

CANADA / JUDGMENT

4HD Construction Ltd. v. Dawson Wallace Construction Ltd.

2020 BCSC 1224

COURT

Supreme Court of British Columbia

DECIDED

19 August 2020

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2020 BCSC 1224 4HD Construction Ltd. v. Dawson Wallace Construction Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

4HD Construction Ltd. v. Dawson Wallace Construction Ltd.,

2020 BCSC 1224

Date: 20200819

Docket: S205145

Registry: Vancouver

Between:

4HD Construction Ltd.

Appellant

And

Dawson Wallace Construction Ltd.

Respondent

Before: The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court, dated May 28, 2020

(Dawson Wallace Construction Ltd. v. 4HD Construction Ltd., 2020 BCSC 905)

Counsel for the Appellant:

S. Lin

Counsel for the Respondent:

D.S. Lamb

R. Clark

Place and Date of Hearing:

Vancouver, B.C.

July 22, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 19, 2020

INTRODUCTION

- [1] The appellant appeals the order of Master Muir, issued May 28, 2020, cancelling a claim of lien pursuant to s. 24 of the Builders Lien Act, S.B.C. 1997, c. 45 [BLA], and also cancelling a related certificate of pending litigation ("CPL").
- [2] The respondent is the contractor on a project for the construction of a distribution centre on property in Langley, British Columbia (the "Property"). TDL Group Corp. ("TDL") is the registered owner of the Property. The respondent awarded the appellant a subcontract for work on the Property. A dispute subsequently arose regarding payment terms.
- [3] The appellant registered a claim of lien against the Property in January 2020. In May 2020, the respondent filed a petition seeking to cancel the claim of lien pursuant to s. 24 of the BLA on deposit of a lien bond that secures the entirety of the appellant's lien claim. After the petition was filed but before the hearing before Master Muir, the appellant filed a notice of civil claim and registered a CPL against the Property. The notice of civil claim advances a claim for a builders lien and a claim for a constructive trust based on unjust enrichment.
- [4] The appellant argues that s. 24 of the BLA does not authorize the court to cancel a CPL, even where the underlying claim of lien is cancelled on the deposit of sufficient security for the claim. The appellant points to the absence of direct language in s. 24 authorizing the cancellation of a CPL. The appellant says that the respondent is limited to the available methods for discharging a CPL under the Land Title Act, R.S.B.C. 1996, c. 250. Alternatively, the appellant argues that even if the BLA provides authority for the cancellation of a CPL, that authority was not properly exercised in this case given that the appellant advanced equitable claims that could independently give rise to an interest in the Property.

- [5] The respondent says that Master Muir's order is consistent with the statutory objects of the BLA and with long-established practice on an application to cancel a claim of lien pursuant to s. 24 of that Act. The respondent says Master Muir correctly concluded that allowing a CPL to remain on title after a lien bond securing the entire value of the claim was posted would provide the respondent with double security for its claims. The respondent says there is no principled or statutory basis for such a result.

HISTORY OF THE PROCEEDING

The filing of the claim of lien

- [6] It appears to be common ground between the parties that the respondent awarded a subcontract to the appellant for forming work on October 21, 2019. The appellant says that the parties exchanged proposed contractual terms but no written contract was ever signed. The appellant says it began work at the Property sometime in November or December 2019. The appellant withdrew from the site on or about December 20, 2019, after a dispute arose over payment.
- [7] On January 6, 2020, the appellant registered a claim of lien against title to the Property in the amount of \$115,234.15 (the "Claim of Lien").

The petition to cancel the claim of lien and filing of the notice of civil claim

- [8] The respondent says it learned of the Claim of Lien in May 2020. As of May 6, 2020, a progress payment of over \$1.5 million was due from TDL to the respondent in connection with the project. TDL advised the respondent that it was withholding the progress payment until the Claim of Lien was removed from title to the Property. This created urgency from the respondent's perspective. The respondent says that without the progress payment, it would be unable to pay subcontractors and material suppliers which would lead to significant costs and construction delay.
- [9] The respondent says the Claim of Lien presented further problems for the project as it impeded BC Hydro from installing electrical power sources. BC Hydro advised that a statutory right of way was necessary to permit the design and construction of power source connections. The right of way could not be registered while the Claim of Lien remained on title.
- [10] On May 11, 2020, in accordance with the published procedures for this Court's operations during the COVID-19 pandemic, the respondent submitted an online request for the urgent hearing of a petition to cancel the Claim of Lien. On May 13, 2020, the Court granted the respondent's urgent hearing request. The respondent was directed to file and serve its petition and supporting affidavit on the appellant by May 15, 2020, with the appellant having a deadline of May 21, 2020, to file and serve any responsive material.

