IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Tylon Steepe Homes Ltd. v. Landon***,
2010 BCSC 192

Date: 20100115
Docket: S84636
Registry: Kelowna

Between:

Tylon Steepe Homes Ltd.

Plaintiff

And

Heidi Landon

Defendant

- and -

Docket: S85678
Registry: Kelowna

Between:

Tylon Steepe Holmes Ltd.

Plaintiff

And

Dan Henzie

Defendant

- and -

Docket: S80986
Registry: Kelowna

Between:

Tylon Streepe Holmes Ltd.

Plaintiff

And

Charles Eli Pont
and Jill C. Pont

Defendants

And

1216393 Ontario Inc.,
Tylon Steepe Development Corporation
and Dennis Kretschmer

Defendants by Counterclaim

Before: The Honourable Madam Justice Wedge

Oral Reasons for Judgment

Counsel for the Plaintiff in Action S84634, by teleconference:	S. Turner
Counsel for the Plaintiff in Action S80986, by teleconference:	D. Donohoe
Counsel for the Defendants:	F. Potts S. Urquhart
Place and Date of Hearing:	Kelowna, B.C. January 12, 13, 2010
Place and Date of Judgment:	Kelowna, B.C. January 15, 2010

[1] **THE COURT:** The defendant, Heidi Landon, applies for the following relief: first, consolidation of this action, to which I will refer as the "Landon Action"; with Tylon Steepe Homes Ltd. v. Pont et al, B.C. Supreme Court Action Number S091578 in the Vancouver registry, to which I will refer as the "Pont Action"; and to transfer to Vancouver the actions for all purposes, or alternatively, consolidation of the actions and transfer to Kelowna for all purposes; second, discharge of the claim of builders lien filed against the property of Ms. Landon by the plaintiff pursuant to the provisions of the *Builders Lien Act*, S.B.C. 1997, c. 45; and third, security for costs against Tylon Homes pursuant to s. 236 of the *Business Corporations Act*, S.B.C. 2002, c. 57.

[2] By way of background, these matters arise from contracts for the purchase and sale of strata lots at a development known as Crystal Waters. Crystal Waters consisted of 34 bare land strata lots on a property located at the south end of Kalamalka Lake in the Okanagan.

[3] From about the year 2000, the development was marketed to purchasers as residential homes by the defendants by counterclaim, 1216393 Ontario Inc., (to which I will refer as "Ontario Inc."), Tylon Steepe Development Corporation, and Tylon Development's principal Dennis Kretschmer.

[4] Mr. Kretschmer, Ontario Inc., and Tylon Development, (to whom I will refer collectively as the "Developers"), entered into contracts of purchase and sale for each of the 34 lots at Crystal Waters with various individuals. The purchasers paid a 10 percent deposit on the understanding that approval of the development by the local government authority, the District of Lake Country, was imminent.

[5] In 2002, Ms. Landon bought Lot 4 at Crystal Waters for a purchase price of $315,000. In 2004, the

Ponts bought Lot 24 for the purchase price of $259,700.

[6] In August of 2005, the Developers wrote to the purchasers purporting to cancel the initial contracts of purchase and sale, citing delay by the District. The Developers offered amended contracts of purchase and sale to the purchasers. The amended contracts varied from the initial contract in several respects. The purchase price was increased. There were provisions requiring the purchasers to build their homes on the lots with Tylon Development at an unspecified price and to grant Tylon Development an option the repurchase the properties at the purchase price if the purchasers did not build with Tylon Development.

[7] A group of purchasers rejected the amended contract and sued the Developers. The matter, titled *Romfo v. 1216393 Ontario Inc.*, went to trial in the spring of 2007 before Mr. Justice Myers. At trial, it was conceded there was no governmental delay. The purchasers were successful in having the amended contracts set aside. The decision of Myers J. can be found at 2007 BCSC 1375. The defendants appealed, but their appeal was dismissed. The appeal decision is indexed at 2008 BCCA 179.

