

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Chartier
Madam Justice Freda M. Steel
Madam Justice Diana M. Cameron

BETWEEN:

<i>CANOTECH CONSULTANTS LTD.</i>)	<i>R. W. Schwartz</i>
)	<i>for the Appellant</i>
)	
<i>(Plaintiff) Respondent</i>)	<i>T. G. Frohlinger and</i>
)	<i>F. Li</i>
<i>- and -</i>)	<i>for the Respondent</i>
)	
<i>5994731 MANITOBA LTD.</i>)	<i>Appeal heard:</i>
)	<i>February 17, 2017</i>
)	
<i>(Defendant) Appellant</i>)	<i>Judgment delivered:</i>
)	<i>May 12, 2017</i>

On appeal from 2016 MBQB 52

CAMERON JA

Introduction

[1] This appeal concerns the time periods for registration of a builders' lien pursuant to *The Builders' Liens Act*, CCSM cB91 (the *Act*). The defendant appeals the decision of the motion judge which held that the builders' lien (the lien) registered by the plaintiff against the defendant's property complied with the registration time periods as found in the *Act* on the basis that it was filed within 40 days after the completion of services pursuant to section 43(4)(b) of the *Act*.

[2] For the reasons that follow, I have concluded that the motion judge

correctly interpreted the *Act* in reaching his conclusion that the 40-day time period in section 43(1), pursuant to which a contractor may file a lien on the basis of substantial performance, does not begin to run “unless and until a certificate of substantial performance is given” (at para 12). In this case, no certificate had issued. However, regardless of the lack of a certificate of substantial performance, the contract was still being performed at the time the lien was registered and therefore the lien was validly registered pursuant to section 43(1). Thus, in my view, there was no need for the motion judge to have considered whether the plaintiff had filed the lien within the 40-day time period after the completion of services (see section 43(4)(b)).

Background and Proceedings

[3] In July 2010, the plaintiff entered into a “Standard Construction Management Contract” (the contract) with the defendant for the provision of general contracting services for a “Water Park Camp Ground Development” (the project). The project was largely completed by December 14, 2011, with December 24, 2011 being the last date that the plaintiff was at the project. Despite this, there remained a number of deficiencies to be remedied and services to be performed, including electrical work and other work to be done on the air conditioning system.

[4] During the course of the construction, the defendant became dissatisfied with the work that had been performed. On January 24, 2012, its president (the president) directed the plaintiff, by way of email, to ensure that all trades persons make arrangements with the president to do any work on the project as he wanted to supervise the work and document any required repairs.

[5] In February of 2012, an electrical company, hired by the defendant, performed work on the project which was finished on February 29, 2012. On that date, the electrical company forwarded an email to the plaintiff describing the work it had done and including an invoice for supplies required to complete the work. The plaintiff reviewed the email the same day.

[6] On March 7, 2012, the plaintiff registered the lien against the property on which the project was located. In response, the defendant filed a motion requesting that the lien be removed on the basis that it was filed outside of the time periods set out in the *Act*. The plaintiff then filed a motion seeking a declaration that the lien was valid.

[7] The motion judge heard the motions together and declared that the lien was valid. He rejected the defendant's position that the time period for registering the lien started to run as of the date the contract was substantially performed. In his view, in order for the time period to commence running on that basis, a certificate of substantial performance was required. However, since no certificate of substantial performance had been issued, the motion judge held that the time period started to run as of the date of completion of the services provided pursuant to the contract. He found that date to be February 29, 2012. The fact that the lien had been registered on March 7, 2012, meant that it complied with the 40-day time period provided by section 43(4)(b) of the *Act*.

Issues

[8] The defendant alleges that the motion judge erred when he held that a certificate of substantial performance was required to start the 40-day

time period despite the fact that the contract had been substantially performed within the definition of section 2(1) of the *Act*. It further argues that the motion judge erred in finding that the plaintiff completed the provision of services, in accordance with section 43(4) of the *Act*, on February 29, 2012.

[9] The first issue is one of first impression since it has not been specifically addressed by this Court in other decisions.

Discussion

[10] Section 43(1) of the *Act* allows for a contractor to register a claim for lien within four distinct periods of time: It states:

Time within which claim may be registered by contractor

43(1) Except as provided in section 44, a claim for lien by a contractor may be registered before or during the performance of the contract or within 40 days after the substantial performance or abandonment of the contract, as the case may be.

[emphasis added]

[11] The application of section 44 was not before the motion judge and is not in issue in this case.

[12] The time period for registration of a lien on the basis of substantial performance of a contract is governed by section 43(6) of the *Act*, which provides:

Meaning of substantial performance

43(6) For the purposes of this section, substantial performance of a contract or a sub-contract means the date on

which a certificate of substantial performance thereof is given to the owner under section 25 or 46, as the case may be.