- [11] In accordance with the Court's direction, the respondent filed and served its petition and supporting material on May 15, 2020. The orders sought in the petition included the discharge and cancellation of the Claim of Lien and any related CPLs after the respondent deposited a lien bond in the full amount of the Claim of Lien (\$115,234.15) with the Registrar of the British Columbia Supreme Court.
- [12] On May 21, 2020, the appellant filed its response material. The appellant's affidavit material included a copy of a notice of civil claim that was filed by the appellant on May 20, 2020 in the New Westminster registry. The respondent and TDL are defendants to the action. On May 20, 2020, the appellant registered the CPL against the Property.
- [13] The hearing of the petition proceeded by telephone before Master Muir on May 28, 2020.

The decision of Master Muir

- [14] Master Muir provided oral reasons for judgment on the same day the application was heard. Master Muir first addressed the appellant's argument regarding the sufficiency of the proposed lien bond. She held:
- [7] I am satisfied that the lien bond presented is clear on its face that it stands in the place of the lands and premises, covers all form of security that could be granted for the lien claim that is made and will be quite sufficient to fully compensate the respondent for its claim of lien.
- [15] I do not understand the appellant to argue on this appeal that Master Muir erred in her conclusion that the lien bond is sufficient security for the appellant's Claim of Lien.
- [16] Master Muir then turned to the appellant's arguments that the respondent could not seek cancellation of a CPL pursuant to s. 24 of the BLA, and further that an order should not be issued in any event given that the appellant also claimed a constructive trust over the Property based on unjust enrichment. In rejecting these arguments, Master Muir stated:
- [10] My view, then, of the law is that, should I be amenable to ordering that the lien be cancelled and security be provided, that that removes any legal basis for having a CPL on title based on the lien, and, hence, the CPL, being baseless, would have to be removed.
- [11] In my view, the [petition] respondent's assertion that to claim unjust enrichment supports a continuation of the CPL is not a sufficient argument, to maintain both the CPL and the security in place of the lien. The claim for unjust enrichment is essentially duplicative of the lien claim, and to allow the CPL to remain on title after the petitioner has paid the full amount of the lien claim into court, or posted a bond in lieu, would provide the respondent with double security for its claims. Hence, the orders that the petitioner seeks are granted.
- [17] Accordingly, Master Muir ordered that the Claim of Lien against the Property, "and any certificates of pending litigation related thereto" be cancelled or withdrawn on deposit with the court of a lien bond in the amount of \$115,234.15.

ISSUES ON APPEAL AND STANDARD OF REVIEW

[18] There are essentially two issues raised on appeal:

- i. Did the Master have jurisdiction to order the cancellation of the CPL on a petition under s. 24 of the BLA?
- ii. If so, did the Master err in her assessment of the relevant circumstances in exercising the jurisdiction to cancel the CPL in this case?

[19] The parties agree on the principles that govern the standard of review on an appeal from a master. The review of an interlocutory decision of a master is a true appeal and appellate interference is warranted only if the master is "clearly wrong". However, a master's decision on a question of law, a final order, or a ruling that raises questions vital to the final issue in the case will be reviewed by way of rehearing on the merits based on the record that was before the master. The question in the latter category of cases is whether the master was correct, not whether she was clearly wrong. See: *Canadian Western Bank v. 353806 B.C. Ltd.*, 2017 BCSC 1072 at para. 11; *Abermin Corp. v. Granges Exploration Ltd.* (1990), 45 B.C.L.R. (2d) 188 (S.C.).

[20] The parties agree that Master Muir's decision in the present case was interlocutory in that it did not finally decide the rights of the parties but rather addressed the question of interim security for the Claim of Lien.