[8] A second group of purchasers, including the Ponts and Ms. Landon, accepted the amendments to the contracts and proceeded with the purchases. Approval of the Crystal Waters Development by the District followed within several months. The price of the Ponts' lot, pursuant to the amended contract, was increased by $10,000 to $269,700. The price of Ms. Landon's lot, pursuant to the amended contract, was increased by $315,000 to $630,000.

[9] Ms. Landon entered in a fixed price contract with Tylon Homes in or about May 2006. I will refer to that contract as the "Landon Contract". Pursuant to the Landon Contract, Ms. Landon agreed to pay Tylon Homes $911,341, plus tax, for the construction of the home on Lot 4. The contract price was to be paid in advances as follows: first, $127,734 as an initial deposit; second, $163,807 when the basement was ready for backfill; third, $243,492 upon installation of windows, exterior main doors and roofing; fourth, $191,844 when the house was at the taping stage; and fifth, $184,464 upon substantial completion.

[10] Construction on Lot 4 began in July of 2006. By April of 2008, construction was still not complete. All but the last advance had been paid, for a total payment to the plaintiff of $726,877 plus tax. Throughout 2008, a number of builder's liens were filed against Lot 4.

[11] It was a matter of contention as to when this occurred, but it appears that at some point in mid-2008 Ms. Landon and her husband took over the day-to-day responsibility for completing the construction of their home on Lot 4. By October 2008, they had spent approximately $207,000 on labour and materials, which they allege were to have been included in the Landon Contract.

[12] At about the same time, they retained Dan Henzie to assist them in the completion of the home. Mr. Henzie had been employed by Tylon Steepe Homes as the site supervisor, but was terminated on the basis that he was providing assistance to the Landons independently of the contract.

[13] The final payment due on the Landon Contract was $184,464, plus tax, for a total sum of $193,687.20. That payment was due upon substantial completion, but the Landons did not pay it on the basis that they had

paid the $207,000 to complete the project. An occupancy permit for Lot 4 was issued by the District on October 2nd, 2008.

[14] The Ponts contracted with Tylon Steepe Homes for construction of a home on their lot, Lot 24. I will refer to that contract as the “Pont Contract”. The Ponts, unhappy about the pace of construction, terminated the contract at the lockup stage.

[15] In October 2008, Tylon Homes filed a claim of builder’s lien against the Pont property, claiming a lien for $255,982. Pursuant to the *Builders Lien Act*, notice to commence an action was served and the Pont Action was commenced on or about November 14th, 2008, in the Kelowna registry. The Pont Action was later transferred by consent for all purposes to the Vancouver registry. The offices of legal counsel for Tylon Steepe Homes, Donohoe and Company, is located in North Vancouver, and the offices of counsel for the Ponts, Lindsay Kenney, is located in Vancouver.

[16] In early 2009, Ms. Landon applied pursuant to Rule 10 for a discharge of the lien on Lot 4 principally on the basis that it was untimely. That application was heard and dismissed by Mr. Justice Brooke on February 16, 2009. I will return to those reasons in due course.

[17] The Ponts applied to Mr. Justice Burnyeat for a discharge of the claim of builder’s lien on their lot. Burnyeat J. discharged the lien on payment of security in the amount of $90,000, holding that any amount in excess of that was an abuse of process. Those reasons are indexed at *Tylon Steepe Homes Ltd. v. Pont*, 2009 BCSC 253.

[18] On April 2, 2009, the Ponts applied for security for costs. The matter was heard by Madam Justice Ballance, who ordered Tylon Steepe Homes to post security in the amount of $42,000. Those oral reasons were released on April 29, 2009.

[19] A notice to commence an action was delivered in the Landon Action on August 22, 2009. The Landon Action was commenced by Tylon Steepe Homes on September 17, 2009, in Kelowna. A statement of defence and counterclaim was filed by Ms. Landon on October 29, 2009.

