Court of Queen's Bench of Alberta

Citation: Royal Bank of Canada v 1679775 Alberta Ltd, 2019 ABQB 139

Date:
Docket: 1703 21274, 1701 15571
Registry: Edmonton, Calgary

Docket: 1703 21274

Between:

Royal Bank of Canada

Plaintiff

- and -

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

Defendants

Docket: 1701 15571

And between:

Georgetown Townhouse GP Ltd

Plaintiff

- and -

Crystal Waters Plumbing Company Inc, R and R Bruno Enterprises Ltd, Kidco Construction Ltd, Siena Flooring Inc, Spindle, Stairs & Railings 2002 Ltd, Rob's Drywall Services Ltd, 840307 Alberta Ltd, operating as Wildwoord Cabinets, Double R Building Products Ltd, WM Schmidt Mechanical Contractors Ltd, Lehigh Hanson Materials Limited operating as Inland Concrete, Lehigh Hanson Manson Materials Limited, E2 Construction Ltd, Gienow Canada Inc, doing business as Ply Gem, High Caliber Construction Inc, TBA Cleaning Services Ltd, Signature Fan Company Ltd, Scotty's Rentals and Landscaping Ltd, Majestic Electric Inc, Prairie Pipe Sales Ltd, 789072 Alberta Ltd and RKG Developments Ltd operating as Lenbeth Weeping Tile Calgary and Watt Consulting Group Ltd.

Defendants

Reasons for Decision
of the
Honourable Mr. Justice Robert A. Graesser

Table of Contents

Introduction

[1] This decision results from two applications. The first is an application by Alvarez & Marsal Canada Inc. (the "Receiver") in its capacity as Receiver of Reid-Built Homes Ltd. and various other entities that formed part of the Reid-Built Group of Companies (collectively, "Reid-Built"). Its application is to obtain funds previously paid into court to discharge various builders' liens, because the liens have since expired. It also seeks declaratory relief with respect to the definition of "owner" under the *Builders' Lien Act*, RSA 2000, c B-7 (the "*BLA*") as it pertains to various builders' liens filed against a number of parcels of land in which Reid-Built held an interest as purchaser.

[2] The second application is an appeal from the decision of Master Prowse in ***Georgetown Townhouse GP Ltd v Crystal Waters Plumbing Company Inc***, 2018 ABQB 617 (hereinafter "***Georgetown***"). In that decision, Master Prowse held that a builders' lien filed against the registered owner of various parcels of land in which Reid-Built held an interest as purchaser were invalid against the registered owner because the registered owner did not fall within the definition of "owner" under section 1(j) of the *BLA*.

[3] The two applications were heard together because of the common issues relating to the interpretation of section 1(j).

[4] Counsel for the Receiver satisfied me that service of its application was in order such that the builders' lien claimants against whom relief was sought had notice of the application. No one appeared to oppose the application relating to the return of the Receiver's security. None of the affected lien claimants had commenced proceedings to enforce their lien, nor had any certificates of *lis pendens* been filed. The order sought was granted and the security ordered returned to the Receiver.

[5] The ***Georgetown*** appeal could not be heard on October 3, 2018 so filing deadlines were set and a date arranged for oral argument. Georgetown's counsel was present at the initial hearing and made submissions at that time, reserving the ability to respond to the Appellant's argument. Those submissions were made and argument on the ***Georgetown*** appeal was heard on November 30, 2018.

Background

[6] Reid-Built was a prominent home builder and property developer in Alberta before it went into receivership in the fall of 2017. A common arrangement for Reid-Built was to purchase newly developed lots from property developers such as Melcor Developments Ltd., Jesperdale Communities Inc., Georgetown Townhouse GP Ltd., Walton Big Lake Developments Corporation, La Vita Land Inc., Genesis Land Development Corp., and Rapperswill Developments Ltd. (collectively the "Developers").

[7] While the exact terms and conditions of the lot purchase agreements differed depending on the particular Developer, the common arrangement was that Reid-Built was obliged to purchase lots from the Developers. Some money would be put down, and the balance would be paid at some future date, generally triggered by Reid-Built completing a house on a lot and selling the completed house and lot to a third party purchaser. On the closing of the sale to the third party purchaser, the balance owed by Reid-Built for the specific lot would be paid.

[8] Generally, Reid-Built was permitted to obtain building permits and commence construction on lots it had agreed to purchase, without paying off the lot. The Developer typically imposed building requirements on Reid-Built (and other home builders buying lots from them) relating to the type of construction, the quality of construction, and other matters such as lot grading and exterior finishes.

[9] Reid-Built had a purchaser's interest in the various lots it had agreed to purchase from the Developers, but it did not file caveats to protect its interests.

[10] Whether Reid-Built was building a show home, or a spec home, or was building a house for a committed third party purchaser, it acted as general contractor for the building of the house. Reid-Built in turn subcontracted with various suppliers and subtrades to supply the materials and provide the labour for the construction.

[11] When Reid-Built went into receivership on November 2, 2017, it was in the process of constructing a large number of homes on lots it had purchased from the Developers. It did not have title to any of these lots, and title to all of the lots against which builders' liens were filed remained in the names of the Developers. A large number of unpaid material suppliers, workers and subtrades filed builders' liens against many of the lots.

[12] The Receiver provided a summary of the builders' liens filed, the face value of which totalled approximately $7-million. There is considerable duplication as some of the builders' lien claimants worked on more than one lot, and filed for a global amount against all of the lots it had worked on.

[13] With respect to Reid-Built's interest in any of the lots, regardless of the stage of construction on them, builders' liens filed against Reid-Built's interest are worthless, as Reid-Built had not registered a caveat protecting its interest against any of the lots, and the Royal Bank of Canada has a first charge against most of Reid-Built's assets. That first charge crystallized on the order appointing the Receiver.

[14] It appears to be common ground that the Receivership will not yield any distribution to unsecured creditors, such as trade creditors like the builders' lien claimants. The builders' lien claimants' hope is that their builders' liens will attach to the fee simple interest of the Developers in the lots.

[15] Typically when filing a builders' lien claim, the lien claimant stated that the work had been performed for Reid-Built or the materials had been supplied to Reid-Built. It is clear from the evidence filed with respect to the applications that all work and materials that were the subject matter of builders' liens had been contracted for by Reid-Built, and not any of the Developers. None of the Developers had any direct dealings or direct contact with any of the builders' lien claimants. None of the Developers specifically requested any builders' lien claimant to do work or supply materials.

[16] The materials and work were furnished, supplied, or provided directly to or for Reid-Built and its subtrades.

[17] In most cases, Reid-Built was not identified as the "owner."

[18] Following the Receivership, all work stopped on the houses Reid-Built was constructing. The Receiver began the task of attempting to liquidate Reid-Built's assets, including the lots it had agreed to purchase from the Developers and the houses it had under construction.

[19] In some cases, the third party purchaser completed the purchase through negotiations with the Receiver. If there were builders' liens filed against the particular lot, the liens would be removed by court order requiring the Receiver to pay the face amount of the builders' liens plus 10 percent security for costs into court to stand as security for the lands. The Developers were paid the balance owed for the lot on closing.

[20] With respect to the lots Reid-Built had agreed to purchase from Georgetown Townhouse GP Ltd. (hereinafter "Georgetown"), the Receiver turned those lots back to the Developer, as it had been unable to sell the lots for more than was owed to the Developer on the lot purchase agreement.

[21] Reid-Built had commenced construction on some of the lots, so Georgetown ended up keeping what Reid-Built had paid as a down-payment as well as any lot improvements that remained on Georgetown's lands. There was no evidence as to any ultimate benefit to Georgetown by virtue of getting the lots back with some improvements on them.

[22] In the builders' liens before me (but for those in ***Georgetown***) the Developers were ultimately paid what was owed to them for the lots sold by the Receiver to other home builders. None of those Developers got any lots back or received the benefit of any improvements constructed on their lots. Any improvements were presumably valued in the price for the lots received by the Receiver so Reid-Built (or at least Reid-Built's secured creditors) may have received some value for the work performed by the lien claimants.

[23] Georgetown did not wait for the Receiver to bring its application for declaratory relief regarding the various builders' liens. Instead, Georgetown applied to have the builders' liens filed against its lots discharged under section 48 of the *BLA*. Liens against its lots were discharged on payment of the face amount of the liens plus an amount for security for costs into court. In the proceedings before Master Prowse, Georgetown sought a declaration that the builders' liens filed against its lots were invalid as it was not an owner within the meaning of the *BLA*. Master Prowse agreed, and the application before me is the builders' lien claimants' appeal from that decision.

Issues

[24] There are a number of issues arising on the remaining applications. With respect to the Receiver's application regarding the definition of "owner" in the *BLA*, there are several issues:

1. Are any of the Developers "owners" within the meaning of section 1(j) of the *BLA*?
2. Are any of the builders' liens filed against the Developers' interests in various lots invalid because they did not properly describe the interests in land to be liened?

3. Are any of the builders' liens filed against the Developers' interests in various lots invalid because they did not specify the estate or interest in the land being charged by the builders' liens?
4. If there are deficiencies or irregularities in any of the filed builders' liens, can they be cured under the provisions of section 37 of the *BLA*?

[25] With respect to the ***Georgetown*** appeal:

1. What is the applicable standard of review from Master Prowse's decision?
2. Is Georgetown an owner within the meaning of section 1(j) of the *BLA*?

