

IN THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

YELLOWKNIFE CIVIL SITTINGS

JANUARY 18, 1994

COUNSEL

TRIAL JUDGE

COURT

NELSON LUMBER  
COMPANY LTD.

G.M. Watt, Esq.

Richard, J

Tallis, J.A.  
de Weerd, J.A.  
Hetherington, J.A.

Appellant

- and -

THE EXECUTIVE LTD.  
and 892536 N.W.T. LTD.

P.A. Bolo, Esq.

Respondents



APPEAL CA 00436

MEMORANDUM OF JUDGMENT

1 The issues in this appeal centre upon the meaning and application of the  
Mechanics Lien Act, R.S.N.W.T. 1988, c. M-7.

I. THE FACTS

2 The order under appeal was made following the trial of certain agreed issues  
on the basis of agreed facts. By that order, the registration of specified mechanics liens  
in the Land Titles Office was vacated.

3 One of these liens was that of Nelson Lumber Company Ltd. ("Nelson"), the

appellant. This lien had been registered against title to a lot registered under the **Land Titles Act**, R.S.C. 1985, c. L-5, in the name of the respondent 892563 N.W.T. Ltd. ("892") as owner. The lien was registered to perfect Nelson's claim of lien for a sum in excess of \$25,000, being the unpaid price of building materials used in the construction of a house on the lot. At the time of registration of the lien there was nothing on the record of title in the Land Titles Office to indicate any interest in the lot other than that of 892.

4           The building materials were supplied by Nelson to B.A.S. Developments Ltd. ("B.A.S."), at the lot in question, under a contract between Nelson and B.A.S., the latter company having earlier entered an oral agreement with 892 to purchase the lot for \$45,000, for development (by construction of the house on the lot) and resale.

5           B.A.S. subsequently entered into a written agreement, in standard real estate format, for sale of the developed lot at a price of \$135,000. The purchaser under that agreement, T.C. Enterprises Ltd., later assigned its entire interest under the agreement to the respondent The Executive Ltd. ("Executive"). And on October 20th 1992 B.A.S. entered into a bill of sale with Executive evidencing the sale of the house, as a chattel, by B.A.S. to Executive at a price of \$90,000.00. This last transaction was closed on that date with payment of \$81,000 by Executive to B.A.S., the remaining \$9,000 being held back pursuant to s.8 of the **Mechanics Lien Act**. In the meantime or shortly afterwards, by agreement between 892, B.A.S. and Executive, it was arranged that title to the lot would be transferred directly from 892 to Executive or its assignee

upon payment of the \$45,000 price to 892 by Executive, without any intermediate registration of title in the name of B.A.S. under the **Land Titles Act**, thus saving expense.

6           The last of the building materials was supplied to B.A.S. by Nelson on October 21st 1992, the day after the closing of the transaction between B.A.S. and Executive. Nelson was unaware of the closing and of the arrangements made with respect to the transfer of title direct from 892 to Executive (or any subsequent purchaser from Executive).

7           Notwithstanding the fact that 892, T.C. Enterprises Ltd. and Executive all had a director in common, in the person of Tony Chang, whose signature appears on the real estate form of purchase and sale between B.A.S. and T.C. Enterprises Ltd., the parties agree that the \$81,000 was paid by Executive to B.A.S. in good faith and not to defeat any claim of lien. It is also agreed that the \$81,000 was paid after Nelson's right to a lien on the lot arose under the **Mechanics Lien Act**.

8           No money ever became due by 892 to B.A.S. in connection with the construction of the house on the lot by B.A.S. or under the oral agreement between 892 and B.A.S., whereby 892 undertook to sell the lot for \$45,000 to B.A.S. No instrument was ever registered under the **Land Titles Act** to reflect any interest in the lot of B.A.S., T.C. Enterprises Ltd., or Executive.

9           Nelson filed its claim of lien in the Land Titles Office for registration under the **Mechanics Lien Act** on November 12th 1992. The lien was duly registered with effect on that date.

## II. LEGISLATION

10 As noted by the trial judge, the **Mechanics Lien Act** is essentially unchanged since it was first enacted in this jurisdiction (then inclusive of what is now Alberta and Saskatchewan as well as Yukon) over a hundred years ago.

11 The Act confers a lien for the price of work done on a building or erection, or for the installation of machinery or supply of materials to be used in the construction, alteration or repair of a building or erection (and for certain other things), in favour of labourers, contractors and others and against the building, erection or mine in question, or the lands occupied or enjoyed in that connection. Subsection 4(1) states:

4. (1) The lien shall attach to the estate and interest of the owner in the building, erection or mine in respect of which the work is done or the materials or machinery are placed or furnished and the land occupied or enjoyed in connection with the building, erection or mine.

12 Section 19 of the Act provides for registration of claims of lien in the Land Titles Office, subject to requirements which are not in issue here. Section 20 of the Act states:

20. Where a claim is registered under section 19, the person entitled to the lien shall be deemed to be a purchaser for the amount of the lien.

