different situation than an ordinary creditor. A lien provides security against the land or the funds paid into court for both the amount of the lien and for costs: sections 48 and 61 of the *Act*. If the lien claimants are successful, they will be awarded their costs which are sheltered under the *Act*.

84 Is there enough equity in the lands to cover the claimants' costs? The only evidence of the value of the lands is the appraisal filed by LPPI. Filed at the very last minute, and shaky though it may be, it indicates that there is adequate security in the lands. While the lands are under threat as a result of the most recent City order requiring the excavation be filled in, that order is under appeal and the result is unknown. The value of the lands if filled pursuant to that order, is unknown. While the appraisal includes an amount of $4,150,000.00 for the land, the effect of a successful fill order, either positive or negative, has not been addressed. The lien claimants may, or may not, continue to be adequately protected.

85 Furthermore, the courts have held that as a defence of set-off must be raised by way of counterclaim, the awarding of security for costs in such situations should not result in the denial of a defendant's right to a defence: *Poppies International Inc. v. International Hasco Trading Co.* (2008), 95 Alta. L.R. (4th) 292 (Alta. Master); *Athabasca Realty Co. v. Lafontaine* (1981), 15 Alta. L.R. (2d) 221 (Alta. Master); *Ritter v. Hoag* (2003), 334 A.R. 290 (Alta. Q.B.), *Porta-Test Inc. v. Montenay-Birwelco Inc.*, [1991] A.J. No. 904 (Alta. Master)

86 A counterclaim need not be tied to or relate to the main action: *Phoenix Piston Hydraulics Inc. v. Echo Valley Farms Inc.* (1996), 44 Alta. L.R. (3d) 283 (Alta. Master) at p. 287.

87 However, in this case a review of the evidence and the pleadings supports LPPI's contention that the counterclaims are so intertwined with the claims that to require security for costs could have the effect of denying it the right to raise its defences to those claims.

88 In conclusion, insofar as the lien claimants are seeking security for costs in relation to their defences to the counterclaims, their applications are denied.

89 The IBI Group seeks security for costs in the sum of $777,840.00 as a defendant to a third party notice. Security in such a situation has been allowed subsequent to the amendment of rule 593: *Ernst & Young Inc. v. Central Guaranty Trust Co.*, 1999 ABQB 488 (Alta. Q.B.), para. 8.

90 The third party notice imports the IBI Group into the action commenced by UPA. A separate action was commenced by the IBI group against LPPI. In the third party notice LPPI incorporates similar claims to those it makes in its defence and counterclaim in the IBI Group action. Therefore, an award of costs in relation to the third party notice in the UPA action would accomplish what has not been allowed in relation to the counterclaim against the IBI Group in the IBI Group action.

91 The awarding of costs is a discretionary remedy and when costs have been denied in the IBI action it is not appropriate to award them to IBI in the UPA action, particularly when the actions are to be consolidated. This application for costs is also denied.

Conclusion

92 LPPI contested the validity of the lien of IBI. The IBI Group has the right to file a lien for at least some of the services it provided to the project.

93 The applications to declare valid the amounts of the liens of UPA, Agra and the IBI group are referred to trial.

94 The applications for the appointment of a trustee are adjourned to permit the filing of further evidence.

95 The applications for security for costs are denied.

96 The applications before this court to have the liens determined are required under the *Act*, section 53. The lien holders must bring these applications and the court must review the matter to determine if it can be decided summarily. In many instances such applications are handled by way of consent order. In this case no agreement was reached.

97 The court is given the power under the *Act* to make further orders as it considers necessary or desirable.

98 It has now been over two years since the lien holders stopped work on the site. The land is in limbo, and no plans were put forward by the owner in the course of the application to proceed with either construction or sale. The application to set the amount to be paid into court was withdrawn so there is apparently no intention on the part of the owner to replace the property with funds in court. The City is clearly becoming frustrated with the situation and the lien holders remain unpaid.

99 This matter needs to proceed to trial expeditiously. Affidavits have been filed, cross-examinations held and countless documents provided. The parties are to provide to the court, within 30 days of the date of this decision, an agreed-to litigation time line to take this matter to trial forthwith. Should no such agreement be reached, the parties are to appear at 10 a.m. November 30, 2010, and a time line will be set. They should be prepared to discuss at that time what, if any, examinations for discovery need to be held.

100 As the plaintiffs were required under the *Act* to bring this application and they are entitled to their liens, albeit in an amount to be determined, they are each awarded their costs of their application. However their success was limited and therefore the cost of the three half days of hearing time is set at one half day for a contested application. Costs for each lien claimant will be calculated in the column that corresponds to the amount established for that claimant's lien were funds to be paid into court. The costs are payable forthwith.