Case law

[26] The case law relating to the matters on these applications is relatively sparse. The *BLA* is somewhat unique legislation in Canada, such that decisions from other provinces on their builders' liens or mechanics' liens are not particularly helpful (save for a few significant cases). All parties have essentially referred to the same body of case law, relying on the cases helpful to their positions and distinguishing those that are unhelpful.

[27] As a starting point, builders' liens are entirely statutory. There was no body of common law giving a material supplier, builder, or worker a charge against the real estate they supplied materials to or worked on. As with income tax legislation, these statutory exceptions to common law rights have been construed narrowly and not expansively: ***K & Fung Canada Ltd v NV Reykdal & Associates Ltd***, 1998 ABCA 178 (CanLII), leave to appeal dismissed, [1998] SCCA No 349 (hereinafter "***Fung***") at para 5. That case cites ***Clarkson Co et al v Ace Lumber Ltd***, [1963] SCR 110, 1963 CanLII 4 (SCC).

[28] Various provinces have treated builders' lien rights and remedies differently in their legislative provisions. It is not surprising that the legislation gives an interest in land to someone who deals directly with the owner of the lands that they improved at the owner's request. It is more challenging to give proprietary remedies to claimants who did not deal directly with the owner, but rather a contractor or subcontractor whose interest in the improvements is tenuous at best.

[29] The *BLA* provides a mechanism for owners to protect themselves from builders' lien claims filed by claimants other than their direct contracting parties. Essentially, owners are generally protected if they retain 10 percent from payments made to the parties they contract with directly. Once substantial completion of the work has occurred, they have trust obligations with respect to payment of further amounts to such parties.

[30] Alberta has limited trust provisions. Other provinces like Ontario have much more onerous ones, which arise at the commencement of the project. Alberta protects mortgagees who have advanced mortgage funds in good faith and prior to the registration of any builders' liens. Other jurisdictions protect lien claimants for the increase in value to the property resulting from the improvements they constructed.

[31] The reality of the Alberta provisions is that those who are looking to the lands they have improved as security for payment are behind mortgagees in priority, and the mortgagees get the benefit of the value of any improvements made to the lands after any mortgage advances and before the filing of any builders' liens. Liens attach only to the owner's equity in the lands.

[32] Beyond that, with the limitations on recoveries against the land in the event the owner has maintained proper holdbacks, and the ultimate limitation on recovery by subcontractors, material suppliers (other than those who supply directly to the owner) and those who provide labour (other than directly to the owner), the *BLA* is all too frequently an ineffective remedy for project creditors.

[33] This reality has led to claimants seeking to attach the interests of landlords and mortgagees in the property. The seminal case in this area is ***Northern Electric Co Ltd v Manufacturers Life Ins Co***, [1977] 2 SCR 762, 1976 CanLII 203 (hereinafter "***Northern Electric***"). In that case, a lien claimant succeeded in establishing that the mortgagee of the property was an "owner" within the meaning of the applicable lien legislation, allowing the claimant to take priority ahead of the first mortgagee.

[34] That decision turned on the definition of "owner" under the Nova Scotia *Mechanics' Lien Act* of the time. That definition is virtually identical to the definition of owner in section 1(j) of the *BLA*.

[35] The Nova Scotia Act provided:

> (d) "owner" extends to any person, body corporate or politic, including a municipal corporation and a railway company, having any estate or interest in the land upon or in respect of which the work or service is done, or materials are placed or furnished, at whose request and
>
> (i) upon whose credit; or
>
> (ii) on whose behalf; or
>
> (iii) with whose privity and consent; or
>
> (iv) for whose direct benefit;
>
> work, or service is performed or materials are placed or furnished, and all persons claiming under him or them whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the materials furnished have been commenced to be furnished...

[36] ***Northern Electric*** turned on the finding that Manulife, as mortgagee, was more than a mere mortgagee on the property. It had, in effect, entered into a joint venture arrangement with the developer of the property (who had gone into bankruptcy leaving a slew of unpaid creditors, including the mechanics' lien claimants). Manulife had acquired the fee simple interest in the property from the developer, and then leased the property back to the developer under a long term head-lease. The project was financed by a mortgage against the developer's leasehold estate. At the expiry of the lease, the property reverted to Manulife as owner.

[37] Martland J, speaking for the majority in the Supreme Court of Canada, held at page 770:

> In my opinion, the work herein can properly be said to have been done also on the respondent's behalf, if not also for its direct benefit. It may be said that it was also done on behalf of Metropolitan and for its direct benefit, but, if so, this does not preclude a similar finding in respect of the respondent, having regard to the arrangement between it and Metropolitan. The outright purchase by the respondent of the land on which the apartment building was to be built, the fact

> that title to the building would belong to the respondent no less than the title to the land, without any revestment right in Metropolitan, and the fact that, to the knowledge of the respondent, Metropolitan was to act as contractor on the project which was to proceed according to plans and specifications approved by the respondent and under the latter's financial control, are significant indications to me that the work was being done and the materials furnished more on behalf of the respondent than on behalf of Metropolitan, and more for its direct benefit than for the direct benefit of Metropolitan.

[38] He continued at page 774:

> I cannot agree with the submission that Metropolitan was merely borrowing money to enable it to put up a building of its own, and that the respondent was not advancing money for the construction of a building for it by Metropolitan. The title position and the rent payment provisions are against any such submission. Whose building was it if not the respondent's, subject to possession and use by Metropolitan for a limited period, by way of being able to realize some pecuniary advantage from its original ownership of the land and from its exertions as contractor? The letters of commitment are clear enough on this point since they associate the obligation to construct the building with the transfer to the respondent of the land upon which the building is to be constructed, and they provide that the construction will be paid for by the respondent. This is the substance of the overall arrangement, and the security aspect of the transaction, involving a mortgage of the leasehold, cannot be allowed to mask that substance. I am not at all persuaded that the true character of the transaction between the parties can be founded upon a consideration of only the mortgage of the leasehold, with its commonplace provision that any advances thereon are in the discretion of the mortgagee.

[39] In that case, Metropolitan had acted as general contractor for the construction of the improvements on the lands.

[40] There have been numerous attempts in Alberta to find mortgagees and landlords to be "owners" under the *BLA* and thus liable for builders' liens registered against their interests in the land. Few such claims have been successful.

[41] The Alberta Court of Appeal has considered these issues in a number of cases. Three are the most significant: ***Acera Developments Inc v Sterling Homes Ltd***, 2010 ABCA 198 (hereinafter ("***Acera***"), ***Royal Trust Corp of Canada v Bengert Construction Ltd***, 1988 ABCA 28, *sub nom* ***Gypsum Drywall (Northern) Ltd v Coyes***, (hereinafter "***Bengert***"), and ***Fung***.

[42] The challenge for the builders' lien claimants here is to demonstrate that the Developers fall within the *BLA*'s definition of "owner," or put another way, for the Receiver to demonstrate that none of the Developers Reid-Built dealt with fall within that definition.

[43] The case law is found within ***Acera***, ***Bengert*** and ***Fung***, as well as subsequent decisions such as my decision in ***Westpoint Capital Corp v Solomon Spruce Ridge Inc***, 2017 ABQB 254, ***Arres Capital Inc v Graywood Mews Development Corp***, 2011 ABQB 411, and Master Prowse's decision in ***Georgetown***.

BLA framework

[44] To begin the analysis, it is important to look at the structure of the *BLA*. "Owner" is defined in section 1(j):

> (j) "owner" means a person having an estate or interest in land at whose request, express or implied, and
>
> (i) on whose credit,
>
> (ii) on whose behalf,
>
> (iii) with whose privity and consent, or
>
> (iv) for whose direct benefit,
>
> work is done on or material is furnished for an improvement to the land and includes all persons claiming under the owner whose rights are acquired after the commencement of the work or the furnishing of the material;

"Contractor" is defined in section 1(b):

> (b) "contractor" means a person contracting with or employed directly by an owner or the owner's agent to do work on or to furnish materials for an improvement, but does not include a labourer;

"Subcontractor" is defined in section 1(n):

> (n) "subcontractor" means a person other than
>
> (i) a labourer,
>
> (ii) a person engaged only in furnishing materials, or
>
> (iii) a person engaged only in the performance of services,
>
> who is not a contractor but is contracted with or employed under a contract...

[45] Builders' liens are created by section 6(1):

> 6(1) Subject to subsection (2), a person who
>
> (a) does or causes to be done any work on or in respect of an improvement, or
>
> (b) furnishes any material to be used in or in respect of an improvement,
>
> for an owner, contractor or subcontractor has, for so much of the price of the work or material as remains due to the person, a lien on the estate or interest of the owner in the land in respect of which the improvement is being made.

[46] Section 6(2) relates to work with respect to mines and minerals, so has no application here.

[47] Section 25 limits the owner's liability:

> 25 An owner is not liable under this Act for more than
>
> (a) the total of the major lien fund and the minor lien fund, or

(b) the major lien fund, where a minor lien fund does not arise under section 23.

[48] The "major lien fund" is described in section 1(h):

(h) "major lien fund" means

(i) where a certificate of substantial performance is not issued, the amount required to be retained under section 18(1) or (1.1) plus any amount payable under the contract

(A) that is over and above the 10% referred to in section 18(1) or (1.1), and

(B) that has not been paid by the owner in good faith while there is no lien registered;

(ii) where a certificate of substantial performance is issued, the amount required to be retained under section 18(1) or (1.1) plus any amount payable under the contract

(A) that is over and above the 10% referred to in section 18(1) or (1.1), and

(B) that, with respect to any work done or materials furnished before the date of issue of the certificate of substantial performance, has not been paid by the owner in good faith while there is no lien registered...

