

Cite as: Sharon Sales Ltd. v. South Shore Development Ltd., 1971 NSCA 1

CASE NO.

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1970

S. C. No. 16184

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

BETWEEN:

SHARON SALES LIMITED,
a body corporate,

Appellant
(Plaintiff)

- and -

SOUTH SHORE DEVELOPMENT
LIMITED and MONTREAL TRUST
COMPANY

Respondents
(Defendants)

HEARD

at Halifax, Nova Scotia, before the
Honourable Chief Justice McKinnon,
the Honourable Mr. Justice Coffin
and the Honourable Mr. Justice Cooper
of the Appeal Division, Jan. 18, 1971

ORAL
OPINION

January 18, 1971

COUNSEL

Douglas A. Caldwell, Esq. Appellant
George W. MacDonald, Esq. Respondents

Statement of claim, Mechanics' Lien Act

O. XIX, r. 4; O. LXVIII, r. 1,
The Judicature Act, 1950

1970

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LIMITED and MONTREAL TRUST
COMPANY

Respondent
(Defendants)

[oral opinion]

McKINNON, C.J.N.S.:

This is an appeal from the decision of His Honour Judge R. Clifford Levy, Judge of the County Court for District Number Two, dated the 1st day of December, 1970, and from an order granted pursuant to that decision vacating the registration of a claim of lien dated the 14th day of December, 1970.

The facts as contained in the submission of the appellant are as follows:

"On the 17th day of April, 1970, a Claim of Lien for Registration, signed by W. Alton Snow, as President of the Appellant Company, was registered in the Registry of Deeds Office at Liverpool, N. S., along with the Affidavit of Verification of W. Alton Snow, claiming a Lien on certain property, pursuant to the Mechanics' Lien Act, R.S.N.S., 1967, c. 178.

On the 14th day of July, 1970, a State^{ment} of Claim in the action was filed with the Clerk of the County Court for District Number Two in Liverpool, N. S., together with a Certificate of Lis Pendens. The Statement of Claim was dated the 13th day of July, 1970, and was signed as follows:

' (Sgd.) D. A. Caldwell
Douglas A. Caldwell
Jones, Milford & Freeman
P. O. Box 820
Liverpool, Nova Scotia '

Subsequently a Notice of Motion to vacate the registration of a Claim of Lien, signed by the Solicitor for the Respondent, South Shore Development Limited was served upon Mr. Gerald B. Freeman, Solicitor for the Appellant Company. The Notice of Motion was dated on the 23rd day of October, 1970. In his Affidavit in Support of the Motion, the Respondent's Solicitor, alleged inter alia that Douglas A. Caldwell, who signed the Statement of Claim, was not at the time of the signing of the Statement of Claim, a Barrister or Solicitor entitled to practice in the Province of Nova Scotia, and that, as the Statement of Claim was not signed by the Plaintiff (Appellant), it was invalid according to the provisions of Order XIX, Rule 4 of the Rules of the Supreme Court.

The Appellant's Solicitor, Mr. Gerald B. Freeman, in his Affidavit dated the 2nd day of November, 1970, opposing the motion, acknowledged that Douglas A. Caldwell signed the Statement of Claim in the action and that Douglas A. Caldwell was, at the time, an articled clerk practicing with the firm of Jones, Milford & Freeman and of which Mr. Freeman was a partner. Mr. Freeman further alleged that he duly authorized Douglas A. Caldwell to sign the Statement of Claim as his Agent or Attorney and on his behalf, as Solicitor for the Plaintiff (Appellant).

In rendering his decision on December 1st, 1970, His Honour Judge Levy said: 'I am of the opinion that the failure of the signing of the Statement of Claim by the Plaintiff's Solicitor affects the whole substance of the claim to the extent that it is incurable. Without the commencement of the action there can be nothing to amend. It is not a question of an irregularity that is curable.' "

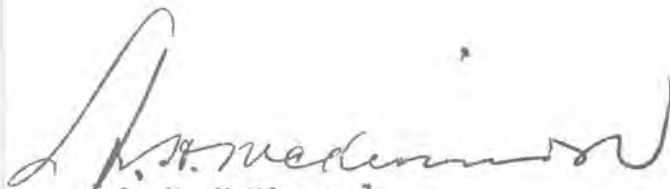
After carefully reviewing the record herein and considering the representations of counsel for the appellant and respondents, it appears to us that the Respondents have not been misled nor substantially injured by the appellant's non-compliance with Order XIX, rule 4 of The Judicature Act, 1950, and we are of the opinion that this finding is supported by the decision of Middleton, J., in Bank of Hamilton v. Baldwin, [1913] 12 D.L.R. 232, where he is reported in part as follows [235]:

"Little purpose would be served by the citation of instances in which the Court has exercised its remedial jurisdiction. The general principle underlying all the cases is, that the Court should amend where the opposite party has not been misled or substantially injured by the error."

It is the opinion of the Court that the statement of claim stands as from the date of issue, notwithstanding that it was not signed by the then solicitor of the appellant on that date; the statement of claim itself remains effective as from the date of issue.

The appeal is allowed with the case being referred back to the Court below for trial on the merits; the respondents will have the costs of this appeal.

DATED at Halifax, Nova Scotia, this 18th day of January,
A. D., 1971.



[A. H. McKinnon]
CHIEF JUSTICE OF NOVA SCOTIA



[T. H. Coffin]
A JUSTICE OF THE APPEAL DIVISION



[A. G. Cooper]
A JUSTICE OF THE APPEAL DIVISION