

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *Anixter Canada Inc. v. Phil Miller Electric Ltd.*, 2004 NSCA 67

**Date:** 20040527

**Docket:** CA 212725

**Registry:** Halifax

**Between:**

Anixter Canada Inc.

Appellant

v.

Phil Miller Electric Ltd. and J.D. Irving Ltd.

Respondent

**Judges:** Bateman, Hamilton, Fichaud, JJ.A.

**Appeal Heard:** April 8, 2004, in Halifax, Nova Scotia

**Held:** Leave to appeal is granted; appeal dismissed with costs in the cause as per reasons for judgment of Fichaud, J.A.; Bateman and Hamilton, JJ.A. concurring.

**Counsel:** Colin Bryson, for the appellant  
George MacDonald, Q.C., for the respondent

Reasons for judgment:

[1] This is an application for leave to appeal and, if granted, an appeal from an order of Justice C. Richard Coughlan of the Supreme Court in a mechanic's lien matter. Justice Coughlan's order was further to an application under Rule 25.01 (a) for determination of a question based on an Agreed Statement of Facts.

***Background***

[2] The essential facts, paraphrased from the Agreed Statement, are:

(a) The respondent, J.D. Irving Limited ("Irving") contracted with the respondent Phil Miller Electric Limited ("Miller") that Miller would provide the electrical installation for the construction of a stud mill on lands owned by Irving. The appellant, Anixter Canada Inc. ("Anixter") supplied wire and cable to Miller for installation on the project.

(b) Miller encountered financial difficulties and, by February 2000, had failed to meet its milestones for completing the work. Irving exercised the power under its contract with Miller to complete the work directly. Irving completed the work partially by re-engaging Miller and partially by supplying and paying directly for additional labour.

(c) On April 12, 2000 Miller's contract work with Irving was substantially performed within the meaning of s.13(1) of the *Mechanics' Lien Act* R.S.N.S. 1989, c. 277. Between February 2, 2000 and April 29, 2000 Anixter supplied materials to Miller for the project.

(d) Irving made several progress payments to Miller early in the project followed by a payment of \$325,000 plus HST on May 26, 2000.

(e) On June 8, 2000 Anixter filed a claim for lien against Irving's lands in the amount of \$128,186.04 plus interest.

(f) Irving and Miller discussed further payment by Irving. On June 14, 2000 Irving sent a letter to Miller advising that, further to an agreement between Miller and Irving, cheques totalling \$128,800 were enclosed. Three

of the cheques were payable jointly to Miller and to subcontractors of Miller (not Anixter) and a fourth cheque was payable to Miller alone.

(g) On July 13, 2000 Anixter filed a *lis pendens* for the amount stated in Anixter's claim of lien.

(h) As a result of a credit provided by Anixter to Miller, and a dividend received from Miller's bankrupt estate, the amount of Anixter's lien has been reduced to \$114,336.09 plus interest.

[3] The critical fact was Irving's payment of \$128,800 on June 14 after Anixter had filed its lien on June 8. As none of that amount was paid to Anixter, was Irving liable to pay this amount again, this time to Anixter?

[4] The chambers justice issued an initial decision dated June 25, 2003 which characterized the initial issue as follows:

The question for the Court is whether the amount paid on June 14, 2000 is to be included in calculating the amount of the holdback.

The chambers justice ruled that the payment of \$128,800 was for work which had been done on the project and therefore was part of the holdback held by Irving up to June 14. Justice Coughlan stated that if the parties were still unable to agree on the amount of Anixter's lien, he would issue further directions.

[5] The parties could not agree on the amount of the lien, or the extent to which Irving was liable to pay any of the \$128,800 again, to Anixter.

[6] After further submissions, Justice Coughlan issued a supplementary decision of December 2, 2003, followed by an order which incorporated the terms of both decisions. The order provided:

(a) The total contract price between Irving and Miller was \$1,501,250.

(b) On June 14, 2000 the statutory holdback required of Irving was 2 ½ % of this contract price (ie. \$37,531.25).

(c) Anixter could assert its lien against Irving's payment of \$128,800, requiring Irving to pay again, subject to the right of Irving to set off any amount owed by Miller to Irving, down to the statutory holdback of 2 ½ % (\$37,531.25).