[49] "Minor lien fund" is described in section 1(i), but only arises after a certificate of substantial performance has been issued.

[50] There is no indication in the evidence that a certificate of substantial performance was ever issued with respect to any of the work done for Reid-Built on any of the liened properties, so I will not deal with any minor lien fund obligations.

[51] Section 4 defines the "value of the work done":

4 For the purposes of this Act, the value of the work actually done and materials actually furnished shall be calculated on the basis of

(a) the contract price, or

(b) the actual value of the work done and materials furnished, if there is not a specific contract price.

[52] The mechanics of the major lien fund is out in section 18:

18(1) Irrespective of whether a contract provides for instalment payments or payment on completion of the contract, an owner who is liable on a contract under which a lien may arise shall, when making payment on the contract, retain an amount equal to 10% of the value of the work actually done and materials actually furnished for a period of 45 days from

(a) the date of issue of a certificate of substantial performance of the contract, in a case where a certificate of substantial performance is issued, or

(b) the date of completion of the contract, in a case where a certificate of substantial performance is not issued.

...

(2) In addition to the amount retained under subsection (1) or (1.1), the owner shall also retain, during any time while a lien is registered, any amount payable under the contract that has not been paid under the contract that is over and above the 10% referred to in subsection (1) or (1.1).

(3) Except as provided in section 13(1), when a lien is claimed by a person other than the contractor, it does not attach so as to make the major lien fund liable for a sum greater than the total of

(a) 10% of the value of the work actually done or materials actually furnished by the contractor or subcontractor for whom and at whose request the work was done or the materials were supplied giving rise to the claim of lien, and

(b) any additional sum due and owing but unpaid to that contractor or subcontractor for work done or materials furnished.

[53] Simply stated, the structure of the *BLA* is to give a contractor a lien for the full value of the work done by the contractor, determined under the contract (if the contract specifies a contract price) or by *quantum meruit* if the contract does not specify a price (section 4). Being a contractor requires contracting with the owner, or being employed directly by the owner.

[54] The lien funds are aimed at protecting subcontractors, sub-subcontractors, labourers and materialmen, all of whom are not "contractors." These are the notional funds established to protect those who have dealt with contractors or subcontractors in the event they are not paid by the party who contracted with them.

[55] The owner is not actually required to set aside funds to be available to lien claimants. Rather, it is a notional amount based on 10 percent of the value of the work performed under the contract between the owner and the contractor, and calculated with reference to the value of the work done by the contractor (for those claiming through the contractor). For those claiming

through a subcontractor, the notional fund is based on 10 percent of the value of the work done by the subcontractor.

[56] In reality, the scheme is more complicated, as the lien funds are increased by the value of any monies owed but unpaid to the respective contractor or subcontractor, and they are also increased by the amount of any payments made in the face of a registered builders' lien.

[57] Essentially, an owner can limit its potential liability to everyone other than a "contractor" to 10 percent of the value of the work done under the contract with the contractor, as long as the owner does not make any payments to the contractor or anyone under the contractor in the face of a lien.

[58] The "worst case scenario" for an owner who has made payments on account to the contractor but has not made payments in the face of builders' liens is to be liable for 110 percent of the contractor price or the value of the work done.

[59] Where the contractor fails on a project and leaves a host of unpaid subcontractors and suppliers, it is often little solace to the unpaid parties when they share only 10 percent of the value of the work done under the contract between the owner and the contractor.

[60] Here, none of the builders' lien claimants contracted with any of the Developers. Reid-Built was acting as its own general contractor with respect to the work done on the subject lots, and all of the claimants appear to have contracted directly with Reid-Built. None of the builders' lien claimants are "contractors" within the meaning of the *BLA*.

[61] Reid-Built was more than a general contractor, as it had an interest in the lots themselves. Its equitable interest as purchaser is a lienable interest in the lots, despite Reid-Built not having filed any caveats to protect its purchaser's interest. Thus any of the claimants who contracted directly with Reid-Built would have a 100 percent lien for the value of work done by them, as they attached to Reid-Built's interest in the lots. As noted above, that does not get any of the lien claimants anywhere, as the Royal Bank's interest under its security against Reid-Built crystallized before any builders' liens were filed and thus takes priority over the liens. Despite the Receiver having realized on Reid-Built's interest in many of the lots, the information before me indicates that there will be nothing left over for creditors other than the Royal Bank and creditors with superior claims to those of the Royal Bank.

[62] It is a different story if the lien claimants can succeed against the Developers.

[63] The lien claims against the Developers are not expressly contemplated by the *BLA*. Reid-Built itself was an "owner" and was building houses on the lots to its own account. It alone would benefit from any profit on sales to third-party house buyers. It alone contracted with the third-party house buyers. And it alone contracted with the trades and material suppliers. So in the conventional sense, Reid-Built was the owner of the lots and the general contractor for all house building on the lots. It was solely responsible to purchasers for completion of the houses and performance of the house purchase agreements. And it was solely responsible for payment to the trades and material suppliers that contracted with it.

[64] There was no payment due to Reid-Built from any of the Developers, so there was no practical ability for a Developer to make any holdback from Reid-Built to protect themselves (if they needed any protection) against default by Reid-Built to its trade creditors. Under section 25 of the *BLA*, it is difficult to see how any claims against the Developers could be quantified.

[65] Section 25 does not distinguish between or among "owners." But how does that relate to a Developer's interest in the lots? These are questions unanswered by the *BLA*, although as discussed below, the Supreme Court has held that the absence of a specific remedy in the provincial legislation and difficulties in quantifying liens against non-contracting parties do not affect the ability of a lien claimant to obtain a remedy from any "owner."

Analysis

1. Are any of the Developers "owners"?

[66] It is clear that for this provision to apply, a Developer must be found to have made a request (express or implied) for work to be done on its lands and that one of the criteria in section 1(j) be met. That requires that the Developer be found to have done one of the following:

(a) agreed to pay for the improvement;

(b) contracted for the work as principal;

(c) consented to the work in some contractual way; or

(d) directly benefited from the work.

[67] ***Acera*** is the most recent Alberta Court of Appeal decision on this point. It is important to understand the underlying facts in that case.

[68] Acera was the owner of a large parcel of land in Cochrane, Alberta. It was in the process of subdividing the land into a number of individual lots. Before the subdivision process was complete, Acera agreed to sell a number of the lots to Sterling Homes Ltd., a home builder.

[69] The lot purchase agreement required Sterling to pay some $2.5 million down, with the balance of some $10 million to be paid at a later date, including when individual lots were sold by Sterling to third party home buyers.

[70] Despite the fact that the subdivision process was not complete and no individual lots existed other than on unregistered plans, Sterling began construction on a number of four-plexes on the land. Filing the subdivision plan was a condition precedent to the agreement, and the agreement provided various remedies in the event the subdivision plan was not registered. It was silent on remedies for improvements constructed by Sterling before subdivision.

[71] Architectural and construction guidelines had been finalized before the plan was to be registered and Sterling submitted some initial plans to Acera for approval. During this pre-plan registration period, Acera facilitated Sterling's applications for building permits and Acera's staff visited the site daily. Acera itself built underground services, developed and paved the roadways, and installed hydrants and streetlights in anticipation of the filing of the plan.

[72] During this period, Acera continuously represented to Sterling that the subdivision plan process was proceeding and that the plan would be registered soon. Ultimately, Sterling stopped work and filed a builders' lien for the value of the work that it had done on the four-plexes.

[73] Berger JA, writing for the majority, described the issues at paragraph 23 of the decision:

> [23] The critical question here is whether Acera is an "owner" within the meaning of subsec. 1(j) of the ***Act***. The relevant inquiry is whether Acera requested that work be done or material be furnished for an improvement

> to the lands in question and whether the work done and the material furnished by Sterling accrued to the "direct benefit" of Acera.

[74] Acera's participation in the construction process was described in paragraphs 24-27 of the decision:

> [24] The Appellant points to the architectural and construction guidelines issued by the Respondent which set out detailed requirements for the design of the residential units and which gave Acera control over that design. Sterling was also required to comply with TRC being a low impact development.
>
> [25] The homes to be constructed by Sterling had to be approved by Acera or its consultant, in which case an approval form was issued. The Appellant also points to Acera's role in facilitating Sterling and other home builders obtaining building permits for their respective homes.
>
> [26] In the result, Sterling obtained building permits for twelve homes. The building permit applications included an "architectural approval form" issued by Acera's consultant and by a "building grade form" issued by Acera's engineering consultant. The Appellant maintains that it was always contemplated by Acera that the home builders would build on the lands prior to the subdivision being registered and, accordingly, prior to the home builder getting a transfer of the lots.
>
> [27] It is clear on this record that Sterling has excavated, laid the foundations, framed the structure, completed some of the rough-in plumbing and electrical work, and brought the homes to various stages of construction. The value of the work performed to date by the Appellant is $1,750,000.

[75] At paragraph 32 Berger JA noted:

> [32] It was always contemplated by Acera that the homebuilders would build on the lands prior to the subdivision being registered.