Applications granted in part.

End of Document

TAB 8

1992 CarswellOnt 608
Ontario Court of Justice (General Division)

Atlas-Gest Inc. v. Brownstones Building Corp.

1992 CarswellOnt 608, [1992] O.J. No. 1674, 26 R.P.R. (2d) 233, 2 C.L.R. (2d) 275, 35 A.C.W.S. (3d) 158

Re Contruction Lien Act, 1983

ATLAS-GEST INC. v. THE BROWNSTONES BUILDING CORPORATION, THE BREAKERS EAST INC., MONTREAL TRUST COMPANY, MONTREAL TRUST COMPANY OF CANADA and URSUS CAPITAL CORPORATION

MONTREAL TRUST COMPANY OF CANADA v. JOHN J. RYAN, KATHLEEN TIMMINS, 713905 ONTARIO LIMITED and THE BREAKERS EAST INC.

Stach J.

Heard: July 15-17, 1992
Oral reasons: July 17, 1992
Written reasons: August 11, 1992
Docket: Docs. 92-CQ-21862 and 38494/91

Counsel: *T. Kerzner, Q.C.*, for defendants Montreal Trust Company and Montreal Trust Company of Canada (Doc. 38494/91), and for plaintiff Montreal Trust Company of Canada (Doc. 92-CQ-21862).
John A.M. Judge and *Jim Doris*, for plaintiff Atlas-Gest Inc.
W.G. Dingwall, Q.C., and *Ian C. Marshall*, for defendants Brownstones Building Corporation, The Breakers East Inc. and Ursus Capital Corporation.
Max Shafir, Q.C., for lien claimant Forum Electrical.
Bruce Bos, for lien claimant Quality Rugs of Canada.

Subject: Property; Contracts; Civil Practice and Procedure; Corporate and Commercial
Related Abridgment Classifications
Civil practice and procedure
VIII Commencement of proceedings
  VIII.4 Originating notice, summons or application
    VIII.4.g Miscellaneous
Debtors and creditors
VII Receivers
  VII.3 Appointment
    VII.3.b Application for appointment
      VII.3.b.i General principles
Debtors and creditors
VII Receivers
  VII.4 Order appointing receiver
Real property
X Condominiums
  X.14 Miscellaneous
Headnote
Practice --- Institution of proceedings — Originating notice, summons or application

Receivers --- Appointment — Application for appointment
Receivers --- Order appointing receiver
Sale of Land --- Condominiums
Mortgages — Mortgagee's rights — Appointment of receiver — Essential management functions of condominium project being neglected — Trustee-receiver-manager appointed to oversee completion and management of project — Receiver's authority limited.
Receivers — Appointment — Procedure — Application for appointment — Mortgagee applying for appointment by way of motion — Motion valid and not a nullity — Appointment not required to be by way of application only.
Receivers — Appointment — Extraordinary remedy — Receiver-manager appointed to oversee completion of condominium project where developer neglecting essential management functions — Receiver required to protect mortgagee's security and eroding pool of funds required to satisfy numerous lien claimants.
A 68-unit luxury condominium project was constructed, and several interim occupancy closings had occurred. However, approximately $200,000 was still required to substantially complete the building to a point where the remaining unsold units could be offered for sale. The project was not registered as a condominium, and had not been completed because of complex litigation between the developer and the mortgagee. The mortgage had become due about a year and a half prior to the trial date, and approximately $13.6 million was due on principal and $1.3 million in accrued interest was owing to the mortgagee. Construction lien claims on the project totalled approximately $2.7 million and, in addition, there were also public utilities arrears on the project. The mortgagee moved for the appointment of a trustee-receiver-manager to take over operation of the project.

Held:

The motion was granted and the trustee-receiver-manager was appointed.
The mortgagee's motion for appointment of a receiver was proper, and such remedy was not required to be brought only by way of an application. The motion was not a nullity.
The essential management functions of the project were being severely neglected. The current real estate market was in a very uncertain position, and if the obdurate position of the developer continued, the impasse between it and the mortgagee would not end. The result would be that interest charges would continue to accrue, and to erode the pool of funds ultimately available to construction lien claimants. Moreover, the mortgagee's security interest was likely to be increasingly in jeopardy.
The appointment of a receiver-manager is an extraordinary remedy which is to be granted only rarely, where it is just and convenient in all of the circumstances to do so. Although there was no fraud on the part of the developer and no physical deterioration of the mortgagee's security interest, there were sufficient indicia to satisfy the test for a judge to exercise his or her discretion to appoint a receiver-manager. Having regard to the applicable considerations of whether there existed a vacuum in the management of the project, an abandonment by the owner/developer, insolvency, irresponsibility, risk of deterioration and risk to encumbrancers' security, two potential streams of substantial income could not be tapped, as final closings on occupied units could not take place and closings of unsold units could not occur.
The trustee-receiver-manager was to take all necessary steps to register the project as a condominium, and to complete all existing sales and sell all remaining unsold units. The receiver's authority was, however, to be narrowed so as not to intrude upon the ability of the developer to continue with or commence further legal proceedings in respect of its litigation with the mortgagee.

