

CANADA / JUDGMENT

Outback Developments Inc. v. Hare

2019 BCSC 2404

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 2404 Outback Developments Inc. v. Hare

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Outback Developments Inc. v. Hare,

2019 BCSC 2404

Date: 20190517

Docket: S110926

Registry: Kelowna

Between:

Outback Developments Inc.

Plaintiff

And

Matt Hare

Defendant

Correction notice: Typographical errors in these reasons for judgment were corrected on May 6, 2020

Before: The Honourable Madam Justice S. Matthews

Oral Reasons for Judgment

In Chambers

Counsel for Plaintiff:

W.L. Thiessen

Counsel for Defendant:

C.A. Fraser

Place and Date of Trial/Hearing:

Kelowna, B.C.

April 16, 17, 18, and

May 17, 2019

Place and Date of Judgment:

Kelowna, B.C.

May 17, 2019

- [1] These reasons for judgment were given orally after the conclusion of the trial of this matter. They have been edited without changing the substance.

Introduction

- [2] Outback Developments Inc. claims that the defendant, Matt Hare, its neighbour in a residential neighbourhood in Kelowna, filed an invalid lien against its development property just as it was to close on the sale of the property causing it to incur legal fees to negotiate and post security. The subject of the lien was a retaining wall built by Mr. Hare near or on the property line between Outback's property and Mr. Hare's property. Outback asserts it was aware that Mr. Hare was building a retaining wall, but its principal Kelly Whitehouse understood it was being built on Mr. Hare's property and never agreed to pay for any portion of the cost of the retaining wall.
- [3] Mr. Hare asserts the lien was validly filed as he and Mr. Whitehouse agreed that he would build a retaining wall on the boundary between their properties and Outback would pay for one half of the materials. He says the retaining wall was required because the Outback property was an uphill property and the guidelines of the community development in which their lots were situated provided that such walls were the responsibility of uphill owners. Mr. Hare contends that the wall is situated on both properties. He counterclaims for damages for breach of the contract he says existed by which Outback agreed to pay for one half of the cost of the materials.
- [4] The central issues are whether the retaining wall was built pursuant to an agreement between Outback and Mr. Hare, such that Outback was an owner and Mr. Hare was a contractor, whether it was built in part on Outback's lot and, if so, whether Outback is deemed to have authorized it. There are also issues as to whether damages for an invalidly filed lien are appropriate and, if so, in what amount. Outback also seeks damages to condemn Mr. Hare's behaviour such as a fine pursuant to s. 45 of the Builders Lien Act, SBC 1997, c. 45, s. 19 exemplary damages, or punitive damages. Mr. Hare's counterclaim for

damages for breach of contract raises factual issues that overlap with the factual issues pertaining to the validity of the lien.

Was the Lien Valid when Filed?

- [5] A person who files a lien against land to which the lien claim does not attach is liable for costs and damage incurred by the owner in accordance with s. 19 of the Builders Lien Act.
- [6] A lien for work and material is described in s. 2 of the Builders Lien Act:.

Lien for work and material

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.
- [7] Section 3 provides for liens on work done with the knowledge of an owner, but not at the request of the owner:

Deemed authorization

3 (1) An improvement done with the prior knowledge, but not at the request, of an owner is deemed to have been done at the request of the owner.

- (2) Subsection (1) does not apply to an improvement made after the owner has filed a notice of interest in the land title office.
 - (3) Subsection (1) does not apply to an improvement on land owned by the government.
- [8] In *West Fraser Mills Ltd. v. BKB Construction Inc.*, 2011 BCSC 1460, overturned at 2012 BCCA 89 but not on this point, Madam Justice Gropper described the purposes of the legislation citing several leading authorities as follows:

[18] The purpose of the Act, which gives the right to lien, was described by the court in *Q West Van Homes Inc. v. Fran-Car Aluminum Inc.*, 2008 BCCA 366. At paragraph 28, quoting from *Noranda Exploration Co. Ltd. v. Sigurdson*, [1976] 1 S.C.R. 296, the court stated the objective as "to protect the claims of those who supply work and materials so long as the owner is not prejudiced . . ."

[19] In *Kettle Valley Contractors Ltd. v. Cariboo Paving Ltd. et. al.* (1986), 1 B.C.L.R. (2d) 236 (C.A.), the Court of Appeal discussed the purpose of the Act in detail at 251 - 252:

In *Hickey v. Stalker*, 53 O.L.R. 414, [1924] 1 D.L.R. 440 (C.A.), Meredith C.J.C.P. defined the purpose of mechanics' lien legislation as follows [p. 415]:

Speaking generally, the object of the Mechanics' Lien Act is to prevent owners of the land getting the benefit of buildings erected and work done at their instance on their land without paying for them.

... In *Scratch v. Anderson*, 11 Alta. L.R. 55, [1917] 1 W.W.R. 1340 at 1342, 33 D.L.R. 620, Harvey J. stated that the purpose of the Act was to ensure that "the land which receives the benefit shall bear the burden".

These aims are implicit in the scheme of the Act. The right to claim a lien or an interest in the owner's trust fund flows in a pyramid from the owner through the contractor to those who assist the... [contractor] in performing his contract with the owner and thus contribute to the improvement on the land.

These statements of the purpose of the legislation are consistent with the recognized requirement that, before a lien will lie, the claimant must have contributed physically to the improvement of the site. It is for this reason, for example, that the Act requires that materialmen place material on the land as a condition of claiming. They are also consistent with the requirement that the connection between the work done or material supplied and the improvement on the land be direct. Both those requirements are arguably met by the claimant in the case at bar.