[7] Irving's right to set off was significant because, as a result of Miller's failure to perform, Miller owed to Irving an amount which exceeded Anixter's lien claim.

### *Issues*

[8] Anixter's notice of appeal to this Court states the ground of appeal as:

That the learned Chambers Judge erred in law by holding that, pursuant to section 13 of the *Mechanics' Lien Act*, the statutory holdback, against which the Appellant's lien had a charge, not subject to rights of offset, was 2.5% of the total contract price (i.e. \$37,531.25), even though, at the time of the recording of the Appellant's lien, \$112,000, plus HST, of the 10% statutory holdback of \$150,125.00, plus HST, remained unpaid by the Respondent, JD. Irving Limited to the Respondent, Phil Miller Electric Limited.

[9] Anixter's factum to this Court covered two issues:

(a) When Anixter filed its lien on June 8, did the "statutory holdback" include the full \$128,800 which Irving paid on June 14? If so, this full amount should be available towards satisfaction of Anixter's lien.

(b) Was Anixter entitled to interest on its lien further to s. 13(8) of the *Mechanics' Lien Act*?

### *First Issue: Statutory Holdback*

[10] Anixter introduced its written argument by accepting as an accurate statement of the law the following passage from Macklem & Bristow, *Construction Builders' and Mechanics' Liens in Canada* (6<sup>th</sup>), p. 3-35:

The minimum amount of the owner's liability to the subcontractor is the amount of the statutory holdback. However, if for some reason the owner retains more than the statutory holdback, the subcontractor is entitled to assert his lien against this excess, subject to the owner's right to reduce this excess by the amount of his

claim for set-off or counterclaim, if any, against the contractor for defective workmanship, for breach of contract, for additional cost of completion, or for other damages.

[11] The appellant states that the full \$128,800 paid by Irving on June 14 was, immediately before that date, included in the “statutory holdback” and was subject to Anixter’s lien claim which had been filed before Irving made the payment. Therefore, the argument goes, according to the passage from *Macklem & Bristow*, none of the \$128,800 was subject to Irving’s right to set off any amounts owing by Miller to Irving. By making the payment improperly, Anixter says, Irving rendered itself liable to Anixter to satisfy Anixter’s lien up to \$128,800.

[12] I disagree with Anixter’s submission.

[13] Section 13 of the *Mechanics’ Lien Act* governs the holdback:

13 (1) In this Section, a contract under which a lien can arise pursuant to Section 6 is deemed to be substantially performed

(a) when the work or improvement is ready for use or is being used for the purpose intended; and

(b) when the work to be done under the contract is capable of completion or correction at a cost of not more than two and one-half per cent of the contract price.

(2) In all cases the person primarily liable upon any contract under or by virtue of which a lien may arise shall, as the work is done or materials are furnished under the contract, deduct from any payments to be made by him in respect of the contract, and retain for a period of forty-five days after the contract is substantially performed, ten per cent of the value of the work, service and materials actually done, placed or furnished as mentioned in Section 6, and such value shall be calculated on the basis of the contract price, or if there is no specific contract price, then on the basis of the actual value of the work, service or materials.

(3) Forty-five days after the contract is substantially performed the amount required to be retained pursuant to subsection (2) may be reduced to two and one-half per cent of the value of the work, service and materials actually done, placed or finished and this balance of two and one-half per cent may be retained

by the person primarily liable upon the contract until all required work is performed completely.

(4) The lien shall be a charge upon the amount directed to be retained by this Section in favour of subcontractors whose liens are derived under persons to whom such moneys so required to be retained are respectively payable.

(5) All payments up to ninety per cent of the contract price or actual value made in good faith by an owner to a contractor, or by a contractor to a subcontractor, or by one subcontractor to another subcontractor, before notice in writing of such lien given by the person claiming the lien to him, shall operate as a discharge *pro tanto* of the lien.

(6) Payment of the percentage required to be retained pursuant to subsections (2) and (3) may be validly made so as to discharge all liens or charges in respect thereof after the expiration of the periods mentioned in subsections (2) and (3) unless in the meantime proceedings have been commenced to enforce any lien or charge against such percentage as hereinafter provided.

