

PROVINCE OF NOVA SCOTIA  
COUNTY OF HALIFAX

C.H. No. 66738

I N T H E C O U N T Y C O U R T  
O F D I S T R I C T N U M B E R O N E

BETWEEN:

J. W. BIRD AND COMPANY LIMITED

PLAINTIFF

- and -

NEWELL ELECTRIC LIMITED,  
CYNTHIA SLADE AND THOMAS NEWELL

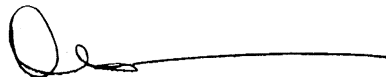
DEFENDANTS

David G. Coles, Esq., Counsel for the Plaintiff.  
William J. Chisholm, Esq., Counsel for the Defendants.

AMENDMENT AS TO COSTS

1991, January 31st, Bateman, J.C.C.:- I decline to award the Plaintiff's costs on the judgment against Newell Electric Limited, as the amount owing was not disputed by the company.

I award the Defendants, Cynthia Slade and Thomas Newell, costs on their successful defence of the action. Consistent with Section 41(2) of the Act, the costs shall be in the amount of 25% of the judgment entered, together with disbursements.



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A Judge of the County Court  
of District Number One

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William J. Chisholm, Esq., Counsel for the Defendants.

1991, January 30th, Bateman, J.C.C.: This is an action under the **Mechanics Lien Act**, R.S.N.S. 1967, c. 178 as amended. The Plaintiff, J. W. Bird & and Company Limited ("Bird") claim Ten Thousand Three Hundred Sixty-Seven Dollars and Two Cents (\$10,367.02) together with interest, being the balance due for materials supplied in relation to the construction of the home of the Defendant, Cynthia Slade. The property in question is located at 22 Lawlor Crescent, Dartmouth, Nova Scotia.

**BACKGROUND**

The Defendants, Cynthia Slade and Thomas Newell, are husband and wife. Thomas Newell is the sole shareholder of the company, Newell Electric Limited. Cynthia Slade is not an officer or a shareholder of that company.

In February, 1989, Cynthia Slade purchased a lot located at 22 Lawlor Crescent. She subsequently hired Ravenwood Developments Limited to construct a house on the lot for approximately One Hundred and Forty-Two Thousand Dollars (\$142,000.00). The contract was not in writing. Thomas Newell is the sole shareholder of Ravenwood Developments Limited. Ravenwood Developments Limited hired Newell Electric Limited ("Newell") to perform work as a subcontractor. Newell Electric Limited purchased materials from Bird. Bird allege that they were not paid by Newell for the materials. Newell Electric Limited is now bankrupt. Bird claims reimbursement for the materials from Cynthia Slade or Thomas Newell and, nominally, Newell Electric Limited.

#### ANALYSIS

Originally included in the issues before me was the matter of a personal guarantee to Bird, signed by Thomas Newell, on behalf of Newell Electric, before Newell Electric became a Limited Company. At the outset of the hearing both counsel agreed that they did not wish me to deal with effect of the guarantee.

In resolving the primary issue, which is the liability of Cynthia Slade, or Tom Newell, or both, to the claim by Bird, a number of included issues must be considered.

Firstly, to whom did Bird extend credit when it advanced the materials?

Thomas Newell gave uncontradicted evidence that he commenced operating Newell Electric as a sole

proprietorship around November of 1987, at which time he arranged credit from a number of suppliers, including Bird. At the time of making arrangements for the credit he filled out a credit application form with Bird and signed a personal guarantee. In March of 1988, "Newell" was incorporated and Mr. Newell so advised all of his suppliers by letters, which he delivered in person. In the case of Bird he delivered the letter to Keith Butte who was the salesman in charge of his account.

Mr. Newell tendered into evidence documents from two other suppliers confirming that his status was changed from a sole proprietorship to a limited company, at least for billing purposes, as was indicated by the addition of "Limited" to the business name on the invoices from the two suppliers. Bird did not change the name of Newell Electric on their invoices and Mr. Newell discussed the matter with Keith Butte. Keith Butte assured him that it was not a problem of any significance and Mr. Newell paid no more attention to it. Mr. Newell gave evidence that none of his other suppliers had asked him to fill out additional credit application forms once he incorporated. He assumed, having had six months trouble free operation with Bird prior to incorporating, Bird was prepared to extend credit on his record and he did not think a new credit application form would be necessary.