[9] In this case, Outback argues that the lien did not attach because Mr. Hare is not a contractor as he was not engaged by Outback to build the retaining wall, the retaining wall is not an improvement in relation to Outback's property because it was built entirely on Mr. Hare's property and there was no price agreed to by contract.

[10] Mr. Hare argues that because he and Mr. Whitehouse agreed that he would build the wall and that he and Outback would share the cost of the materials for the wall, he was a contractor. He asserts that the wall is partially built on Outback's property because part of the footings, the drain tile, the drain gravel, and the geotech anchor extend onto Outback's property. He further argues that the retaining wall was built with Mr. Whitehouse's prior knowledge and so Outback is deemed to have requested the construction of the retaining wall.

[11] Several Builders Lien Act definitions relate to these arguments including contractor, improvement, material and owner:

"contractor" means a person engaged by an owner to do one or more of the following in relation to an improvement:

- (a) perform or provide work;
- (b) supply material;

but does not include a worker;

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

"material" means movable property that is delivered to the land on which the improvement is located and is intended to become part of the improvement, either directly or in a transformed state, or is consumed or used in the making of the improvement, including equipment rented without an operator;

"owner" includes a person who has, at the time a claim of lien is filed under this Act, an estate or interest, whether legal or equitable, in the land on which the improvement is located, at whose request and

- (a) on whose credit,
- (b) on whose behalf,
- (c) with whose knowledge or consent, or
- (d) for whose direct benefit

work is done or material is supplied, and includes all persons claiming under the owner, but does not include a mortgagee unless the mortgagee is in possession of the land

[12] Before considering whether, on the facts of this case, the retaining wall was an improvement, Mr. Hare was a contractor, and Outback was an owner deemed to have requested the wall, it is convenient to set out the circumstances in which Mr. Hare built the retaining wall.

[13] Outback and Mr. Hare built houses on side-by-side building lots. Outback is a residential construction company owned by Kelly Whitehouse and Ruth Whitehouse. Matt Hare is an RCMP officer who lives and works in Kelowna.

[14] Mr. Whitehouse describes himself as a general contractor. Outback purchases residential lots and builds houses on them. Mr. Whitehouse oversees every aspect of the construction together with Ms. Whitehouse. Generally speaking, they divide the duties such that Mr.

Whitehouse is responsible for the construction in terms of being on site, obtaining the supplies, getting quotes from contractors and subcontractors, and supervising them in their work. Ms. Whitehouse tends to the financial matters including setting the budget, tracking adherence to the budget, paying for supplies and paying contractors and subcontractors. In addition, Ms. Whitehouse takes the lead on issues pertaining to design of the residence and interior finishing.

- [15] In 2014, Outback built a residence in a development known as Black Mountain in Kelowna. The developer is a company called Melcor Developments Ltd. Mr. Hare visited the house built by Outback with a builder to look at it as he was planning to build a house in the same development. At that time, Outback had purchased another building lot, Lot 26, on Prestwick Lane in the same development. Mr. Hare purchased Lot 27, next door to Lot 26. Although the lots are not perfectly oriented north and south, generally speaking, Lot 27 is to the east of Lot 26.
- [16] Mr. Whitehouse testified that the lots are typical rancher walk-out lots. This means that the street level side of the lot is relatively level to the street and there is a slope down to the backyard of the lot on the north side, where the lots are bounded by another road, Birkdale Avenue. Mr. Hare does not dispute this description. I find it to be accurate.
- [17] Mr. Whitehouse testified that Lot 27 was slightly lower than Lot 26 at the front street level. He testified that the backyard elevation was the same across the two lots until well inside the Lot 27 property line. This is in dispute as Mr. Hare asserts that Lot 26 was the "uphill" lot to Lot 27.
- [18] Mr. Whitehouse was the general contractor for Outback's build. Outback's intention was to buy the lot, build a house, and sell a completed home. Generally speaking, that includes landscaping, but in the case of 370 Prestwick Lane, Outback was approached by a potential buyer before the landscaping had been undertaken and sold the property prior to landscaping. With regard to the slope of the lot, Mr. Whitehouse testified that Outback did not do any work on the Lot 27 side, but on the Lot 25 side, the west side of Lot 26, Outback dug into the bank and put a retaining wall there so as to create a level backyard for the property. Outback constructed and paid for the retaining wall.
- [19] Mr. Hare also has experience in construction. Prior to joining the RCMP, he attended the Northern Alberta Institute of Technology and obtained a journeyman's carpenter certificate. He had a homebuilding company with a partner for about two or three years. He has built homes on and off while employed by the RCMP.
- [20] Mr. Hare bought Lot 27 in the Black Mountain development to build a residence. He intended it to be for himself, but he had also considered selling it. He commenced construction in February 2015. He hired a contractor to build it up to the lockup stage, and then he took over the rest of the build. He built the retaining wall which is the subject of the dispute between the parties.

