

C A N A D A  
PROVINCE OF NOVA SCOTIA  
COUNTY OF HALIFAX

CH 27581  
28434  
28435  
31586

IN THE COUNTY COURT FOR  
DISTRICT NUMBER ONE

IN THE MATTER OF the Mechanic's Lien Act, R.S.N.S. 1967,  
Chapter 178.

BETWEEN:

ATLANTIC STEEL BUILDINGS LIMITED,  
a body corporate,

Plaintiff,

- and -

THE CAYMAN GROUP LIMITED, a body corporate,  
MOTION TIRE LIMITED, a body corporate,  
MICHAEL McGRATH and THOMAS MacGUIRE,

Defendants.

BEFORE:

His Honour Judge Lester L. Clements, an Additional Judge  
of the County Court for District Number One, in Chambers  
at Liverpool, Nova Scotia on January 12, 1983.

DECISION: January 21, 1983.

COUNSEL: Michael S. Ryan, Esq., for Atlantic Steel Buildings Limited.

Robert S. Grant, Esq., for Midas Realty Corporation of  
Canada, Incorporated.

CLEMENTS, CCJ:

This was a Mechanics' Lien action tried before me in April, 1981, at Halifax, Nova Scotia.

The only issue argued before me at the trial and the only issue dealt with in my judgement of April 27, 1981 was the question of priority of mortgage advances as between Atlantic Steel Buildings Ltd. and Co-operative Trust Company of Canada Inc. Mr. Robert Grant counsel for Midas Realty Limited was present at the trial of this action but made no submissions on behalf of his client.

Following my decision in April, Mr. Grant contacted the Court in September, 1981 and requested that I hear further evidence on the matter of priority as between Midas Realty Limited and Atlantic Steel Buildings Ltd.

I rejected this application which was appealed to our Appeal Division. By their decision dated the 29th January, 1982, the Midas Appeal was dismissed. Co-operative Trust had also appealed my decision with respect to priority of mortgage advances as between it and Atlantic Steel Buildings Ltd. - this appeal was successful and Co-operative Trust was held to have priority over Atlantic Steel Buildings Ltd.

In this decision dated 18th March, 1982, Mr. Justice MacDonald, speaking for the Court, stated in part as follows:

"The trial judge under s.34(1) of the Mechanics' Lien Act must now adjust the rights and liabilities, including priorities, of Midas, Atlantic, Co-op and all other parties who were served with a notice of trial. The only issue this judgment forecloses is that of the priority between Atlantic's alleged lien and Co-op's mortgage advance.

In the result I would allow the appeal with costs to the appellant against the respondent Atlantic only and would reverse and set aside that portion of the decision of Judge Clements in which he found that the lien of Atlantic has priority over the mortgage advance."

After several abortive attempts to get this matter on for trial the matter finally came on before me for hearing at Liverpool on January 12th, 1983. Although all parties had been given ample notice only Atlantic Steel Buildings Ltd. and Midas Realty Corporation of Canada were represented. Michael J. Ryan for Atlantic and Robert Grant for Midas.

In a brief pre-trial memorandum not enlarged on at the vive voce hearing, Mr. Ryan stated as follows:

"In the end result Your Honour is simply being asked to determine priority between Atlantic and Midas. Atlantic's position is that in any event, regardless of the doctrine of sheltering, its collateral mortgage recorded March 28, 1979, takes priority over the Midas lease, recorded November 16, 1979. Your Honour will recall that Mr. Grant for Midas made an application to lead additional evidence. Your Honour dismissed the application and the Appeal Division affirmed this decision.

Atlantic has closed its case and there will be no further evidence before Your Honour. Quite simply, on the basis of the certificate of title on file, Atlantic takes priority."

(Attached to this decision is a photocopy of the relevant charges as shown in the abstract of title.)

There was no attempt by Atlantic to claim priority by virtue of its Mechanics' Lien which was recorded after the Midas Lease but sought shelter under the prior Nicols lien.