[20] In both the Pont and Landon Actions, the defendants’ have counterclaimed on the basis of fraudulent misrepresentation, for, among other things, declarations that the clauses of the amended contract pertaining to the option and the requirement that they build with Tylon Development or Tylon Homes, are null and void, as are the Landon and Pont Contracts themselves. As part of the defence to the counterclaim, Tylon Steepe Homes and the defendants by counterclaim have pleaded that Ms. Landon interfered with the contract of employment between Dan Henzie and Tylon Steepe Homes. There has also been a separate action commenced by Tylon Steepe Homes against Dan Henzie alleging that he interfered with the building contract between Tylon Steepe Homes and Ms. Landon.

[21] I will turn first to the issue of consolidation and the related issue of transfer. Rule 5(8) of the *Rules of Court* governs consolidation and provides as follows:

> (8) Proceedings may be consolidated at any time by order of the court or may be ordered to be

tried at the same time or on the same day.

[22] The leading case on Rule 5(8) is *Merritt v. Imasco Enterprises Inc.* (1992), 2 C.P.C. (3d) 275 (B.C.S.C.). Master Kirkpatrick, as she then was, said the following at page 282:

> The examination of the pleadings will answer the first question to be addressed: Do common claims, disputes and relationships exist between the parties? But the next question which one must ask is: Are they "so interwoven as to make separate trials at different times before different judges undesirable and fraught with problems and economic expense"? *Webster v. Webster* [citation omitted] That second question cannot, in my respectful view, be determined solely by reference to the pleadings. Reference must also be made to matters disclosed outside the pleadings:
>
> (1) Will the order sought create a saving in pre-trial procedures, (in particular, pre-trial conferences)?;
>
> (2) Will there be a real reduction in the number of trial days taken up by the trials being heard at the same time?;
>
> (3) What is the potential for a party to be seriously inconvenienced by being required to attend a trial in which that party may have only a marginal interest?; and
>
> (4) Will there be a real savings in experts' time and witness fees?
>
> This is in no way intended to be an exhaustive list. It merely sets out some of the factors which, it seems to me, ought to be weighed before making an order under Rule 5(8).

[23] In *Shah v. Bakken* (1996), 20 B.C.L.R. (3d) 393 (S.C.), Master Joyce, as he then was, citing *Merritt*, said the following:

> The first observation to make is that the order is discretionary. A test often applied in the exercise of the discretion is whether there is a common question of law or fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matter should be disposed of at the same time [citation omitted] …
>
> The purpose of consolidation is to avoid multiplicity of proceedings … Considerations include whether the order will result in a saving of time and expense and the better administration of justice …

[24] In *Insurance Corp. of British Columbia v. Sam* (1998), 6 C.C.L.I. (3d) 228 (B.C.S.C.), the court added, as another factor to consider, the possibility of inconsistent results.

[25] In this case, the pleadings disclose significant common issues. Much of the factual matrix of the claims and much of the history is the same. Both the Landons and the Ponts allege that the liens amount to an abuse of process. They say the liens were filed for the same improper purpose. The evidence concerning these matters will involve the same witnesses, including Dan Henzie, site supervisor on both projects, and possibly representatives of the District. There are two separate building contracts, and clearly there will be different evidence with respect to the work done pursuant to them. However, if any parties are inconvenienced by having all of the evidence heard in one proceeding, it is the Ponts and the Landons, not Tylon Steepe Homes. As the plaintiff in both matters, Tylon Steepe will benefit considerably by having the evidence heard at the same time.

[26] A central issue in both the Landon and Pont Actions is the enforceability of the building contracts. In essence, it is alleged in defence of the actions that the contracts were induced by fraud. The circumstances

surrounding the purchase of the lots and entering into the building contracts are the same in both actions. This, and related issues, will clearly attract interlocutory and summary proceedings. Should these matters be heard in two separate actions, there is a real possibility of inconsistent results. The parties will be put to needless extra time and expense. Having said that, it is also clear that the Landon counterclaim will give rise to additional and more complex issues. For example, Tylon Steepe alleges, as part of its defence to the counterclaim, that the Landons induced the breach of the employment contract between Tylon Steepe and Dan Henzie.