[13] Section 25 deals with holdbacks and section 46 deals with the certificate of substantial performance.

[14] Section 2(1) of the *Act* deems substantial performance to be performed when certain conditions exist. It states:

Substantial performance

2(1) For the purposes of this Act, a contract or sub-contract shall be conclusively deemed to be substantially performed when

- (a) the structure to be constructed under the contract or sub-contract or a substantial part thereof is ready for use or is being used for the purpose intended or, where the contract or sub-contract relates solely to improving land, the improved land or a substantial part thereof is ready for use or is being used for the purpose intended; and
- (b) the work to be done under the contract or sub-contract is capable of completion or correction at a cost of not more than
 - (i) 3% of the first \$250,000. of the contract price,
 - (ii) 2% of the next \$250,000. of the contract price, and
 - (iii) 1% of the balance of the contract price.

[15] The defendant maintains that, despite the fact that a certificate of substantial performance had not been issued, substantial performance, as the term is described in section 2(1), had been completed on December 24, 2011. Accordingly, it says that the plaintiff had until February 2, 2012, 40 days later, to file its lien. Since the plaintiff did not register its lien until

March 7, 2012, the defendant submits that the judge erred when he declared it valid.

[16] The plaintiff submits that, irrespective of section 2(1), when section 43(1) is read in conjunction with section 43(6), it is clear that the 40-day time period does not start to run until the certificate of substantial performance is given.

[17] In rejecting the defendant's position, the motion judge stated (at para 12):

It is clear from s. 43(6) that unless a contract has been abandoned the 40-day time period in s. 43(1) does not begin to run unless and until a certificate of substantial performance is given. The concept of substantial performance was included in the *Act* as a result of a recommendation of the Manitoba Law Reform Commission (the "Commission") in its 1973 report on "Mechanics' Liens Legislation in Manitoba". The purpose was to speed up the flow of funds through the construction chain by allowing for payment prior to total performance of a contract. However, the Commission recognized the problem with payment upon substantial completion of contracts is the difficulty it causes in determining the date after which liens can no longer be registered. As a result, it recommended that lien rights begin to run from the date a notice of substantial performance is given. Substantial performance is therefore not something that can be inferred by the court. Whether a contract has been substantially performed is a matter of opinion and difficult to pinpoint. Without the issuance of a certificate of substantial performance the parties may have a difference of opinion as to when a contract has been substantially performed. A certificate of substantial performance serves to create the necessary certainty and provides notice to all parties that the time for filing a lien has begun to run.

[emphasis added]

[18] The parties agree, as do I, that the determination of when the *Act* mandates that the time period for registration begins to run, pursuant to section 43(1), involves an exercise of statutory interpretation and constitutes a question of law, reviewable on the standard of correctness. See *Housen v Nikolaisen*, 2002 SCC 33 at paras 8-9.

[19] In *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, Iacobucci J, writing for the majority of the Supreme Court of Canada, adopted the modern approach to statutory interpretation described by Elmer Driedger in *Construction of Statutes* (2nd ed 1983) at 87 (at para 21):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[20] In my view, the motion judge correctly interpreted the *Act*. Section 43(6) is clear and unambiguous. A certificate of substantial performance is required to engage the 40-day time period when a contractor relies on substantial performance as a basis for registering a lien. Further, as I set out below, this interpretation is consistent with the scheme and object of the *Act* and the intention of the legislature.

[21] In the Manitoba, Law Reform Commission, *Report on Mechanics' Liens Legislation in Manitoba*, (13 August 1979), online: <www.manitobalawreform.ca/pubs/pdf/archives/32-full_report.pdf> (the report), the authors describe the previous applicable legislation as follows (at p 3):

“*The Mechanics' Liens Act*” has been around long enough and in a sufficient number of jurisdictions to become an integral part of

the construction industry and related industries which nurture it. The statute affects virtually every job where an asset attached to real property is created by the application of labour and materials. The fundamental purpose of this legislation and “*The Builders and Workers Act*” (C.C.S.M. cap. B90) is to ensure that a person contributing to the improvement of such land is paid for that contribution in accordance with his contractual entitlement.

