Date: 2005 07 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

[1] By order filed March 1, 2005, the Village of Fort Simpson was permitted to pay the sum of $150,021.80 ("the lien fund") into court to discharge a number of mechanics' liens filed against its property. The liens arise from a construction project undertaken by the Village on which Camillus Engineering Consultants Ltd. was the main contractor and which is the subject of litigation because Camillus claims that it has not received full payment for its work.

[2] The Village has paid the money into court. The applications before me have been brought pursuant to paragraph 5 of the said order, which reads as follows:

> 5. AND THIS COURT DOTH FURTHER ORDER AND DIRECT that if The Municipal Corporation of the Village of Fort Simpson pays the mechanics' lien fund into Court, the rights of the Respondents to such funds and the priority of such claimants shall be determined by agreement amongst the Respondents or as determined by this Honourable Court.

[3] There are two applications before me. Camillus applies to have the lien fund paid to its solicitors in trust to be distributed according to an agreement reached among the Respondents, save for the lien claimant Foothills Industrial Systems Ltd. The Receiver Manager appointed for Foothills has agreed to the proposed distribution, but Foothills itself, through its directors and shareholders, objects. The issue is who is entitled to speak for Foothills: the company itself or the Receiver Manager.

[4] The second application is made by Foothills, seeking dismissal of the application brought by Camillus and an order determining the rights of the Respondents to the lien fund. Foothills objects to the priority right asserted by Canada Customs and Revenue Agency ("CCRA") and it also submits that some of the liens filed are defective. It argues that only Foothills and Vector Electric and Controls Inc. are entitled to share in the lien fund.

[5] The Village did not take part in these applications and counsel for Camillus advised that counsel for the Village does not take a position on the matters at issue.

*Who is entitled to speak for Foothills?*

[6] The background relevant to this issue is as follows. There is a separate court action, CV8756, as between Camillus, Foothills and the Village, also involving Foothills' lien on the Village's property. In that action, Vertes J. made an order on February 23, 2001 ("the Vertes order"), that the issue of the validity and amount of the lien claim by Foothills will be determined by arbitration pursuant to the *Arbitration Act*, R.S.N.W.T. 1988, c. A-5.

[7] On March 23, 2001, on application by Camillus against Foothills in the Court of Queen's Bench of Alberta, an order was made by Lutz J. ("the Lutz order") that Deloitte & Touche Inc. be appointed as Receiver and Manager of Foothills. Although paragraph 5 of that order gives the Receiver authorization to prosecute and defend all suits, proceedings and actions involving Foothills and the right to settle any actions, applications or proceedings, it is expressly made subject to paragraph 5.1, which provides as follows:

> 5.1 With respect to the mechanics lien dispute between Foothills and Camillus Engineering Consultants Ltd. that is the subject of arbitration in the Northwest Territories and Judicial Proceedings in the Supreme Court of the Northwest Territories Action No. C.V. 08756 (the "NWT Arbitration"), the Receiver Manager is hereby expressly ordered to seek advice and directions from this Honourable Court before making any decisions concerning the continuation of the NWT Arbitration. For further clarity, the Receiver Manager is hereby ordered not to restrict, intervene or interfere with Foothills' conduct or continuation of the NWT Arbitration without first obtaining the advice and directions of this Honourable Court.

[8] Also relevant is paragraph 19, which empowers the Receiver to receive and collect all money now or hereafter owing to Foothills and to enter into arrangements or compromises of any claim as in its judgment may be desirable.

[9] The arbitration ordered by Vertes J. did not take place. Camillus and Foothills each blame the other for that. Nothing further of any substance has taken place in the action in which the Vertes order was made. Nor has anyone applied to set aside the Vertes order.

[10] The distribution of the lien fund proposed by Camillus is not intended to settle or compromise any of the claims made on it. The $18,000.00 that Foothills would receive under the proposed distribution would be credited towards, but not compromise, the $392,446.13 claimed pursuant to its lien. From a practical standpoint, however, counsel for Foothills says that if the proposed distribution is accepted, because of the number of claims against Camillus and Camillus' financial situation, $18,000.00 is all that Foothills is likely ever to recover. However, if the Receiver is not entitled to accept the proposed distribution, Foothills will argue that it should recover $150,000.00 out of the lien fund due to the deficiencies it points to in the other claims.

[11] The difference between the positions taken by Foothills and the Receiver arises from more than simply the amount that would be recoverable out of the lien fund. Because of the positions taken by Foothills and CCRA, which I will refer to below, if Foothills' position prevails, any distribution will have to await the outcome of the main lawsuit between Camillus and the Village.

[12] Camillus relies on the Receiver's authority in paragraph 19 of the Lutz order to receive money and compromise claims. Foothills, on the other hand, relies on paragraph 5.1 as excepting any claims relating to the arbitration from the Receiver's general authority in paragraphs 5 and 19 to deal with claims. Foothills also raises concerns about the fact that it was Camillus who sought the appointment of the Receiver in the first place, that Camillus has made an assignment of certain monies in favour of the Receiver, that the $18,000.00 under the proposed distribution will cover the Receiver's fees but nothing more. No one appeared for the Receiver on this application and there is nothing before me from the Receiver explaining why it has chosen to accept the proposed distribution rather than make the same argument that Foothills does about its entitlement to a larger portion of the lien fund.