13 It is noteworthy that Nelson was not a party to the various contractual arrangements between 892, B.A.S., T.C. Enterprises Ltd. and Executive. Section 2 of the Act states:

2. No agreement shall be held to deprive a person otherwise entitled to a lien under this Act and not a party to the agreement of the benefit of the lien and the lien shall attach notwithstanding the agreement.

14

It is not in dispute that Nelson, as supplier of building materials for construction of a house on the lot, is owed in excess of \$25,000 as the unpaid price of those materials, which have since been incorporated into the house in the course of its construction by B.A.S. It is contended, however, by the respondents Executive and 892, that this did not give rise to any lien against the land because 892 at no time has been liable, as owner, for any part of the cost of the construction of the house (or of the materials supplied to B.A.S. by Nelson for that purpose) and Executive is no more than a purchaser of the land and house, in good faith and for value, likewise having no liability for the cost of the construction or of the materials. In support of this contention, Executive and 892 rely on section 11 of the Act:

11. Except as provided in this Act, the lien shall not attach so as to make an owner liable for a greater sum than the sum payable by the owner to the contractor.

15

It is Nelson's position that B.A.S. was not a "contractor", in the sense contemplated by the **Mechanics Lien Act**, in relation to either Executive or 892. But Executive takes the position that it is not, and has never been an "owner" within the sense intended by the Act. On that basis, the respondents say that Nelson's claim of lien could not attach so as to make either of them, or anyone but B.A.S., liable for any part of the debt due to Nelson, with the result that the lien claimed by Nelson never did attach to the land.

Executive relies, furthermore, on section 8 of the **Mechanics Lien Act** which, in this instance, may be read without reference to section 9. Section 8 states as follows:

8. Subject to section 9,
  - (a) payments up to 90% of the price to be paid for the work, machinery or materials referred to in section 3, that are made in good faith by the owner to the contractor, by the contractor to the sub-contractor or by the sub-contractor to another sub-contractor, before the person claiming the lien gives written notice of the claim to the person making the payment, discharge the lien given by this Act for the amount of the payments, but this section does not apply to a payment made for the purpose of defeating or impairing a claim to a lien existing or arising under this Act;
  - (b) in addition to all other rights or remedies given by this Act, a lien operates as a charge, to the extent of 10% of the price to be paid by the owner for the work, machinery or materials referred to in section 3, up to 10 days after the completion of the work or after the delivery of the machinery or materials in respect of which the lien exists, unless written notice is given as provided in paragraph (a); and
  - (c) a lien for wages for 30 days, or for a balance equal to wages for 30 days, to the extent of 10% of the price to be paid to the contractor, has priority over all other liens under this Act and over any claim by the owner against the contractor for or in consequence of the failure of the contractor to complete the contract.

If, as the trial judge found, Executive is indeed an "owner" of the lot by virtue of its various contractual arrangements with 892, B.A.S., and T.C. Enterprises Ltd., then Executive claims the benefit of paragraphs 8(a) and (b) as above quoted. Those paragraphs each refer to section 3 of the Act, which states:

3. Every labourer, contractor or other person,
  - (a) doing work on a building or erection,
  - (b) erecting, furnishing or placing machinery in, on or in connection with a building, erection or mine, or
  - (c) furnishing materials to be used in the construction, alteration or repair of a building or erection,has, on the building, erection or mine and the lands occupied or enjoyed in connection with the building, erection or mine, a lien for the price of the work, machinery or materials, not exceeding the amount justly due to that person, unless he or she signs an express agreement to the contrary.

17                   The **Mechanics Lien Act** specifically defines the terms "contractor" and "sub-contractor" as follows:

1. In this Act,

"contractor" means a person contracting with or employed directly by the owner for the doing of work or the placing or furnishing of materials or machinery for any of the purposes mentioned in this Act; ...

"sub-contractor" means a person not contracting with or employed directly by the owner for the doing of work or the placing or furnishing of materials or machinery but contracting with or employed by a contractor or under a contractor by another sub-contractor.

18                   The definition of "owner" is not similarly restrictive; but, on the contrary, enlarges the ordinary meaning of that term. This definition reads:

1. In this Act, ...

"owner" includes

- (a) a person having an estate or interest in the lands on or in respect of which work is done or materials or machinery are placed or furnished, at whose request and on whose credit, or on whose behalf or consent or for whose direct benefit the work is done or materials or machinery are placed or furnished, and

- (b) a person claiming under a person referred to in paragraph (a) whose rights are acquired after the commencement of the work or the placing or furnishing of the materials or machinery in respect of which the lien is claimed.