There being no evidence called to contradict that of Mr. Newell as to notice to Bird, I accept Mr. Newell's evidence that he made reasonable efforts to notify Bird as to the change of status of the business. He gave his evidence on this matter in a straightforward manner and it was supported by the evidence of notice of incorporation to other suppliers.

The fact that Bird was unaware of the incorporation, if that is indeed the case, is attributable to problems with Bird's internal business practices and not related to any lack of reasonable efforts on Mr. Newell's part to advise Bird. There was no direct evidence called on behalf of Bird as to their lack of knowledge of Newell Electric's incorporation. Both Mark McGrath and Sandra Pope gave evidence on behalf of Bird but neither had dealings directly with Mr. Newell on the issue of the incorporation. Keith Butte was not called.

I am satisfied, therefore, that while certain members of the Bird operation may have been under the impression that they continued to deal with Newell Electric, sole proprietorship, their understanding in that regard was not rationally based, as Mr. Newell had given appropriate notice. In particular, I find that Bird supplied the materials to Newell Electric Limited.

The next matter for consideration is whether the lien was filed in time. Cynthia Slade and Tom Newell gave uncontradicted evidence that the house was complete April 21st, 1989 and, indeed, that they moved in on that date. In support of that contention they provided an invoice from a moving company confirming that there was a move of some household goods from their prior residence to the new residence on that date. While that evidence is not of itself, absolute confirmation that all of the household effects were moved on that date, there is no evidence to contradict theirs' as to the date of completion and I accept it to be April 21st, 1989.

Bird asserts in its Statement of Claim that the last materials were supplied on the 30th of April, 1989. The lien was filed on the 7th day of June, 1989.

In support of its contention Bird tendered two invoices, one dated April 28th, 1989 and another May 5th, 1989 (the "later invoices") allegedly for materials supplied for the subject property, or for materials which Bird thought were to be applied to the subject property.

Section 24(2) of the **Mechanics' Lien Act**, R.S.N.S. 1990, c. 277 provides that a claim for materials must be registered within forty-five (45) days after the last material was furnished or placed.

There is no evidence offered to contradict the date of completion being April 21st, save any inference which might be drawn from the two above invoices.

Mr. Newell gave uncontradicted evidence that none of the materials in the "later invoices" were used in the house. Indeed, a number of the items are not of a kind used in new construction, but rather the type to be used in renovation of existing structures. Additionally, certain of the items on the two "later invoices" remained in the inventory of Newell Electric Limited and show on the inventory filed for purposes of bankruptcy.

I accept the evidence of Cynthia Slade and Thomas Newell as to the date of completion, and as to the fact that none of the materials in the two "later invoices" were used, nor intended by "Newell" to be used in the house.

The relevance of intention is dealt with by **Macklem and Bristow - "Construction Builders and Mechanics' Liens in Canada"**, (6th Ed.) at page 3-29:

"The intention and the expectation of the supplier as to the purpose for which the materials were delivered is the test applied by the courts...". Clearly, however, the expectation of the supplier must be reasonably based.

At page 3-35 of **Macklem and Bristow**, supra:

"In order for the materialman to have a claim for lien, it must have been intended by the parties that the material sold was to be used for purposes set out in the **Acts**, and that it was to be used on some particular lands known to the lien claimant. While it is not necessary for him to have the immediate intention of filing a lien when he sells the materials to the contractor, the **Acts** contemplate a contract more specific than the mere sale of materials in the ordinary course of business. If the materialman sells his materials without any regard for the purpose for which they are going to be used, or the land on which they are going to be used, then he will be selling on the credit of the buyer alone and without regard to any security that he might have under the **Acts**."

