
CANADA / JUDGMENT

West Fraser Mills Ltd. v. BKB Construction Inc.

2012 BCCA 89

COURT

British Columbia Court of Appeal

DECIDED

27 February 2012

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2012 BCCA 89 West Fraser Mills Ltd. v. BKB Construction Inc.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

West Fraser Mills Ltd. v. BKB Construction Inc.,

2012 BCCA 89

Date: 20120227

Nos: CA039380; CA039386

Docket: CA039380

Between:

West Fraser Mills Ltd.

Respondent

(Petitioner)

And

BKB Construction Inc.

Appellant

(Respondent)

And

NDF Enterprises Ltd.

Respondent

(Respondent)

- and -

Docket: CA039386

Between:

West Fraser Mills Ltd.

Respondent

(Petitioner)

And

NDF Enterprises Ltd.

Appellant

(Respondent)

Before:

The Honourable Mr. Justice Low

The Honourable Mr. Justice Frankel

The Honourable Madam Justice Garson

On appeal from: Supreme Court of British Columbia, September 30, 2011

(West Fraser Mills Ltd. v. BKB Construction Inc., 2011 BCSC 1460,

Vancouver No. S116239)

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BKB Construction Inc.:

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NDF Enterprises Ltd.

W. McLean

Counsel for the Respondent:

J.S. Logan & D. Thompson

Place and Date of Hearing:

Vancouver, British Columbia

January 17, 2012

Place and Date of Judgment:

Vancouver, British Columbia

February 27, 2012

Written Reasons by:

The Honourable Mr. Justice Low

Concurred in by:

The Honourable Mr. Justice Frankel

The Honourable Madam Justice Garson

Reasons for Judgment of the Honourable Mr. Justice Low:

- [1] These two appeals concern the scope of enquiry by a chambers judge on the hearing of a petition brought by an owner of land for an order under s. 25 and, in the alternative, s. 24 of the Builders Lien Act, S.B.C. 1997, c. 45 ("the Act").
- [2] BKB Construction Inc. and NDF Enterprises Ltd. appeal an order made by a chambers judge under s. 25 of the Act, cancelling liens they had caused to be filed in the Land Title Office against lands owned by West Fraser Mills Ltd. ("West Fraser").
- [3] For the reasons that follow, it is my opinion that the chambers judge erred in cancelling the liens and the appeal should be allowed. It is apparent that counsel led the judge into error by arguing the petition, in part, as though it were a summary trial of actions brought by the appellants to enforce the liens. No actions had yet been brought and the time for bringing action had not yet expired. Even in this court, counsel for the appellants, in their factums, argued that we should make orders declaring the liens to be valid. The Act often presents difficult interpretation issues and I think that in their submissions to the chambers judge counsel on both sides lost sight of the limited scope afforded under s. 24 and s. 25 for the summary disposition of liens.

Facts

- [4] West Fraser had operated the Eurocan paper mill on property it owned in Kitimat, B. C. In 2010 it closed the mill and decided to sell the land and some of the machinery separately. It sold one of its paper machines for approximately \$12.5 million to Fibre Source Machinery Inc. ("Fibre Source") under a written agreement. A recital in the agreement states that Fibre Source "wishes to resell ... to PT Pelita Cengkareng Paper" ("Pelita"). Fibre Source did resell to Pelita but it appears that Fibre Source remained bound by the terms of the agreement with respect to the removal of the paper machine. Pelita was not a party to the agreement between West Fraser and Fiber Source.