Table of Authorities

Cases considered:

Durcard Mechanical Contractors Ltd. v. I.C.R. Development Corp. (April 19, 1975), Grange J. (Ont. H.C.) [unreported] — *applied*

Macon Drywall Systems Ltd. v. H.P. Hyatt Construction Ltd., [1972] 3 O.R. 189, 17 C.B.R. (N.S.) 6, 27 D.L.R. (3d) 641 (H.C.) — *applied*

Royaledge Industries Inc. v. Perma-Roof Ontario Ltd. (1991), 44 C.L.R. 160, 2 O.R. (3d) 488 (Gen. Div.) — *applied*

Statutes considered:

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

s. 68

Rules considered:

Ontario, Rules of Civil Procedure —

R. 41

Ontario, Rules of Practice.

Motion by mortgagee for appointment of trustee-receiver-manager over uncompleted condominium project.

Editor's Note

The developer applied for a stay of this order pending appeal. On August 13, 1992, Mr. Justice Montgomery (Doc. Whitby 38494/91, Ont. Gen. Div.) refused the application on the basis of balance of convenience. Montgomery J. determined that a stay would cause delay which would harm unit purchasers and lien claimants, and would certainly jeopardize the mortgagee's security interests.

***Stach J.*:**

1 In this proceeding, the Montreal Trust Company of Canada and the Montreal Trust Company ("Montreal Trust") ask the court to appoint Coopers & Lybrand Limited as trustee of a parcel of land on which a 68-unit luxury building is situate, and as receiver-manager of The Breakers East Inc. ("Breakers"), the registered owner of the land in question.

2 The building is up, and although substantially complete, requires approximately $200,000 to render it into a state of completion that will permit the many remaining condominium units to be offered for sale. Several of the 68 condominium units have already been "sold," and have undergone the first phase of closing, known as "occupancy closing." The general contractor on this project has long since left the site as a result of a dispute with Breakers; that dispute is multi-faceted, and is now the subject of litigation.

3 The first mortgage on this development is held by the Montreal Trust Company of Canada, and although the mortgage matured on December 1, 1990, it remains unpaid. Approximately $13.6 million remains outstanding on the principal of that mortgage and, as at May 21, 1992, another $1.276 million has accrued in unpaid interest charges; and the interest continues to accrue.

4 The documentation necessary to effect registration of the project as a condominium is at hand, but has not been tendered for registration, owing in large measure to a dispute involving Breakers and a related corporation on the one hand and Montreal Trust on the other. The resulting stalemate has already endured for a considerable period. Numerous construction lien claims in excess of $2.7 million have been registered against the land.

5 Unit purchasers who have already occupancy closed are unable to secure title to their holdings, because title closing cannot take place until condominium registration is completed. The impasse between Breakers and Montreal Trust appears on the surface to stem from an obdurate position being taken by Breakers and a related corporation; the impasse shows no hint of ending or even abating. This continuing stand-off operates to the financial disadvantage of those persons who have completed occupancy closings but are unable and helpless to secure final closing. Debts for hydro and other services to the building are substantial, and are in considerable arrears.

6 The current real estate market is uncertain. If the impasse is allowed to carry on, interest charges will continue to accrue, and will continue to erode the pool of funds ultimately available to construction lien claimants. The security interest of Montreal Trust is likely to come increasingly in jeopardy.

7 Such is the background confronting the court in this proceeding.

8 Breakers takes the preliminary position that this motion is fatally flawed and that, in the result, it is a nullity. In short, counsel for Breakers advance the position that this proceeding ought to have been commenced by way of "application" rather than by "motion," and that the failure to do so is fatal to the position of Montreal Trust.

9 I hold a different view. Counsel have kindly provided me not only with the 1990 revision of the *Construction Lien Act*, R.S.O. 1990, c. C.30, but also the predecessors of that statute. I have carefully examined s. 68 of the current *Construction Lien Act* against the relevant statutory provisions in the predecessor legislation. Counsel have also provided me with the relevant *Rules of Practice* which obtained at the time the predecessor legislation was in effect, and also drew to my attention the current *Rules of Civil Procedure* which apply in respect of the current *Construction Lien Act*.

