

COURT FILE NUMBER 1703-21274
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE EDMONTON
PLAINTIFF ROYAL BANK OF CANADA
DEFENDANTS 1679775 ALBERTA LTD., REID-BUILT HOMES LTD., REID WORLDWIDE CORPORATION, BUILDER'S DIRECT SUPPLY LTD., REID BUILT HOMES CALGARY LTD., REID INVESTMENTS LTD., REID CAPITAL CORP., and EMILIE REID



IN THE MATTER OF THE RECEIVERSHIP OF 1679775 ALBERTA LTD., REID-BUILT HOMES LTD., REID WORLDWIDE CORPORATION, BUILDER'S DIRECT SUPPLY LTD., REID BUILT HOMES CALGARY LTD., REID INVESTMENTS LTD., 1852512 ALBERTA LTD., and REID CAPITAL CORP.

APPLICANT ALVAREZ & MARSAL CANADA INC., in its capacity as Court-appointed Receiver of the current and future assets, undertakings and properties of 1679775 ALBERTA LTD., REID-BUILT HOMES LTD., REID WORLDWIDE CORPORATION, BUILDER'S DIRECT SUPPLY LTD., REID BUILT HOMES CALGARY LTD., REID INVESTMENTS LTD., 1852512 ALBERTA LTD., and REID CAPITAL CORP.

DOCUMENT **BRIEF
(Expired Builders' Liens Registered
against Developer Lands)**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT
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I. OVERVIEW OF APPLICATION

1 This brief of argument is filed in support of an application filed on behalf of Alvarez and Marsal Canada Inc. in its capacity as Court-appointed Receiver (the **Receiver**) of the current and future assets, undertakings and properties of Reid-Built Homes Ltd., 1679775 Alberta Ltd., Reid Worldwide Corporation, Builder's Direct Supply Ltd., Reid Built Homes Calgary Ltd., Reid Investments Ltd., 1852512 Alberta Ltd., and Reid Capital Corp. (collectively referred to herein as **Reid**).

2 The Receiver seeks declaratory relief allowing it to release moneys heldback in respect of builders' liens that expired pursuant to the provisions of the *Builders' Lien Act* (the **Act**).¹

II. FACTS

3 On November 2, 2017, Alvarez & Marsal Canada Inc. was appointed as Receiver over the current and future assets, undertakings and properties of Reid pursuant to a Consent Receivership Order granted by the Honourable Justice Hillier (the **Receivership Order**).

4 Section 10 of the Receivership Order (as appears in the template) exempts from the stay and authorities the registration of a claim for liens.

5 Melcor Developments Ltd., Lewis Estates Communities Inc., Villeneuve Communities Inc., Winterburn Developments Inc., Rosenthal Communities Inc., Villeneuve Communities Inc., Jesperdale Communities Inc., Westmere Communities Inc., Georgetown Townhouse GP Ltd., Walton Big Lake Developments Corporation, La Vita Land Inc., Genesis Land Development Corp., and Rapperswill Developments Ltd. (each, a **Developer**, and collectively, the **Developers**) held fee simple title to certain lands (the **Developer Lands**).

6 Pursuant to Lot Sale Agreements between the subject Reid Group entity and the subject Developer, Reid built improvements and residential houses on the Developer Lands with the intent that the Reid entity would then purchase the Developer Lands or sell them to a third party. The terms of the Lot Sale Agreements were specific to each Developer or project.

¹ *Builders' Lien Act*, RSA 2000 c B-7 [the **Act**] [TAB 1].

