

(CV 06205)

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JOHNSON'S BUILDING SUPPLIES LTD.

Plaintiff

- and -

**933376 NWT LIMITED, carrying on business as O'NEILL HANDIMAN SERVICES;
MICHAEL RICHARD O'NEILL; and KAM LAKE ENTERPRISES LTD.**

Defendants

AND BETWEEN:

FITZGERALD CARPETING LTD.

(CV 06212)

Plaintiff

- and -

**933376 N.W.T. LTD., 933376 N.W.T. CARRYING ON BUSINESS UNDER THE NAME
AND STYLE OF O'NEILL HANDIMAN SERVICES, KAM LAKE ENTERPRISES LTD.,
BROWNING SMITH INC., as trustee of the estate of MICHAEL O'NEILL, a bankrupt, and
MICHAEL O'NEILL CARRYING ON BUSINESS UNDER THE NAME AND STYLE OF O'NEILL
HANDIMAN SERVICE**

Defendants

AND BETWEEN:

BARTLE & GIBSON CO. LTD.

(CV 06208)

Plaintiff

- and -

**933376 N.W.T. LTD., 933376 N.W.T. LTD. CARRYING ON BUSINESS UNDER THE
NAME AND STYLE OF O'NEILL HANDIMAN SERVICES, KAM LAKE ENTERPRISES LTD.,
BROWNING SMITH INC., as trustee of the estate of MICHAEL O'NEILL, a bankrupt, and
MICHAEL O'NEILL CARRYING ON BUSINESS UNDER THE NAME AND STYLE OF O'NEILL
HANDIMAN SERVICES**

Defendants

AND BETWEEN:

JOHNSON'S BUILDING SUPPLIES LTD.

(CV 06206)

Plaintiff

- and -

**933376 N.W.T. LIMITED, carrying on business as O'NEILL HANDIMAN SERVICES;
MICHAEL RICHARD O'NEILL; JEAN PIRO; GORDON PIRO; and BRIAN PIRO**

Defendants

MEMORANDUM OF JUDGMENT

I will address the defendants' motions with reference to each separate project subject to the lien claims.

Lot 114 Project:

The project on Lot 114, Block 555, Plan 2134, Yellowknife, was a joint venture by Kam Lake Enterprises Ltd. and the bankrupt 933376 N.W.T. Limited. The joint venture agreement provides that both parties agreed to "cause a house to be constructed on the property" and that profits and losses were to be shared equally. The bankrupt company would do the work of a "contractor" but both companies were to be beneficial if not legal co-owners. At one point, both companies were registered on title as co-owners.

The defendant Kam Lake seeks to deposit 10% of the construction costs as a lien fund, pursuant to s.8 of the Act, as security to vacate the security currently in place for the lien claims.

For Kam Lake to be able to shelter under the benefits of s.8(a) of the Act, the payments made by Kam Lake to the bankrupt company must have been (1) made in good faith (2) by the owner to the contractor (3) before the owner received written notice of the claims. Defendant's counsel argues that one can be both "owner" and "contractor". Yet, the definition of "contractor" in the Act clearly contemplates the contractor

contracting with the owner, i.e., distinct entities. The definition of "owner" in the Act includes any one "having an estate or interest in the lands". In *Executive Ltd. v. B.A.S. Developments Ltd.*, [1994] N.W.T.R. 154, the Court of Appeal said that, since s.8 provides exceptions to or restrictions upon the operation of the lien rights created by the Act, the terms used in that section must be given a restricted rather than an extended meaning.

In my opinion, it is far from clear-cut that s.8 applies to the relationship as between Kam Lake and the bankrupt company. Even if it can be said that 933376 N.W.T. Limited can be both "owner" and "contractor" at the same time, then it means, as Mr. Gullberg noted, that it as "owner" had notice of the unpaid claims and s.8 was never meant to shelter someone who has actual notice.

There are many facts that need to be examined to determine the true legal nature of the relationship between the two companies. It is trite to say that a court should not attempt to decide contested matters on competing affidavits, especially if there have been no cross-examinations on the affidavits. The facts presented on these motions are not incontrovertible so this is not a pure question of law. The matter should go to a trial.

I have also considered Mr. Marshall's argument that there is no proper evidence brought on these motions. The defendants rely on affidavits filed in the bankruptcy proceedings. Supreme Court Rule 380 provides that an affidavit may be used at any

stage of the proceedings. But, this rule does not allow what was done on these motions. Evidence by affidavit in another proceeding is not evidence in these proceedings. Having regard to my decision, however, I have overlooked this defect and considered all of the affidavits submitted to me.

The defendants also seek a consolidation of actions numbered CV 06205, CV 06208 and CV 06212 (the actions relating to Lot 114). There is undoubtedly merit in consolidating these actions. There is also merit in consolidating with them, if possible, the proceedings relating to the allegedly impermissible conveyance prosecuted by the bankruptcy trustee. I think it would be best if counsel would try to work out some agreed-upon directions for expediting all of these actions. If they can agree then a consent order can be sought. If they cannot agree then directions may be sought from the court. Any directions should address as well the unprosecuted lien of the claimant Charland.