- [5] Fibre Source was obliged under the contract to dismantle and remove the machine and to "repair or cause to be repaired any damage to the Mill or to any buildings, structures or improvements [occasioned] by or related to such removal ..." There seems to be no dispute that before its removal the machine formed part of the realty.
- [6] Pelita hired the first lien claimant, BKB Construction, to remove the machine at a cost of approximately \$2.9 million. BKB Construction hired the second lien claimant, NDF Enterprises, to perform a substantial portion of the removal work at a cost of \$1.7 million.
- [7] The removal project took approximately eight months. It involved dismantling the paper machine and loading its components into more than 200 shipping containers for transport to a mill in Indonesia. The work performed by the claimants, in addition to the work of dismantling and loading, included removing masonry walls, installing hand railings, covering holes in the floor, breaking up concrete in the mill, performing site building demolition, removing hazardous materials from the site, removing thousands of tons of steel and other material from the mill, and performing extensive cleanup of the mill's basement, including sweeping and clearing lunch rooms and lab rooms.
- [8] BKB Construction was not fully paid by Pelita and NDF Enterprises was not fully paid by BKB Construction.
- [9] BKB Construction filed a lien in the Land Title Office for \$1,404,973.64. NDF Enterprises filed a lien for \$200,000.
- [10] West Fraser filed and served a petition in which it sought an order under s. 25 of the Act cancelling each lien. In the alternative, it sought an order under s. 24 that the liens be replaced by security in a nominal amount.
- [11] On the basis of affidavit evidence, the chambers judge declared both liens to be invalid under s. 25 and ordered their cancellation. Although she held that West Fraser was an "owner" and that the respondents were "subcontractors" for purposes of the Act, she based her order on her conclusion that the removal of the paper machine was not an "improvement" as that term is defined in the Act.
- [12] While this appeal was pending, West Fraser sold the subject property. On 6 October 2011, Madam Justice Rowles made an order staying the order under appeal pending West Fraser's posting of security in the amount of \$440,000, either in the trust account of its lawyers or with the Registrar of this court, in cash or by an irrevocable letter of credit. The order further provides that cancellation of the liens does not deprive any party of the benefit of the provisions of the Act, except that the appellants will not be required to file a certificate of pending litigation (as would have been required by s. 33 of the Act). The security amount covered both liens because the lien of NDF Enterprises is subsumed by the lien of BKB Construction.

Provisions of the Act

[13] Sections 24 and 25 of the Act read:

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 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.

25 (1) An owner, contractor, subcontractor, lien claimant or agent of any of them may at any time apply to the court, registrar or gold commissioner and the court, registrar or gold commissioner may cancel a claim of lien if satisfied that

- (a) a lien is extinguished under section 22 or 33,
 - (b) an action to enforce the claim of lien has been dismissed and no appeal from the dismissal has been taken within the time limited for the appeal,
 - (c) an action to enforce the claim of lien has been discontinued, or
 - (d) the claim of lien has been satisfied.
- (2) An owner, contractor, subcontractor, lien claimant or agent of any of them may at any time apply to the court and the court may cancel a claim of lien if satisfied that
- (a) the claim of lien does not relate to the land against which it is filed, or
 - (b) the claim of lien is vexatious, frivolous or an abuse of process.
- (3) An application under subsection (1) or (2) may be made without notice to any other person.

[14] Section 33 reads:

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.

(2) Despite subsection (1),

(a) an owner, or

(b) a lien claimant who has commenced an action

may serve on a lien claimant, or other lien claimants, as the case may be, a notice to commence an action to enforce the claim of lien and to register in the land title office or in the gold commissioner's office, as the case may be, a certificate of pending litigation within 21 days after service of the notice.

(3) The notice served under subsection (2) must be in the prescribed form, and service is validly effected if the notice is

(a) served personally on the lien claimant, or

(b) mailed or delivered to the address for service given in the claim of lien.

(4) If service is by mail the notice is conclusively deemed to have been served on the eighth day after deposit of the notice in the Canada Post Office at any place in Canada.

(5) Unless an action to enforce a claim of lien is commenced and a certificate of pending litigation is registered within the time provided in this section, the lien is extinguished.

Chambers judgment

[15] The chambers judge asked herself four questions. The first was whether it was appropriate to hear the petition on short notice. She decided that it was and we are not concerned with that part of her judgment.

[16] The other three questions the judge posed were:

2) Are the claims of lien valid?

3) If so, should the lien be cancelled and West Fraser ordered to pay security under s. 24 of the Act?

4) If so, what amount of security should be posted by West Fraser?