[27] The circumstances surrounding this consolidation application bear some resemblance to those facing the court in the case of *Peel Financial Holdings v. Western Delta Lands Partnership*, 2003 BCSC 784, 37 C.P.C. (5th) 115; 2003 BCSC 784. In that case, Madam Justice Allan observed that consolidation of two actions may be appropriate where the parties are the same and the issues are in common so that disposition of one action will necessarily dispose of the other. However, if more issues are raised in one action than the other, and if some of the parties have more limited roles than others, consolidation for all purposes may not be the appropriate course. The court may instead order that the two actions be tried at the same time in one trial and that the evidence be evidence in both actions, including discovery evidence and other pre-trial evidence. This eliminates two separate trials and separate interlocutory applications and other pre-trial procedures thus reducing costs and inconvenience to both the parties and to the court.

[28] I have concluded that these actions are not suitable for consolidation, because disposition of one action may not necessarily dispose of all of the issues in the other. However, I am satisfied they ought to be heard together in one trial. Further, the evidence in one action, both at trial and in all pre-trial proceedings, will be evidence in the other action. In the words of Allan J. in the *Peel Financial Holdings* case, there is much to be gained and nothing lost by having the actions heard together in this manner. As I have noted, any prejudice that accrues, accrues to the defendants Landon and Pont, yet those defendants are satisfied, and rightly so, that overall there is much more to be gained by having the actions heard together.

[29] I turn, then, to the related issue of whether the actions should be transferred to Vancouver or Kelowna. Rule 64(13) governs the issue and provides as follows:

> (13) At any time after a proceeding is commenced, the court may on application order it to be transferred from the registry in which it was commenced to any other registry of the court for any or all purposes.

[30] As noted earlier, the Pont Action was transferred to Vancouver by consent before the plaintiff commenced the Landon Action in Kelowna. As observed by Master Doolan in *Robertson v. Zimmer*, 2001 BCSC 1067, a change of venue may be ordered on the basis of the interests of justice or the preponderance of convenience. The plaintiff, as *dominus litis*, has the right to choose the place of trial, but that is subject to its being changed by the defendant for sufficient cause. In this case it is noteworthy that the plaintiff has already chosen as Vancouver the place of trial in the Pont Action.

[31] Tylon Steepe Homes argued that in the event of an order that the actions be heard together, the preponderance of convenience favours the actions being heard in Kelowna, because that is where most of

the witnesses reside who will be called at trial. However, as argued by Landon and Pont, there will likely be numerous pre-trial and interlocutory applications which will require only the attendance of counsel. This issue was considered by Barrow J. in the recent decision of *Cooper v. Lynch*, 2009 BCSC 1317. At para. 11, Barrow J. said the following:

> Although the test is the same whether considering moving the place of trial or changing the registry out of which proceedings are taken, the application of the test in these two contexts will not always yield the same result. That is so because circumstances which may prove inconvenient or greatly inconvenient for purposes of trial may be inconsequential for purposes of pre-trial applications. The most obvious example involves witnesses. The degree to which one place or another is convenient for purposes of trial will be affected by where the bulk of the witnesses reside. On the other hand, where the witnesses reside will usually have little bearing on whether it is appropriate to move a proceeding. That is so because generally witnesses are not required and rarely attend pre-trial or interlocutory applications.

[32] In the present actions, the interlocutory and pre-trial applications have only involved counsel, and I am satisfied that is likely to continue until trial.