- 7 Builders' liens (the **Liens**) were registered against the Developer Lands pursuant to the *Builders' Lien Act*.
- 8 By correspondence dated February 12, 2018, the Receiver confirmed to the service list the ongoing requirement that Lien claimants as against Developer Lands comply with the provisions of the *Act*. This correspondence is attached as Appendix "A".
- 9 Over the course of the receivership the Receiver was granted numerous Sale Approval and Vesting Orders (**SAVOs**) vesting title to lots registered in the name of a Developer to third-party purchasers. In respect of liens registered against Developer-owned lots, the SAVO directed the Receiver to holdback 110 percent of the Lien claims.
- 10 During the administration of the receivership, the Receiver identified numerous "duplicative" Liens where a potentially valid Lien claimant registered a consolidated Lien as against multiple properties (a **Duplicative Lien**). As set out in various prior Receiver's reports, the Receiver discounted the necessary lien holdback amount required by the applicable SAVOs to account for the Duplicative Liens. The Receiver is continuing its review and may further adjust and reduce lien holdbacks to reflect Duplicative Liens.
- 11 The Receiver has also identified numerous Liens where the lien claimant failed to register a certificate of lis pendens (**CLP**) with the Land Titles Registry within 180 days of registration of the Lien, notwithstanding the February 12 letter and the requirements of section 43(1) (the **Expired Liens**) of the *Act*. A list of the Expired Liens are attached hereto as Appendix "B".

III. ISSUES

- 12 The issue before this Court is whether lien claimants who allowed their liens to expire pursuant to the terms of the *Act* prior to the granting of the applicable SAVO have any claim to the funds held back by the Receiver in accordance with that SAVO.

IV. LAW AND ANALYSIS

13 The *Act* creates a statutory remedy that does not exist at common law:²

The builders' lien is a statutory remedy supplementing the normal remedies available to a subcontractor and the *Builders' Lien Act* should be regarded as a code fully defining their creation, registration, enforcement or lapse.

[Emphasis added]

14 As such, the *Act* must be interpreted and applied strictly. As Your Lordship explained in *Westpoint Capital Corp. v. Solomon Spruce Ridge Inc.*:³

Builders' lien claims are an extraordinary remedy allowing claimants in circumstances to advance claims and collect payment from parties they had no contractual relationship with. Because of the extraordinary nature of the lien remedy, the courts have consistently held that lien claims and the rights of lien claimants are to be construed narrowly.

[Emphasis added]

15 In recognition of the extraordinary nature of lien rights, the *Act* requires lien claimants to take positive steps to advance lien claims. As explained by Slatter J.A. in *Tervita Corp. v. ConCreate USL (GP) Inc.*:⁴

Section 6 of the Builders' Lien Act provides that a person who improves land has a lien on the land. Section 10 confirms that the lien arises when the work is first done. A lienholder has certain priorities over other creditors, and also has a direct claim against the owner notwithstanding that there may be no privity of contract with the owner. As a result, the Act provides some strict rules about the registration and enforcement of the lien. It is well established that a liberal approach may be taken to determining the scope of the lien right, but a strict interpretation is placed on the procedure that is required to enforce a lien.

[Emphasis added]

² *Nexen Energy ULC v EDS Decommissioning Canada Inc. (Trustee of)*, 2015 ABQB 271 at para 12 [*Nexen*], quoting *Electric Furnace Products Co. v. Quality Rentals*, [1991] 5 WWR 539 (Alta CA) at para 14 [**TAB 2**].

³ *Westpoint Capital Corp. v. Solomon Spruce Ridge Inc.*, 2017 ABQB 254 at para 65 [*Westpoint*] [**TAB 3**].

⁴ *Nexen*, *supra* at para 9, quoting *Tervita Corp. v. ConCreate USL (GP) Inc.*, 2015 ABCA 80 at para 5 [**TAB 2**].

- 16 One such step is the requirement to file a Statement of Claim and CLP within 180 days from the date of registration of the Lien, which is set out at section 43(1) of the *Act*.⁵

Expiry of registered lien

43(1) A lien that has been registered ceases to exist unless, within 180 days from the date it is registered,

(a) an action is commenced under this Act

(i) to realize on the lien, or

(ii) in which the lien may be realized,

and

(b) the lien claimant registers a certificate of lis pendens in respect of the claimant's lien in the appropriate land titles office.

...

(5) The Registrar without charge may on the Registrar's own initiative, and shall on request, cancel registration of a lien where the lien has ceased to exist under subsection (1).