10 After hearing the submissions of counsel, I have come to the view that the "form" of the proceeding is not what governs, and that the proceedings as presently constituted in the form of a motion are in fact properly constituted. In coming to that view, I also place reliance on *Macon Drywall Systems Ltd. v. H.P. Hyatt Construction Ltd.*, [1972] 3 O.R. 189, 17 C.B.R. (N.S.) 6, 27 D.L.R. (3d) 641 (H.C.), in which Mr. Justice Lerner carefully analyzed a considerable body of case authority in coming to the conclusion that the request to appoint a trustee (under the predecessor legislation) was an interlocutory proceeding, i.e., and can be brought on a motion. The "old" *Rules of Practice* also contemplate such an interpretation. Although the 1990 revision of the *Construction Lien Act* and the "new" *Rules of Civil Procedure* have minor changes of wording, they do not dictate the result contended for by counsel for Breakers which, in my opinion, would be manifestly undesirable as a throwback to the old forms of action. Accordingly, any technical objection based upon the form of the proceeeding now before this court must, in my view, fail.

11 In the argument before me, it was vigorously urged by counsel for Montreal Trust that some of the documentation prepared by Breakers, by a closely related corporation and by Mr. Ryan, was either fraudulent or had a dishonest intent. I do not discern from the im pugned documentation, nor from the cross-examination of Mr. Reinards, any fraud, dishonesty or deceit. Rather, I regard the documentary steps taken by "the Breakers group" as an attempt to protect its additional investment vis-à-vis Montreal Trust, and as continuing evidence of the stalemate that exists between this group and Montreal Trust. The "Breakers group" may well have deliberately created this impasse to protect their interest vis-à-vis Montreal Trust on grounds that are not contemplated in the Montreal Trust security agreements. But there is no fraud.

12 The power of the court to appoint a trustee and a receiver-manager has its origin in the law of equity. Although the notice of motion does not clearly allege fraud or dishonest intent, the thrust of many parts of Mr. Reinards's affidavit in support of the application makes such allegations, and they were expanded upon in the submissions before me by counsel for Montreal Trust. Having regard for my finding that Montreal Trust has failed to established these very serious allegations, that alone may have been sufficient for me to dismiss this motion. I do not do so, however.

13 There are other factors which the court considers of such sufficient significance that, in the final analysis, an order appointing a trustee and a receiver-manager must issue. In making such an order on the basis that it is just and convenient in all of the circumstances to do so, this court is nevertheless mindful of the proposition that the appointment of a trustee, receiver-manager, is an extraordinary remedy, and must therefore be a remedy that is granted rarely.

14 One is similarly mindful of the series of cases (outlined in G.D. Watson and M. McGowan, *Ontario Civil Practice* (Toronto: Carswell, annual) under R. 41 of the *Rules of Civil Procedure*) which tend to indicate that the remedy is one that is not given without great care.

15 In applying what I consider to be the appropriate considerations, I found it most useful to review the decision of Mr. Justice Lane in *Royaledge Industries Inc. v. Perma-Roof Ontario Ltd.* (1991), 44 C.L.R. 160, 2 O.R. (3d) 488 (Gen. Div.). In addition, I drew assistance from the full test of an earlier unreported decision of Mr. Justice Grange (as he then was) in *Durcard Mechanical Contractors Ltd. v. I.C.R. Development Corp.* (April 19, 1975), (Ont. H.C.) [unreported]. Although their precise make-up may vary greatly, the factors that seem to emerge in these kinds of cases appear to have considerable commonality. Yet it is the particular mix of factors present, their precise make-up and their relative importance in the particular circumstances that must in the end govern the discretion which the court exercises.

16 In *Royalege*, for example, Mr. Justice Lane refused to appoint a trustee for reasons he summarized, in part, as follows (at p. 497 [O.R.]):

> There is no vacuum in the management of these premises; the owner has not abandoned them, is not insolvent and is not acting in an irresponsible way. There is no income flow to be taken in hand for the benefit of the lien claimants to avoid a sale of the premises. There is no danger of deterioration of the services that have been installed. The security of the lien claimants has not been shown to be at risk.

17 In *Durcard*, the situation before the court invoved an apartment building that was up and, although not fully rented, was apparently being managed properly. On the contested allegations before him, Mr. Justice Grange could not determine whether the lien claimants were truly at risk.

18 In the case before me, the luxury condominium building is "up," but unfinished, and not in a state that permits the sale of several additional units to go ahead. Nor, in this artificial stalemate, can those units which are already "sold" proceed to final closings. If existing unit sales were allowed to complete and prospective sales permitted to go ahead, two separate streams of substantial income flow could be tapped.

