

Date: 2004 01 26

Docket: S-0001-CV-2003000077

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF THE *MECHANICS' LIEN ACT*,  
R.S.N.W.T. 1988, c.M-7;

AND IN THE MATTER OF CERTAIN MECHANICS' LIENS  
REGISTERED AGAINST THE ESTATE AND INTEREST  
OF THE MUNICIPAL CORPORATION OF THE  
VILLAGE OF FORT SIMPSON

BETWEEN:

THE MUNICIPAL CORPORATION OF THE  
VILLAGE OF FORT SIMPSON

Applicant

-and-

CAMILLUS ENGINEERING CONSULTANTS LTD.,  
KIWI ELECTRIC LTD., J.S.L. MECHANICAL INSTALLATIONS LTD.,  
VECTOR ELECTRIC AND CONTROLS INC.,  
FOOTHILLS INDUSTRIAL SYSTEMS LTD.,  
DELOITTE & TOUCHE INC. in their capacity as Court  
Appointed Receiver (Alberta Court of Queen's Bench)  
of Foothills Industrial Systems Ltd., REG BELLEFONTAINE,  
carrying on business under the trade name and style of  
"RIGHTWAY COATINGS", THE GUARANTEE COMPANY  
OF NORTH AMERICA, CANADA CUSTOMS AND REVENUE AGENCY, and  
BANK OF MONTREAL

Respondents

MEMORANDUM OF JUDGMENT ON COSTS

[1] This is my ruling on costs of the Village's application for an order setting the lien fund, in regard to which I issued a Memorandum of Judgment on December 14, 2004 (*Village of Fort Simpson v. Camillus Engineering et al* 2004 NWTSC 84).

[2] The Village seeks costs on a solicitor and client basis or alternatively, double the tariff amount, against Camillus and The Guarantee Company of North America ("the surety") and asks that I order that the surety pay any costs awarded against Camillus.

[3] When the lien fund application came on to be heard, Camillus sought an adjournment through counsel, who had only recently been retained. When the adjournment request was denied, counsel declined to participate in the application as he had no instructions. Camillus' counsel has, however, filled written submissions on this costs application, as have the Village and the surety. I have reviewed all the submissions and have considered the issues raised.

[4] I am not persuaded that this is an appropriate case for solicitor and client costs. The "unusual and extraordinary" circumstances on which the Village relies are largely, at this stage, untried allegations, for example the value of the work done and the amount by which the Village says Camillus was overpaid. The fact that evidence submitted on the lien fund application was accepted for purposes of setting the fund does not mean that all issues the evidence is relevant to are resolved.

[5] That Camillus was ordered to post security for costs in three related actions is not relevant to the costs of the lien fund application. Richard J. previously ordered costs on a solicitor and client basis to sanction Camillus for applications which he found were frivolous. The lien fund application should be dealt with separately and the question is whether the circumstances relating to the application itself warrant solicitor and client costs.

[6] I choose to treat the lien fund application as a fairly straightforward, interlocutory matter. I disagree, however, with Camillus' submission that the setting of the lien fund and consequential payment into court is a "quasi-administrative process".

[7] The power given to the Court by s.27(2) of the *Mechanics Lien Act*, R.S.N.W.T. 1988, c.M-7, is a discretionary one and, as happened in this case, can give rise to legal issues. On the lien fund application, the only issue raised was whether the Village's evidence about the contract value should be accepted for purposes of setting the lien fund or whether there should be a *viva voce* hearing on that.

[8] As indicated, I decline to order solicitor and client costs. As to costs on the basis of double Column 6 of the Tariff, I find no basis for such an order. As noted, this was a fairly straightforward interlocutory application on which Camillus made no submissions and filed no materials. The material filed by the surety was concise and specifically directed to the one issue it addressed, whether there should be a *viva voce* hearing. The application itself was necessary in that an order was required to vacate the liens from the Village's property, although such orders are often made on consent.

[9] As there is no evidence that the Village's expert witnesses were retained solely to provide the affidavit material for the application, rather than for purposes of the action generally, the cost of their assistance should be dealt with at trial and not as an expense on this costs ruling.

[10] The Village also requests the travel expenses of its non-resident counsel. I agree with counsel for the other parties that there is no evidence bringing this application within Rule 648(4). Although the travel costs will not be included as costs of the lien fund application, I do not intend that as any comment on whether such costs should be awarded for any other application or for trial.

[11] Counsel for Camillus submits that any costs awarded should come out of the lien fund. In my view that is not appropriate as it would reduce the lien fund to the likely prejudice of the various lien claimants.

[12] I order that the Village have its costs of the lien fund application on a party and party basis under Column 6 of the Tariff. The Village will have one set of costs against Camillus and one set against the surety. I make that order not on the basis of the performance bond, which is an issue still in dispute, but because of the respective roles played by Camillus and the surety with regard to the application. Camillus' last minute adjournment application and the fact that no submissions were made on its behalf did not relieve the Village's counsel from having to prepare for the case and the arguments that Camillus, previously not represented by counsel, might have made.

The surety opposed the application and raised a specific issue so I see no reason why it should not bear costs.

[13] Since the surety's liability under the performance bond is a disputed matter, the surety will not be responsible for the costs awarded against Camillus.

[14] An order will issue accordingly.

[15] V.A. Schuler

[16] J.S.C.

Dated at Yellowknife, NT this  
26th day of January, 2005.

Counsel for the Village of Fort Simpson: W. Donald Goodfellow, Q.C.  
Counsel for The Guarantee Company of North America: Sheila MacPherson  
Counsel for Camelus Engineering Consultants Ltd.: Robert A Kasting

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