[21] The first issue raised on this appeal - the Master's jurisdiction to cancel the CPL - is a pure question of law that is reviewable by way of rehearing on a standard of correctness. The second issue raised on appeal - the Master's decision to cancel the CPL in the circumstances of this case - attracts a more deferential standard of review. Appellate interference is warranted only if it is shown that the Master was clearly wrong in granting an order cancelling the CPL on these facts.

CLAIMS OF LIEN UNDER THE BLA

[22] A lien is a statutory remedy available to a party who has provided material or services to a construction site. The right to a lien is created by s. 2 of the BLA, which provides:

2 (1) Subject to this Act, a contractor, subcontractor or worker who, in relation to an improvement,

- (a) performs or provides work,
- (b) supplies material, or
- (c) does any combination of those things referred to in paragraphs (a) and (b)

has a lien for the price of the work and material, to the extent that the price remains unpaid, on all of the following:

- (d) the interest of the owner in the improvement;
 - (e) the improvement itself;
 - (f) the land in, on or under which the improvement is located;
 - (g) the material delivered to or placed on the land.
- (2) Subsection (1) does not create a lien in favour of a person who performs or provides work or supplies material to an architect, engineer or material supplier.
- [23] A lien under the BLA is an in rem right that attaches to the land and improvements. One objective of the statutory lien, and the BLA as a whole, is to prevent owners of the land from receiving the benefit of work and materials supplied to land without paying for them: *Northern Thunderbird Air Ltd. v. Royal Oak Mines Inc.*, 2002 BCCA 58 at paras. 24-25.
- [24] Pursuant to s. 15 of the BLA, a claim of lien is made by filing in the land title office a claim of lien in the prescribed form. The registrar of land title must then endorse a memorandum of the filing on the register of title to the land or against the estate or interest in the land described in the claim of lien. Section 21 of the BLA provides that a claim of lien takes effect from the time the work began or the time the first material was supplied for which the lien is claimed, and it has priority over other claims after that date.
- [25] A claim of lien is enforced by an action in the British Columbia Supreme Court: BLA s. 26. The limitation period for initiating an action to enforce a claim of lien is set out in 33(1) of the BLA as follows:
- 33 (1) If a claim of lien has been filed, an action to enforce the claim of lien must be commenced and, unless the claim of lien has been removed or cancelled under section 23 or 24, a certificate of pending litigation in respect of the action must be registered, not later than one year from the date of its filing, in the land title office or gold commissioner's office in which the claim has been filed.
- [26] Pursuant to s. 33(5) of the BLA, the lien is extinguished unless an action to enforce a claim of lien is commenced, and a CPL is registered, within the time provided in s. 33.
- [27] Section 24 of the BLA establishes a mechanism by which an owner of land on which a claim of lien has been filed, or a contractor working on their behalf, can apply to court to have a claim of lien cancelled on provision of security in lieu of the claim of lien. Section 24 provides:
- 24 (1) A person against whose land a claim of lien has been filed, and a contractor, subcontractor or any other person liable on a contract or subcontract in connection with an improvement on the land, may apply to a court to have the claim of lien cancelled on giving sufficient security for the payment of the claim.

