COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Tylon Steepe Homes Ltd. v. Pont,***
2009 BCCA 211

Date: 20090514
Docket: CA36910

Between:

Tylon Steepe Homes Ltd.

Appellant
(Plaintiff)

And

Charles Eli Pont and Jill C. Pont

Respondents
(Defendants)

Before: The Honourable Mr. Justice Chiasson
(In Chambers)

D.W. Donohoe	Counsel for the Appellant
F. Potts and S. Urquhart	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia 20 March 2009
Place and Date of Judgment:	Vancouver, British Columbia 14 May 2009

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

Introduction

[1] This is an application for leave to appeal from an order discharging a builders lien on payment of security of $90,000 with no additional amount for security for costs.

[2] The applicant contends the chambers judge erred in failing to hold it is entitled to a lien in the amount of a contractual progress payment, regardless of the value of the work done on the building to that point. It also states the chambers judge's determination of the amount posted to replace the lien should have included security for the costs. The applicant seeks a stay of execution of the judge's order pending the determination of the appeal

[3] For the reasons that follow, I dismiss this application.

Background

[4] The applicant, Tylon Steepe Homes Ltd. ("Tylon"), is a developer and home builder which contracted to construct a home for Mr. and Mrs. Pont. I shall not review the extensive history of the course of dealings between the parties, but shall address what I consider to be the salient facts relevant to the present application.

[5] The parties entered into a construction contract that provided for periodic payments based on stages of completion of construction. Construction of the home began in April 2008. In July 2008, Tylon delivered an invoice for $375,175.32, pursuant to the stage of completion it had reached under the contract. The full amount owing was $375,586.00, but Tylon deducted a credit for windows that the Ponts had already paid for, leaving the balance of $375,175.32. Issues had arisen between the parties and the Ponts purported to terminate the contract in September 2008. Tylon filed a builders lien against the property in October 2008.

[6] The amount of the lien as filed was $255,982, which the principal of Tylon deposed was the value of the work done. Tylon adduced expert evidence to support its value. At the hearing in Supreme Court chambers, Tylon took the position it was entitled to a lien for the then due progress payment of $375,175.32.

[7] The Ponts challenged the alleged value of work done. Using $375,586, which was the specified amount of the contractual progress payment, as a base value, the Ponts deducted various amounts, including $211,571 they previously paid to Tylon, to reach an amount owing of $43,548.91.

[8] The chambers judge considered the submissions, including a contention the lien filing was frivolous and vexatious. He concluded filing the lien was an abuse of process, but did not base his decision on this. The judge determined Tylon was entitled to a lien. It was his view that Tylon did not have a lien claim for either $255,982 or $375,175.32 and concluded an appropriate amount of security was $90,000. Referring to this Court's decision in ***Q West Homes Van Homes Inc. v. Fran-Car Aluminum Inc.***, 2008 BCCA 366, the legislation and a number of authorities, the judge concluded the amount of security required to discharge the lien should not include security for costs. His reasons for judgment are indexed as 2009 BCSC 253.

Discussion

General observation

[9] The criteria to be addressed on an application for leave to appeal from an interlocutory order are whether:

1. the point on appeal is of significance to the practice;
2. it is of significance to the action itself;
3. the appeal is *prima facie* meritorious, or, on the other hand, whether it is frivolous;
4. the appeal will unduly hinder the progress of the action.

(See ***J.C.R. (Litigation Guardian) v. British Columbia***, 2007 BCCA 496, per Donald J.A. in chambers, referring in para. 21 to ***Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.*** (1988), 19 C.P.C. (3d) 396 (B.C.C.A.))

[10] In its written submission, Tylon did not address these criteria, but they were reviewed at the hearing.

[11] The relevant sections of the ***Builders Lien Act***, S.B.C. 1997, c. 45 are ss. 2 and 24, which provide as follows:

> **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.

. . .

Cancellation of claim of lien by giving security

24 (1) A person against whose land a claim of lien has been filed, and a contractor, subcontractor or any other person liable on a contract or subcontract in connection with an improvement on the land, may apply to a court to have the claim of lien cancelled on giving sufficient security for the payment of the claim.

(2) The court hearing the application under subsection (1) may, after considering all relevant circumstances, order the cancellation of the claim of lien on the giving of security satisfactory to the court.

(3) The value of the security required under an order under subsection (2) may be less than the amount of the claim of lien.

(4) The registrar or gold commissioner in whose office a claim of lien is filed must, on receiving an order or certified copy of the order made under subsection (2), file it and cancel the claim of lien as to the property affected by the order.