[13] In my view, the issue comes down to interpretation of the Lutz order. Was the order meant to exclude only the arbitration itself from the Receiver's authority, or also the claim which was to be the subject of the arbitration?

[14] I do not think I should attempt to interpret the Lutz order, particularly when that order specifically says that the Receiver must seek advice and directions from the Alberta Court before making any decisions concerning the continuation of the arbitration or restricting, intervening or interfering with Foothills' conduct or

continuation of the arbitration. It may well be that since Camillus and Foothills had recently been ordered to submit their dispute to arbitration when the Lutz order issued, no thought was given by them to what would happen to the disputed claim if the arbitration did not proceed. I am concerned in these circumstances that if I make an order interpreting or, in effect, adding to, the Lutz order, I may be without jurisdiction to do so: *Knowles v. Knowles*, [1999] N.W.T.J. No. 144, 1999 NWTSC 19 (S.C.).

[15] Since Camillus and Foothills do not agree on the scope of the Receiver's authority, they will have to go back to the Court that made the order to have it clarified or for a direction from that Court.

*The CCRA claim*

[16] The proposed distribution as set out in Camillus' notice of motion states the amount to be distributed to CCRA from the lien fund as $85,165.10. In submissions, however, Camillus took the position that this Court should determine whether that or a lesser amount is owing.

[17] CCRA claims $85,165.10 as the amount owing to it by Camillus for unremitted source deductions, interest and penalties valued as at May 31, 2005, and for which the Village was served with a notice of requirement to pay as a party owing money to Camillus. CCRA asserts a priority claim to that amount from the lien fund under the "enhanced garnishment" procedure in s. 224(1.2) of the *Income Tax Act*. Alternatively, if the enhanced garnishment procedure is held to be inapplicable, CCRA asserts a claim to $64,672.46 as the amount of unremitted source deductions only, under the deemed trust provisions of the *Income Tax Act*, ss. 224-227.

[18] Foothills is the only party to take a position against the CCRA claim. Its opposition is based on the following. Under s. 224(1.2)(b) of the *Income Tax Act*, for the lien fund paid into Court by the Village to be subject to the enhanced garnishment provisions, it must be established that the payment by the Village is a payment "to a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor". Similarly, under the deemed trust provisions, s. 227(4) creates in the lien fund a deemed trust in favour of Her Majesty if the fund can be said to be property that, but for the security interest of a secured creditor, would be property of Camillus. In either case, if the requirements are satisfied, CCRA would have a priority claim.

[19] The issue then is whether the lien fund is the property of Camillus, that is, whether it represents money owed to Camillus by the Village. The problem is that the Village has taken the position all along that it does not owe Camillus anything; that it has in fact overpaid Camillus for the work done under the construction project contract. That is what the lawsuit between Camillus and the Village is about: whether Camillus is owed anything more than what has already been paid to it. The lien fund, which was set in the amount proposed by the Village, was not based on an amount owing to Camillus, it was based on the value of the work done and was sought so that the Village could have the liens removed from its property.

[20] Foothills takes the position that in order to be successful in its claim, CCRA must establish that money is still owed to Camillus. Since CCRA has not established that as a fact, Foothills says that it cannot assert its claim against the lien fund. However, since that is the very subject of the lawsuit between Camillus and the Village, it would be unreasonable, in my view, to require CCRA to establish the debt to Camillus on a summary application like this one. Whether the CCRA claim can attach to the lien fund will have to await the outcome of the trial, barring some arrangement like that proposed by Camillus and agreed to by the various claimants.

*Conclusion*

[21] The applications before me are premature, at least until such time as direction is obtained from the Alberta Court of Queen's Bench as to whether Foothills itself or the Receiver is authorized to deal with Foothills' claim. Whatever ruling the Alberta Court makes, distribution of the lien fund will have to await a determination as to whether it is money owed to Camillus and therefore attached by the enhanced garnishment provisions in favour of CCRA, unless all claimants agree to a distribution that is not dependant on that determination. Apart from and except for the issue whether the lien fund is money owed to Camillus, I am satisfied that CCRA has established its claim under the enhanced garnishment provisions, that is, to the sum of $85,165.10.

[22] I am not going to rule at this time on the deficiencies alleged by Foothills regarding the liens of the other claimants. That ruling will not be necessary if the Alberta Court decides in favour of the Receiver and the parties come back to this Court for an order authorizing the distribution proposed by Camillus. If the Alberta

Court decides in favour of Foothills, counsel may bring this matter back on before me with respect to the lien claims challenged by Foothills, bearing in mind that the CCRA claim will have to await the outcome of the trial as set out above unless some other arrangement is agreed to.

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

V.A. Schuler
J.S.C.

Heard at Yellowknife on July 18, 2005

| | |
|---|---|
| Counsel for Camillus Engineering Consultants Ltd.: | Robert Kasting |
| Counsel for Kiwi Electric Ltd., JSL Mechanical Installations Ltd. and Bank of Montreal: | Doug McNiven |
| Counsel for Foothills Industrial Systems Ltd.: | Louis Walsh |
| Counsel for The Guarantee Company of North America: | Sheila MacPherson |
| Counsel for Canada Customs and Revenue Agency: | Scott Duke |

S-001-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 OF
THE HONOURABLE JUSTICE V.A. SCHULER