[33] Rule 64(13) permits the court to transfer a proceeding “for any or all purposes”. I am satisfied that at this stage of the proceedings the actions ought to be dealt with from the Vancouver registry, at least for purposes of pre-trial and interlocutory applications. Two of the three legal counsel involved have their offices in Vancouver. Should these matters proceed to trial, the plaintiff will be at liberty to apply to have the trial of the actions heard in Kelowna.

[34] It is also my view that these actions require case management and that a case management judge should be assigned to them. That will form part of the order concerning the order to have the matters heard together and the transfer of the actions to the Vancouver registry.

[35] I turn, then, to the second issue which arises from the application by Ms. Landon to have the claim of lien of the plaintiff discharged pursuant to s. 25(2) of the *Builders Lien Act*, or, in the alternative, that the lien be discharged pursuant to s. 24(2) of the *Builders Lien Act* upon deposit by Ms. Landon of security in the amount of $1. As mentioned earlier, Ms. Landon applied in December of 2008 to have the lien discharged pursuant to s. 25(2) of the *Builders Lien Act* on the basis that, first, it was filed out of time; and second, that it was an abuse of process.

[36] The matter was heard by Brooke J. on February 16, 2009. Ms. Landon argued that pursuant to s. 25(1)(a), the lien ought to be cancelled, because it was extinguished under s. 22 of the *Act*. Section 22 provides that where a lien is not filed within the time stipulated by the *Act*, it is extinguished. Section 20(2) provides that the lien must be filed no later than 45 days after the substantial completion of the improvement. Ms. Landon argued, in the alternative, that the lien ought to be discharged under s. 25(1)(b) as being an abuse of process.

[37] I have reviewed the transcript of the proceeding before Brooke J. The focus of the argument was the timeliness argument, and in fact counsel for Tylon Steepe Homes responded only to the timeliness issue. It is perhaps for that reason that Brooke J. dealt only with the timeliness issue in his oral reasons for judgment

delivered February 17, 2009 (*Landon v. Tylon Steepe Homes Ltd.*, 2009 BCSC 1537). At para. 1 of the reasons the court stated:

> The petitioner attacks the validity of the respondent's claim of builders lien on the basis that the claim of builders lien was filed more than 45 days after the contract was completed, abandoned or terminated.

[38] The court then went on to consider, at para. 15, whether the evidence filed in support of the application established that the contract was substantially completed more than 45 days before the claim of lien was filed. At para. 16 to 17, Brooke J. concluded as follows:

> [16] I am unable to find substantial completion to satisfy the definition of "completed" nor can I find the improvement was ready for use or used for the purpose intended of a dwelling house. Here I refer specifically to the evidence of Mr. Kretschmer that there were two serious defects which if known would have led the inspector to refuse an occupancy permit, temporary or final.
>
> [17] I accept the evidence on this point is not the best evidence, but it is sufficient to lead to a dismissal of the petitioner's application for summary determination of the issue pursuant to Rule 10 of the *Rules of Court*.

[39] Again, at para. 21 the court said:

> [21] The proceeding taken by the petitioner cannot, in my view, be faulted, but I cannot find on the balance of probabilities that the improvement was completed, abandoned or terminated 45 days before the claim of lien was filed.

[40] And, at para. 23:

> [23] The conclusion I have reached is predicated upon firstly the existence of serious deficiencies and secondly the likelihood that those deficiencies if known would not have supported the occupancy permits that were issued. Those issues I expect to be central should this matter continue.

[41] In response to a question by counsel for Ms. Landon, the court clarified once again that the significant question was the question of substantial completion. He indicated that he was not satisfied that there was substantial completion, and the burden of proving that rested with the petitioner having elected to proceed in a summary way.

[42] There was some further comment by Brooke J. as to whether, if better evidence were advanced, the petitioner would be at liberty to revive the petition. Brooke J. then went on to express doubt that the petition could be revived with respect to that issue. The petition was dismissed and an order was filed reflecting the dismissal.

