

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

SUPPLEMENTARY MEMORANDUM OF JUDGMENT

Counsel for the defendant Kam Lake Enterprises Ltd. has requested that I address two points which he says I did not deal with in my Memorandum of Judgment dated June 21, 1996. They are:

- (a) whether security by way of letters of credit may be posted in substitution for the funds currently held in trust; and,

(b) whether the Charland lien, a lien filed but for which no action has been commenced, may be vacated.

I have reviewed my notes and the material on file, including the written submissions received from plaintiffs' counsel in response to this request, and conclude that these points were not dealt with because they were not argued at the previous hearing leading up to my June 21st memorandum. Nevertheless I will address both points.

Substitution of Letters of Credit:

While I have no difficulty in principle with the defendant posting letters of credit as security, in this particular case it is significant that the funds being held in trust, the amounts and conditions attached thereto, were the subject of the agreement of all parties and consent orders issued in May. The defendant is asking me to vary those earlier consent orders. Nothing has been placed before me to explain the necessity for such a variation and I note that the plaintiffs oppose this request.

The burden on someone seeking a variation is extremely high when the initial order was obtained pursuant to the agreement of the parties. I reject this request.

Status of the Charland Lien:

At the previous hearing, defendant's counsel submitted that these proceedings should be consolidated in some coherent manner, since they all involve the same project, and any such consolidation should take into account the Charland lien. I think all parties agree that this should be done at some point but no submissions were made about the form of such a consolidation. For that reason I had previously indicated that counsel should try to agree upon a set of directions for the consolidated and speedy trial of all of these claims. I repeat that suggestion.

Counsel for the defendant now asks me to vacate the Charland lien. The plaintiffs, in effect, take no position on this point.

The Charland lien was registered but not "perfected" due to failure to commence proceedings as required by s.24 of the *Mechanics Lien Act*. Ordinarily this failure would entitle the defendant to an order vacating the lien. Subsection 26(2) of the Act, however, provides that "an action brought by a lien holder shall be taken to be brought on behalf of all lien holders of the same class who have registered their liens before or within 30 days after commencement of the action" (emphasis added). The proceedings commenced by the plaintiffs are "class actions" and arguably the claimant Charland is entitled to shelter under these actions. Counsel may wish to review the discussion of this principle in Macklem & Bristow, *Construction and Mechanics' Liens in Canada* (5th ed.), pages 279 - 286.

The question of whether the claimant Charland is entitled to the protection of s.26(2), i.e., whether he is in the "same class" as the plaintiffs or whether his claim is "registered" within the appropriate time, is a question of fact. It is not something that can be determined on a summary application. His claim may have to be left to be determined in the trial of these proceedings and obviously if he does not appear at that trial the defendant may then move to have his claim dismissed.

I therefore dismiss this motion as well.

It seems to me that this request for further relief was unnecessary. It required further submissions on the part of counsel for the plaintiffs. I am inclined to direct that the defendant pay the plaintiffs' costs on the basis of a contested motion, item 35(a) of column 5 of the tariff of costs,

but counsel may make further submissions to me on this point, if necessary, or it can be left to be dealt with by the trial judge.

Dated this 7th day of August, 1996.

J. Z. Vertes
J.S.C.

To: Robert A. Kasting
Counsel for the Defendant (Applicant),
Kam Lake Enterprises Ltd.

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
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Defendants

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