19 It is argued on behalf of the appellant that paragraphs (a) and (b) of this definition must be read so as to restrict the meaning of "owner" in sections 8 and 11 of the Act; and that the comprehensive definition given to that term in, for example, the federal **Land Titles Act** does not apply. That Act defines the term as follows:

1. In this Act, ...  
"owner" means any person or body corporate entitled to any freehold or other estate or interest in land, at law or in equity, in possession, in futurity or in expectancy.

20 The **Land Titles Act**, R.S.N.W.T. 1988, c. 8 (Supp.), which replaced the federal statute of that name with effect on July 19th 1993, defines the term "owner" in identical terms to those of the federal statute.

21 The trial judge vacated the registration of Nelson's lien pursuant to subsection 27(3) of the **Mechanics Lien Act**, subject to payment into court of the \$9,000 held by Executive, on the ground that Executive was an "owner" as defined by the Act and hence was entitled to the benefit of section 8 of the Act.

### III. The Issues

22 The parties agree that the issues in this appeal may be simply stated in terms of whether Nelson's lien is defeated either by section 8 or by section 11 of the **Mechanics Lien Act**.



IV. Discussion

23

It is not necessary to consider whether Executive was an "owner", as the trial judge found and as counsel for Executive and 892 submits. It was on that basis that Executive paid the \$81,000 to B.A.S., holding back \$9,000 in reliance upon section 8 of the **Mechanics Lien Act**.

24

Section 8 requires that any payment to which it refers is to be made by "the owner" to "the contractor", or by the latter to "the sub-contractor", or by "the sub-contractor to another sub-contractor", before any written notice of a claim of lien has been given. The language of the section does not extend to payments made by an owner to someone other than a "contractor" as defined by the Act.

25

B.A.S. had possession of the lot by the leave and licence of 892, the registered owner, with permission to build a house on the lot for resale of both house and lot, 892 having agreed to sell the lot to B.A.S. for \$45,000 subject to B.A.S. proceeding on that basis.

26

There was no contract between B.A.S. and 892 or Executive, in the sense contemplated by the **Mechanics Lien Act**, that qualified B.A.S. as either a "contractor" or a "sub-contractor", on the agreed facts before the Court. B.A.S. was not "a person contracting with or employed directly by the owner for the doing of work or the placing or furnishing of materials or machinery for any of the purposes of this Act", that is to say, a "contractor" as defined by the Act. Nor was B.A.S. "a person not contracting with or employed directly by the owner for the doing of work or the placing or furnishing of materials or machinery but contracting with or employed by a contractor or under a

contractor by another sub-contractor." so as to be a "sub-contractor" within the definition of that term in the Act. If anything, B.A.S. was an "owner" as defined by the Act. That being so, section 8 does not apply with respect to the payment by Executive of the \$81,000 to B.A.S.

27           Likewise, B.A.S. not being a "contractor" as defined by the Act, the provisions of section 11 do not apply.

28           Sections 8 and 11 provide exceptions to or restrictions upon the operation of the lien rights created by the Act. These sections are therefore to be given a restricted rather than an extended meaning. There is no room for enlargement of the terms "contractor" or "sub-contractor" to include B.A.S. within their scope, on the facts of the present case as agreed by the parties.

29           The foregoing conclusions are consistent with section 2 of the Act, Nelson having not been party to (or aware of) the various arrangements between 892, B.A.S., T.C. Enterprises Ltd. and Executive.

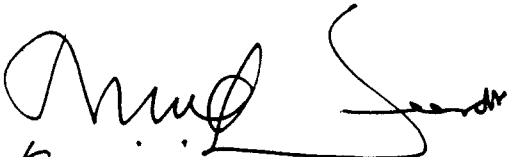
30           The argument that no lien attaches for Nelson's benefit under the Act because B.A.S. was not "the" owner (or even "an" owner) of the lot does not hold, since B.A.S. contracted with Nelson for the materials used to build the house on the lot pursuant to 892's permission given to B.A.S. to do that very thing. This is not the case of an unwitting owner whose property is saddled with a lien for which the owner can justifiably disclaim all responsibility. Whatever the full scope of the agreement between 892 and B.A.S. may have been, it clearly could not affect Nelson's lien rights under sections 3, 4 and 20 of the **Mechanics Lien Act**, having regard to section 2 of the Act.


V. Disposition

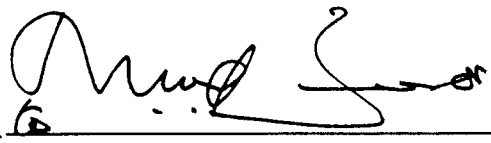
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The appeal is allowed, the order below being set aside with costs to Nelson both here and below.

Dated at Yellowknife, Northwest Territories, this 14<sup>th</sup> day of March 1994

  
Authorized to \_\_\_\_\_  
sign for TALLIS, J.A.

  
\_\_\_\_\_  
de WEERDT, J.A.

  
Authorized to \_\_\_\_\_  
sign for HETHERINGTON, J.A.

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