- [21] Throughout the spring of 2015, Mr. Hare and Mr. Whitehouse communicated with each other pertaining to various issues. For example, Mr. Whitehouse testified that Mr. Hare's contractor asked Mr. Whitehouse if he could store fill from the basement excavation for Mr. Hare's build on Outback's lot. Mr. Whitehouse agreed.
- [22] Mr. Hare testified that with regard to the retaining wall, he and Mr. Whitehouse discussed the retaining wall while in their backyards. Mr. Hare testified that the discussion included the fact that he wanted to build a retaining wall that would enhance his backyard and wanted to see if they could reach a mutual agreement to the benefit of both of them. Mr. Hare testified that he told Mr. Whitehouse that he wanted to do some sort of retaining wall and they discussed the building guidelines pertaining to the Black Mountain development. Mr. Hare testified that the guidelines made it clear that dirt between the properties had to be retained and the lot on the high side had to retain the dirt. Mr. Hare testified that he had already built a retaining wall on the other side of his Lot 27, which was the high side in relation to the neighbouring lot to the east, to retain the dirt.

Is the Retaining Wall an Improvement in Relation to Outback's Land?

- [23] The meaning of improvement is broad. It includes anything made, constructed, erected, built, altered, or repaired. It includes clearing and excavating.
- [24] The key issue is whether the alleged improvement, the retaining wall, and any of its constituent parts and any auxiliary components are on Outback's land. Above ground the retaining wall is entirely on Mr. Hare's property, Lot 27. Mr. Hare argues that certain underground components, the footings, geotech anchor, drain tiles and drain rock, all extend into Outback's property, Lot 26.
- [25] The evidence of Mr. Whitehouse in this regard is that he understood from his conversations with Mr. Hare that the retaining wall would be built on Mr. Hare's side of the property line. What he observed during the construction of the retaining wall was consistent with that. He observed a line strung along what he believed to be the property line. Mr. Hare testified that he, with the assistance of a surveyor friend strung that line essentially from property line pin to pin along the property line.
- [26] Mr. Whitehouse testified that, from what he observed, Mr. Hare built the retaining wall entirely on the Lot 27 side of the line. He agreed that he was not constantly watching the construction of the retaining wall in order to confirm this.
- [27] I find that Mr. Whitehouse expected the retaining wall to be built entirely on Lot 27. He observed that the excavation was entirely on Lot 27 and what he observed of the construction of the retaining wall took place entirely on Lot 27. However, I also find that he did not observe all aspects of the construction.
- [28] Mr. Hare testified that the footings for the retaining wall, which he built, straddled the property line and, in addition, material which he describes being like a ski fence netting and which is called geotech anchor, was used in between some layers of the Allan Blocks as an

anchor and then covered with fill. Mr. Hare testified that the netting extended out horizontally from the retaining wall before it was covered with fill such that it extended into Lot 26 by a few feet. He testified that he installed drain tile and drain rock on the uphill side of the retaining wall and that extended into Lot 26. He argues that all of that forms part of the retaining wall and, therefore, constitutes an improvement on Lot 26.

- [29] After the dispute in this matter arose the parties, through the developer Melcor, agreed to have a survey of the retaining wall. The Agreed Statement of Facts between the parties on this trial include that a representative of Melcor, after receiving the survey, wrote to the parties saying:

My final non-binding comment is that Lot 26 has virtually preserved the pre-construction elevation (give or take a few centimeters) and has not created a burden to retain the final grades. The retaining wall has been constructed wholly within Lot 27 and the purpose seems to have been to create more level space at the lower elevation.

- [30] Mr. Hare disagrees with the conclusion that the retaining wall is wholly on Lot 27.

- [31] The determination of whether parts of the retaining wall extend into Lot 26 below the surface calls, in part, for me to assess credibility of Mr. Whitehouse compared to Mr. Hare as they are the only two witnesses who testified as to the excavation and the retaining wall built within the excavation.

- [32] In assessing credibility, the following approach described by Madam Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para 186, aff'd 2012 BCCA 296, is often cited by judges of this court because it comprehensively and efficiently summarizes the task at hand:

- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919) 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with [the] independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).

- [33] In *Novak Estate, Re*, 2008 NSSC 283, Nova Scotia Supreme Court summarized the same factors as Madam Justice Dillon did in *Bradshaw* and noted that caution should be used when relying on demeanour and consideration should be given to the motive that parties to the proceedings who are witnesses may have to fabricate evidence.
- [34] With regard to dangers of using demeanour as a key factor in determining credibility, I also refer to *R. v. Sue*, 2011 BCCA 91, at para 46-47; and *R. v. P.(S.H.)*, [2003] N.S.J. No. 171, at paras 28-30.
- [35] Generally, where the evidence of Mr. Hare and Mr. Whitehouse conflicts, I prefer the evidence of Mr. Whitehouse. Mr. Whitehouse was very precise with his evidence. He did not purport to know things that he did not know. As will be discussed below, he conceded that he did not see everything that went on with the building of the retaining wall and he conceded matters on cross-examination even where they did not help his case. The other objective evidence fits with his evidence.
- [36] Mr. Hare's evidence does not fit with the preponderance of probabilities on key issues. That is so particularly on the evidence of whether there was an agreement between the parties about the retaining wall. I will have more to say about that in due course.
- [37] On the issue of whether the retaining wall extended into Lot 26, Mr. Whitehouse did not totally contradict Mr. Hare because Mr. Whitehouse did not see the totality of the construction. The survey could not determine whether the anchor netting extended into the Lot 26 property. Mr. Whitehouse agreed that conceptually if this type of anchor netting was used and was installed properly, it could extend onto Lot 26. He disagreed that it did because he believed he would have seen the machinery necessary to excavate and place it. However, he agrees he was not there during the entire time. I conclude that Outback has not proven that the retaining wall remains completely within Lot 27. It likely extends into Lot 26 by virtue of the anchor netting material inserted between layers of the Allan Blocks and covered by fill. I find that the footings are entirely on Lot 26 based on Mr. Whitehouse's testimony that he observed that the excavation in which the footings were constructed was entirely on Lot 26.
- [38] The evidence did not establish that the drain tiles or drain rock were part of the retaining wall as opposed to simply laid in the excavation next to the retaining wall. I accept Mr. Whitehouse's evidence that the excavation was completely on Lot 26 and did not extend beyond the string that Mr. Hare claimed he accurately placed to show the property line. It is possible that there was further excavation done for the geotech netting. However, while Mr. Hare testified that there was additional excavation done for the geotech netting, he did not give evidence that the drain tiles and rock were placed in the additional excavation. There is simply not enough evidence for me to conclude whether the drain tiles and drain rock are on Lot 26. However, because I have decided that the geotech netting is part of the retaining wall, is an improvement and does extend into Lot 26, the drain tile and rock is not determinative.