[emphasis added]

[22] Regarding the registration of liens, the report criticized *The Builders and Workers Act*, CCSM cap B90 (formerly *The Builders and Workmen Act*, RSM c 24, S 1, as amended by *An Act to Amend the Builders and Workmen Act*, SM 1976, c 22) for failing to impose clear time periods regarding the filing of a lien against land. It concluded (at p 25):

The old right to file a builders’ and workers’ lien against land without regard to time limits must, we think, be sacrificed in order to create the following benefits:

1. Absolute certainty to owners and others having an interest in land, including mortgagees financing the construction on the land, in the knowledge that all lien rights have expired by a certain fixed date;
2. (Flowing from item 1), faster payment of funds by the mortgagee to the owner and in turn from the owner to the contractor as a result of the increased certainty concerning the existence of an encumbrance respecting the land.
3. A discipline that, in the absence of alternative security, a mechanics’ lien must be registered in a timely fashion in order to secure the land and improvements.
4. An incentive to deal with problems of non-payment as they arise rather than postponing them until the project ends.
5. One comprehensive piece of legislation.

[23] In considering the concept of substantial performance as a triggering event for the time period for registration of a lien, the report specifically recommended the “issuance of a certificate by an architect, engineer or other agreed-upon person, certifying that the work has been completed to his satisfaction”, failing which provision would be made for a motion to a judge for an order that would have the same effect as a certificate of substantial performance (at p 61). It also recommended that “there be established a specific date of ‘substantial performance’ for all purposes under the Act” (at p 64).

[24] The recommendations contained in the report were adopted almost in their entirety with the enactment of the current *Act* and, thus, evidence the intent of the legislature.

[25] The motion judge held, and I agree, that, read together, sections 43(1) and 43(6) give clear notice to all affected parties of the date of substantial performance and, therefore, the dates that lien rights begin to run, as recommended by the report. The requirement for a certificate of substantial performance promotes uniformity and certainty, thereby facilitating the “flow of funds through the construction chain” (at p 59).

[26] Further, I agree with the plaintiff that, when the *Act* is read as a whole, the requirement of a certificate of substantial performance to commence the time period set in section 43(1) is consistent with other provisions such as sections 24(1)(a) and 25(1)(a), which require a certificate of substantial performance to be issued in order to engage the time period for determining when holdback monies may be released.

[27] Regarding the description of substantial performance found in section 2(1) of the *Act*, fulfillment of its conditions does not trump the requirement for a certificate of substantial performance in section 43(6). In my view, section 2(1) may be useful as an aid in determining when such a certificate should issue pursuant to sections 46(1) and (2) or when a judge should make an order that a contract has been substantially performed pursuant to section 46(3) of the *Act*. See pp 60-61 of the report.

[28] Simply put, section 2(1) has a purpose other than the establishment of a date of substantial performance for the purpose of commencing the time period to register a lien pursuant to section 43(1).

[29] Finally, I disagree with the defendant's position that the decision in *Bukhari v Mannington Custom Homes Ltd*, 2016 MBQB 96, is inconsistent with the finding of the motion judge that a certificate of substantial performance is required to trigger the time period in section 43(1). In that case, two certificates of substantial performance were issued. The dispute concerned which of the two certificates was valid. *Bukhari* did not consider whether a certificate was required to start the clock running regardless of whether substantial performance, as defined in section 2(1) of the *Act*, was met. Rather, the Court considered the parties' arguments as to when the conditions in section 2(1) were met in support of their respective positions regarding which certificate was valid. Ultimately, the Court was not satisfied that there was sufficient evidence to decide the matter on the basis of substantial performance within the meaning of section 2(1)(b). Therefore, it decided the matter based upon the certificates themselves and the way that the parties acted.

[30] Despite the fact that there was no certificate of substantial performance in this case, it must be remembered that section 43(1) deals with more than just that situation. Specifically, a lien may be registered during the time that a contract is being performed.

[31] In this case, the contract stipulated that the plaintiff was to “Monitor the Work of the Trade Contractors and coordinate the Work with the activities and responsibilities of the Owner”.

[32] As earlier stated, the lien was filed on March 7, 2012. On January 24, 2012, the president of the defendant sent an email to the plaintiff, which stated, in part:

I am still creating the list of deficiencies for work completed to date. . . . I will not be back to Winnipeg until Feb. 7th. Please advise ALL trades that they need to make arrangements with me to do any work onsite, as I will need to be present to document any repairs.

Also can you let [a sub-contractor] [know] not to come out tomorrow to connect the air conditioning. . . . We can have this done in March when it starts to warm up.

[emphasis added]

[33] The above evidences the expectation of the parties that the plaintiff would continue to perform the contract until at least March of 2012. The plaintiff was still charged with the responsibility of fulfilling the conditions of the contract. Indeed the HVAC system was not completed until March of 2012.

[34] The conditions of section 43(1) having been met, there was no

need for the motion judge to consider whether the plaintiff was eligible to file a lien based on the completion of services pursuant to section 43(4). Thus, I need not determine whether the motion judge erred in applying that section.

[35] In the result, I would dismiss the appeal with costs.

Cameron JA

I agree: Chartier CJM

I agree: Steel JA