- [17] The judge found that the lien claims were not valid and that it was not necessary to answer the final two questions. In considering the validity of the liens, she set out s. 2 of the Act which provides that "a contractor, subcontractor or worker who, in relation to an improvement, (a) performs or provides work has a lien for the price of the work ...". After some analysis with reference to the cases, she stated her conclusion as follows:
- [45] In this case, the alteration of the building was required to enable Paper Machine No. 1 to be removed. The removal of Paper Machine No. 1 did not make the land more valuable, despite there being a benefit to West Fraser if Paper Machine No. 1 and the land were sold separately. Neither was the alteration an improvement to the building. In fact, both the land and the building were placed in the position they had been before the machine was installed.
- [46] The best that can be said was that it was a partial demolition. While demolition work is lienable when it is part of a larger alteration program that provides an improvement to the land, as noted in [Rupert Reinforcing Ltd. v. World Wide Connections Inc. (1980), 24 B.C.L.R. 78 (C.A.)], here the removal of Paper Machine No. 1 was not part of such a program. There was no improvement to the land or buildings by the removal, nor was the removal required in order to carry out any improvements.
- [47] The sale of the paper machine was separate from the sale of the land, and West Fraser certainly derived a benefit from that. Nevertheless, it does not mean that the work provided by BKB and NDF meets the definition of improvement in the Act, or its interpretation based on the definition from Black's Law Dictionary, as set out in [Boomars Plumbing and Heating Ltd. v. Marogna Bros. Enterprises Ltd. (1988), 27 B.C.L.R. (2d) 305 (C.A.)].
- [48] I am convinced by West Fraser's argument that the work performed by the respondents does not meet the definition of improvement.
- [18] It is my opinion that it was an error to pose and to answer the question "Are the liens valid?" The issue of validity does not arise under either s. 24 or s. 25. Neither section requires the lien claimant to prove the lien. Nor does an application under either section provide an opportunity for the owner (or a contractor) to disprove the lien. An application under either section should not be addressed as though it were a summary trial in an action commenced in compliance with s. 33.
- [19] The question under s. 25 is whether the lien is defective (or has lapsed) for any of the reasons specified in s. 25(1) or s. 25(2)(a), or whether it is vexatious, frivolous or an abuse of process under s. 25(2)(b).
- [20] The question under s. 24 is the amount of security that should be ordered (assuming, as would usually be the case, that the lien claimant does not argue that there should be no cancellation of the lien on the giving of security).

Discussion

Section 25

- [21] West Fraser does not contend that either lien in this case was filed out of time or in the wrong form, was filed against the wrong property, has been satisfied, has been extinguished under s. 33, or has been litigated to conclusion, so as to support an order of cancellation under s. 25(1) or s. 25(2)(a). West Fraser has not given 21 days' notice under s. 33 and neither lien claimant has commenced a lien action.
- [22] On the evidence, the cancellation remedy could have been considered only under s. 25(2)(b). However, the chambers judge did not find, explicitly or impliedly, that either of the liens was vexatious, frivolous or an abuse of process. Her finding was that they were invalid, for the reasons reproduced above. As I have said, the judge asked and answered a question that was not properly before the court.
- [23] West Fraser argues in this court that the liens are frivolous and that the order under appeal should be maintained on that basis. (West Fraser does not argue that the liens are vexatious or an abuse of process.)
- [24] The test for whether a claim is frivolous imposes a low threshold on the lien claimant. The wording of s. 25(2)(b) of the Act is similar to that of R. 9-5(1) of the Supreme Court Civil Rules, which deals with scandalous, frivolous, or vexatious matters. The test for striking pleadings under that rule is whether it is "plain and obvious" that pleadings should be struck: *MacKinnon v. Instalogs Financial Solution Centres (Kelowna) Ltd.*, 2004 BCCA 472, 33 B.C.L.R. (4th) 21, at paras. 36-38. The only consideration under the practice rule is whether there is "a question fit to be tried": *Kripps v. Touche Ross & Co.* (1992), 69 B.C.L.R. (2d) 62 at p. 68, 94 D.L.R. (4th) 284 (C.A.).
- [25] In *G.A.P Contracting Ltd. v. 0790643 B.C. Ltd.*, 2011 BCSC 1059, Master Baker considered an application for cancellation of a lien under s. 25(2)(b). After describing conflicting affidavit evidence, at para. 20 he expressed "misgivings" about the factual assertions of the lien claimant but said he was unable to conclude that the lien claim was vexatious, frivolous, or an abuse of process. He said: "I am satisfied that there are at least arguable claims (and counterclaims, for that matter) respecting the work done and that the lien should not be removed under [s. 25(2)(b)]". In other words, he found there was a question fit to be tried. In my opinion, he applied the correct test.
- [26] In the present case, the chambers judge did not ask whether the lien claims were arguable or whether it was plain and obvious that they could not succeed. Instead, she asked, in effect, whether the appellants had proven their liens.