Two questions are then involved, did Bird supply this material for the specific property in question or, at least, with a reasonably based belief that the material was intended for that property and, secondly, did Bird supply the materials on a contract more specific than simply the supply of materials on credit?

To substantiate the claim, that the materials were supplied for a specific purpose, Bird relied upon

the invoices relating to the materials. Two sets of invoices were tendered. One set totalling Four Thousand Nine Hundred and Twelve Dollars and Twelve Cents (\$4,912.12) is not in dispute as referable to the property. The second set of invoices totalling Five Thousand Four Hundred and Fifty Four Dollars and Ninety Centre (\$5,454.90) are in dispute. Specifically, Newell and Slade say that those materials were not intended for, nor used in, the property.

In relation to the disputed invoices the material was, in every case, picked up at the Bird establishment by employees of Newell Electric Limited or Newell himself. At the time the goods are ordered a sales order form is completed by Bird and the receipt of goods acknowledged by the signature of the person collecting the goods. The actual invoice for the material is mailed after receipt of the goods. The sales order form contains the name and business address of the purchaser and a further space designated "shipped to", presumably intended to represent the destination of the goods.

Mark McGrath, Division Manager of J. W. Bird, gave evidence that the "shipped to" box, in the case of materials picked up, would be filled in by Bird employees in accordance with what the person picking up the goods told them was the destination.

The office of Newell Electric Limited was always located at the home of Thomas Newell. Prior to the move to Lawlor Crescent the address was 99 Appian Way, Dartmouth.

On all of the invoices which are not in dispute the business address is recited as "99 Appian Way" and the "shipped to" designation is typed in as "own house", save on one invoice which is typed in "99 Appian Way". On the invoices in dispute the "shipped to" designation



is left blank on all but one invoice where the word "same" appears. Presumably, the designation "same" is intended to represent that the destination address is the same as the address of the purchaser, in other words, 99 Appian Way. On each of the forms where the "shipped to" designation is blank, there is written, in pen, the words "own house".

Mr. McGrath gave evidence that the handwriting designation "own house" indicated that Bird supplied the material for the specific purpose of building Tom Newell's personal residence. He was uncertain as to who had placed the writing on the forms and when the writing had occurred. He concluded, however, from the pricing and, in particular, the discount extended on the items included in those invoices that, as is the custom, Newell had been given a break on the price, as a courtesy, because he was building his own premises. Mr. McGrath had no direct knowledge as to any discount arrangements but drew his conclusions from the pricing.

Thomas Newell testified that he was unaware of any special discount being extended. He went on to indicate that if he had been aware of a special discount on materials for his house he would have purchased all of his materials through Bird rather than from other suppliers. He gave uncontradicted evidence that he made no special arrangements with the Bird salesman, Keith Butte, for a discount on materials for his own home. Thomas Newell does acknowledge that Butte was probably aware, through their general conversation, that he was building a home.

I am not satisfied that it has been established that the designation "shipped to" provides any confirmation of the understanding of Bird as to the intended use of

the disputed materials. I conclude, that the designation under "shipped to" was, because the materials were picked up by Newell Electric Limited employees, somewhat irrelevant and that it why it was left blank in most instances. Because the Newell Electric Limited office was located in Mr. Newell's personal residence, the designation "same" or "own house" could equally mean the material was going into inventory with Newell Electric Limited or being used for a project or purpose not specifically known to Bird. I do not find the "shipped to" designation "own house" conclusive evidence of Bird's understanding that the material was to be used in Newell's own residence. Indeed, one of the order forms contains a shipment of fifty (50) thermostats. It would hardly be logical to conclude that Bird was under any assumption that these fifty (50) thermostats were for a private home. While Mr. McGrath gave evidence that the destination to be filled in under "shipped to" was intended to be used by Bird for lien purposes, I am not persuaded that that was the case. Thomas Newell gave evidence that he understood the destination was on the form for the convenience of the purchaser. It is probable that the "shipped to" designation was simply intended to delineate the delivery destination but irrelevant where goods are picked up.