[43] In the present application, counsel for Ms. Landon tendered affidavit evidence from the building inspector to the effect that despite the deficiencies the occupancy permit issued on October 2, 2009, remained valid. That was the evidence to which Brooke J. referred to as “the best evidence”, which he did not have.

[44] Ms. Landon argued that the decision of Mr. Justice Brooke concerning the timeliness of the lien did not render the issue *res judicata*. I cannot accept that argument. In his reasons, Brooke J. acknowledged that at

the trial of the matter the question of timeliness of the lien could be revisited, but that the summary application must be dismissed. The court predicated its decision on the existence of the deficiencies and on the fact that the deficiencies, if known, would not have supported the occupancy permit. The court also noted those issues would likely be central, should the matter continue to trial.

[45] The case authorities cited by Ms. Landon are distinguishable. In *Hilltop Hotel Ltd. v. Juno Holdings Ltd.*, 1975 CarswellBC 472, the issue was whether a default judgment could be set aside. The court granted the default judgment, but made clear in its reasons that if the plaintiff could establish that there was a proper defence, then the default judgment could be set aside on the basis that it was an interlocutory judgment.

[46] In *Leier v. Shumiatcher* (1962), 37 W.W.R. 605, the court made clear that an application dismissed because of insufficiency or imperfection in supporting materials could not be made again except with leave of the court dismissing the application. Where an application is dismissed on the merits a second application cannot be brought. As noted by the court at para. 5 of the decision, the theory underlying the principle is that the applicant has already received a judicial decision against them on the material submitted and the matter is *res judicata*.

[47] In the present case, leave was not granted to resubmit materials. The petition was dismissed. The court made clear, however, that dismissal of the summary application would not affect the trial of the matter.

[48] However, that is not the end of the matter. First, Brooke J. did not decide the issue of whether the lien was an abuse of process. It is clear from the reasons for judgment that no finding of fact or law was made on that issue. That issue is therefore not *res judicata*. Second, Ms. Landon did not advance the petition on the basis of s. 24 of the *Act*. She sought only cancellation of the lien under s. 25.

[49] The current application is brought, in the alternative, under s. 24 of the *Act*, seeking discharge of the lien upon payment of minimal security. The respondents oppose the posting of the security in an amount less than the face value of the claim. It is Ms. Landon's position under both s. 24 and s. 25(1)(b) that the amount of the lien claim is not for work performed or materials supplied towards the construction of the home. Instead, the lien is for an amount equal to the last advance payable on the Landon contract and does not relate in any way to work already performed but not paid for, or materials already supplied but not paid for.

[50] Counsel for Tylon Steepe Homes conceded that the invoice filed by Mr. Kretschmer in support of the lien is with respect to the amount of the last advance payable on the contract. The worksheet filed by Mr. Kretschmer sets out various charges and credits, but the amounts of each are roughly equal. They reflect an amount owing of approximately $12,000. Those charges and credits are not supported by any documentation. In any event, they do not establish that $193,600, which is the amount of the lien claim, is owed as a result of unpaid work performed or unpaid materials provided. There is no documentation filed in support of the claim that would suggest any amounts owing on that basis.

[51] While a lien claimant need not provide *prima facie* proof of the amount of the lien, he or she must provide more than a mere bare assertion of the amount owing. Mr. Kretschmer has not even deposed in his affidavit that the amount claimed, $193,600, or any part of it, is actually for work he has performed but has

not been paid for, or materials provided and not paid for. The invoice he provided establishes only that he is claiming the final advance payment stipulated by the fixed price contract.

[52] Ms. Landon, on the other hand, deposed that she has paid $273,878.54 to complete the house. She deposed that $66,458 of that amount was not part of the building contract and was outside the scope of the specifications. The remaining $207,420, she deposed, were amounts within the scope of the specifications. Ms. Landon provided invoices and receipts for $116,926, and also provided particulars of the balance of $156,952.26. Mr. Kretschmer did not dispute that the latter amounts were paid, nor did he dispute that they were within the scope of the specifications. He disputed only the amount of $116,926.28. In earlier affidavits filed in support of the petition, he attached invoices totalling approximately $20,000.