[39] I conclude that the geotech netting anchor of the retaining wall extends into Lot 26 and is an improvement on Lot 26.

Was Mr. Hare a Contractor?

[40] In order to file a lien, s. 2 requires that Mr. Hare must be a contractor, subcontractor or worker. The definition is set out above. The key issue is whether Mr. Hare was engaged to perform work in relation to Outback's property.

[41] Mr. Hare testified that he and Mr. Whitehouse discussed materials and costs and agreed that he would do the labour and Outback would pay for half the material. He testified that they also discussed the choice of materials. He observed that Outback had built a concrete wall on the other side of its property. Mr. Hare did not like the look of the concrete wall and suggested that the retaining wall he would build would be built with Allan Blocks which would look better and be cheaper.

[42] Mr. Whitehouse testified that up until September 2015, he and Mr. Hare had a cordial relationship as neighbours who are builders of residential properties. He said that he would discuss many aspects of building, including qualified and cost-efficient sub trades with Mr. Hare. Mr. Whitehouse testified that he came to know that Mr. Hare was building a retaining wall when Mr. Hare said he was going to do so and asked to store fill on the northeast corner of Outback's lot. Mr. Whitehouse testified that he had no problem with that as when Mr. Hare's contractor had asked to store fill from the excavation of the basement of Lot 27 on Lot 26, there had been no problems. Mr. Whitehouse recalls that being the extent of the first discussion about the retaining wall.

[43] Mr. Whitehouse testified that at some point Mr. Hare asked him about recommendations for people to build the retaining wall. Mr. Whitehouse sent him a text providing the contact information for Outback's landscaping contractor. Mr. Whitehouse also testified that at some point Mr. Hare told him he was going to be using Allan Blocks for the retaining wall. Mr. Whitehouse saw this conversation as the same type of conversation they had over the months while building their projects. Mr. Whitehouse testified that although they discussed Mr. Hare's retaining wall prior to it being built and as he was building it, they never discussed an agreement by which the cost of the retaining wall would be shared or the concept that it was the responsibility of Outback to retain dirt and to pay for a retaining wall to do so, until September 2015 when the retaining wall had been built and Mr. Hare demanded payment.

[44] Mr. Whitehouse testified that he understood that the retaining wall would be on Lot 27. He testified that if he had become concerned that the retaining wall was not going to be on Lot 27, he would have had a specific conversation with Mr. Hare about that. Aside from that issue, he did not think he had any really valid input into the retaining wall as he was of the view that if Mr. Hare wanted to build a retaining wall on his property, he could build it with whatever materials he wanted and however he wanted.

- [45] There is dispute on the evidence as to whether the retaining wall was completed in July 2015 or September 2015. Given the conclusions I have reached on the rest of the matters and the approach I have taken to damages, I need not decide this issue. However, based on the uncertainty in the evidence on this issue, Outback did not prove on a balance of probabilities that the wall was completed in July 2015.
- [46] On September 16, 2015, Mr. Hare had a title search done pertaining to Lot 26. He testified on cross-examination that he had done it for the purpose of filing a lien against the property. On September 18, 2015, Mr. Hare sent Mr. Whitehouse a text which reads as follows:

Kelly its Matt here from next door at your build on prestwick.

Just want to know where we stand with the costs of the retaining wall in the backyard. I have spoken about it a few times and just wanted to know where it stands. If you could let me know would appreciate it.

Thanks in advance

Matt Hare

- [47] Mr. Whitehouse testified that when he received this text, he did not know what Mr. Hare was referring to. He texted Mr. Hare back and said that he was at the building site on Prestwick Avenue and could meet. Mr. Hare responded that he was at work. Ultimately, they met the next day.
- [48] Their evidence is quite similar as to what transpired at that meeting. Mr. Hare advised Mr. Whitehouse that his share of the cost of building the retaining wall was approximately \$8,300. Mr. Whitehouse asked him what he was talking about. Mr. Hare advised Mr. Whitehouse that they had agreed that Outback would pay for half the materials to build the retaining wall and Mr. Hare would build it. He had built it and wanted Outback to pay him. Mr. Whitehouse replied that he never made any such agreement.
- [49] They dispute whether they debated that Outback was responsible for the retaining wall on the basis that its property was the uphill property. Mr. Whitehouse testified that Mr. Hare said that if he did not pay for the retaining wall, Mr. Hare would put a lien on Outback's property and that he responded that Mr. Hare could not put a lien on the property because he had not done any work on the Outback property. Mr. Whitehouse testified that Mr. Hare said that if Mr. Whitehouse was not agreeable to pay, Mr. Hare would pull down the retaining wall and the Outback land would slough onto Mr. Hare's property. Mr. Hare denies making threats about a lien and taking down the wall.
- [50] They both agreed that Mr. Whitehouse directed profanities at Mr. Hare and walked away. They agree that Mr. Whitehouse turned around and came back and asked Mr. Hare what he wanted. He testified that Mr. Hare replied that if Mr. Whitehouse paid him \$5,000 they would call it square. Mr. Whitehouse walked away. Mr. Hare agrees that that exchange took place.