- (2) The court hearing the application under subsection (1) may, after considering all relevant circumstances, order the cancellation of the claim of lien on the giving of security satisfactory to the court.
 - (3) The value of the security required under an order under subsection (2) may be less than the amount of the claim of lien.
 - (4) The registrar or gold commissioner in whose office a claim of lien is filed must, on receiving an order or certified copy of the order made under subsection (2), file it and cancel the claim of lien as to the property affected by the order.
 - (5) The giving of security for the payment of a claim of lien under subsection (1) does not make the owner liable for a greater sum than provided for in section 34.
- [28] An application under s. 24 of the BLA involves a two-prong test. The first is consideration of what claims should be taken into account in fixing security. The second involves determining the appropriate amount of security. The court exercises discretion in fixing the amount of security, including discretion to fix an amount that is less than the claim. That discretion must be exercised judicially taking into account the legislative objectives of protecting those who supply work and materials to a construction project so long as the owner is not prejudiced: *Q West Van Homes Inc. v. Fran-Car Aluminum Inc.*, 2008 BCCA 366 at para. 56.
- [29] The effect of an order cancelling a lien under s. 24 is to permit the security to stand in substitution for the owner's land over which the charge was registered. As explained by Justice Wedge in *Greater Vancouver Sewerage and Drainage District v. A-Millenia Construction Ltd. et al.*, 2006 BCSC 1629 at para. 25:
- [25] In *Paramount Drilling and Blasting Ltd. v. North Pacific Roadbuilders Ltd.*, 2004 BCSC 622, [2004] B.C.J. No. 949 (QL), affirmed on appeal 2005 BCCA 378, [2005] B.C.J. No. 1581 (QL), the court held that where security is posted under s. 24 of the Act and liens against the owner's property cancelled, the security is merely substitution for the owner's land. The effect of posting the lien bond in this case is that the registered lien claim has been cancelled and the land as security for the claim is replaced with the security posted in court. However, the claim remains a claim against the land. Cancellation of the lien does not alter the character or nature of the lien, and the claim as a matter of substance remains an action in rem. Whether the entity posting the security in court was the owner of the property or some entity in the chain of liability under the Act, (in this case the contractor), is irrelevant in the sense that it does not alter the nature of the lien claim itself.
- [30] Section 24 of the BLA ensures that the interests of lien claimants are protected on an interim basis pending resolution of the dispute while still providing a summary mechanism for cancellation of a claim lien on title that may otherwise prejudice the owner and lead to increased construction cost and delay.

ANALYSIS

Issue 1: Did the Master err in law in concluding that a CPL may be cancelled under s. 24 of the BLA?

Position of the Parties

- [31] The first issue on appeal raises a question of jurisdiction. The jurisdictional question arises because s. 24 of the BLA is silent on the court's power to cancel a CPL as consequential relief on an application to cancel a claim of lien. The parties disagree as to the implication of the absence of explicit authority in s. 24 for the court to cancel a CPL.
- [32] The appellant argues that once a notice of civil claim is filed and a CPL registered against the owner's property, as required by s. 33(1), the claim of lien is "spent" and it is the CPL, not the claim of lien, that is the operative instrument encumbering the land. After a CPL is registered, there is, on the appellant's theory, no claim of lien to cancel under s. 24. The appellant argues that to interpret s. 24 of the BLA as containing a power to cancel a CPL would undermine the purpose of s. 33 and its express wording.
- [33] The appellant thus submits that if an owner wishes to cancel a CPL, even one related to a builder's lien, the owner is limited to the methods available under the Land Title Act. Relying on *NextGen Energy Watervliet TWP, LLC v. Bremner*, 2018 BCCA 219 at paras. 5-7, the appellant says that there are only three grounds upon which a CPL may be cancelled under the Land Title Act: (i) pursuant to s. 254 if the subject court action is dismissed and the appeal period has expired, (ii) pursuant to ss. 256-257 upon security being posted if the CPL is causing hardship and inconvenience to the land owner, and (iii) pursuant to the court's inherent jurisdiction where the pleadings on their face are incapable of supporting an interest in land. The appellant says that the first and third grounds are inapplicable in the present case as the action has not been dismissed and the pleadings on their face establish an interest in land. I note parenthetically that there appears to be doubt in any event as to whether a master has the inherent jurisdiction to cancel a CPL on the third ground: *Fritz v. 848 Yates Nominee Ltd.*, 2019 BCSC 1294 at para. 11.
- [34] In the present case, the appellant says the only basis upon which the respondent could have applied to cancel the CPL registered against the Property is pursuant to ss. 256-257 of the Land Title Act. Pursuant to s. 256, an applicant must provide evidence of the hardship and inconvenience that the applicant has experienced or is likely to experience as a result of the registration of the CPL. Section 256(3) of the Land Title Act requires that an application to cancel a CPL must, where the applicant is a party to the proceeding, be brought in the action to which the CPL relates.