Mr. Grant in his written and oral submission dwelt at some length on the doctrine of sheltering and whether or no the doctrine could be extended to the extent of giving priority over a prior recorded document. In the event, since Atlantic abandoned any claim under this heading I conclude I have no necessity to deal with it. What remains then is clearly a contest that turns on the effect of the provisions of the Registry Act.

Atlantic's collateral mortgage was recorded on the 28th March, 1979 and the Midas lien was recorded on the 16th June, 1979.

In response to Atlantic's submission, Midas contends as follows:

Decision

"(a) Deficiencies in Pleadings

The present application on behalf of Atlantic Steel arises out of an Originating Notice (Action) and Statement of Claim bearing the Court File No. 1980 C.H. No. 31586, between Atlantic Steel Buildings Limited and The Cayman Group Limited. The basis for this Statement of Claim clearly rests upon Atlantic Steel's performance of a contract to furnish building materials and construct a building for The Cayman Group Limited. Nothing in the Statement of Claim indicates that the Plaintiff is seeking to pursue its action in reliance upon its Collateral Mortgage. (There is, however, the standard basket clause on which the Plaintiff seeks such "other relief" as when the justice of the case requires.)

The failure of Atlantic Steel to indicate that it was bringing its claim in reliance upon the Collateral Mortgage is a significant one insofar as Midas is concerned. Had Midas been placed on notice that Atlantic Steel was founding its claims upon its Collateral mortgage, Midas would have been alerted to the fact that unless representatives of Atlantic Steel had actual knowledge of the existence of the Midas Lease at the time the Collateral mortgage was executed, the Collateral mortgage in favour of Atlantic Steel would rank in priority to the Midas lease by virtue of Section 17 of the Registry Act. Under these circumstances, Midas would have attempted to lead evidence relating to the actual knowledge by Atlantic Steel of the Midas lease.

"(b) Jurisdiction of the County Court Under Section 24(1) of the Mechanics' Lien Act

The jurisdiction of the County Court under Section 34(1) of the Mechanics' Lien Act only extends to matters relating to "the action" which refers to the mechanics' lien action brought by the plaintiff by way of Originating Notice and Statement of Claim. Under this Section, a trial Judge is directed to dispose of "the action" and "of all matters, questions and accounts arising in the action, or, at the trial, and to adjust the rights and liabilities of and give necessary relief to all parties to the action..." No question as to the relative priority of the Midas lease and the collateral mortgage has arisen as a result of the action by Atlantic Steel to enforce its lien. Therefore, it is respectfully submitted that this court does not have jurisdiction to consider the priority of the Midas lease and the collateral mortgage.

Decision

"(c) Correct Procedure

The proper procedure in which to obtain a remedy when the covenants of a mortgage have been breached is through the statutory remedy of foreclosure and sale of the property. (Pew v. Zinck (1853) 2 DLR 337 (Supreme Court of Canada). Well defined procedures for bringing such an action have been prescribed by the Judges of the Supreme Court of Nova Scotia in the Nova Scotia Civil Procedure Rules and Related Rules and through Practice Memoranda (for example, Practice Memorandum Number 16 regarding foreclosure proceedings and forms.) It is apparent that the Plaintiff has not proceeded in this prescribed fashion. Failing to proceed in this matter, the Plaintiff may not obtain the relief sought.

"(d) Parties to the Action

The abstract to title on file herein indicates that the Collateral mortgage executed March 27, 1979 by the Cayman Group Limited to Atlantic Steel Buildings Limited and recorded March 28, 1979 in Book 3309 at Page 716 at the Registry of Deeds in Halifax was subsequently assigned on August 26, 1982 to Aulcam Enterprises Limited, which assignment is recorded in Book 3427 at Page 367. It is submitted that, by virtue of such an assignment, the Assignor, Atlantic Steel, ceased to have any interest in the collateral mortgage and, therefore, is unable to maintain an action based upon that mortgage."

Dealing with the submissions in paragraph (a), in my view this matter was commenced as a Mechanics' Lien action under the provisions of the Mechanics' Lien Act and it is and remains such an action.