Thomas Newell gave further evidence that he did not arrange any special line of credit or account for the purposes of building his home. He simply used the "Newell" account which was already in place.

Both Newell Electric Limited and Ravenwood Developments were companies which had been in operation for some time and performed contacting and electrical work

for other consumers. There is no suggestion that these companies were set up simply for the purpose of building Newell's personal residence. Newell Electric Limited was purchasing materials from Bird for a variety of purposes including but not limited to the building of the Slade residence. Accordingly, and for clarity, I find that the terms that the arrangements between Bird and Newell Electric Limited do not support the registration of a lien in that it was not intended by the parties that the material sold was to be used for a specific project on particular lands known to Bird.

I find, as well, that even had the arrangements between Bird and Newell been the appropriate subject matter of a lien, the lien was clearly filed out of time as the two later invoices did not relate to materials supplied for the purpose of the construction of this property. I do not accept that Bird was of the genuine belief that the materials were supplied for the purposes of the subject property, nor is there any direct evidence to that effect.

The plaintiff requests, in the alternative, that a personal judgment be entered against the Defendants should a valid lien not be established. The authority to grant a personal judgment is contained in Section 46 of the **Mechanics' Lien Act**, R.S.N.S. 1989, c. 277 which reads as follows:

**"Personal judgment if lien not established**

46. When, in any action brought under this Act, any claimant fails for any reason to establish a valid lien, he may nevertheless recover therein a personal judgment against the party or parties to the action for such sum or sums of money as appear to be due him from such party or parties, and which he might recover in an action

on the contract against such party or parties."

The interpretation of the words of the section "...fails for any reason to establish a valid lien..." have received some judicial consideration. In order for the claimant to have the benefit of a personal judgment, is it necessary that he demonstrate that his lien would have been valid but for some purely technical or procedural deficiency or, on the other hand, is the claimant entitled to a personal judgment notwithstanding that the claim was not, for example, the proper subject matter of a lien claim?

In Halliday Craftsmen, Division of Sumner Holdings Limited v. Dewar and Dewar (1977), 34 N.S.R. (2d) 94, McLellan, C.C.J., held that a claim for costs did not constitute a valid lienable claim upon which to grant a personal judgment under the Act. At page 99 of that decision the Learned County Court Judge appeared to adopt the restrictive view to the effect that the claim must have related to a subject matter for which a valid lien could have been granted. In Thompson and Purcell Surveying Limited v. Burke, (1977), 39 N.S.R. (2d) 181, O Hearn, J.C.C. held that notwithstanding the fact that the claim of the surveyor was not properly the subject matter of a lien, a judgment would enter, "because although there never was any lien the monetary claim is within the jurisdiction of this court, and it would be quite contrary to the spirit of the Civil Procedure Rules, especially Rules 1.02, 2.01, 2.02, 9.01 and 37.10 to dismiss it." He awarded personal judgment against the Defendant who had hired the surveyor. In Lee v. Hill and Hill [1978] 6 W.W.R. 522 (Sask. D.C.), Walker D.C.J. considered, at length, the court's jurisdiction to enter personal judgment where it was found that the claim was not properly the subject matter of a lien. Generally, he found that a personal judgment could

stand even though the Court concluded that the lien did not exist for other than procedural reasons, where the matter of whether a proper lien claim existed was equivocal. He essentially held that there is a group of cases in between those where it is "patently demonstrable" that no lien exists (where there may be no personal judgment) and those cases in which there is a lien which fails for procedural reasons (where there may be a personal judgment). In such "middle ground" cases the question as to whether a personal judgment is proper is a matter within the discretion of the Trial Judge considering a number of factors which he enumerates at page 536 of his decision.

Following the analysis of Walker, D.J.C., I find that this is one of those equivocal cases in which there has been no suggestion of abuse of process or **mala fides** on behalf of the claimant, where the propriety of the lien action was not raised as a preliminary matter, where the amount of the claim is within the jurisdiction of the Court and where it would be inappropriate for there to be a multiplicity of actions within the spirit of the guidance offered by O Hearn, J.C.C. in Thompson, supra. Accordingly, I find that it is an appropriate case to consider the granting of a personal judgment.