- [51] Both Mr. Whitehouse and Ms. Whitehouse testified as to their standard procedure when hiring subcontractors to work on projects. Unless it is a contractor or subcontractor with whom they have worked and they are confident that the entity is the right subcontractor to do the job, they obtain competitive bids, review them together, and determine who the subcontractor will be. They exchange some sort of documentation with the subcontractor pertaining to the estimate for the work to be done and to confirm that the work is to be done and on what basis. Even when they contract to a subcontractor they have worked with before and have not gone through the competitive bid process, there is some sort of documentation which confirms the scope of the work to be done and the price which will be paid for it.
- [52] They both testified that they did not seek any bids to build a retaining wall between Lot 26 and Lot 27 and they had no documentation with Mr. Hare confirming that he would build a retaining wall and at what price.
- [53] Mr. Hare's claim that he and Mr. Whitehouse agreed that he would supply the labour to build the retaining wall and Outback would pay for one half of the materials is inconsistent with the evidence of Mr. Whitehouse and Ms. Whitehouse about how Outback goes about its business in building such properties. This property was a business matter for Outback. It was building the house on Lot 26 to sell it, and the cost of all the inputs into the finished project affected Outback's profits. It makes sense that they had a process such as what they described in their evidence for hiring subcontractors. It does not make sense that they would agree to have a retaining wall built with no cost estimate and simply an open-ended agreement to pay for half of the materials.
- [54] I find that the wording of the text sent to Mr. Whitehouse by Mr. Hare on September 8, 2015, is inconsistent with Outback having engaged Mr. Hare. The text language does not speak of an agreement reached, but rather asks a question. That question makes no sense if there was an agreement. Mr. Hare testified that he was simply conveying to Mr. Whitehouse that the retaining wall was now built and it was time for Outback to pay. I do not accept this evidence as it does not fit with the other evidence.
- [55] For example, Mr. Hare demanded payment for an amount equal to the total material costs for which he had receipts notwithstanding that the purported agreement was that Outback would pay for one half of the cost of the materials. Mr. Hare testified that he paid cash for the balance and that the materials for which he paid cash totalled almost as much as the amount he had receipts for. I do not believe this evidence. I conclude that Mr. Hare made that up to be in a position to recoup all of the material costs he incurred in building the retaining wall.
- [56] Mr. Hare did not come to the meeting on September 19, 2015 to present the invoices for one half of the materials and submit them for payment in accordance with the agreement he asserts existed. He simply went to the meeting to try to convince Mr. Whitehouse to pay. As I have explained, he did not even have invoices for the entirety of the materials. In addition,

Mr. Hare did the title search prior to sending the text to Mr. Whitehouse inquiring about payment and prior to the meeting at which he demanded payment for the retaining wall. He agreed he did it for the purpose of filing a lien. I conclude that he knew the property was going to be sold and he wanted to be in a position to file a lien.

- [57] Mr. Whitehouse's evidence makes sense, and Mr. Hare's evidence does not make sense to such an extent that I conclude that Mr. Hare concocted it. I accept Mr. Whitehouse's evidence as to the content of the discussion on September 19, 2015. With regard to the disputed discussion about the uphill property, the evidence that Mr. Hare relied on this factor is consistent with the balance of the evidence in which he repeatedly asserted this building guidelines as supporting his view on who was responsible for the wall. As to the dispute as to whether he threatened to file a lien or pull down the wall, those threats are consistent with the facts that he did a property search shortly before he sent the text for the purpose of using the threat of the lien and the imminent sale of the Outback property to assert pressure on Outback.
- [58] Mr. Hare made up the suggestion that there was an agreement that Outback would pay for one half of the materials in order to assert the lien claim. When that did not work, he relied on the building guidelines. When the survey and the developer concluded that the building guidelines did not help him, he did not perfect his lien by filing a civil claim, he refused to remove it.
- [59] I conclude that Outback and Mr. Hare did not reach an agreement for Mr. Hare to build the retaining wall. Mr. Hare is not a contractor because he was not engaged to supply the materials for the retaining wall or to build the retaining wall.

Was Outback an owner deemed to have requested the wall?

- [60] An owner is someone who has an interest in the land on which an improvement is located at whose request and on whose credit behalf with whose knowledge and consent or for whose direct benefit work is done or material is supplied.
- [61] Accordingly, if the work is not done at the alleged owner's request, the alleged owner is not an owner. A request, however, may be expressed or it may be based on deemed authorization.
- [62] Outback did not expressly request Mr. Hare to build the retaining wall. Accordingly, the question arises as to whether there was a deemed authorization within the meaning of s. 3 of the Builders Lien Act. A deemed authorization arises where an improvement has been done with the prior knowledge, but not at the request of an owner.
- [63] The retaining wall was clearly built with the prior knowledge of Mr. Whitehouse; however, given the definition of owner, which requires that the improvement be on the owner's land, the prior knowledge must include that the improvement was to be on Outback's land.