19 I am satisfied that the impasse is even now operating to the financial detriment of lien claimants and to the financial detriment of unit purchasers who are otherwise innocent. The impasse, if allowed to continue, will result in a proportionately greater erosion of their respective positions. Accordingly, I am satisfied that the impasse has resulted in the neglect of essential management functions.

20 To be sure, Breakers also has a direct interest in the overall completion of the enterprise and, to the extent that the Breakers "group" has a legitimate dispute with Montreal Trust or other interested persons as to the priority that can or should attach to its "additional investment," my reasons should not be taken as an attempt to eliminate that perceived right.

21 Although it cannot be said, particularly with the mortgagee having gone into possession of the unfinished premises, that there is any *physical* deterioration of the asset here in question, yet it is plain that the value of the assets is deteriorating in an economic sense.

22 In coming to this result, I am reluctant to characterize Breakers as insolvent. It is not entirely clear from the evidence whether Breakers's failure to pay many of the outstanding accounts resulted from insolvency, or whether the failure was just symptomatic of the impasse that developed between Breakers and Montreal Trust. To be sure, the mortgage indebtedness of Breakers to Montreal Trust is very substantial, and has remained outstanding for a period in excess of 18 months. There are serious implications to a finding of insolvency, however, and I believe that aspect of the matter is better left to the appropriate forum to deal with on greater evidence than was before me on this issue. Suffice it to say that a very significant debt has remained outstanding for a considerable period, and it is my view that the security interest of Montreal Trust also stands to be imperilled further,and proportionately more, as the situation in its present state is allowed to continue.

23 In conclusion, I find that there are sufficient indicia to meet the test most recently set out in the *Royaledge* case by Mr. Justice Lane.

24 In the order that I make appointing a trustee and receiver-manager, I do not wish to be over-broad. To the contrary, I choose explicitly to narrow the authority of Coopers & Lybrand Limited by making it plain that the trustee-receiver-manager may not intrude on the ability of the directors or officers of Breakers to continue with any current litigation or to commence any additional litigation, if advised, provided that such litigation does not have the effect of imperilling the assets which are the subject of the charge to the trustee. I am hopeful that counsel can draft an order which incorporates that intent. If there is no agreement, I may be of some assistance in setting the terms of the order.

25 Accordingly, I make an order appointing Coopers & Lybrand Limited as trustee of the lands in question and as receiver and manager of The Breakers East Inc., subject to the limitations that I have already expressed. By way of direction to the trustee and receiver-manager, there will be an order directing Coopers & Lybrand, in addition to its other duties, to take such steps as are necessary to register the property as a condominium corporation, to complete and close the existing agreements of purchase and sale and to sell unsold units. In addition, there will be an order requiring The Breakers East Inc. and Ursus

Capital Corporation, its officers, directors, agents (including solicitors), to turn over all documents, writings, records and things relating to the registration of the condominium corporation, and that each of them co-operate with the trustee and receiver and manager for these purposes.

26 I adverted earlier in my reasons to the fact that I did not discern any dishonest or fraudulent purpose in the documentation of the Breakers group. Because of that finding, I make no order for costs.

Addendum

27 Appended as Schedule "A" to these reasons is the form of order settled with the assistance of counsel on July 30, 1992.

Motion granted.

Appendix — Order

This motion made by Montreal Trust Company of Canada for an order appointing Coopers & Lybrand Limited as receiver and manager of The Breakers East Inc. and as trustee of the lands and premises referred to in this order, without security, was heard the 15th, 16th and 17th days of July, 1992, at Toronto, Ontario.

On reading the evidence and proceedings herein and upon hearing counsel for the parties:

1. This court orders that Coopers & Lybrand Limited be and it is hereby appointed receiver and manager without security of all of the assets, property and undertaking of The Breakers East Inc., save the causes of action being or to be advanced by The Breakers East Inc. against the plaintiff and its bonding company, with authority to manage and operate the business and undertaking of The Breakers East Inc. in respect of which it has been herein appointed and to act at once until further order of this court.

2. This court orders that Coopers & Lybrand Limited be and it is hereby appointed trustee under the *Construction Lien Act* of the lands and premises set out below:

> Parcel J-2, Section M-977, part of Block J, according to Plan M-977, designated as parts 2, 9 and 10, Plan 40R-11755, Town of Ajax, Regional Municipality of Durham, Land Titles Division of Durham (No. 40)

3. This court orders that the said trustee, and receiver and manager (hereinafter "Coopers"), shall have the powers set out in this order.