The questions remain, however, in what amount should such a personal judgment be granted and against whom?

The cases are clear that personal judgment can only be ordered where there is privity of contract.

Logically, the personal judgment can only be ordered for the amount which, while in dispute, could have been the subject matter of the lien claim, in other words,

the value of the materials which are referable to the property.

Privity of contract existed only as between Newell Electric Limited and Bird unless the corporate veil is lifted to attach personal liability to Cynthia Slade and/or Thomas Newell.

The uncontradicted evidence was that Ravenwood Developments and its subcontractor, Newell Electrical Contracting Limited were **bona fide** contracting companies which had been in business for some time and worked on other projects. Indeed, Newell Electrical Contracting Limited did electrical work not only for Ravenwood but also for other contractors.

Cynthia Slade gave evidence, also uncontradicted and not explored on cross-examination, that she had fully paid Ravenwood Developments. There was no evidence that the price paid to Ravenwood (testified by Slade to be about \$142,000.00) was not a fair price for the project, nor was there any suggestion that, ultimately, Slade paid Ravenwood less than that price. Ravenwood, through Thomas Newell, gave evidence that that company had fully satisfied any accounts owing to Newell Electric Limited prior to the latter company's bankruptcy. There was no evidence as to whether Newell Electric Limited had actually invoiced Ravenwood for the Slade house, therefore one cannot say if Ravenwood had benefited by perhaps not paying for the Slade job. Had that occurred Ravenwood and Newell would presumably benefit personally; Newell being the sole owner of Ravenwood. Again, such a scenario was not explored and, accordingly, I must conclude that it did not exist and that, as stated by Thomas Newell, Newell Electric Limited were fully paid by Ravenwood.

The purpose of incorporation is to create a distinct legal entity. There may be many reasons for incorporation. The corporate person is not to be lightly set aside by the courts, if at all. There is no evidence here that the companies, Ravenwood or Newell, were incorporated simply for the purposes of this particular house transaction, nor for any improper purpose. There is clear and uncontradicted evidence that the companies performed work over a number of years in the construction business. Bird was made aware of the corporate status of Newell Electric Limited at the time of its change from a sole proprietorship. While Cynthia Slade did some bookkeeping for both companies, she was not an officer or director. It appeared from certain of the exhibits, in particular cheques tendered by the defence, that Cynthia Slade had signing authority on behalf of Newell Electric Limited. Her association with that company was not explored on cross-examination and, accordingly, there is no evidence suggesting impropriety.

On the basis of the evidence presented before me, I am satisfied that the companies were not simply a sham set up by Slade or Newell for the purposes of this house transaction, but rather were **bona fide** enterprises engaged in business.

While the use of the corporate structure in this instance is somewhat unsettling as there is the risk that Slade and Newell will benefit at Bird's expense, there is no evidence that they have so benefited and, indeed, the evidence is quite to the contrary. Accordingly, I decline to look behind the corporate entity Newell Electric Limited to impose any personal obligation on Cynthia Slade or Thomas Newell.

In the result, I grant judgment only against Newell Electric Limited. The amount of the judgment shall be limited to the total of the invoices contained in Exhibit 1. Those are the invoices not in dispute and clearly referable to the subject property. The total of those invoices is agreed by counsel to be Four Thousand Nine Hundred and Twelve Dollars and Twelve Cents (\$4,912.12). That is the amount of the personal judgment which shall enter against Newell Electric Limited. It shall be subject to any limitations arising as a result of the bankruptcy of "Newell".

x *write* ?

As the Defendants <sup>2</sup> have been substantially successful in this proceeding I award costs to the Defendant, <sup>3</sup> consistent with Section 41(2) of the **Act**, in the amount of 25% of the judgment (Four Thousand Nine Hundred and Twelve Dollars and Twelve Cents (\$4,912.12)) together with disbursements.

Nancy Baileman  
A Judge of the County Court  
of District Number One