[76] He concluded on the request issue at paragraph 36:

> ...the construction proceeded prior to subdivision at the owner's request. Indeed, the liened party who was actively involved in the supervision of the construction was fully aware that the construction was proceeding prior to subdivision approval. The lien claimant was contractually bound to construct improvements to a specific standard and scope. Indeed, Acera's architectural and construction guidelines required that Acera approve the construction plans, elevations, finished grades, finishing materials and colours, final grade slips, setbacks, foundation designs, auxiliary buildings and fencing, and landscaping. All such plans were approved prior to construction. The construction was inspected by Acera as work progressed. In my opinion, that is sufficient to conclude that the homes were constructed at the request of the liened party.

[77] Having found a "request," Berger JA went on to consider whether Acera had received a direct benefit. He concluded at paragraphs 37-39:

> [37] It remains, accordingly, to consider whether the work done and the material furnished by Sterling accrued to the "direct benefit" of Acera. Acera allowed Sterling to improve its lands. In law, the improvements become attached to the land and are owned by the owner of the freehold. Until the subdivision plan is registered Acera is prohibited from selling the lots, so it must be taken to have invited Sterling to improve the lands "for its [Acera's] direct benefit". Acera owns the freehold, therefore it owns the improvements, therefore it is directly benefitted. Having allowed Sterling in as a tenant-at-will it cannot argue the improvements were done against its will, i.e. that they were "not requested". Paragraph (iv) of the definition of "owner" is satisfied.
>
> [38] Acera has failed to transfer the lots in accordance with the lot purchase agreement. Accordingly, Sterling cannot sell the homes to interested third parties. It follows that Acera has directly gained the value of the improvements to the lands and will continue to hold that increase in value to its benefit as long as it retains title to the lands. In other words, were it not for Sterling's lien, Acera would keep the benefit of the improvements. Therefore, until such time as Sterling is able to acquire title to the homes, the direct benefit from the entirety of the work accrues to Acera.
>
> [39] In addition, the contractual arrangement whereby Sterling would build homes in advance of acquiring title to the land included, as I have found, the implied request by Acera of Sterling to do just that. All of this, as I have indicated, took place under the watchful eye and subject to the stringent building requirements imposed by Acera. It is apparent, by way of illustration, that strict adherence to Acera's architectural and construction guidelines were intended to facilitate and enhance the development of Acera's lands. In that sense, mindful that it was anticipated that construction would begin before sub-division approval and transfer of the lots was obtained, such construction was of direct benefit to Acera.

[78] Berger JA noted that while the lien was declared valid, the quantum of the lien was undetermined. That issue was left for trial.

[79] ***Acera*** followed two previous Court of Appeal decisions where similar claims failed. ***Bengert*** involved a priority fight between a purchaser and a builders' lien claimant. Bengert Construction Company was a home builder. It had arrangements with a developer to purchase a lot, but had not yet acquired title. Bengert contracted with the Coyes to build a house for them on the lot. The Coyes paid a significant down payment and filed a purchaser's caveat against title to the lot. Bengert then acquired the lot and obtained a mortgage. Bengert began construction, paying for the costs from further mortgage advances. The Coyes had no control over the mortgage advances and had no means to ensure that the subtrades were being paid as construction proceeded.

[80] Before completion, Bengert went broke. Unpaid subtrades filed builders' liens. Following foreclosure proceedings on the mortgage, there was a surplus. The Coyes and lien claimants disputed priority of access to the funds.

[81] The Court of Appeal noted at paragraph 25:

> [25] In this case, the Coyes' participation in the construction activities was little more than to choose a house plan. They had such a minimal part in design that their contract does not even specify any extras to be added to it. The contract does not empower them to inspect during construction or to have any involvement with sub-trades. The builder had obtained the mortgage and financed construction from it so that Mr. and Mrs. Coyes were unable to control the cash flow into the project to ensure that no builders' liens would be outstanding. Moreover the form of contract describes the Coyes as interim purchasers, which was borne out by the provision for a closing when the house was completed at which time most of the purchase price would be paid by cash and the assumption of the builders' mortgage. Only then would title be transferred.

[82] It concluded that the "essential contract" in the case was for the purchase of a completed home. The Court of Appeal held that the Coyes were not "owners" within the meaning of the *BLA*, finding that the Coyes' participation in the construction process was merely passive and consensual (at paragraph 26).

[83] At paragraph 27, the Court noted:

> [27] The task before the court in each case of this kind, where the contract with a builder is relied upon as constituting a request, is to determine, as a finding of fact, the essential purpose of the contract as it can be determined from all the factors in evidence. For this reason cases decided on a different set of facts are not particularly helpful in reaching a conclusion.

[84] In ***Fung***, an unpaid electrical contractor sought to lien the landlord's interest in the property when the tenant failed to pay for improvements done to its restaurant. The case turned on the Court of Appeal's consideration of the extent to which the landlord had participated in the construction of the restaurant improvements.

[85] The Court of Appeal noted at paragraph 8:

> [8] Whether or not active participation is established is a question of fact. The learned Master held as follows:
>
> ".....the applicant (sic) participation in the substantial renovations consisted of:
>
> (a) approving concept plans and;
>
> (b) approving the selection of paint for the exterior of the building.
>
> The applicant did not select the general contractor, did not prepare a set of plans nor approve a set of construction plans, did not control funding for the construction, did not provide any on-site supervision or inspection; did not receive any participation rent, in summary there is not sufficient evidence that the landlord actively participated to the extent that the court ought to find that the

> applicant made an implied request of the respondents to do work or provide materials."

[86] The tenant was given a significant allowance by the landlord to construct improvements to the premises, and the landlord reserved the right to approve "the Tenant's conceptual drawings and specifications for the finishing of the Premises, storefront design and signage design." There was no evidence that the landlord had actually done so, and the tenant was not required to construct the improvements.

[87] The Court of Appeal noted at paragraph 10:

> There is no question that the Landlord intended an arrangement whereby considerable control might have been exercised over tenant's improvements. And had that intended participation materialized, it might well have satisfied the test.

[88] There, the Court of Appeal confirmed the Master's decision holding that there had been no request by the landlord to the contractor to have the work performed.

[89] ***Fung*** approved a decision by McDonald J (as he then was), ***Suss Woodcraft Ltd v Abbey Glen Property Corporation***, [1975] 5 WWR 57, [1975] CarswellAlta 48 (ABSC) (hereinafter "***Suss Woodcraft***"), which in turn relied on ***John A Marshall Brick Co v York Farmers Colonization Co* (1916)**, 1916 CanLII 521 (ONCA), aff'd (1917), 54 SCR 569, 1917 CanLII 596 (SCC) (hereinafter "***Marshall Brick***"). In ***Marshall Brick***, the Supreme Court stated at page 581:

> While it is difficult if not impossible to assign to each of the three words 'request', 'privity' and 'consent' a meaning which will not to some extent overlap that of either of the others, after carefully reading all the authorities cited I accept as settled law the view enunciated in *Graham v. Williams* (1885), 8 O.R. 478, affirmed 9 O.R. 458 (C.A.), and approved in *Gearing v. Robinson* (1900), 27 O.A.R. 364, at page 371, that 'privity and consent' involves "'something in the nature of a direct dealing between the contractor and the persons whose interest is sought to be charged … Mere knowledge of, or mere consent to, the work being done is not sufficient.'"

[90] In ***Suss Woodcraft***, it is important to note that the respondent landlord/fee simple owner had conceded that there had been an "implied request" that the work be done by Suss Woodcraft. The facts as found by McDonald J made it clear that there were direct dealings between the tenant's contractor and the landlord relating to the plans and the building permit, and that the landlord had played a role in supervising and monitoring the construction. The case turned on "privity and consent" and "direct benefit." The landlord had for the purposes of the application admitted that it had made a "request," so that was not in issue.

[91] ***Fung*** points out the difficulty noted in ***Marshall Brick*** in distinguishing between "direct dealings" for the purpose of determining if there had been a "request" and "direct dealings" for the purpose of finding "privity and consent." If privity and consent is found, I cannot imagine circumstances where a "request" would not be found, or at least an implied request. But just because there has been a request does not mean there has been privity and consent. Request needs to be considered separately from privity and consent, and "direct dealings" are more important for privity and consent than they are for request.

[92] However, ***Suss Woodcraft*** has certainly been considered in subsequent cases in the context of "request" and it is an important case in this area. It is more important with respect to

"privity and consent" and "direct benefit" than it is to "request," and I will deal with it further when discussing those issues.

[93] ***Bengert*** required an analysis as to the "true nature" of the contract, where the contract with a builder is relied upon as constituting a request. That instructs the master or chambers judge to determine "as a finding of fact, the essential purpose of the contract as it can be determined from all the factors in evidence" (at paragraph 27). In that case, the "true nature of the contract" was that it was a contract between the ultimate purchaser and the vendor for a completed home. Since the purchaser had played no role in the construction process, no "request" was found.

[94] ***Fung*** confirmed that ***Bengert*** "governs the determination of whether a request, expressed or implied, that materials be furnished or that the work be done is made out" (at para 17). It notes that "whether or not active participation is established is a question of fact" (at para 8).

[95] The Court in ***Fung*** stated at paragraph 10:

> There is no question that the Landlord intended an arrangement whereby considerable control might have been exercised over tenant's improvements. And had that intended participation materialized it might well have satisfied the test.