- [35] Finally, the appellant relies on the principle of strict construction that it says applies to the interpretation of the BLA. The appellant points out that there must be strict compliance with the requirement in s. 33 of the BLA that a CPL is registered at the time an action to enforce the claim of lien is filed: *Alan Jones Construction Limited v. Hicks*, 2019 BCSC 568. The appellant says there is no express language in s. 24 of the BLA that would override the requirements of s. 33 or otherwise authorize the cancellation of a CPL.
- [36] The respondent says that the appellant's arguments are premised on a misunderstanding of the statutory purposes of the BLA generally and s. 24 in particular. The respondent argues that the purpose of s. 24 is to permit security in substitution for the land over which the claim of lien is registered, and consequently to clear title prior to determination of the claim of lien. Section 24 thus achieves the statutory purposes of protecting lien claimants while avoiding prejudice to the owner and others affected by the claim of lien.
- [37] The respondent says there is nothing in the language of s. 33 of the BLA, or its purpose within the legislative scheme, to support the interpretation advanced by the appellant. The respondent does not dispute that the appellant has taken steps to perfect its Claim of Lien as required by s. 33 of the BLA. However, the respondent says the fact that the appellant has complied with s. 33 does not answer the question of whether the CPL can, once registered, be cancelled in an application under s. 24.
- [38] The respondent says that Master Muir was correct in concluding that the cancellation of the claim of lien removed any legal basis for having the CPL remain on title. The respondent points out that the order granted by Master Muir is a standard form of order in builders lien practice, and indeed incorporated the standard terms recommended in the forms and precedents section of Derek A. Brindle, Robert W. Jenkins, J. Marc MacEwing & Jonathan Vogt, eds, *British Columbia Builders Liens Practice Manual*, loose-leaf, (Vancouver: CLEBC, 2019). The respondent points to other cases in which an order in this form has been granted, including by this Court in *Iberdrola Energy Products Canada Corporation v. Factory Sales & Engineering Inc. d.b.a. FSE Energy*, 2018 BCCA 272, rev'g in part 2017 BCSC 1776 [*Iberdrola*].

Discussion

The rule of strict construction

- [39] I will begin by addressing the appellant's submission that a rule of strict construction applies in interpreting s. 24 of the BLA.
- [40] The proper approach to interpreting the BLA is set out at paras. 26-34 of the Court of Appeal's decision in *Iberdrola*. The Court notes that the concept of "strict" construction of a statute historically applied in diverse areas of the law, including penal laws, laws that derogate from property rights, and taxation statutes. The era of strict construction has largely been overtaken as a result of the Supreme Court of Canada's adoption of the "modern rule" of statutory interpretation in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21. The modern rule requires that the words of a statute be read in their entire context, and

in their grammatical and ordinary sense harmoniously with the scheme of the Act and statutory objects and purposes. The modern rule is consistent with s. 8 of the Interpretation Act, R.S.B.C. 1996, c. 238, which requires that every enactment be given such "fair, large and liberal construction" as best ensures the attainment of its objects.

- [41] The concept of strict construction is relegated to a limited and secondary role under the modern rule of statutory interpretation. If interpretation in accordance with the modern rule reveals genuine ambiguity in a statutory provision and the provision falls within a category of statutory provisions that were traditionally subject to strict construction, then the ambiguity may be resolved by applying a rule of strict construction: *Iberdrola* at para. 30, citing *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at paras. 28-30.
- [42] In my view, there are at least two difficulties with the appellant's reliance on a rule of strict construction in the present case. First, the appellant appears to equate the principle of strict construction with a requirement that s. 24 must be interpreted literally and without regard to the provision's context and purpose or the overall legislative purposes. This is inconsistent with the modern rule of statutory interpretation which, as *Iberdrola* directs, is the starting point for interpreting any provision of the BLA.
- [43] Second, to the extent that the rule of strict construction might have some limited and secondary role in resolving ambiguity, s. 24 of the BLA is not the type of provision that was traditionally strictly construed. The purposes of the BLA are furthered by a legislative scheme that employs three main mechanisms: the right to a lien, holdback provisions, and the creation of a trust. Since these rights did not exist at common law, the threshold question of entitlement is strictly construed. However, once entitlement is established, the BLA is construed liberally with a view to its remedial purposes: *Bank of Montreal v. Peri Formwork Systems Inc.*, 2012 BCCA 4 at para. 62. Section 24 of the BLA is not a provision that determines entitlement.
- [44] In summary, I do not find it necessary or appropriate to invoke the rule of strict construction in order to determine the issue before me; that is, whether the legislature intended s. 24 of the BLA, interpreted in context and in light of statutory objects, to include a power on the part of the court to cancel a CPL as consequential relief on cancellation of a claim of lien.
- [45] The fact that the power to cancel a lien is not explicit in s. 24 is not determinative. A power may be conferred by implication where it is necessary to achieve legislative objects and the intention of the legislature to imply such a power can be discerned with relative certainty: *Sullivan on the Construction of Statutes* (6th ed, (Markham: LexisNexis Canada Inc., 2014) at 386-87; *New Brunswick Electric Power Commission v. Maritime Electric Company Ltd. et al.*, [1985] 2 F.C. 13 (C.A.) at 26-28.