[Emphasis added]

- 17 Failure to file a Statement of Claim and register a CLP is fatal to the lien claim.
- 18 As the Court of Appeal of Alberta explained in *Wil-ton Construction Ltd. v. Amerada Minerals Corp. of Canada*, there is “nothing in the Act expressly or impliedly authorizing revival of a lien which has ceased to exist by reason of failure to commence an enforcement action in time.”⁶ A lienholder who defers filing a claim does so “at its peril”, as “[a] lien that has ceased to exist is gone forever.”⁷
- 19 Here, the Expired Liens expired prior to the granting of the applicable SAVO as a result of the lien claimant's failure to register a CLP within 180 days. As stated above, procedural requirements set out in the *Act* are interpreted strictly and there is nothing in the *Act* that would authorize a revival of the Expired Lien claimants' lien claim; it is “gone forever”.

⁵ *Act*, *supra*, s. 43 [TAB 1].

⁶ *Wil-ton Construction Ltd. v. Amerada Minerals Corp. of Canada*, 1989 ABCA 213 at para 44 [TAB 4].

⁷ *Nexen*, *supra* at para 20, quoting *Krause v. Group Builders Inc.* (1990), 106 AR 29 (Alta Master) at para 53 [TAB 2].

- 20 The Receiver acknowledges that waiver of strict compliance with section 43(1)(b) was allowed in *TRG Developments Corp. v. Kee Installations Ltd.*⁸ (***TRG Developments***). However, that decision involved a very unique set of facts not at all similar to the case at bar.
- 21 In *TRG Developments*, the defendant landowner initiated litigation proceedings pursuant to section 48 of the *Act* to determine the validity of the liens. Representatives of the parties were questioned on their affidavits filed in support of their liens and undertakings were made and answered. The Application, which was originally scheduled to be heard *before* the expiration of the 180 days, was adjourned to a date past the expiration of the 180 day deadline. The lien claimants failed to register CLPs and the owner wrote Land Titles requesting the discharge of the liens.
- 22 The Court allowed the reinstatement of the liens, holding that the owner had impliedly waived the obligation of the lien holders to file CLPs. The owner initiated proceedings to have the lien claims determined. In that circumstance, the owner did not need notice of their own action and it makes no sense to insist upon duplicate proceedings when an extant originating application has been brought by the owner for the very purpose of assessing the validity of the liens.⁹ “[N]o CLP needed to be filed to preserve the ability of the Court to adjudicate on the very issue submitted by the landowner.”¹⁰ In reaching its decision, the Court also emphasized that there were no third parties who were adversely affected by the re-registration of the liens.
- 23 The unique circumstances justifying a waiver of strict compliance of section 43 in *TRG Developments* clearly do not exist here. The Receiver has so far taken no steps to challenge the validity of the Expired Liens and has not brought any applications pursuant to section 48 relevant to the Expired Liens. Further, and unlike in *TRG Developments*, the interests of third parties are at play here, as the holdback funds are otherwise releasable to other creditors.
- 24 The Receiver and the Developers have engaged in no conduct that could be interpreted as a waiver of compliance with the terms of the *Act*. In fact, the opposite is true: the

⁸ *TRG Developments Corp. v. Kee Installations Ltd.*, 2015 ABCA 187 [*TRG Developments*] [TAB 5].

⁹ *Ibid* at para 9.

¹⁰ *Ibid* at para 11.

Receiver expressly advised all lien claimants of the ongoing requirements of the *Act* to preserve lien claims registered against Developer-owned properties.

- 25 As the Expired Liens have “ceased to exist” and cannot be revived, the Expired Lien claimants have no basis for any claim against the 110 percent holdback. As such, any amounts held-back in connection with the Expired Liens should be releasable to satisfy Reid’s other creditors.

Relief Requested

- 26 The Receiver respectfully requests an Order declaring that it is not required to holdback moneys in respect of Expired Liens.
- 27 In accordance with this Court’s usual practice, the Receiver does not believe any party is entitled to its costs of this Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of September, 2018



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