Cite as: Turf Masters Landscaping Ltd. v. T.A.G. Developments Ltd., 1992 NSCO 45

PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX C.H. NO. 68861

I N T H E C O U N T Y C O U R T
OF DISTRICT NUMBER ONE

BETWEEN:

TURF MASTERS LANDSCAPING LIMITED

PLAINTIFF

- and -

T.A.G. DEVELOPMENTS LIMITED and THE CITY OF DARTMOUTH

DEFENDANTS

Charles D. Lienaux, Esq., Counsel for the Plaintiff;
Jean McKenna, Counsel for the Defendant, The City of Dartmouth;
Daniel L. Weir, Esq., Counsel for the Defendant, T.A.G. Developments Limited;

1992, September 28th, Bateman, J.C.C.:- This is a mechanics' lien action. The City of Dartmouth is the owner of the liened lands. T.A.G. Developments is the contractor employed by Dartmouth to complete work on the lands. Turf Masters are sub-contractors of T.A.G.

Turf Masters claim is for monies owing for labour and materials provided by Turf to Dartmouth's lands, including a claim for necessary extra labour and materials.

Dartmouth has served a Third Party Notice and Statement of Claim on CBCL Limited, the consulting engineers hired by the City of Dartmouth to tender and oversee the contract. Turf has applied to strike the Third Party Notice.

Turf says the third party action against CBCL is not within the class of actions contemplated by Section 34(2) of the **Mechanics' Lien Act**. Dartmouth says that if it is held liable for the extra work it will necessarily seek indemnification from CBCL, which company was the embodiment of the City in this contractual arrangement.

The original Statement of Claim was filed with the Court on December 21, 1989. It is in standard form and alleges that the unpaid value of the materials and services supplied by Turf Masters, at the request of T.A.G., is $382,656.00. On August 6, 1992 in a contested application, Turf was granted leave of the court to file an Amended Statement of Claim, which it did on September 10, 1992. To that point, Dartmouth had not filed a Defence.

In the Amended Statement of Claim Turf alleges that the extra work and materials was required due to the failure of Dartmouth and CBCL to disclose certain sub-

surface site conditions which conditions affected the amount of work and material required to complete the project. Dartmouth says the third party claim is necessitated by the Amended Statement of Claim which, for the first time, raises the issue of non-disclosure.

Turf's basis for opposing the third party action is that it would unduly delay and complicate the action. Extensive discoveries have now been completed and, although CBCL was in attendance at the discoveries as a witness it is reasonable to expect that, if made a party to the action, CBCL would wish to conduct further discoveries in that capacity. Turf is supported in this motion by T.A.G.

Dartmouth agrees that the litigation will be somewhat delayed and more expensive, however, takes the position that this is a proper third party claim within the contemplation of section 34(2) of the Act.

There is very little case law on the joinder of third parties in mechanics' liens actions as the amendment to the Statute is relatively new. Originally third party proceedings were not permissible as decided in P.P.G. Industries Canada Limited v. J. W. Lindsay et al (1982), 52 N.S.R. (2d) 267. In reaching that

conclusion the court focused on the purpose of the Mechanics' Lien Act. At page 284 Jones J.A. says:

> "The Act was intended to provide an expeditious remedy to lien claimants. It was never the intention of the legislation that lien claimants would be forced to wait for the determination of their claims, while the owner, or in many instances, the contractor pursued claims against third parties which were totally unrelated to the original claim or of no concern to the lienholder."

Apparently in response to the holding in P.P.G., supra, the legislature amended the Mechanics' Lien Act with section 33(1)(A), now section 34(2) which reads:

> "The jurisdiction of the County Court under this Act includes a third party procedure where the amount claimed relates to the lien claim and arises out of the building contract or work done or the materials supplied that is the subject of the lien claims."

In Tri-Corp General Contracting and Sales Limited et al v. Oceanside Constructions Limited et al, (1987) 81 N.S.R. (2d) 346, the Appeal Division denied an application to add three officers and directors of the defendant general contractor as defendants in their personal capacity.

At page 349, Matthews J.A. states:

> "Courts have consistently stated that a multiplicity of actions should be avoided whenever possible; actions should proceed expeditiously; costs of law suits in time and money should be minimized. With respect, these broad and laudable goals beg the question. We are not here concerned with the common law action where such parties could and would be added, but one under statute. Jurisdiction here cannot be assumed because of some worthy goal nor can it be conferred by consent. Jurisdiction must be found within the confines of the Act."

And at page 350:

> "The authority given to the Trial Judge in section 34(1) of the Act to proceed to try the action and all questions which arise therein, does not, in my view, permit issues to be raised and determined which are extraneous to the purposes of the Act. A claim cannot be permitted which is in essence a separate action."

Matthews J.A. states that it is not sufficient that the proposed action arise out of the same set of facts as does the original action. It must arise out of the contract or the work done or the materials furnished.

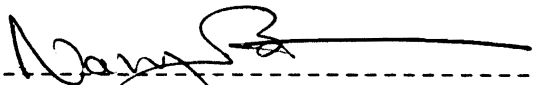
Were this not a mechanics' lien action CBCL would be an appropriate third party. Without question it would be "economical" in the legal sense to have all matters determined in a single action. The potential liability, however, of CBCL to Dartmouth is the subject matter of a separate contract, the contract between CBCL and the City of Dartmouth. This issue is of no concern to Turf. Whether the alleged extra work and materials provided by Turf was precipitated by a wrongful act of CBCL or the City of Dartmouth, or simply flowed from relatively benign circumstances, is the only issued to be determined in the context of the mechanics' lien action. If Dartmouth is found liable, it may or may not choose to pursue an action against CBCL. Dartmouth may be found not to be liable or, alternatively, Dartmouth may be found to be liable in circumstances which would not support a claim against CBCL. In other words, litigation surrounding the relationship between Dartmouth and CBCL is not inevitable.

One of the concerns of Dartmouth, in joining CBCL is that there not be a circumstance under which, in two separate pieces of litigation, courts reach inconsistent findings. For example, the court in this proceeding may find that any necessary extra work or materials was precipitated by the failure of CBCL to make proper

disclosure of the sub-surface site conditions. Since, for the purposes of this contract, CBCL stood in the place of Dartmouth, counsel for Dartmouth says that sets up an inevitable claim by Dartmouth against CBCL for failure to properly perform its duties within the context of its relationship with Dartmouth. It is conceivable that in the resulting claim by Dartmouth against CBCL the Court could find that there was no failure by CBCL to disclose. While there is potential for such inconsistent results, that possibility does not override the limitations proscribed by the **Mechanics' Lien Act**. It does not cloak me with jurisdiction to permit joinder of a third party outside the narrow scope of the Statute.

Accordingly, the application of Turf to strike the third party notice is granted.

Costs of this application are payable by Dartmouth to Turf, such costs to be fixed and paid upon final disposition of the action. As T.A.G. has played a limited role in this aspect of the matter there shall be no costs payable to T.A.G.



A Judge of the County Court
of District Number One