Can a CPL be cancelled under s. 24 of the BLA?

- [46] For the reasons that follow, in my view s. 24 must be interpreted to include an implicit power on the part of the court to cancel a related CPL on an application to cancel a claim of lien. Such a power is necessary to avoid undermining statutory objects and to ensure coherence in the operation of the scheme as a whole.
- [47] The appellant's jurisdictional argument depends on interpreting the BLA, and s. 33(1) in particular, as having the effect of cancelling the claim of lien once a CPL is registered against the subject property. There is nothing in the wording of the statute to support such a theory. The appellant points to no statutory mechanism that removes the claim of lien from title on the filing of a CPL. Despite the appellant's reliance on the principle of strict construction, its theory would in fact require the court to read into the BLA at least two provisions that are not explicit: first, that a claim of lien is "spent" (by which I assume the appellant means cancelled) once a CPL is filed, and second, that s. 24 of the BLA is temporally limited in that a claim of lien only exists, and therefore can only be cancelled, prior to the registration of a CPL.
- [48] In my view, there is no basis in the wording, context, or objectives of the BLA to infer that the legislature intended the statute to operate in this manner. The result would be to render s. 24 effectively meaningless as an interlocutory mechanism to clear title after a CPL has been registered. This is contrary to the legislative objective of providing a summary means for owners or contractors to clear title, and thereby avoid construction delay and associated costs, while still protecting the rights of the lien claimant.
- [49] In oral argument, the appellant submitted that even if a claim of lien is not cancelled by the registration of a CPL, an owner or contractor is nevertheless required to bring an application under ss. 256-257 of the Land Title Act in order to seek cancellation of the CPL. This proposed interpretation requires two separate applications: the first one to cancel the lien under s. 24 of the BLA, and the second one to cancel the CPL under the LTA.
- [50] The convoluted nature of the process proposed by the appellant further undermines its suggested interpretation of the BLA. On the appellant's theory, an applicant is forced to bring two applications, each with different tests and evidentiary requirements, to achieve the single purpose of clearing title to the land. Where the CPL relates to a claim of lien, there is no rationale that I can discern for its continued registration once an order is granted under s. 24 substituting security for the property. As Master Muir observed, once the claim of lien is cancelled, the CPL is baseless.
- [51] In my view, the language of s. 33(1) of the BLA supports the view that a CPL is redundant and unnecessary once the underlying claim of lien is cancelled. The requirement to file a CPL applies "unless the claim of lien has been removed or cancelled under section 23 or 24". I note that this exempting language was not in the precursor legislation to the BLA. Sections 26-27 of the Mechanics' Lien Act, R.S.B.C. 1960, c. 238, required the filing of a CPL to preserve a claim of lien without an express exception where the claim of lien had been cancelled. Yet in *Universal Supply Co. Ltd. v. S. Radatske Construction Co Ltd.*, [1972] B.C.J.

No. 738 (C.A.), our Court of Appeal held the provisions should not be construed as requiring lien claimants to go through the "abortive motion" of filing a CPL after a claim of lien had been cancelled on provision of substitute security.