(5) The giving of security for the payment of a claim of lien under subsection (1) does not make the owner liable for a greater sum than provided for in section 34.

[12] It is clear the issue of posting security for costs as part of the amount required to discharge a builders lien is a matter of significance to the profession. In its written submission, Tylon addressed the issue as follows:

> On the matter of the Plaintiff's claim for security for costs as a component of security for the lien claimant, the Plaintiff will rely on ss. 37(2) and s 38(l)(a) of the *Builders Lien Act* which both grant priority in any distribution of either holdback funds or the proceeds of sale of the subject property to the costs of the lien claimants, prior to payment of the money owing either to construction workers for their wages or in respect to the principal money owing to contractors or subcontractors. Because of this priority granted to recovery of legal costs ahead of the principal debt claim of lien contractors, there must be an additional amount that is paid into court by an owner to constitute "sufficient security" in order to protect the payment of the full amount of the principal claim of the lien claimant. Otherwise, the prior payment out of the security amount to pay the costs of lien claimants will mean that there is a shortfall in the claimant's recovery of the principal amount claimed.

[13] The issue of including security for costs was argued by the Ponts in the chambers proceeding and it appears to have been the subject of written submissions after the hearing. The chambers judge dealt extensively with the matter and concluded the legislation did not authorize including an amount for security for costs.

[14] In this context and in the context of its proposed appeal concerning the amount of the lien, Tylon relies on the holdback provisions of the ***Act***. As noted above, in the context of security for costs, in its written submission it referred to s. 37(2) and in oral submission s. 4(3) concerning the quantum of its lien. It is not clear to me that Tylon raised consideration of the holdback provisions with the chambers judge. Although I question the applicability of the holdback provisions of the ***Act*** to either the issue of posting security to discharge a lien or including an amount for security for costs in that security, I cannot say the issue is frivolous, but it must be placed into context.

The value of the lien

[15] In this case, Tylon filed a lien based on its view of the value of the work done. In its statement of claim, Tylon stated the amount of the lien was in error and that it claimed the full amount of the then due progress payment. At the chambers hearing, Tylon adduced evidence of the value of work done, but also relied on the amount of the progress payment. The following exchange took place between the judge and counsel for Tylon during oral submissions:

> MR. DONOHOE: My Lord, this is not a quantum merit or cost plus contract. This is a fixed-price contract. The defendant Ponts agreed to pay the specific amount once the work that had -- that was required by draw number C had been completed. That wasn't made conditional upon the plaintiff contractor providing detailed evidence that, in fact, there was work in place to justify that draw number C would be payable for that amount of work. So as long as the plaintiff contractor has performed its side of the agreement, namely to press forward with the stage of construction to entitle it to payment under draw number C, then it really doesn't matter whether the value as assessed by Mr. Evans is tens of thousands of dollars less than that particular payment that's due under the contract. That payment is due --
> THE COURT: Doesn't that go to the question of whether the contract was terminated properly and not to the question of what the lienable amount is?
> MR. DONOHOE: I'm not sure I follow the point you're making.
> THE COURT: You get a lien for the work done on the property. You don't get a lien done -- you don't get a lien for the assessment of the contractor of what — whether something is payable or not.
> MR. DONOHOE: Well --
> THE COURT: He makes an assessment which may or may not be right, but they have reached a certain point in construction --
> MR. DONOHOE: Right.
> THE COURT: -- that something is owing.
> MR. DONOHOE: Yes.
> THE COURT: That calculation is totally irrelevant. It's not completely unrelated, but isn't it irrelevant to the issue of how much has actually been -- the work actually done on site?
> MR. DONOHOE: Well, I agree that it's a completely separate and distinct question as to whether there's -- that's true, these are two different questions. But the original point I'm making is these are two parties who signed a building contract and, for example, let's take the hypothetical example of a contractor who's actually completely finished the job right to substantial completion with a certificate being issued, and the contract calls for a million dollars worth of work, and then quantity surveyors on the job and they say, Oh, sure, you can finish the job but we assess the value of this work at only $800,000. That doesn't mean the contractor now has to accept only 800,000.
> THE COURT: Oh, no, no, but -- I accept that proposition, Mr. Donohoe.
> MR. DONOHOE: Right.
> THE COURT: But I mean I'm having difficulty with the context of how much the lien is and therefore how much I should provide for security, understanding why it's important to know that it was the right of your client that payment C should be made.
> MR. DONOHOE: It's not simply the -- it's not simply my client's evidence on this point. I mean there is evidence also in --
> THE COURT: Well, the totality of the evidence
> MR. DONOHOE: Right.
> COURT: -- would lead me to the conclusion that it may or may not have been required to make payment C.
> MR. DONOHOE: Yes.
> THE COURT: Okay. But do I have to make that assessment or rather do I have to make the assessment of how much work was done?
> DONOHOE: Well, My Lord, my submission is that as long as the plaintiff has adduced evidence to