- [27] The sole basis on which the chambers judge ruled the liens invalid was that the work performed was not in relation to an "improvement". The appellants contend that the judge erred in applying the dictionary definition of "improvement", as opposed to the Act's inclusive definition. They say that in removing the paper machine and repairing all damage done in the removal, their work "altered" the property as contemplated by that term's inclusion under the s. 2 definition of "improvement".
- [28] The appellants also say that they were denied access to documents in the possession of West Fraser that might serve to shed light on the purpose for which West Fraser decided to sell the paper machine and have it removed. They say that these documents have the potential to reveal what West Fraser had contemplated to be the possible uses of the building with the paper machine removed and remedial work done as required by the sales contract in evidence. The appellants contend that the evidence needs to be explored more thoroughly before it can argue its case that the work done was an improvement under the Act and that its liens otherwise fit within the scheme of the Act. I consider this argument to have some merit if only to demonstrate that caution should be exercised in summarily cancelling a lien without a complete evidentiary record, which can be generated only in the context of an action.
- [29] I do not say the appellants' position is correct, or that it will ultimately prevail. I say only that the liens are not frivolous and determination of their validity was premature. Their validity remains to be adjudicated in the context of an action under s. 33 of the Act. The argument of the appellants that their liens fit within the overall scheme of the Act is worthy of consideration. Their claims are arguable. No more is needed to defeat West Fraser's assertion that the liens are frivolous.
- [30] The order under appeal cannot be supported as a correct application of s. 25 (2)(b) of the Act.

Section 24

- [31] West Fraser says the chambers judge made all findings of fact necessary to support a conclusion that the liens could not be proven because they do not fit within the scheme of the Act. Therefore, the judge could have made an order under s. 24 for the liens to be replaced with security in the amount of one dollar. West Fraser pleaded this in its petition as an alternative basis for relief but, as I have said, the chambers judge did not rule upon it.
- [32] An order of the kind suggested by West Fraser would be tantamount to declaring the liens invalid. It would render them nugatory. This is because the provable amount of a lien is proscribed by the amount of security ordered under s. 24. If West Fraser's argument were to prevail, the amount of recovery in an action brought by either lien claimant in compliance with s. 33 would be limited to one dollar.

- [33] For much the same reasons that the liens survive the attack under s. 25(2)(b), they must survive this application of s. 24 urged by West Fraser. Section 24 is no more a means of conducting a summary trial than is s. 25. Indeed, my analysis could stop here and I could go on to express my view as to the amount of security that West Fraser should post under s. 24. However, there is a judgment of this court on the application of s. 24 that should be discussed.
- [34] In *Q West Van Homes Inc. v. Fran-Car Aluminum Inc.*, 2008 BCCA 366, 83 B.C.L.R. (4th) 349 the question was the appropriate amount of security. There was no suggestion that the liens were not provable.
- [35] In *Q West*, the plaintiff (*Q West Van Homes Inc.*) was the owner and developer of a condominium construction project. It had a contract with the defendant for the defendant to deliver and install windows and doors. The owner brought an action against the defendant for damages for breach of contract and delay. The defendant had filed two liens against the property that totalled close to \$2 million. In the damage action, the owner brought a motion for an order under s. 24 of the Act for cancellation of the liens upon the giving of security. The only issue was the amount of security that should be ordered. The chambers judge ordered security in the amount of \$1.25 million and this court increased the amount to \$1.5 million.
- [36] In this court's decision, Mr. Justice Chiasson discussed the requirement under s. 24(1) that the security be "sufficient" and the requirement under s. 24(2) that it be "satisfactory to the court". At para. 15, he stated that the former is tempered by the latter. At para. 18, he expressed the view that the enactment of s. 24(2) in 1997 "[enlarged] the court's discretion by requiring the judge to consider all relevant circumstances". He went on to discuss what test a chambers judge should apply in exercising the discretion created by s. 24.
- [37] At para. 22, he stated that on an application to substitute security "there are two enquiries ... one, are the claims advanced by the parties sustainable; two, what is the appropriate quantity of the security". At the next paragraph, with reference to certain trial court decisions, he said "... I do not quarrel with the plain and obvious test or the analogy to striking out pleadings ... as being applicable to the consideration whether a claim is sustainable in the context of a builders lien". He added: "Another way of phrasing the test is that there is a *prima facie* case to support the claim (*Strata Plan LMS 2262 v. Belgrove Construction Ltd.*, 2003 BCSC 535)."
- [38] Chiasson J.A. summarized the law as follows (my emphasis):
- [56] Under s. 24 there is a two-prong test. The first is consideration of what claims should be taken into account when fixing security. The second is determining what amount of security is appropriate. In summary:
- the judge must look at the claims of the parties to determine whether it is plain and obvious they will not succeed; a *prima facie* case will suffice;