4. This court orders that The Breakers East Inc., its officers, directors, agents, servants, solicitors and shareholders, do forthwith deliver to Coopers all of the assets, property and undertaking of every kind and nature of The Breakers East Inc., save those excluded from Coopers' appointment, and all books, documents, contracts, papers and records of every kind relating thereto, and to co-operate with Coopers in so doing and without restricting the generality of the foregoing, all documents, plans, writings, records or things, necessary for the due and prompt registration of the subject lands and premises as a condominium, and the closing of the existing agreements of purchase and sale with purchasers, including those who have taken interim occupancy under their agreements of purchase and sale, subject to any further order of the court in respect of documents required solely for The Breakers East Inc.'s prosecution or defence of claims left to its control herein by paras. 1 and 7 hereof.

5. This court orders that Coopers be and it is hereby empowered to complete any construction or repairs that it feels are necessary, in order to permit sales of units to close or to be entered into and to comply with or otherwise perform agreements of purchase and sale with purchasers existing or future.

6. This court orders that Coopers be and it is hereby authorized to take appropriate steps for the preservation of the subject lands and premises.

7. This court orders that Coopers be and it is hereby fully authorized and empowered to institute and prosecute all actions, applications or proceedings as may in its judgment be necessary to take possession of, receive, protect, preserve or realize upon the assets, property and undertaking of The Breakers East Inc. in respect of which Coopers has been appointed and likewise to defend all actions, applications or proceedings as may in its judgment be necessary to take possession of, receive, protect, preserve or realize upon the assets, property and undertaking of The Breakers East Inc. in respect of which Coopers has been appointed and likewise to defend all actions, applications or proceedings instituted against The Breakers East Inc. or Coopers and to appear in and conduct the prosecution or defence of any such action, proceeding or application now or hereafter instituted in any court by or against The Breakers East Inc., the prosecution or defence of which will in the judgment of Coopers be necessary to take possession of, receive, protect, preserve or realize upon the assets, property and undertaking of The Breakers East Inc. in respect of which Coopers has been appointed, and the authority hereby conferred shall extend to such appeals as Coopers shall deem proper and advisable in respect of any order or judgment pronounced in any such action, application or proceeding. For greater clarity, the authority hereby given to Coopers shall not include the prosecution of causes of action in respect of which Coopers has not been appointed nor the defence of this or any other *Construction Lien Act* claim (including breach of trust claims even if commenced by proceedings under the *Courts of Justice Act*) against The Breakers East Inc. or the defence of Action 92-CQ-21862.

8. This court orders that Coopers shall be at liberty to retain agents or such assistance including solicitors from time to time as it may consider necessary for the purposes of preserving the said assets, property and undertaking of The Breakers East Inc. and carrying on its business in respect of which Coopers has been appointed, and generally performing its duties and powers hereunder.

9. This court orders that Coopers shall be at liberty to carry on the business of The Breakers East Inc. including:

(a) To carry on the business of The Breakers East Inc., including the power to sell those of its assets in respect to which it has been appointed in the ordinary course of business;

(b) To sell, lease or mortgage the assets, property, and undertaking of The Breakers East Inc. or any part or parts thereof in respect to which it has been appointed out of the ordinary course of business with the approval of this court, without waiting for the determination of any inquiries or accounts which may be directed herein or in the future, provided that the purchase money, rent or proceeds of any such realization shall be paid to Coopers;

(c) To manage, rent or lease and collect the rents, interim occupancy fees and other revenues from the lands and premises;

(d) To sell, lease, mortgage, or otherwise dispose of all or a part of the lands and premises in the ordinary course;

(e) To take such steps for the preservation and protection of the assets, property and undertaking of The Breakers East Inc. in respect of which it has been appointed as Coopers deems necessary;

(f) To purchase or lease such machinery and equipment as may be necessary for the improvement or enhancement of the business assets or undertaking of The Breakers East Inc. in respect of which it has been appointed;

(g) To settle, extend or compromise any indebtedness or claim by or to The Breakers East Inc. in respect of which it has been appointed or for which it has authority to defend;

(h) To enter into any agreements or incur any obligations necessary or reasonably incidental to the exercise of the powers granted in this order to Coopers.

10. This court orders that Coopers is authorized to join in and execute all necessary bills of sale, conveyances, deeds and documents of whatsoever nature in the name of and on behalf of The Breakers East Inc., in respect of the business, assets and undertaking in respect of which it has been appointed.

11. This court orders that any expenditure which shall be properly made or incurred by Coopers shall be allowed to it in passing its accounts and together with its remuneration shall form a charge on the assets, property and undertaking of The Breakers East Inc. in priority to all prior and subsequent encumbrances.

12. This court orders that Coopers may from time to time move this court for advice and direction in the discharge of its powers and duties hereunder.