> establish what I will a call a *prima facie* case that it is entitled to the payment under draw number C, then that gives it rights to lien, to file a lien, in respect to the debt claim for the payment due under draw number C regardless of what is the value of the work in place. Now, obviously, there was -- prior to these parties actually signing the contract they, as reasonable, intelligent people, must have assessed whether draw number C should entitle the contractor to recover X amount, whatever that payment was, and the Ponts having looked at that said, Yes, that's a fair amount for us to pay to you once that particular draw C is established. That's a very important independent factor, in my submission, for the court to look at because this was the agreement made by the parties at the time of entering into the contract concerning a fair valuation of the work at that stage. And as I say, there's -- there is clear evidence that that particular stage of construction has been reached.

[16] From this exchange, it can be seen that the focus of the application and the discussion was on value. Tylon's position was that the parties had agreed on the value of work and materials supplied to the project as being certain milestones of work completed. In fact, the judge used the value proposed by Tylon (in para. 35, he based his conclusion on the Ponts' calculation which started with this number). Tylon's only quarrel is that the judge deducted the amount paid previously by the Ponts.

[17] In this context, the judge stated in para. 32 that Tylon "failed to distinguish between what might be owing under the Contract and what might be lienable as a result of the labour and materials relating to the improvement on the Property". Section 2 of the ***Act*** provides for a lien "for the price of work and materials". The judge was following the language of the statute and long-standing practice.

[18] Tylon is free to pursue its position that it is entitled to a lien for the contract progress payment amount without deduction in the action on its lien. If it were not to succeed, it would have a right to appeal. Although I cannot say the present appeal on this issue is frivolous, I do not think it is *prima facie* meritorious. In my view, a division of this Court is unlikely to disturb the judge's conclusion at this point in the litigation which concerns fixing security for costs for the discharge of the lien.

[19] While an appeal on the issue may have significance to the action itself, in my view, it is an issue that should have the benefit of full submissions in and reasons of the trial court. I note the matter engages considerations of the validity of the termination of the contract by the Ponts, potentially whether the filing of the lien was proper and the underlying circumstances of the relationship between the parties. A determination by this Court at this time of whether Tylon is entitled to a lien for the amount of the progress payment without a deduction for monies paid previously by the Ponts would have to be subject to these presently unresolved issues.

[20] In my view, an appeal of this interlocutory order likely would hinder the progress of the litigation because the issue may engage the core of the dispute: the amount of the lien to which Tylon is entitled.

[21] I would not grant leave to appeal the judge's order fixing the security for the discharge of the lien.

Security for costs

[22] The judge gave comprehensive reasons why security for costs should not be included in the amount of security posted to discharge the lien. Apart from relying on the holdback provision of the ***Act***, Tylon identifies no error in the judge's interpretation of the legislation. The judge also concluded that if he had a residual discretion to order the inclusion of security for costs, he would not do so. No error has been identified in his exercise of that discretion. In my view, a division of this Court is unlikely to interfere with the judge's conclusion on this issue.

[23] Considering the amount in issue and the other issues that must be addressed, whether security for costs is included in the amount of security required to discharge the lien is not of significance in this action.

[24] I do not think an appeal on this issue alone would hinder the progress of the action.

[25] I do consider that in the interests of justice, which always is an overriding criterion in matters such as this, leave should not be granted on this issue.

[26] The amount at issue is small. The Ponts are private individuals trying to have their home construction concluded. At the end of the litigation, if an appeal by Tylon were warranted, it may be able to challenge the order refusing the inclusion of security for costs. In my view, the Ponts should not be obliged at this time to respond to an appeal on a point that may have significance to others, but which is of little interest to them.

Conclusion

[27] Based on my conclusions, it is not necessary for me to address the application for a stay of proceedings, but if it were necessary for me to do so, I would not order a stay. I do not think Tylon meets the requirements for such an order, considering the three factors: the merits of its proposed appeal; irreparable harm; balance of convenience.

[28] I dismiss this application for leave to appeal.

"The Honourable Mr. Justice Chiasson"