[96] It upheld the findings below that the landlord had not actively participated in the renovation project and, as such, that there had been no "request" by the registered owner (at para 14). The lien was struck.

[97] The keys to the ***Acera*** decision are found in paragraphs 35 and 37. In paragraph 35, the majority found that there had been an implied request by Acera that Sterling begin to build homes on the unsubdivided lots. Berger JA stated:

> [35] In my opinion, by its course of conduct, Acera impliedly requested that the work be performed. Here the lien claimant entered into an agreement with the liened party to build according to plans approved by the liened party. It is not a condition precedent that there be a direct communication amounting to an express request between the liened party and the builder, but something more than mere knowledge or consent must exist.

[98] At paragraph 37, the majority found that Sterling's construction activities had been for the direct benefit of Acera:

> [37] It remains, accordingly, to consider whether the work done and the material furnished by Sterling accrued to the "direct benefit" of Acera. Acera allowed Sterling to improve its lands. In law, the improvements become attached to the land and are owned by the owner of the freehold. Until the subdivision plan is registered Acera is prohibited from selling the lots, so it must be taken to have invited Sterling to improve the lands "for its [Acera's] direct benefit". Acera owns the freehold, therefore it owns the improvements, therefore it is directly benefitted. Having allowed Sterling in as a tenant-at-will it cannot argue the improvements were done against its will, i.e. that they were "not requested". Paragraph (iv) of the definition of "owner" is satisfied.

[99] Berger JA continued at paragraph 39:

> [39] In that sense, mindful that it was anticipated that construction would begin before sub-division approval and transfer of the lots was obtained, such construction was of direct benefit to Acera.

[100] Martin JA in separate but concurring reasons would have directed the trial of an issue as to whether Acera had been unjustly enriched and whether Sterling was entitled to a restitutionary remedy. Restitutionary remedies have progressed significantly since builders' lien remedies were enacted decades ago, so there are arguably more potential remedies for unpaid contractors and subcontractors now than before.

[101] This analysis of the binding case law leads me to now consider the three key issues: Was Reid-Built the Developers' contractor? Was there a request within the meaning of the *BLA*? If so, are any of the other conditions to a finding of "owner" satisfied?

a. Was Reid-Built the "contractor" of any of the Developers?

[102] This argument flows from ***Northern Electric***, where the Supreme Court concluded that Manufacturers Life was not only an "owner" for the purposes of the Nova Scotia *Mechanics' Lien Act*, but that Metropolitan, the fee simple owner who contracted with the various trades (including Northern Electric) was essentially Manufacturers Life's contractor.

[103] The contracts between Reid-Built and the Developers were not construction contracts. As discussed above, unless Reid-Built defaulted on its obligations after building something on one of the lots, the Developers got no benefit from the construction that they were paying Reid-Built for. They got the same price for the lot whether Reid-Built had constructed something or not. The contracts between the parties were lot purchase agreements, not construction contracts. The Developers did not ask Reid-Built to build anything; they had no power under the contract to require Reid-Built to build anything. If Reid-Built wanted to build something before paying the full price for a lot, Reid-Built had to get the developer's approval for the plans and specifications. The Developers had extensive rights under the lot purchase agreements to inspect any work being constructed, but there is no evidence any of them ever did so.

[104] I cannot see that Reid-Built could or should be considered to be the Developers' contractor.

b. Request

[105] ***Northern Electric*** requires the trier of fact to determine the true nature of the contract in question. Here, that contract is the lot purchase agreement between Reid-Built and the various Developers.

[106] As noted in ***Marshall Brick*** at page 581, "it is difficult if not impossible to assign to each of the three words 'request', 'privity' and 'consent' a meaning which will not to some extent overlap that of either of the others."

[107] I am satisfied that there is no material difference in the terms of the various lot purchase agreements relevant to the determination of this issue. In all cases, the agreement governed how and when Reid-Built would acquire title to the lots it had agreed to purchase from the developer, and when Reid-Built would pay for the lots. In all cases, the Developers retained control over some aspects of construction of houses on the lots by Reid-Built, including approval of plans and specifications and architectural controls.

[108] In all cases, where construction activities by Reid-Built took place on various lots, the Developers had approved plans and specifications. Beyond that, there is no evidence of any involvement by any of the Developers during the construction process itself, such as by supervising the work, inspecting the work, or having any dealings of any kind with any of Reid-Built's contractors or suppliers.

[109] Reid-Built acted as its own general contractor. So long as Reid-Built fulfilled its contractual obligations to the Developers, the Developers would receive exactly the same price for a lot whether Reid-Built had built on it or not. It was Reid-Built that benefited from the payment arrangements relating to construction: it did not have to pay the full price for a lot until it had sold the lot to a purchaser, or when final payment for the lots came due regardless of the state of construction.

[110] This case is somewhat unique, at least in Alberta. In all cases, Reid-Built's contractors, who are the lien claimants here, are themselves like general contractors in that they contracted directly with Reid-Built. Reid-Built was itself the "owner" of the various lots, at least in equity. Reid-Built was not a contractor building houses for the registered owners, the Developers. It was building show homes for its own account or for purchasers from it, and it was solely liable for payment to the various contractors working for it. Reid-Built had no right to receive any payment from the Developers.

[111] *Vis-a-vis* Reid-Built, this case is very similar to ***Acera***. Theoretically, Reid-Built might have liened the properties in the event that any of the Developers terminated the lot purchase agreements and purported to have the value of any improvements forfeited to them. But it is not Reid-Built advancing any claims.

[112] There are several reasons why the facts in ***Acera*** are unique in the case law. There, Sterling began construction on lots that it had a conditional right to purchase. The condition precedent to purchase was subdivision of the lands owned by Acera. Satisfaction of the condition precedent was solely in Acera's control. Acera was contractually obliged with Sterling to obtain subdivision approval and complete the subdivision. Until subdivision was completed, Acera, as registered owner of the lands, was the only party who could directly benefit from the value of any improvements to those lands. Construction was encouraged by Acera, if not specifically requested. Acera cooperated fully with Sterling with obtaining building permits and approving plans and specifications. Its failure to complete subdivision could hardly (at least in equity) allow it to benefit from its default in fulfilling its obligation to subdivide.

[113] I do not think that ***Acera*** should be seen as altering in any way the law set out in ***Bengert*** and ***Fung***. It does not purport to do so, and in fact relies on ***Bengert*** and distinguishes ***Fung*** on its facts (on the issue of request). On first glance, it appears in ***Acera*** that there was not much more than the developer approving the builder's plans and specifications. But there was clearly more than just that. Acera did exercise some of the contractual powers over the builder such as inspections, and the contractual imperative to build was stronger in ***Acera***, as were exhortations for Sterling to do so by Acera.

[114] ***Acera*** is, on its facts, distinguishable from this case. In ***Acera***, a key fact finding was that Acera expected that Sterling would commence construction before it acquired title to any lots. Acera expected Sterling to commence construction before the subdivision plan had been registered, so Sterling effectively could not obtain title before it commenced construction.

[115] There is no evidence here that any of the Developers expected or required Reid-Built to commence construction on any lot before it was paid for and transferred to Reid-Built. The lot purchase agreements allowed Reid-Built to build on a lot before taking title, but that was up to Reid-Built. Reid-Built could also obtain title to a lot by paying for it without any construction having occurred on a lot.

[116] The ***Acera*** fact findings also emphasize the greater control exercised by Acera and the greater involvement by Acera in the construction activities than is the case here.

[117] In ***Phoenix Assurance v Bird Construction***, [1984] 2 SCR 199, the facts were somewhat similar to those in ***Northern Electric***. Phoenix Assurance wanted to build a head office, and entered into a complicated arrangement with Ownix Developments Limited whereby a Phoenix subsidiary would acquire the lands necessary for the office building, lease the lands to Ownix on a long-term lease, and then sublease the building back from Ownix. Ownix mortgaged its leasehold interest, and the rent was sufficient to pay off the mortgage. At the end of the lease, the building would revert to the Phoenix subsidiary.

[118] Ownix contracted with Bird Construction for the construction of the building, but went bankrupt during the course of construction, leaving Bird Construction unpaid. Bird Construction liened the interests of Ownix and Phoenix.

[119] Under the terms of the agreement with Ownix, Phoenix had the right to alter plans, and to inspect and supervise construction. The Supreme Court of Canada held at page 215:

> It should be noted that it is difficult to examine the factual complexities of the transactions with which this appeal is concerned without concluding that both PUK and PCDA, in a factual sense, requested that the work be done. PUK, the parent, owns all the issued and outstanding shares of PCDA. PUK entered into these arrangements for the sole purpose of establishing a suitable head office facility in Toronto for its wholly-owned subsidiary. PUK was the guiding entrepreneur in these operations, and PCDA the immediate occupant and ultimate owner of the building. It would be legalism in its purest form to conclude that either company had not requested the work, in the sense of s. 1 of the Act.

[120] Thus, the Supreme Court concluded that Phoenix had "requested" the work for the purposes of the Ontario *Mechanics' Lien Act*.