13. This court orders that liberty be reserved to any interested person to bring a motion to this court for such further order as such person may be advised.

14. This court orders that there be no order as to the costs of this motion.

15. This court orders that Coopers make a first report to this court as to its administration within 60 days of the date of this order.

16. This court orders that Coopers shall pass its accounts from time to time and shall pay the balance in its hands into court to the credit of this action or as the court may otherwise direct. Coopers shall be at liberty from time to time to apply reasonable amounts from the moneys in its hands against its fees and disbursements and such amounts shall constitute advances against its remuneration when assessed.

17. This court orders that Coopers be and it is hereby empowered to borrow moneys without personal liability from time to time as it may consider necessary, not exceeding the principal sum of $200,000 in the aggregate at such rate or rates of interest as it deems advisable and for such period or periods as it may be able to arrange for the purpose of taking possession of, receiving, protecting, preserving or realizing upon the assets, property and undertaking of The Breakers East Inc. in respect of which it has been appointed and that as security for such borrowings and every part thereof, Coopers is authorized to pledge, assign or give security or securities on any such assets, property or undertaking but subject to the right of Coopers to be indemnified out of such assets, property and undertaking with respect to its liabilities, amounts and its own remuneration properly incurred and all of such amounts shall be a first charge on such assets, property and undertaking.

18. This court orders that the moneys authorized to be borrowed by this order shall be in the nature of a revolving credit and that Coopers may pay off or reborrow within the limits of the authority hereby conferred so long as the maximum principal amount owing in respect of such borrowings at any one time does not exceed the amount hereby authorized.

19. This court orders that for purposes of its borrowings, Coopers be authorized to give or issue receipts or receivers' certificates for any such moneys borrowed by it pursuant to this order, which receipts or certificates shall substantially be in the form of the Schedule "A" annexed hereto.

20. This court orders that any security granted by Coopers in connection with its borrowings shall not be enforced without leave of this court.

21. This court orders that no action, application or other proceedings shall be taken or continued against The Breakers East Inc. or Coopers without leave of this court first being obtained, except that the following shall be allowed to proceed as to The Breakers East Inc.:

(a) Those which have been excluded from Cooper's authority to defend by para. 7 of this order and from prosecuting by para. 1 of this order;

(b) Such other proceedings as the court may by order hereafter determine.

22. This court orders that the tenants of any property of The Breakers East Inc. do attorn to and pay their rents in arrears and accruing rents to Coopers and that any persons who are liable to pay interim occupancy fees to The Breakers East Inc. shall hereby attorn to and pay such occupancy fees in arrears and accruing occupancy fees to Coopers.

23. And this court orders that without limiting the generality of any preceding paragraph of this order, all persons, firms, and corporations be and they are hereby enjoined from disturbing and interfering with utility services including but not limited to the furnishing of gas, heat, electricity, water, telephone or any other utilities of like kind furnished up to the present date to The Breakers East Inc., and they are hereby enjoined from cutting off or discontinuing or altering any such utilities or services to Coopers, except upon further order of this court.

24. And this court orders that the liability of Coopers which it may incur as a result of its appointment or as a result of the performance of its duties hereunder, save and except for negligence or wilful misconduct, shall be limited to the net proceeds realized upon the lands and premises. The net proceeds of the lands and premises shall be the cash proceeds realized by Coopers from the disposition of the lands and premises or any part thereof after deducting the remuneration and disbursements of Coopers and after any moneys borrowed by Coopers pursuant to this order are repaid.

25. And this court orders that the provisions of para. 4 hereof shall apply mutatis mutandis to Ursus Capital Corporation, its officers, directors, solicitors, servants or agents to turn over all documents, writings, records and things relating to The Breakers East Inc., the lands and premises which are the subject-matter of this order, including but not limited to those necessary or required by Coopers in order to effect prompt registration of the subject property as a condominium, including but not limited to all plans, surveys and approvals required for condominium registration, and to co-operate with Coopers in so doing.

26. And this court orders that for greater clarity in its duties and powers hereunder, without in any way restricting the generality of those, Coopers shall take such steps as are necessary to register the subject property as a condominium, complete and close existing agreements of purchase and sale, complete necessary construction or repairs where required in order to close or effect sales of units, and sell all unsold units in the subject property.

SCHEDULE "A"

Amount $_____

Receiver's Certificate No.

1. This is to certify that Coopers & Lybrand Limited, trustee and receiver and manager of the assets, property and undertaking of The Breakers East Inc. (the "company") acknowledges receipt of $_____ as trustee and receiver and manager, and that the trustee and receiver and manager is indebted to the holder of this certificate in the sum of $_____ in the aggregate.