- [52] In the same vein, the legislation should not be construed as requiring an owner or contractor to bring a separate application to cancel a CPL under ss. 256-257 of the Land Title Act after the underlying claim of lien has been cancelled under s. 24 of the BLA. Although the CPL serves no purpose in protecting the lien claimant's interest in such circumstances, the owner would still be required to prove hardship and inconvenience from the registration of the CPL in order to have it removed. There is no indication in the BLA that the legislature intended such result.
- [53] The mischief that could ensue from the appellant's proposed interpretation of the BLA is evident in the circumstances of the present case. The appellant filed a notice of civil claim and a CPL in reaction to receiving notice of the respondent's petition to cancel the claim of lien. On the appellant's theory, the respondent's only recourse was to draft a second application to cancel the CPL pursuant to ss. 256-57 of the Land Title Act, a step which would no doubt have delayed the prompt hearing of the respondent's petition.
- [54] The requirement in ss. 256-257 of the Land Title Act that the applicant prove hardship and inconvenience from the continued registration of the CPL, which are not preconditions under s. 24, invariably invites a more prolonged hearing process. This is evident in the materials before me on this application. The respondent advanced grounds of urgency for the purpose of satisfying the Court's COVID-19 protocols. The appellant disputes the urgency and wishes to advance arguments that the respondent has not met the threshold for hardship and inconvenience under s. 256 of the Land Title Act. It is not necessary to engage in a debate over hardship and inconvenience if s. 24 of the BLA authorizes all of the relief sought by the respondent, including cancellation of the related CPL. Unlike an application to cancel a CPL under ss. 256-57 of the LTA, proof of hardship and inconvenience is not a precondition to the cancellation of a claim of lien under s. 24 of the BLA.
- [55] Section 24 assists in achieving the overall objectives of the BLA in protecting lien claimants while avoiding prejudice to owners and other impacted parties resulting from the cloud on title. The BLA provides a statutory code for the assertion and enforcement of lien claims, as well as the operation of interlocutory mechanisms for clearing claims of lien from title. It is a code that is directed at balancing the interests at stake in the particular context of disputes over payment for the provision of work and material to a construction project. I can see no basis for inferring a legislative intent within this scheme to require an owner to apply under s. 256-257 of the Land Title Act to cancel a CPL after the claimant's interests have already been fully protected by the substitution of sufficient security in place of the land.

[56] I conclude, therefore, that s. 24 of the BLA, interpreted in light of statutory objectives, implicitly authorizes the court to order cancellation of a CPL as consequential relief to the cancellation of a claim of lien. Master Muir was correct in concluding that she had jurisdiction to order the cancellation of a CPL in such circumstances under s. 24 of the BLA.

Issue 2: Did the Master err in exercising discretion to cancel the CPL in the circumstances of this case?

[57] The appellant argues, in the alternative, that even if Master Muir had jurisdiction to order the cancellation of the CPL under s. 24 of the BLA, she erred in exercising her discretion to do so in this case. The appellant acknowledges that the applicable standard of review on this aspect of the appeal is whether Master Muir was clearly wrong.

[58] The appellant relies on s. 24(2) of the BLA which provides that the court may order the cancellation of a lien "after considering all relevant circumstances". The appellant says Master Muir failed to consider, or at least give appropriate weight to, three factors: (i) the appellant's pleading advanced a claim for a constructive trust based on unjust enrichment in addition to a claim for a builders lien, (ii) the absence of a written contract between the parties, and (iii) an alleged lack of merit to the respondent's claims of urgency.

[59] For the reasons that follow, I do not agree that Master Muir overlooked relevant considerations in exercising her discretion to cancel the claim of lien and CPL under s. 24 of the BLA.

[60] With respect to the first factor, the appellant emphasizes that the lien bond only secures the claim of lien under the BLA. If the appellant is not successful on the claim of lien but does succeed on the claim for unjust enrichment, then the lien bond provides no security. For this reason, the appellant says it was entitled to have the CPL remain on title, subject to any application to cancel registration under ss. 256-257 of the Land Title Act.

[61] I begin by observing that Master Muir did not overlook this factor. Rather she rejected the appellant's arguments because she concluded that the claim for unjust enrichment was "essentially duplicative" of the lien claim. The only question for me is whether she was clearly wrong in reaching this conclusion.

[62] There is no issue in this case that an agreement of some form was reached between the appellant and the respondent for the provision of forming work on the project. The respondent says that it awarded a subcontract to the appellant. The appellant characterizes the parties' arrangement as an "understanding", and says it commenced work before a written contract was signed. There is a dispute between the parties regarding payment terms. The appellant says it is entitled to certain payments for the work and materials it has provided.

[63] The essence of the appellant's claim, accordingly, is that it has provided work and supplied materials in relation to an improvement, that it has not been paid for the price of the work and material, and that it has an interest in the land on which the improvement is located.