[121] The Supreme Court reached a similar conclusion in ***Hamilton (City of) v Cipriani***, [1977] 1 SCR 69, where Laskin CJ (for a unanimous court) stated at page 173:

> Schroeder J.A. in the Ontario Court of Appeal, looking to the substance of the transactions between the City, the Commission and McDougall, construed the interrelationship as one where the Commission became the general contractor for the City and, as such, proceeded to carry out its contract through another general contractor. In my opinion, this is a proper analysis, recognizing the fact that the Commission was being the City's banker. The City was and remained the "owner" within s. 1(*d*) so as to make its land lienable under s. 5, and it is idle formalism to contend that the work was not done at its request. I do not regard *Marshall Brick Co.* v. *York Farmers Colonization Co.* as standing in the way of this conclusion. That case turned largely on the words "privity and consent" which were then conjunctive under the statute and they are now disjunctive. If the

submission is that direct dealing is required before a request can be found, I am unable to accept such a limitation under the present *Mechanics' Lien Act.*

[122] It is clear that there was no direct request by any of the Developers that Reid-Built construct any improvements on the lots. The Developers consented to Reid-Built doing so, and facilitated Reid-Built in doing so by approving plans and specifications.

[123] The contractual provisions involved here should not, in my view, be interpreted as impliedly "requesting" Reid-Built to commence construction.

[124] Essentially, what the lien claimants suggest here is that the Developers are guarantors of Reid-Built. Because Reid-Built constructed improvements on lots being purchased by Reid-Built but not yet conveyed to it, any builders' lien obligations owed by Reid-Built to its contractors or suppliers are jointly owed by the Developers.

[125] That, in my view is an interpretation of the *BLA* that goes far beyond the narrow approach mandated in the early case law.

[126] The facts here do not demonstrate that any of the Developers exercised any of their supervision or inspection rights under the lot purchase agreements. While they could have been involved in the construction activities, they did not do so other than by approving plans and specifications. The Developers had no dealings at all with the lien claimants. While direct dealings are only one factor to be considered and are not conclusive one way or the other, the absence of direct dealings and the absence of any significant involvement by the Developers is telling. The lien claimants worked for Reid-Built, took all of their direction from Reid-Built, and until Reid-Built went into receivership, looked solely to Reid-Built for payment.

[127] I note here that the "request" required under section 1(j) of the *BLA* does not require that the imputed owner have made or be deemed to have made a request of all lien claimants. If the lien claimants are contractors or subcontractors or material suppliers who provided work on an improvement for someone whom an owner had requested work or materials from, that is sufficient to satisfy that part of the test for anyone claiming under a contractor or someone else who directly contracted with the owner. That is clear from ***Northern Electric***. Manufacturers Life was liable for Northern Electric's mechanics' lien because Manufacturers Life was held to have requested Metropolitan to construct a building for Manufacturers Life. Northern Electric was a contractor or subcontractor for Metropolitan.

[128] It is not fatal to the lien claimants' claims that none of them had any direct dealings with the Developers, or that the Developers made no express requests of work from them. It would have been sufficient had the Developers been found to have requested, expressly or impliedly, Reid-Built to construct the improvements on the lots.

[129] Ultimately, the facts here do not bring the Developers within any of the cases, including ***Acera,*** where a developer or other stranger to the construction contract made an express or implied request that improvements be constructed on its lands.

[130] As a result, I conclude that none of the Developers made a request of Reid-Built to construct improvements on the lots within the meaning of section 1(j) of the *BLA*.

[131] This finding effectively precludes any of the Developers from being found to be "owners." However, if I am wrong in this analysis, I need to deal with the other elements of the *BLA*'s definition of "owner," such as the issues of privity and consent and direct benefit.

c. Privity and consent

[132] The case law is clear that the finding of a request does not equate to a finding that there is privity and consent under section 1(j)(iii). Any reading of the legislation leads to the conclusion that they are different requirements. That is not to say that there are not significant similarities.

[133] As noted in ***Marshall Brick*** at 581:

> While it is difficult if not impossible to assign to each of the three words 'request', 'privity' and 'consent' a meaning which will not to some extent overlap that of either of the others, ... I accept as settled law ... that 'privity and consent' involves
>
> > 'something in the nature of a direct dealing between the contractor and the persons whose interest is sought to be charged … Mere knowledge of, or mere consent to, the work being done is not sufficient.'

[134] The leading Alberta case on privity and consent is ***Suss Woodcraft***. There, McDonald J stated at paragraphs 17-21:

> [17] ... The question here is whether there was "something in the nature of a direct dealing" between the plaintiff and the defendant. The plaintiff contends that that "something" is to be found in the facts that:
>
> (a) The defendant approved the plans,
>
> (b) The plaintiff provided plans to the defendant,
>
> (c) The defendant obtained the building permit,
>
> (d) The defendant's representative discussed with Mr. Suss the fact that the defendant would apply for the building permit with the plans Mr. Suss had delivered,
>
> (e) The plaintiff delivered to the defendant a copy of a page from the contract between the plaintiff and the tenant,
>
> (f) The plaintiff paid the defendant the cost of the building permit, and
>
> (g) During the construction period the defendant's representative (Mr. Yacyk) and his assistants expressed concern regularly with what the plaintiff was doing (e.g., by giving instructions directly to the plaintiff in respect of fireproofing, and by specifying that the general contractor was to cut the floor where the front doors were to be installed).
>
> [18] I find all these facts except (c) to exist.
>
> [19] I consider that these facts, whether including (c) or not, do not constitute "something in the nature of a direct dealing." Consequently I find that, while there was consent, there was not "privity and consent." In reaching that conclusion I recognize that the test to be applied does not require

> direct contractual relations between the owner and the lien claimant, and I realize that the facts of *Orr v. Robertson* are similar. However, on the facts of the latter case as reported it appears to me that something in the nature of direct dealing was afforded particularly by the fact that the head tenant ordered the contractor to do certain of the work. In the present case that did not occur.

[135] The decision in ***Suss Woodcraft*** ultimately turned on the fact that Suss Woodcraft had not registered extra-provincially in Alberta. It was found to have had no capacity to file a builders' lien, so its claim was dismissed.

[136] There is no doubt here that there were direct dealings between the Developers and Reid-Built. The direct dealings were limited to the lot purchase agreement itself and the obtaining of the Developers' approval of plans and specifications for the houses to be built. The Developers were simply not involved in the improvements, other than knowing about them and consenting to them by way of approving plans and specifications. They could have been more involved because of the terms of the lot purchase agreements, but they were not.

[137] The direct dealings between Reid-Built and the Developers were not, on the facts before me, sufficient to constitute "privity and consent" as contemplated in section 1(j)(iii) of the *BLA* so as to make the Developers "owners." It cannot be said that Reid-Built was in effect the Developers' contractor or that "privity and consent" existed with respect to the construction of the houses.

[138] As discussed above, it is not necessary for each of the lien claimants to be able to establish that it had direct dealings with the Developer. It would have been sufficient if the contractor for whom a lien claimant worked (Reid-Built) had such sufficient direct dealings, as in ***Northern Electric*** and ***Hamilton v Cipriani***.

[139] As a result, it has not been established that privity and consent existed so as to make the Developers "owners" for the purpose of the *BLA*.

d. Direct benefit

[140] ***Northern Electric*** remains the main binding precedent from the Supreme Court in this area. The majority found that the construction activities were for the direct benefit of Manufacturer's Life as they would share in the gross revenues from the developed property over the 80-year period of the lease with Metropolitan Projects Limited.

[141] No authority has been provided to me, and I am not aware of any other authority, suggesting that a reversionary right to improvements at the end of a lease or on termination of the lease by the landlord for tenant default, without more, is a "direct benefit" to the landlord.

[142] ***Northern Electric*** found a direct benefit because the chambers judge and the Supreme Court concluded that the development was as much for Manufacturers Life's benefit as for the developer, Metropolitan. In ***Hamilton v Cipriani*** the Supreme Court concluded that the Ontario Water Services Commission acted as Hamilton's contractor (and banker) such that Hamilton became an owner and was liable for liens filed by contractors and suppliers working for the Commission. In ***Phoenix v Bird***, the Supreme Court concluded that the improvements were for the direct benefit of Phoenix and its subsidiary because the construction was in effect for Phoenix's head office.

[143] Before ***Acera***, ***Suss Woodcraft*** was the leading Alberta case on "direct benefit." There, McDonald J (as he then was) found a direct benefit because of the participation rent the landlord was entitled to, not the landlord's reversionary interest in the improvements at the end of the lease. McDonald J considered the effect of the reversion at the end of the term, as well as the potential forfeiture of the improvements to the landlord in the event the tenant defaulted under the lease during the term. However, those comments (as well as the comments by the trial judge in ***Northern Electric*** referred to in ***Suss Woodcraft***) do not hold that the reversion, or the possibility of forfeiture because of the landlord's default, constitute by themselves direct benefit.

[144] McDonald J considered that issue at paragraphs 20-21:

> (b) Was there "direct benefit"?
>
> [20] It is submitted by the plaintiff that the defendant is an "owner" within the meaning of s. 2 of the Act because the work done and the material furnished by the plaintiff were for the "direct benefit" of the defendant. The plaintiff points to the fact that in the lease between the defendant and the tenant, cl. 9.03 governs the surrender of the premises on the expiration of the lease or the sooner determination of the term, and provides in particular as follows:
>
> "... all alterations, improvements and fixtures (other than the fixtures in the nature of trade or tenant's fixtures) upon the leased premises and which in any manner are or shall be attached to the floors, wall or ceiling, or any linoleum or other floor covering which may be cemented or otherwise affixed to the floor of the leased premises, shall remain upon the leased premises and become the property of the landlord at the expiration or sooner determination of this lease".
>
> [21] The plaintiff submits that the effect of the reversionary interest created by cl. 9.03 is that the landlord had a direct benefit from the work done and materials supplied.