- [64] In other words, a person cannot construct a structure with the knowledge of the adjoining property owner, trespass while doing so, and then claim the subject of the trespass owes him or her for the structure because the subject of the trespass knew in advance it was to be built even though he or she did not know in advance it was to be built on his or her property.
- [65] Mr. Hare argues that I should conclude that Mr. Whitehouse had prior knowledge that the geotech netting, the drain tiles, and the drain rock would extend onto Lot 26 by virtue of what Mr. Whitehouse saw and what he knew about building retaining walls.
- [66] On this issue, the string that Mr. Hare placed to mark the property line is important. Mr. Hare testified that it did accurately mark the property line. Mr. Whitehouse said he saw it, and although he did not check it, it looked like it demarked the property line to him. He testified that from what he saw, the excavation, the footings, and everything he saw placed in the excavation was well within Lot 27. As I already discussed, he did not see everything and, in particular, he did not see the geotech anchor go in.
- [67] Mr. Hare testifies that the footing straddled the property line as does the excavation. He argues that I should prefer his evidence as he was there right on the spot building the retaining wall and Mr. Whitehouse was not.
- [68] I prefer Mr. Whitehouse's evidence. I accept that if the excavation and footings straddled the property line that would be plainly evident given the string marking the property line. Mr. Whitehouse testified that if saw the excavation and/or footings crossing the property line, he would have voiced a concern. I accept this evidence. I also note that Mr. Hare did not testify as to the purpose for the string if the retaining wall was not to be built wholly within Lot 27.
- [69] I find that the geotech anchor that extends into the Outback property was put there without Outback's prior knowledge and is only there to the extent of the anchor netting that may have been extended horizontally from the retaining wall and covered by fill.
- [70] Outback had no prior knowledge of the retaining wall as an improvement done on Outback's property.
- [71] Mr. Hare relies on *West Fraser Mills Ltd.* in which the court found that work done at this mill was an improvement even if West Fraser had no knowledge and had not consented because it was of direct benefit to West Fraser. The difference between that case and this case is that in *West Fraser* the improvement was clearly on West Fraser's land and so its prior knowledge of the improvement could not be questioned. That makes it different from this case where Mr. Whitehouse may be wrong about whether the retaining wall extended onto his property, but the evidence in no respect supports a finding of prior knowledge that it would extend onto his property such that he could be deemed to have requested it.

[72] Outback also argues that West Fraser stands for the proposition that even where there is a deemed request by an owner, the lien claimant must be a contractor or a subcontractor and so have been engaged by someone to do the work. This is clearly the case as s. 2 only gives the right to lien to contractors or subcontractors or workers who, by definition, have been engaged by an owner, a contractor or a subcontractor.

What was the Price?

[73] Section 2 of the Builders Lien Act refers to "a lien for the price of the work and the material." Outback argues that where there was no agreement on the price to be paid there can be no price and no lien. It relies on *Paladin Security Systems Ltd. v. JBLK Enterprise Inc.*, 2010 BCCA 532, for the proposition that the price is the contract price. It goes on to say that where there is no contract price, there can be no lien.

[74] I have concluded that the lien was not valid because Mr. Hare was not a contractor and Outback was not an owner. I do not need to consider whether there is a means of determining price for the purpose of s. 2 on these facts.

Conclusion on the Validity of the Lien

[75] The retaining wall is an improvement. Mr. Hare was not a contractor, subcontractor or worker as he was not engaged by Outback or anyone else to build the retaining wall. Outback was not an owner in relation to the retaining wall as it did not request the retaining wall nor did it have prior knowledge that the retaining wall would be built on Outback's land. The lien was invalidly filed.

Damages for an Invalidly Filed Lien

[76] Outback claims damages pursuant to s. 19 of the Builders Lien Act for the cost it incurred to have the lien removed so it could proceed with the sale of the Lot 26 project. It also claims a fine under s. 45 of the Builders Lien Act, exemplary damages or punitive damages. Finally, it claims special costs.

Section 19 Damages

[77] Section 19 of the Builders Lien Act provides liability for wrongful filing:

Liability for wrongful filing

19 A person who files a claim of lien against an estate or interest in land to which the lien claimed does not attach is liable for costs and damages incurred by an owner of any estate or interest in the land as a result of the wrongful filing of the claim of lien.

- [78] Outback claims damages pursuant to this provision in the amount of the legal fees it paid its solicitors, Pushor Mitchell, to negotiate and draft a security arrangement whereby Outback paid the amount of the lien into trust and Mr. Hare released the lien so Outback could proceed with the pending sale of its property on Lot 26.
- [79] Mr. Hare does not dispute that those damages had been proven; however, he argues that s. 19 damages are available only where the lien has been proven to be frivolous, vexatious or an abuse of process. He relies on *Tuscany Village Holdings Ltd. v. Conquest Development Corporation*, 2005 BCSC 1392, in this regard. In my view, that case does not stand for the proposition advanced. Although Mr. Justice Burnyeat referenced s. 19 in *Tuscany Village*, the passage in which he stated that the plaintiff had met the threshold of proving that the lien was frivolous, vexatious or an abuse of process was not addressing s. 19 but, rather, the test for a court to cancel a lien under s. 25(2) of the Builders Lien Act. Mr. Justice Burnyeat did say, as I will discuss below, that proving the lien was frivolous, vexatious or an abuse of process is not sufficient for special costs.
- [80] In my view, s. 19 is triggered by the wrongful filing of a lien claim as occurred in this case.
- [81] Pushor Mitchell's invoice is in the amount of \$1,362.18. I award damages in this amount, plus court ordered interest, pursuant to s. 19 of the Builders Lien Act.
- [82] Next I will discuss the legal underpinnings of s. 45 fines, exemplary damages, and punitive damages before explaining why I found punitive damages to be the most appropriate in this case.