- any claims that are not sustainable will not be considered in fixing the appropriate quantum of security;
- looking at the evidence as a whole, the judge has discretion in fixing the amount that is appropriate security;
- that discretion must be exercised judicially based on the relevant evidence before the court and taking into account the objectives of the legislation: to protect those who supply work and materials to a construction project so long as the owner is not prejudiced;
- the amount of security may be less than the amount claimed under the lien.

- [39] It is important to note that in *Q West* the concern was with the components of the lien claims, not with the validity of the liens as such. Therefore, the case is not authority for the proposition that the court can order nominal security. The lien can be cancelled under s. 25 if it is defective or if it unarguably does not fit within the scope of the Act so as to be vexatious, frivolous, or an abuse of process. However, if it is arguable that the lien fits within the Act (as I have already found in this case), the enquiry under s. 24 is limited to determining whether the components of the amount claimed are sustainable, as explained in *Q West*.
- [40] It is perhaps theoretically possible for the court to find under s. 24 that it is "plain and obvious" that a lien claim is not provable, and to order nominal security on this basis. However, it seems to me that if the evidentiary record (despite being not fully developed, as it would be in the context of an action) led to such a conclusion, it would be appropriate to find under s. 25(2)(b) that the lien claim was vexatious, frivolous, or an abuse of process. Had the Legislature intended s. 24 to be used as a means by which the court can fully and finally determine the factual or legal merits of a lien, it would have said so in the section. I think the scope of enquiry under s. 24 should be approached with caution in order to avoid injustice to lien claimants who, generally speaking, have the right to have their claims fully adjudicated at trial.
- [41] *West Fraser* attempted to persuade us that it is plain and obvious that neither lien in this case is provable. Both sides referred us to a number of authorities, none of which is directly on point. However, most of the cases were determined in the context of an action brought to prove the lien in question. The circumstances in which the lien claims arose in the present case are unusual. The sum total of the submissions on both sides of this appeal is that there is something for each party to argue at a trial (whether summary or conventional) of actions commenced by the appellants to attempt to prove and to enforce the liens they claim.
- [42] In my view, *West Fraser's* argument that the chambers judge could have ordered nominal security is premised on an incautious application of the test to be applied under s. 24. I would not give effect to the argument.

Security

- [43] It remains to determine the dollar amount of the security to be posted by West Fraser under s. 24 of the Act. The order of Rowles J.A. was for security in the amount of \$440,000. The appellants ask us to continue that order as though it had been made under s. 24 in the first instance. West Fraser makes no submission to the contrary should its argument for ordering nominal security fail.
- [44] It appears therefore to be settled that the sum of \$440,000 would satisfy the requirements of the Act as to security and that is the amount I would order.

Conclusion

- [45] I would allow both appeals and set aside the provision in the order under appeal cancelling the claims of lien filed by the appellants.
- [46] I would order that the sum of \$440,000 deposited by West Fraser as security in accordance with the order of 6 October 2011 continue to be held as security for both liens under s. 24 of the Act pending determination of the liens under the provisions of the Builders Lien Act, with liberty to either party to apply as to the form and manner in which the security is held.

"The Honourable Mr. Justice Low"

I agree:

"The Honourable Mr. Justice Frankel"

I agree:

"The Honourable Madam Justice Garson"

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Prepared on 29 October 2026 · Esheria