[145] McDonald J reviewed the case law and concluded at paragraph 26:

> [26] Despite those cases, I consider that the reasoning of O Hearn Co. Ct. J. in Northern Electric Co. Ltd. v. Metropolitan Projects Ltd., supra, is correct. Adapting it to the present case: the lease here provides not only for rent but for rent equal to a specified percentage of the gross sales if that share exceeds the basic rent. (The landlord thus stands to benefit directly from the improvements, for without them the store will not attract customers and there will be lower or no sales.) When the reversion falls in, the improvements will remain on the property, pursuant to cl. 9.03. The tenant has the right to remove only trade fixtures at the expiration of the lease, and those only if he has paid the rent and performed his covenants. As in Northern Electric, the lease is subject to forfeiture for many reasons, such as bankruptcy or insolvency, and in such event the landlord would keep the improvements. (In my opinion it matters not that the improvements are trade fixtures which may last less than the full term, or, as in Northern Electric, a building.)

[146] To put McDonald J's decision into the proper context, it should be noted that the Supreme Court of Canada had effectively restored O'Hearn J's decision by the time of McDonald J's decision.

[147] All three of the Supreme Court cases, ***Northern Electric***, ***Hamilton v Cipriani*** and ***Phoenix v Bird***, make it clear that there must be some immediate benefit for there to be a "direct benefit." A request may be inferred from the immediate benefit that makes it clear that the improvement is really being constructed at least partly for the imputed owner.

[148] That cannot be said to be the case here. The true nature of the arrangement between Reid-Built and the Developers was a sale of lots to Reid-Built. There was no intention at the time of the making of the contract that a developer would have any interest in the improvements being constructed on the lots.

[149] It would, in my view, be inappropriate to find a "direct benefit" from a reversionary interest that would only materialize 80 years hence, or from a speculative contingent interest based on a possible future default by a tenant.

[150] The same principles apply to the possibility of a forfeiture arising from a purchaser's default.

[151] It is undoubtedly true that the Developers would benefit by the fact of any construction activities taking place on their developments, in that potential purchasers might want to buy homes under construction, or see the potential of the development. Other house builders might want to acquire lots from the Developers and greater demand might result for their lots. That in turn might speed up their cash flow and ability to realize on their investment. However, those are not, in my view, the sort of "direct benefits" contemplated by the *BLA*. Those are "indirect" benefits. There is no interest in the lots retained by the Developers after the close of the purchase by Reid-Built, and the Developers get the same price from Reid-Built whether the lots have been built on or not.

[152] The Developers' situation is no different than a landlord benefitting from a tenant occupying premises and getting rent from an operating tenant, and the fact that other space in the landlord's building might be leased to other tenants who might be attracted to the building by successful operations of existing tenants.

[153] In ***Acera***, the Alberta Court of Appeal concluded that Acera had received a direct benefit from Sterling's construction activities. That was because from the time the construction began on the lands, only Acera owned the lands and had a legal interest in the lands. Because the lands were not subdivided, no one could derive an enforceable interest in the lots until the subdivision was effected.

[154] In my view, ***Acera*** should not be read as concluding that an after-the-fact benefit (as opposed to an initially intended benefit) is sufficient to constitute a "direct benefit." The inevitability of a landlord's reversionary interest in tenant improvements has not by itself been found to be a direct benefit so as to make a landlord an owner. More is required for that. ***Acera*** did not purport to vary existing law in the area.

[155] In this case, the benefits suggested by the lienholders are, in my view, intangible benefits and not direct benefits. It was never intended that the Developers would obtain any direct benefit from the improvements themselves. They might obtain intangible benefits from the fact that

homebuilders were buying lots on their subdivision and actually constructing homes there, but that is not a "direct" benefit.

[156] It is true that the Developers stood to potentially benefit if, after they entered into lot purchase agreements with Reid-Built, subtrades constructed improvements on the lots being sold (and those improvements actually added value to the lots), then Reid-Built defaulted in its obligations under the lot purchase agreements, Reid-Built was then unable to cure any such defaults and, finally, the lots were then forfeited or foreclosed by the Developers against Reid-Built. However, that possibility is far too speculative and dependent on too many contingencies to be considered to be a "direct benefit" to the Developers.

[157] There is, in any event, no evidence that any of the Developers received any benefit from the improvements constructed by or for Reid-Built, so this argument is somewhat moot.

[158] As a result, I find that even if there had been a "request" by any of the Developers that Reid-Built improve the lots, none of the Developers received a "direct benefit" as contemplated by section 1(j)(iv) of the *BLA*.

2. Are any of the builders' liens filed against the Developers' interests in various lots invalid because they did not properly describe the interests in land to be liened?

[159] The leading case in this area is ***LT Interior & Drywall Ltd v Sota Centre Inc***, 2003 ABQB 552 (hereinafter "***LT Interior***"). That decision makes it clear that a builders' lien claimant must describe in the builders' lien the nature of the interest in land the lien claimant intends to attach with the lien (see section 34(2)(a)(iii)). The curative provision in the *BLA*, section 37, allows the Court to cure a defective lien, provided the lien was in substantial compliance with section 34 and the party whose interest is sought to be charged has suffered no prejudice. ***LT Interior*** is clear that failure to describe the interest to be charged in any way (as opposed to a misnomer) is not substantial compliance.

[160] In ***LT Interior,*** the work was done for the tenant. The defendant was the landlord and registered owner of the property. Greckol J (as she then was) described the facts:

> [23] The Defendants note that the Statement of Lien was registered against the fee simple interest of the registered owner, 924745 Alberta, but not against Sota Holdings' leasehold interest. Further, the Statement of Lien identifies Sota Centre as the party for whom the work or materials were provided and does not state that the work was requested by 924745 Alberta.

[161] The lien was declared invalid.

[162] I considered ***LT Interior*** in ***Westpoint Capital Corporation v Solomon Spruce Ridge Inc***, 2017 ABQB 411. In that case, a lien claimant sought to attach the mortgagee's interest in the property on which work had been performed. The builders' lien purported to attach the interest of the registered owner, for whom the claimant claimed to have done the work.

[163] I stated at paragraphs 112 and 113:

> [112] I find the logic and reasoning in ***LT Interior & Drywall Ltd. v Sota Center Inc.***, 2003 ABQB 552 (CanLII), and ***Arres Capital Inc. v Greywood Mews Development Corp.***, 2011 ABQB 411 (CanLII), compelling. The failure to specifically name Westpoint in its lien and to specifically

register a builder's lien claim against Westpoint's interest in the lands is fatal to Solomon's claim against Westpoint or its interest in the lands.

[113] I am also satisfied that the problem here is not one that can be remedied under s 37 of the *Builder's Lien Act*.

[164] Here, some of the builders' liens describe Reid-Built as the "owner." They do not name the developer specifically, although in all cases the developer is the registered owner of the lands.

[165] The builders' liens registered in this fashion would be validly registered against Reid-Built's unregistered and uncaveated interest in the applicable lots. As regards the interest of the developer as owner, failing to describe the developer as "owner" fails to comply with section 34, and any builders' lien so filed does not substantially comply with section 34.

[166] In other words, failing to name Reid-Built as "owner" would not be substantial compliance with section 34 in relation to any claim against Reid-Built's interest in any of the lots.

[167] Other builders' liens described that the work was done for Reid-Built and that the "owner" was the developer. As the developer is the registered owner in all cases, I conclude that a builders' lien filed in that fashion substantially complies with section 34.

[168] Failure to name the developer as "owner" with respect to a lien claim seeking to charge the developer's interest in the lands would not be substantial compliance with section 34.

3. Are any of the builders' liens filed against the Developers' interests in various lots invalid because they did not specify the estate or interest in the land being charged by the builders' liens?

[169] This issue arises out of ***LT Interior***. In that case, Greckol J stated at paragraphs 25-27:

[25] The Statement of Lien must identify the "owner" since, according to s. 6 of the ***Builders' Lien Act***, the lien is "on the estate or interest of the owner in the land in respect of which the improvement is being made." The word "owner" has a singular meaning under the Act. The term is defined under s. 1(j) as "a person having an estate or interest in land at whose request, express or implied, and (i) on whose credit, (ii) on whose behalf, (iii) with whose privity and consent, or (iv) for whose direct benefit, work is done on or material is furnished for an improvement to the land and includes all persons claiming under the owner whose rights are acquired after the commencement of the work or the furnishing of the material." [emphasis added]

[26] As the Defendants point out, a registered owner may be an "owner" if the appropriate notice under s. 15 of the Act has been given (which was not done in this case) or if the actions of the registered owner qualify the registered owner as an "owner" under s. 1(j) of the Act.

[27] The Defendants argue that the Statement of Lien defines the parameters of the estate or interest to which the lien is to attach. The Statement of Lien in this case does not allege that the registered owner, 924745 Alberta,

requested that the Plaintiff perform work for it. Rather, it states that the work was requested by Sota Centre.

[170] I agree with Greckol J that where a lien seeks to attach the interest of a non-contracting owner, that party must be described as an owner in the builders' lien itself, and the lien should state that both the contracting owner and the non-contracting owner requested that the work be done. However, I would describe a builders' lien against a non-contracting owner as being substantially compliant with section 34 so long as the non-contracting owner is named as an owner in the lien itself. Failure to state that the non-contracting owner requested that the work be done would be an irregularity, but not one that renders the lien substantially non-compliant.