Section 45

- [83] Section 45 of the Builders Lien Act provides for fines where liens have been invalidly filed and reads as follows:

Offence

- 45 (1) A person who knowingly files or causes an agent to file a claim of lien containing a false statement commits an offence.
- (2) A person who commits an offence under subsection (1) is liable to a fine not exceeding the greater of \$2 000 and the amount by which the stated claim exceeds the actual claim.
- [84] This provision has been held to create a punitive offence. In order to be engaged, the offender must knowingly make a false statement: *Sandhu v. New Western Plumbing & Lighting Supplies Ltd.*, 2018 BCSC 1930 at para 245.
- [85] Outback submits Mr. Hare made false statements in relation to paras 1, 2, and 4 of the lien claim.

Exemplary Damages

- [86] In the context of builders liens, exemplary damages are proper where a party has shown a cynical disregard for the other party's rights and it is necessary to show that the law cannot be abused with impunity. In *Guilford Industries v. Hankinson Management Services*, (1973), 40 D.L.R. (3d) 398 (B.C.S.C.) at 406, Mr. Justice Anderson addressed a claim for exemplary damages in which he held at page 404:

There is no question in my mind that Gibraltar, acting at the instance of Smith, knew perfectly well that there was not the slightest hope of succeeding on the lien claim and filed the lien for an improper and malicious purpose, namely, to compel Guilford to make a settlement with Hankinson on terms dictated by Hankinson.

- [87] Anderson J. held that exemplary damages are appropriate where the processes of the law are used for ulterior purposes. This is especially important because of the potential for builders liens to restrict a person's use of his or her own assets prior to judgment on the merits of the plaintiff's claim. They are vulnerable to abuse and the courts will step in quickly to ensure that the process of the law is not abused.

Punitive Damages

- [88] Punitive damages are intended to punish conduct and deter similar conduct in others where the context is malicious, oppressive, and highhanded. In that sense, punitive damages are different from most types of damages which are compensatory in nature: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129, at paras 196-197; *Han v. Cho*, 2009 BCSC 458; *Chudy v. Merchant Law Group*, 2008 BCCA 484; *Fraser City Motors Ltd. v. Moore*, 2010 BCSC 146. They are awarded where compensatory damages would be insufficient to achieve the goal of punishment and deterrence. The award must be proportionate to the blameworthiness of the conduct, the degree of vulnerability of the plaintiff, the harm or potential harm directed specifically at the plaintiff, the need for deterrence after taking into account other penalties civil and criminal, and the advantage wrongfully gained by the defendant.
- [89] In *Chudy*, the Court of Appeal held that rationale for the damages must be that the conduct is so outrageous that the punitive damages were rationally required to act as a deterrence.

Discussion on Damages

- [90] I agree with the submission by counsel for Outback that only one of a s. 45 fine or exemplary damages or punitive damages should be ordered on the facts of this case. The facts that would support any of them overlap significantly.
- [91] The facts that support them are that Mr. Hare knew he was never engaged to build the retaining wall, and did not have an agreement to build the retaining wall. Days before Outback was to sell the property, Mr. Hare did the title search for the purpose of filing a lien

and then approached Mr. Whitehouse demanding payment for the materials for the retaining wall under a concocted story about an agreement. Mr. Hare asserted the costs of the wall were double the receipts he had. I find that to be a false assertion. He threatened to file a lien. He threatened to remove the retaining wall so that Outback's property would slough onto his. When Mr. Whitehouse refused to accede to his threats, he filed the lien when he had no right to do so. After the money was paid into trust, he did not commence the litigation to enforce the lien claim. He did not agree to pay the security out of trust. He forced Outback to take the steps to have the funds paid out by court order and to bring this three-day trial to recover its damages.

- [92] In my view, the damages that are most fitting are exemplary or punitive damages. Section 45 damages relate to making a false statement in relation to filing a lien claim. In this case, the false statements made in relation to the invalidly filed lien are a subset of the conduct that I find needs to be deterred.
- [93] I find punitive damages most fitting. Had the conduct been limited to the improper filing of the lien and the abuse of the builders lien legal process, exemplary damages would have been significantly fitting as described in *Guilford Industries*. However, in this case, Mr. Hare's conduct continued past the filing of the invalid lien and included not pursuing the lien claim but at the same time failing to agree to pay out the security. This position required Outback to engage significant resources and energy into two trials, the summary trial before Mr. Justice Betton and this three day trial before me.
- [94] Mr. Hare's conduct reaches the threshold of being highhanded and malicious. Punitive damages are necessary to deter others from such behaviour motivated by gain. Although Outback was not vulnerable in the traditional sense, Mr. Hare took advantage of a window of vulnerability when Outback was to sell its property and a builders lien would cause havoc. Mr. Hare's actions pervert the builders lien system which is to ensure that vulnerable contractors, subcontractors and workers have leverage to assert valid claims when rogue contractors or owners might otherwise let them hang out to dry. This system will not serve its purpose unless persons who abuse it, like Mr. Hare, are punished and seen to be punished by an award of damages.
- [95] In my view, the appropriate amount is an amount similar to what Mr. Hare sought to wrongfully gain. I award punitive damages in the amount of \$8,400.