The claim for a constructive trust mirrors the lien claim. The appellant says that TDL has benefitted from the plaintiff's contribution of skill, labour, materials, and supplies to the improvement of the Property, and the appellant has suffered a corresponding deprivation because it has not been paid. On this basis, it seeks a constructive trust over the Property.

- [64] If the appellant succeeds in establishing that it provided work and supplied materials to the project for which it has not been paid, then the appellant will establish its claim of lien under the BLA. If it is not successful in establishing these things, then it will not be successful in its claim for unjust enrichment. The claim of lien and claim of unjust enrichment are, as Master Muir noted, duplicative in the sense that they rely on the same factual underpinning.
- [65] To allow the appellant to maintain a CPL in relation to the claim for unjust enrichment in these circumstances even after the claim of lien has been cancelled would, again, undermine the purposes of s. 24 of the BLA and the statute as a whole. It would, as Master Muir points out, allow the appellant to have double security for what is essentially a single claim for repayment of work and materials.
- [66] Moving to the second factor cited by the appellant, the fact that there may be no written contract as the appellant asserts is, to my mind, irrelevant. Entitlement to a lien under the BLA does not, as I read the statute, depend on the existence of a written contract. Master Muir did not commit a reversible error in failing to consider an irrelevant circumstance.
- [67] The final factor cited by the appellant, the alleged lack of urgency to the respondent's petition, is not a factor that Master Muir was required to consider under s. 24 of the BLA. As I have already noted, the respondent was required to satisfy the Court that the petition met the criteria for an urgent hearing during the COVID-19-related suspension of the Court's operations. The ruling that the matter was sufficiently urgent was made prior to the hearing before Master Muir. It does not appear to me from the record that the appellant sought to revisit that ruling before Master Muir. Urgency is not otherwise a precondition to the exercise of the Court's discretion under s. 24 of the BLA.
- [68] For these reasons, I conclude that Master Muir was not clearly wrong in exercising her discretion to grant the relief sought by the respondent, including cancellation of the CPL, in this case.

Application to adduce fresh evidence

- [69] I will briefly address the respondent's application to adduce fresh evidence on this appeal in the form of a copy of the CPL that the appellant registered against the Property on May 20, 2020. This document was not part of the petition record at the hearing before Master Muir. The appellant objects to the receipt of the CPL in evidence on appeal on the basis that it does not meet the test for fresh evidence. The respondent says the document does not constitute fresh evidence because it was a document referred to by Master Muir even though it was not before her. Alternatively, the respondent says that even if the document is fresh evidence, it

is in the interests of justice to admit it on appeal.

- [70] The respondent says the significance of the CPL is that it describes the nature of the charge against the Property as "Certificate of Pending Litigation - Builders Lien Act". This, the respondent says, makes it evident that the appellant elected to register its CPL as part of its Claim of Lien and that it does not relate to the claim of unjust enrichment.
- [71] In a letter to the respondent objecting to the fresh evidence, counsel for the appellant explained that it attempted to register the CPL without a description of the nature of the claim to which it related. The Land Title Office (LTO) advised that it would not accept the form for registration unless it was amended to include specific reference to the BLA. The appellant suggests that it is a practice of the LTO to register only one CPL against land even where a notice of civil claim advances multiple claims giving rise to an interest in land.
- [72] In my view, the copy of the registered CPL that the respondent seeks to tender at this time does constitute fresh evidence. It is evidence that was available at the time of the hearing before Master Muir but was not tendered at that time.
- [73] I decline to admit the evidence on this appeal because it does not meet the test for the admission of fresh evidence set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759. While the CPL may have some tangential relevance to the matters in issue, it is not a document of such significance that it could be expected to affect the result. The question of whether a CPL was necessary to preserve the appellant's claim for unjust enrichment, independent of the lien claim, was a matter to be decided on the basis of the pleadings and the provisions of the BLA. This is what Master Muir did. The manner in which the nature of the charge is described on the CPL, whether due to LTO practice or a plaintiff's election, is neither determinative nor particularly material. If the CPL had included the description "Certificate of Pending Litigation - Constructive Trust Based on Unjust Enrichment", this would not, and should not, have changed the outcome.
- [74] For these reasons, I dismiss the respondent's application to adduce fresh evidence.

CONCLUSION

- [75] The appellant's appeal is dismissed with costs to the respondent at Scale B.

"Horsman J."

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