[53] As noted by Mr. Justice Burnyeat in the *Tylon Steepe Homes v. Pont* decision, cited earlier, s. 2(1) of the *Act* is clear that a lien can only be claimed for "the price of the work and material to the extent that the price remains unpaid". Section 2 does not grant a lien for the price of work not yet performed or materials not yet supplied. A party can have a claim for lost profits resulting in the repudiation of a building contract without having a claim of lien. That party's remedy sounds in damages arising from the common law of contract. In that regard, I refer also to the decision of *Golden Hill Ventures Ltd. v. Kemess Mines Inc.*, 2002 BCSC 1460.

[54] There are other problems with the claim for the final advance payment under the contract. That payment was due on substantial completion. Mr. Kretschmer has deposed that the construction was not substantially complete. However, he also deposed that he delivered the invoice for the final payment in early November 2008. The Landons have deposed the invoice was never sent or delivered to them. In effect, Mr. Kretschmer says he delivered the invoice for the final payment in early 2008, yet at the same times says the home was not substantially complete. His evidence in this regard is problematic. It is not disputed that the Landons have paid $726,877, plus tax ,on the building contract of $911,341. On the materials filed, Ms. Landon paid $207,000 to bring the construction to completion. In addition, a number of sub trades have filed liens against the property alleging that the plaintiff did not pay them for their work, and these liens total more than $125,000.

[55] On all of the evidence, it is open to the court to cancel the lien as an abuse of process under s. 25(2)(b). While I am of the view that the decision of Brooke J. did not render the issue *res judicata*, out of an abundance of caution I have considered the matter under s. 24 of the *Act*; that is, whether the lien claim should be discharged upon payment of nominal security, which is the alternative basis argued by Ms. Landon.

[56] Under s. 24, the court has discretion, upon consideration of all the relevant circumstances, to set an amount of security less than the face amount of the claim. Tylon Steepe Homes opposed the posting of security in any amount less than the face value of the claim. In doing so, they must provide at least some evidence that the monies are owed.

[57] In *Strata Plan LMS 2262 v. Belgrove Construction Ltd.*, 2003 BCSC 535, Master Bishop said the following at para. 10:

> When the question arises at the time of posting security with respect to the amounts claimed, the onus shifts to those who want full security posted to provide at least the barest of details which would be something more than a bald statement that the monies are owing and something less than *prima facie* proof of the claim.

[58] I noted earlier in these reasons that the affidavit material filed by the plaintiff, when reviewed closely, does not contain even a bald assertion that the amount of the lien claim is owing for unpaid work performed or materials supplied but not paid for. For that reason, I have concluded it is appropriate in the circumstances to order a discharge of the lien claim upon security posted by Ms. Landon of $1. I note also that this is a house worth well in excess of $1 million, located on lakefront property, and there is no prospect that if Tylon Steepe Homes is successful that it will obtain only an empty judgment.

[59] I turn then to the third and final issue, which is security for costs.

[60] Ms. Landon applies for her costs pursuant to the inherent jurisdiction of the court and s. 236 of the *Business Corporations Act*. Tylon Homes has few, if any, exigible assets. The respondents concede the point and only dispute the amount.

[61] The law with respect to security for costs was neatly summarized by Madam Justice Ballance in the *Pont* action at paras. 17 to 23 of her reasons for judgment, and I will not repeat them here.

[62] A draft bill of costs was provided by counsel for Ms. Landon in which the costs of trial are estimated at just over $50,000. That estimate is based on a seven-day trial with 3.5 days of opposed applications. The respondents argued that $20,000 was the appropriate amount, but did not provide any draft bill of costs or any rationale for the $20,000 amount. In his most recent affidavit, Mr. Kretschmer deposed that the plaintiff in the Landon Action anticipated calling 15 to 20 witnesses. It is also apparent from submissions of counsel that there will be several contested motions before the matter reaches trial. It is noteworthy that Ballance J. ordered security for costs in the *Pont* matter at $42,000 based on an estimated five-day trial.