Special Costs

- [96] Special costs may be ordered for reprehensible conduct deserving of reproof or rebuke. They may be ordered in circumstances where the conduct falls short of scandal or outrage: *Garcia v. Crestbrook Forest Industries Ltd.*, 119 D.L.R. (4th) 740 (BCCA). They may be ordered either for the conduct in the circumstances giving rise to the action or for the conduct in the proceedings or both: *Stiles v. Workers Compensation Board of British Columbia*, [1989] 38 B.C.L.R. (2d) 307 (BCCA) at pages 317 and 319.

- [97] Special costs are not awarded in builders lien cases only by establishing that the lien was vexatious, frivolous or an abuse of process. The plaintiff must also establish that the conduct of the defendant in filing the lien or in the proceedings is deserving of rebuke. In *Tuscany Village Holdings*, Mr. Justice Burnyeat held that an action in relation to a lien that is frivolous or vexatious but still arguable in the circumstances giving rise to it is not a basis for an award of special costs.
- [98] In *Concord v. 371773 B.C. Ltd.*, 2002 BCSC 900 at para. 27, Mr. Justice Cullen held that a lien claimant who filed a lien clearly outside the time required to do so, made a misleading claim based on a fictitious date of completion, had failed to come to terms with a manifest deficiency in its claim, engaged in conduct that "represents the sort of reckless indifference to the legitimate interests of the defendant as is envisioned by the authorities which cite reprehensible conduct as a basis for awarding special costs."
- [99] I have addressed Mr. Hare's conduct in relation to asserting that Outback owed it funds, the filing of the lien, the failure to proceed with the lien action and the failure to discharge the lien through the punitive damages award I have made.
- [100] In my view, special damages are necessary and appropriate in this case in addition to punitive damages because, notwithstanding that Mr. Hare never pursued the lien beyond filing it, after losing the summary trial and being ordered to pay Outback's costs, Mr. Hare forced Outback to this trial to address the damages for the cost of posting security for the lien. In his defence, he asserted the contract. I found that Mr. Hare concocted this contract and concocted that the cost of the retaining wall was close to \$17,000 when he only had receipts for \$8,367.59. This conduct is worthy of rebuke. It is very similar to the sort of conduct described by Mr. Justice Cullen in *Concord*.
- [101] At the summary trial, Mr. Justice Betton raised concerns about Mr. Hare's claim that he was a contractor based on the affidavit evidence before him, but he did not need to resolve that issue to decide the validity of the lien and decided it would be inappropriate to do so on contested affidavit evidence. However, at that time, if not well before, it should have been apparent to Mr. Hare that the writing was on the wall. Even though the case was not appropriate for summary determination, there was is no justification for Mr. Hare to insist on a trial, which has taken three days, to peddle this nonsense. He is responsible for the consequences.
- [102] I order Mr. Hare to pay Outback's costs of this action, except the matters covered by Mr. Justice Betton's cost award, as special costs to be assessed.

Counterclaim - Did Outback and Mr. Hare Enter into a Contract for Mr. Hare to Build a Retaining wall?

- [103] Mr. Hare claims that he and Outback had a contract. He relies on C.J. Smith Contracting Ltd. v. Kazem-Pour, 2014 BCSC 689, for the proposition that an oral agreement can amount to a contract and that the usual rules pertaining to interpreting contracts apply. Those are sound legal principles of which I have no doubt.
- [104] Mr. Hare argues that they agreed to a reasonable price and, therefore, the concept of contractual quantum meruit does not apply. In support of his argument that there was such a contract, Mr. Hare argues that the text message, which I have set out and referred to above, would not have been sent the way it was, out of the blue, if there was no agreement. He argues that Mr. Whitehouse's response, which was to ask if they could meet to discuss, makes no sense unless Mr. Whitehouse knew he was to pay for part of the retaining wall.
- [105] As discussed above, I do not draw these inferences from this text. Mr. Hare's text in using the words "just want to know where we stand with the costs of the retaining wall in the backyard" supports an inference that there was no agreement. Only Mr. Hare knew what the costs were, and if there was an agreement to share the costs, there was nothing for Mr. Hare to ask Mr. Whitehouse. Instead, he would be advising Mr. Whitehouse on these matters. Mr. Hare argued that Mr. Whitehouse's response to suggest a meeting is only consistent with there being an agreement. I do not agree. Mr. Whitehouse said that he did not know what Mr. Hare meant in the text. Text is not a good medium to sort out confusing communication. Mr. Whitehouse sensibly suggested that they get together to talk.
- [106] I find that Mr. Hare sent the text to trigger a discussion where he could make his demand. He anticipated that Outback would not be willing to pay because there was no agreement. That is why Mr. Hare had already done a title search for the purposes of filing a lien.
- [107] I conclude that there were no discussions that amounted to an agreement that Mr. Hare would build the retaining wall and Outback would share in its construction. I do not need to determine whether there was certainty around price as there were no discussions that support the finding of any sort of an agreement.
- [108] The counterclaim is dismissed. The plaintiff shall have the costs of the counterclaim as special costs to be assessed for the same reasons given above.

"Matthews J."

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