Old Town Project:

This project involves the construction of a building on two lots. The lien claim includes, however, a laneway adjacent to the two lots. The defendants contend that s.8 applies to the relationship between them and the bankrupt company since this was a clear owner-contractor situation based on an oral agreement.

With respect to the s.8 issue, my earlier comments apply with equal force here.

There are facts that must be explored respecting the relationship of the parties, the arrangements agreed to by them, the role of Kam Lake in this project (since the payments appear to have come from Kam Lake), and the question of notice. These are all questions that can only be resolved through a trial and not on a summary application.

With respect to the request to vacate the lien from the laneway, this is also a fact issue that requires evidence. I note that, while in fact nothing may have been built on the laneway, the building permit application and the architect's plans include the laneway in the description of the project.

The Act, in s.3, states that the lien claim applies to the building on which materials were furnished and the lands "occupied or enjoyed in connection with the building". This is similar to the phrase "enjoyed therewith" used in many provincial lien statutes. In *Security Labour Co. v. Anaka*, [1927] 1 W.W.R. 975 (Sask. C.A.), the court held that whether the lien will attach to land in addition to that occupied by the building, as land "enjoyed therewith", is a question of fact in each case. It was held, further, that one test to be applied was whether the different parcels, as used by the owner, constitute a single unit, "operated together and for a common purpose, and was the building calculated to facilitate that common purpose and intended to benefit the whole?" This test was approved in *Northern Electric Co. v. Frank Warkentin Electric Ltd.* (1972), 27 D.L.R. (3d) 319 (Man. C.A.).

It seems to me that it could at least be argued that the laneway was intended to

be an integral component of this project, hence land enjoyed in connection with it. But this is a question of fact to be resolved through evidence.

Accordingly, the defendants' motions in all four actions are dismissed. Costs will be in the cause.

Dated this 21st day of June, 1996.

A handwritten signature in cursive script, appearing to read "John Vertes", followed by a horizontal line.

J. Z. Vertes
J.S.C.

To: Robert A. Kasting
Counsel for the Defendants (Applicants),
Kam Lake Enterprises Ltd. and Piro

Austin F. Marshall
Counsel for the Plaintiff (Respondent)
Johnson's Building Supplies Ltd.

Edward W. Gullberg
Counsel for the Plaintiffs (Respondents)
Bartle & Gibson Co. Ltd. and
Fitzgerald Carpeting Ltd.

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN: (CV 06205)

JOHNSON'S BUILDING SUPPLIES LTD.

Plaintiff

- and -

933376 NWT LIMITED, carrying on business as O'NEILL
HANDIMAN SERVICES; MICHAEL RICHARD O'NEILL; and
KAM LAKE ENTERPRISES LTD.

Defendants

AND BETWEEN: (CV 06212)

FITZGERALD CARPETING LTD.

Plaintiff

- and -

933376 N.W.T. LTD., 933376 N.W.T. CARRYING ON
BUSINESS UNDER THE NAME AND STYLE OF O'NEILL
HANDIMAN SERVICES, KAM LAKE ENTERPRISES LTD.,
BROWNING SMITH INC., as trustee of the estate of
MICHAEL O'NEILL, a bankrupt, and MICHAEL O'NEILL
CARRYING ON BUSINESS UNDER THE NAME AND STYLE
OF O'NEILL HANDIMAN SERVICE

Defendants

AND BETWEEN: (CV 06208)

BARTLE & GIBSON CO. LTD.

Plaintiff

- and -

933376 N.W.T. LTD., 933376 N.W.T. LTD. CARRYING
ON BUSINESS UNDER THE NAME AND STYLE OF
O'NEILL HANDIMAN SERVICES, KAM LAKE ENTERPRISES
LTD., BROWNING SMITH INC., as trustee of the estate of
MICHAEL O'NEILL, a bankrupt, and MICHAEL O'NEILL
CARRYING ON BUSINESS UNDER THE NAME AND STYLE
OF O'NEILL HANDIMAN SERVICES

Defendants

AND BETWEEN: (CV 06206)

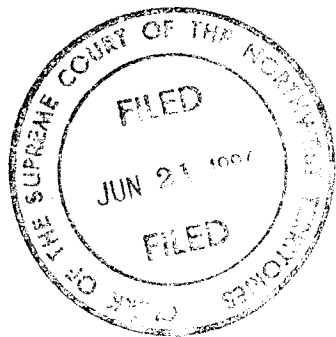
JOHNSON'S BUILDING SUPPLIES LTD.

Plaintiff

- and -

933376 N.W.T. LIMITED, carrying on business as O'NEILL
HANDIMAN SERVICES; MICHAEL RICHARD O'NEILL;
JEAN PIRO; GORDON PIRO; and BRIAN PIRO

Defendants



Memorandum of Judgment of the Hon. Mr. Justice J.Z. Vertes