2. The principal sum of $_____ represented by the certificate is payable on the _____ day of _____ 199_, [or, on demand] with interest thereon at the rate of _____ % per annum payable monthly on the _____ day of _____, 199_, and thereafter in each and every month.

3. The said principal sum of $_____ together with interest thereon is issued pursuant to the order and is secured by the assets, property and undertaking of the company, but subject to any higher ranking security in the nature of a mortgage, lien or encumbrance and to the right of the trustee and receiver and manager to be indemnified out of such property for its liabilities, its expenses and its own remuneration properly incurred.

4. All sums payable in respect of principal and interest under this certificateare payable at the office of _____ at _____ in the City of Toronto, in the Municipality of Metropolitan Toronto.

5. In case default shall be made in payment of interest on this certificate and such default shall continue for a period of _____ days, the principal of this certificate may be declared immediately due and payable by the holder hereof. This certificate and any security granted pursuant to it shall not be enforced without leave of this court.

6. All liability in respect of the whole or any part of the principal sum for which this certificate is issued and for interest thereon shall at any time and from time to time be terminated on tender to the holder hereof of the whole or such part of such principal sum then outstanding with interest accrued thereon to the date of such tender.

7. The trustee and receiver and manager does not undertake and is not under any personal liability to pay any sum in respect of which it may issue certificates under the terms of the said order.

Dated at _____ this _____ day of _____, 199_.

The Breakers East Inc.

Per:_____

End of Document

TAB 9

1992 CarswellOnt 474
Ontario Court of Justice (General Division), Commercial List

Confederation Trust Co. v. Dentbram Developments Ltd.

1992 CarswellOnt 474, [1992] O.J. No. 3870, 9 C.P.C. (3d) 399

CONFEDERATION TRUST COMPANY v. DENTBRAM DEVELOPMENTS LTD., AMNON ALTSCHULER GORDON COBB, OAKBRUM INVESTMENTS LIMITED and THE TORONTO-DOMINION BANK

Borins J.

Judgment: April 24, 1992
Docket: Doc. 92-CQ-8560CM

Counsel: *Michael McGowan* and *Kevin J. Zych*, for plaintiff.
Harvey M. Mandel, for defendants Dentbram Developments Ltd. and Amnon Altschuler.
Theodore Nemetz, for defendant Gordon Cobb.

Subject: Civil Practice and Procedure; Corporate and Commercial
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.i General principles
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.ii Person entitled to make application
VII.3.b.ii.B Creditor
Headnote
Receivers --- Appointment — Application for appointment — General
Receivers --- Appointment — Application for appointment — Person entitled to make application — Creditor
Receivers — Application for appointment of receiver — Mortgage providing for appointment of receiver — Default occurring — Just and equitable to appoint receiver.
Receivers — Persons entitled to apply — Creditors — Default occurring under mortgage — Choice of receiver being choice of creditor.
Pursuant to a mortgage, the plaintiff was entitled to appoint a receiver in the event of default. After the defendant defaulted under the mortgage, the plaintiff unsuccessfully attempted to take steps to protect the property ad realize the debt owing. The plaintiff moved for the appointment of a receiver.
Held:
The motion was granted.
Although the appointment of a receiver was a discretionary remedy and one that ought not to be exercised lightly, in this case it would be just an equitable to appoint a receiver. Where receivers were suggested by both parties, an the receivers possessed similar qualities, generally the receiver suggested by the creditor, who had carriage of the proceedings, should be appointed.

Motion for appointment of receiver.

***Borins J.*:**

1 I appreciate that the appointment of a receiver is a discretionary remedy and that the court ought not lightly to exercise it discretion to appoint a receiver. However, on the evidence before me, I am satisfied that it is just and equitable that a receiver be appointed. The plaintiff has demonstrated that its right under the mortgage to take steps to preserve the property and to obtain the benefits of the property in the realization of its debt have proved to be ineffective. As well, in consideration what is fair and equitable, I have taken into consideration that the mortgage contract contains an express covenant in which the mortgagee agrees to the appointment of a receiver in the event of default, and default has, of course, occurred. I my view, the appointment of a receiver is required, inter alia, for the reasons contained in para. 20 of the plaintiff's original factum.

2 The mortgagor has not provided any evidence why Price Waterhouse, the receiver proposed by the by the plaintiff, should not be appointed. I am satisfied that Price Waterhouse is impartial, disinterested and able to deal with the rights of all interested parties in a fair manner. When receivers proposed by each party possess similar qualities, generally speaking he receiver proposed by the creditor, who has carriage of the proceedings, should be appointed.

3 In he result, a order is to issue pursuant to the order as amended contained in Sched. "A" to the notice of motion which I have placed my fiat.

Motion granted.

End of Document