(7) Where, pursuant to subsection (3), anyone reduces the holdback being retained, everyone retaining the holdback shall pay to the person to whom he is primarily liable ninety-seven and one-half per cent of the value to the payer of the services and the materials supplied by the person who has received the return of the holdback referred to in subsection (3).

(8) Anyone retaining a holdback who does not make payment within fifty days immediately following substantial performance as permitted by subsection (3) or subsection (7) is liable to the person entitled to such payment for interest on the amount which should have been paid at the prime rate of interest then commonly charged by chartered banks plus two per cent unless there has been agreement on some other rate of interest.

(9) As funds retained are paid eventually according to entitlement under the provisions of this Act, the liability of the owner to a lien claim will be reduced in the same proportion as such payments. R.S., c. 277, s. 13.

[14] Section 13(2) states that the initial holdback is to be ten percent of the value of the work, to be retained for 45 days after substantial performance. Section 13(3) states that beginning 45 days after substantial performance, the amount of the holdback may be reduced to two and one-half percent of the value of the work.

[15] According to the order of the chambers justice, the Irving-Miller contract price totalled \$1,501,250, a ruling which has not been appealed. At the hearing of this appeal, counsel for both parties suggested that this number may be incorrect, and that the parties between themselves might agree to a corrected amount. For the purposes of this decision I will use the number in Justice Coughlan's order. The Agreed Statement of Facts states that the Irving-Miller contract was substantially performed on April 12, 2000.

[16] For 45 days after April 12, until May 27, 2000, Irving was required to hold back \$150,125, being ten percent of the contract price. This was the statutory holdback up to May 27, 2000.

[17] After May 27, 2000, s. 13(3) required Irving to hold back only two and one-half percent of the value of the work, quantified in this case as the contract price. Two and one-half percent of the contract price was \$37,531.25. This was the statutory holdback after May 27, 2000.

[18] The chambers justice ruled that the payment of \$128,800 on June 14 should be considered as retained holdback up to that date. Irving has not cross-appealed to challenge this ruling.

[19] This means that between May 27 and June 14, 2000, Irving's retained holdback exceeded the statutory holdback by \$91,268.75 (\$128,800 less \$37,531.25).

[20] Anixter relies on s. 13(6) which states that "payment" of the initial ten percent holdback "may be validly made so as to discharge all liens" after the expiry of the 45 days, unless in the meantime proceedings have commenced to enforce a lien. Anixter argues that, from these words, only "payment" discharges the lien on the initial ten percent holdback. Until payment is made, the lien remains on whatever amount the owner retains of the initial ten percent holdback, even after the passage of 45 days from substantial completion.

[21] In my respectful view, Anixter confuses the application of the lien with the amount of the statutory holdback. The "statutory holdback" is the amount which the statute requires the owner to hold back. Section 13(6) continues the lien on unpaid amounts exceeding the two and one-half percent statutory holdback after 45 days. Section 13(6) continues the lien despite payment if proceedings have been

commenced to enforce the lien. But s. 13(6) does not define the statutory holdback, a function which the statute assigns to ss. 13(2) and 13(3). By section 13(3) the statutory holdback was only two and one-half percent after May 27, 2000. An owner's decision to retain more than the statutory holdback does not designate the excess as "statutory" holdback.

[22] The distinction between the amount of the lien and the amount of the statutory holdback is critical. As stated in the passage from *Macklem & Bristow* p.3-35, quoted above, if the owner retains more than the statutory holdback, (1) the subcontractor's lien may attach to the excess, (2) but the owner may claim set-off against that excess, for amounts owing by the general contractor to the owner.

[23] Accordingly, I agree with the chambers justice that the statutory holdback was only two and one-half percent or \$37,531.25 on June 8 when Anixter filed its lien and on June 14 Irving paid Miller.

[24] I note that there is nothing in the Agreed Statement of Facts to indicate that, before May 27, 2000, 45 days after substantial completion, any claim of lien had been filed or any notice of lien given, or anything else done to commence proceedings to enforce a lien. I make no comment about what holdback would have been required after May 27 if a lien claim had been filed before that date.