[63] I have reviewed the bill of costs and the material submitted by counsel. I am satisfied that an estimate of seven days of trial and three-and-a-half days of contested pre-trial motions is realistic, and that an estimated bill of costs of $50,000 is also realistic, if not conservative.

[64] Accordingly, I order that Tylon Steepe Homes must provide security for costs in the amount of $50,000.

[65] I will summarize my orders. There are three of them.

> 1.(a) the Landon Action and the Pont Action will be tried at the same time in one trial and the evidence in one action, both at trial and in all pre-trial proceedings, will be evidence in the other action;
>
> (b) consequent upon the order under s-s (a), the Landon Action will be transferred to the Vancouver registry for all pre-trial proceedings and applications; the plaintiff, Tylon Steepe Homes,

will be at liberty to apply to have the trial of the actions heard in Kelowna; and

(c) the actions will be case managed in Vancouver.

2. The claim of lien filed by the plaintiff in the Landon Action will be discharged upon Ms. Landon posting security in the amount of $1.

3. There will be an order for security of costs against the plaintiff in the amount of $50,000, pending which all proceedings in the Landon Action are stayed.

[66] MR. POTTS: My Lady, Frank Potts for applicant.

[67] THE COURT: Yes.

[68] MR. POTTS: Two matters. In respect of the order for security for costs, could there be a date by which the money should be posted? We are not particularly concerned with what that date is, but more just that there be one. And secondly, we seek costs in any event of the cause.

[69] THE COURT: In terms of a date for the posting of security, Mr. Turner, do you have any --

[70] MR. TURNER: I would like to suggest 60 days.

[71] THE COURT: Sixty days?

[72] MR. TURNER: Sixty.

[73] THE COURT: Mr. Potts?

[74] MR. POTTS: We do not object to that, My Lady.

[75] THE COURT: All right. As part of order number 3, then, the amount of $50,000 will be posted within 60 days of today's date.

[76] With respect to costs, unless I hear anything to the contrary from counsel for Tylon Steepe Homes, it seems to me that costs should follow the event here.

[77] MR. DONOHOE: My Lady, David Donohoe. I would submit that the appropriate order for costs should be costs awarded to the defendants in the cause, rather than costs in any event. And so, in that case, if the defendants are not successful in improving their position in the whole action, then they would not be entitled to recover costs for these applications.

[78] THE COURT: Mr. Potts?

[79] MR. POTTS: I did not -- perhaps I misunderstood. I did not see any difference between what Your Ladyship said you were going to order and what Mr. Donohoe was seeking.

[80] MR. DONOHOE: Well, I understood, Mr. Potts, that you were seeking costs to the defendants in any event of the cause, which would mean that you would be entitled to recover costs of these applications even if your clients, the defendants, were not successful in the action as a whole, and we --

[81] MR. POTTS: Well, My Lady, I did seek costs in the cause, but -- or costs in any event, but I understood Your Ladyship to say you were not disposed to order that, and that unless the respondents had submissions you were going to order costs in the cause, and I would have thought that would be the end of it.

[82] THE COURT: Yes. Well, there may have been some miscommunication there, but I simply wanted counsel's response to your request for costs in any event. It is appropriate in this case that costs be in the cause for the reasons that counsel has indicated.

[83] That will be the fourth order, then, that costs will be in the cause, and if there is nothing further, counsel, we will adjourn.

[84] MR. POTTS: Nothing further from applicant, My Lady.

[85] MR. DONOHOE: Just to clarify that, that is costs to the defendants in the cause?

[86] THE COURT: Yes.

The Honourable Madam Justice C. A. Wedge