In such an action the lien claimant is not required to specifically plead the provisions of the Registry Act since all of the priorities to be determined in the action are determined in accordance with the provisions of the Mechanics' Lien Act which specifically refer to matters of filing and recording in accordance with provisions of the Registry Act. As is stated in Macklem and Bristow the Registry Act priorities govern. There is no doubt that Midas has suffered prejudice in this matter because it cannot now allege or prove that Atlantic had actual notice of the existence of the Midas lease. However, Midas is the author of its own wrong - it had full opportunity to raise this issue before me at the first hearing of this matter on April 27, 1980 at Halifax but by inadvertence failed to do so.

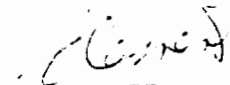
I find that Midas is effectively barred from raising this issue at this stage as there is simply no evidence before this Court as to Atlantic's knowledge of the existence of the Midas lease.

As to paragraph (b) argument, I find that the phrase in S.34(1) "that the trial judge of the action" is directed to dispose of all matters, questions and accounts arising in the action to be sufficiently broad to give the Court jurisdiction to determine priorities arising under the Registry action. It would appear ridiculous to separate this question from all others, thus requiring another hearing to adjudicate on the Registry Act priority. In the case cited by the Respondent, Silver v. R.R. Seeton Construction Ltd. 74 DLR(3d) 212, my brother O'Hearn dealt with a similar factual situation and found no difficulty in disposing of the matter on the basis of Registry Act priorities.

With respect to the submission in para (d) that Atlantic, having assigned its collateral mortgage to Aulcam Enterprises Ltd. on August 26, 1982, I note that the Appeal Court decision on this matter which directed me to determine the priorities in this case was given on the 18th March, 1982. I offered the parties several dates prior to August, 1982 for hearing this matter. I cannot see that Atlantic being in a position to pursue this matter up to August, 1982 has lost its right of action simply because the trial of the action has been unduly delayed.

I have, therefore, come to the conclusion that Atlantic's collateral mortgage has priority over the Midas Lease herein by virtue of the priority provisions of the Registry Act.

Atlantic being successful herein will have its costs to be taxed.

  
CCJ

-6 Relevant Charges Against Lands of Cayman Group Limited  
as set out in the Abstract of Title on file herein:

- "2. Claim of Lien J.L. Nichols Construction Limited  
22 December 1978 against  
28 December 1978  
Book 3291; Page 47 The Cayman Group Limited and/or  
\$8, 625.00 Michael McGrath and Thomas MacGuire
3. Certificate of Lis  
Pendens J.L. Nichols Construction Limited, a  
19 February 1979 body corporate, et al  
19 February 1979 v.  
Book 3301; Page 918 Cayman Group Limited, a body corporate,  
C.H. No. 27581 Michael McGrath and Thomas MacGuire
4. Mortgage The Cayman Group Limited  
9 March 1979 to  
12 March 1979  
Book 3306, Page 436 Cooperative Trust Company of Canada  
Michael McGrath and Thomas MacGuire  
as guarantors

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7. Collateral Mortgage The Cayman Group Limited  
27 March 1979 to  
28 March 1979  
Book 3309, Page 716 Atlantic Steel Buildings Limited  
\$50,097.95

NOT MARKED RELEASED.

Assigned August 26, 1980, to Aulcam Enterprises Limited  
Book 3427; Page 367.

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12. Lease The Cayman Group Limited  
23 June 1978 to  
16 November 1979  
Book 3370; Page 893 Midas Realty Corporation of Canada Inc.  
Lease for term of 21 years.

13. Claim of Lien Atlantic Steel Buildings Limited  
9 January 1980 claims lien against the estate of  
10 January 1980 The Cayman Group Limited  
Book 3380; Page 668

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15. Certificate of Lis  
Pendens Atlantic Steel Buildings Limited  
22 February 1980 v.  
22 February 1980  
Book 3387; Page 835  
\$50,097.95 The Cayman Group Limited  
C.H. No.31586"