### *Set-off*

[25] The passage from *Macklem & Bristow*, quoted above, states that if the owner retains more than the statutory holdback, the sub-contractor is entitled to its lien against the excess "subject to the owner's right to reduce this excess by the amount of his claim for set-off or counterclaim, if any, against the contractor for defective workmanship, for breach of contract, for additional cost of completion, or for other damages."

[26] Based on this principle, the chambers justice's supplementary decision stated that Anixter could assert its lien against the full \$128,800, retained by Irving, subject to Irving's right to reduce the amount in excess of the two and one-half percent statutory holdback by the amount of Irving's claim for set-off against Miller.



[27] Before the hearing of this appeal, this Court requested counsel for both parties to address how Irving could claim a set-off against Miller for \$128,800, after Irving had made that payment to Miller. This matter had not been raised before the chambers justice or in the factums to this Court. The panel asked counsel to comment on passages from *Macklem & Bristow* pp. 3-20.3 and 3-85, *Vaillancourt Lumber v. Trustees* (1964), 42 D.L.R. (2d) 610 (O.C.A.), *S.I. Guttman Limited v. James D. Mokry Limited*, [1969] 1 O.R. 7 (C.A.) and *Canadian Comstock Co. v. Toronto Transit Commission* (1969), 8 D.L.R. (3d) 582 (S.C.C.), at 585, which commented on the effect of payment on a right of set-off under mechanics' lien legislation.

[28] At the hearing of the appeal, both counsel acknowledged that this issue had not been placed before the chambers justice. Counsel for Irving would not agree that this Court could fully consider all aspects of the issue. At one point, counsel for Irving suggested that, had he known of this issue, Irving may have insisted on changes to the Agreed Statement of Fact.

[29] This is an appeal from an application under Rule 25 which permits determination of a specific question based on an agreed statement of facts. This Court is generally restricted to the agreed facts and to the question which was placed before the chambers justice on the interlocutory application.

[30] Accordingly, in my view, this Court should not consider on this appeal whether, after Irving paid Miller \$128,800 on June 14, 2000, Irving could still claim set-off against Miller with respect to that payment.

[31] I wish to make it clear that this issue remains available to be litigated by Anixter in the main proceeding before the Supreme Court. That the issue was not raised on the Rule 25 application, or on appeal from that Rule 25 determination, does not prevent Anixter from raising it in the residue of the claim. I say this notwithstanding the chambers justice's order which expressly deals with the amount subject to the set-off claim.

[32] Counsel for Irving acknowledged on the appeal that the issue could be raised by Anixter on the resumption of the proceedings in the Supreme Court.

[33] My comments above on the nature of the set-off issue after Irving's payment, and the references to the case law are merely to identify the issue which

has not been dealt with on these Rule 25 proceedings and which Anixter is free to raise on the continuation of the proceeding in the Supreme Court. My comments are not meant to indicate any view as to how the issue should be resolved if Anixter chooses to raise it.

***Second Issue: Interest***

[34] Section 13(8) of the *Mechanics' Lien Act* states that anyone retaining a holdback more than 50 days after substantial performance "is liable to the person entitled to such payment for interest." Irving retained holdback monies more than 50 days after April 12, 2000, the date of substantial performance. Anixter claims interest.

[35] Entitlement to interest was not argued in the materials at the hearing before the chambers justice on the Rule 25 application. Because of that, there was no reference to the issue in Justice Coughlan's initial decision. According to counsel on this appeal, after the initial decision, Anixter mentioned interest in a letter, to which Irving responded that it was too late to raise the issue. Justice Coughlan did not consider the interest issue in his second decision of December 2, 2003, apparently accepting Irving's objection that Anixter's argument was untimely.

[36] In this Court, Irving objects to the interest issue being raised.

[37] If the question has not been argued in a timely way on the chambers application under Rule 25, then in the usual course, absent agreement of the parties and a suitable record, the Court of Appeal should not consider the issue for the first time over the objection of one of the parties. I will not consider Anixter's claim for interest on this appeal.

[38] Anixter is free to raise the interest claimed on the resumption of the proceedings in the Supreme Court. There has been no ruling on the merits of the interest claim, and the matter is not *res judicata*.

*Summary*

[39] I would grant leave to appeal, but dismiss the appeal with costs in the cause.

Fichaud, J.A.

Concurred in:

Bateman, J.A.

Hamilton, J.A.