4. If there are deficiencies or irregularities in any of the filed builders' liens, can they be cured under the provisions of section 37 of the *BLA*?

[171] ***LT Interior***, ***Westpoint Capital*** and ***Electric Furnace Products Co v Quality Rentals***, 1991 ABCA 130, make it clear that there is a very limited curative power with respect to non-compliant builders' liens. Firstly, the lien must in any event be substantially compliant. Secondly, the respondent can have suffered no significant prejudice as a result of the non-compliance.

[172] In this case, the only time the curative power can be used is with respect to substantially compliant liens. From the examples above, those are the liens where the non-contracting owner is described as an owner, but the lien fails to state that this party requested that the work be done.

[173] None of the Developers has put forward any evidence of prejudice, so I am satisfied that this irregularity should be cured.

Georgetown Appeal

1. What is the applicable standard of review from Master Prowse's decision?

[174] The standard of review on the lien claimants' appeal of the decision by Master Prowse is one of correctness. That is set out in ***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166.

2. Is Georgetown an owner within the meaning of section 1(j) of the *BLA*?

[175] Master Prowse determined the matter on the basis that Georgetown had not requested that the improvements be constructed on its lands. In doing so, he reviewed the agreement between Reid-Built and Georgetown. He relied on his own decision in ***Labbe-Leech Interiors Ltd v TRL Real Estate Syndicate (07) Ltd***, 2009 ABQB 653, as well as ***Fung*** and ***Lighting World Ltd v Help-U Build Ltd***, 1998 ABQB 930.

[176] The contractual terms between Reid-Built and Georgetown were similar to those with the other Developers, as discussed above. The lot purchase contract gave Georgetown similar rights of approval of plans and specifications and architectural features, but the evidence was that apart from approval of plans and specifications, Georgetown had not exercised any of its other rights during the construction of improvements on Reid-Built's lots either by or for Reid-Built.

[177] Master Prowse concluded on these facts that Georgetown had not acted any differently from the contractor in ***Fung*** and ***Stealth Enterprises Ltd v Hoffman Dorchik***, 2000 ABQB 311 (aff'd 2003 ABCA 58).

[178] He distinguished ***Acera*** on its facts, and in particular on the fact that Acera had been involved in the construction activities by Sterling on its lands.

[179] Master Prowse's decision followed precedents that were binding on him, namely, ***Fung*** and ***Stealth Enterprises Ltd.*** He had previously reviewed relevant authorities in ***Labbe-Leech Interiors Ltd.*** In that thorough review, he noted one case in which a landlord had impliedly requested work to be done.

[180] In ***Consolidated Gypsum Supply v BLR Construction Ltd*** (1984), 55 AR 340, [1984] AJ No 930 (Alta QB), the City as landlord had leased lands for the purpose of public housing. The lease required the tenant to construct public housing units and specified the exact form the improvements must take. In that case, Smith J held at paragraph 10:

> By the terms of the lease, the City requires the tenant to construct the public housing units and specifies the exact form the improvements must take. This provision in a lease is sufficient to make the lessor an owner as defined in s. 1(g) of the Act.

[181] This degree of participation was held to constitute an implied request by the City to the contractor hired by the tenant.

[182] The precise terms of the lease were not detailed in this decision. I do not think this decision is consistent with ***Fung*** or ***Stealth*** and in my view it no longer represents the state of the law in Alberta regarding a "request."

[183] Otherwise, the case law, including all of the authorities binding on me, are consistent with Master Prowse's conclusions.

[184] A significant factual finding was that there was no expectation (or requirement) either in the lot purchase agreement or in the dealings between Georgetown and Reid-Built that construction would commence before Reid-Built took title to a lot. Reid-Built could take title to a lot (by paying Georgetown out) without commencing construction, and it could also commence construction without having to pay out the full lot purchase price. The choice was Reid-Built's.

[185] In ***Acera***, the fact finding was that there was an expectation that Sterling would commence construction before it acquired title to any lot. Acera expected Sterling to commence construction before the subdivision plan had been registered so Sterling could not obtain title before it commenced construction.

[186] I see no error in Master Prowse's decision and conclude that his findings were correct. The lien claimants' appeal from his decision is dismissed.

[187] If I am wrong in my assessment that Georgetown made no "request" to Reid-Built for the improvements to be constructed, that would leave me with whether Georgetown has received a direct benefit as a result of the construction activities by the various lien claimants.

[188] There is no doubt that Reid-Built essentially walked away from the Georgetown lots. The Receiver was unable to find a buyer for Reid-Built's interest in any of the lots either in whole or individually. That resulted in Georgetown keeping the lots free and clear of any claim by Reid-Built. Georgetown also got to keep all deposits on the lot purchase agreement that were paid by Reid-Built. In addition, the lots had been improved to some extent by the lien claimants' construction activities.

[189] I recognize that this is in many respects a very similar situation to that in ***Acera***. There, the Court of Appeal found that Acera had received a direct benefit as a result of the improvements. For Georgetown, that was an unintended and unexpected benefit, if ultimately the improvements actually added value to the lots. Half-built houses may have little or no value and depending on the stage of construction, they may be a liability requiring demolition. In any event, that is an issue that was not dealt with in ***Acera*** as the Court of Appeal did not decide on the value of the lien and left that for future determination.

[190] I have difficulty distinguishing Georgetown's situation from that of a landlord who gets to keep the improvements at the end of the tenant's term, or in the event the tenant defaults under the lease and the landlord has the right to terminate it. As I discussed above, there is no landlord-tenant case of which I am aware where the reversion, or ability of the landlord to keep the improvements on the tenant's default has been characterized as a "direct benefit" in itself. The landlord, or here Georgetown, may have received a benefit, but the benefit cannot be characterized as a "direct" benefit.

[191] The difference from ***Acera*** as I see it is that when the improvements were being made in that case, Sterling's interest in the lots was contingent on the lots being subdivided. Until subdivision occurred, only Acera could benefit from the construction. It was their lands that were being improved, and the improvements would remain theirs unless and until the subdivision was completed.

[192] I see this as an important distinction and one that distinguishes this case from ***Acera***. Otherwise, when a lot purchase agreement or lease contains a provision where the developer or landlord is entitled to retain any improvements constructed by the purchaser or tenant in the event of default by the purchaser or tenant, the developer or landlord becomes an "owner" for the purposes of the *BLA* if a request has been made or is deemed to have been made. That in my view takes the interpretation of section 1 too far, and beyond what was contemplated in ***Bengert***.

[193] I do not read that intent to expand the law in ***Acera***. ***Acera*** was as much a case about preventing a wrongdoer from profiting from its own wrong, and I agree with Master Prowse's approach in distinguishing that case.

[194] While it was argued that Georgetown would otherwise get a windfall if it were not found to be an owner, just because there has been a benefit received does not make the beneficiary an owner. There still must have been a request. In ***Bengert***, as in ***Lightning World Ltd***, there was a direct benefit but no request.

[195] I was referred to ***Con-Forte Contracting Limited Partnership v Eagle Hill Developments Ltd***, 2102 ABQB 724. That is a case that, like ***Acera***, bears a number of similarities to this case. In ***Con-Forte***, the respondents had extensive knowledge about the construction activities on their lands and at one stage undertook financial obligations to keep the project on schedule and represented to the construction manager that "we will be working closely with the Developer's chosen General Contractor" (at para 26). The Respondents were not merely "passive investors."

[196] The facts of that case are highly distinguishable from those in ***Georgetown***.

[197] There, Thomas J had little difficulty finding that the Respondents had received a direct benefit. The case is of significant assistance in quantifying the value of liens against imputed owners.

[198] Concerns over how builders' lien or mechanics' lien legislation operates in the context of "owners" who have not hired contractors and who have no direct responsibility for payment of any contractors or suppliers have been answered starting in ***Hamilton v Cipriani***. At page 174 of that decision, the Supreme Court stated:

> Counsel for the appellant contending, as already noted, that there was no right or duty to maintain a holdback in this case, submitted in effect that this precluded enforcement of the lien. Counsel for the respondent contended that in the present case it was the City that was "the person primarily liable upon a contract... by virtue of which a lien may arise" within s. 11, and that the obligation thereunder to maintain a holdback does not depend on a fund being available out of which the holdback must be reserved. Whether this contention is correct or not on the facts of this case, I do not think that a valid claim of lien against an owner under s. 5 can be defeated by showing that the owner is not a "person primarily liable" under s. 11 and hence not obliged to maintain a holdback. The right to resort to the owner's interest in the affected land is the principal remedy; s. 11 provides merely an ancillary resort for realizing the lien claim.

[199] That statement was affirmed in ***Phoenix v Bird*** at page 226.

Value of Liens

[200] It is not necessary for me to speculate on the value of any of the liens here, as I have found none of them to be valid. I will simply refer to Thomas J's helpful analysis in ***Con-Forte*** and the principles developed through the Supreme Court of Canada trilogy on these issues: ***Hamilton v Cipriani***, ***Northern Electric***, and ***Phoenix v Bird***. ***Muzzo Brothers Ltd v Cadillac Fairview Corp*** (1981), 34 OR (2d) 461, 1981 CarswellOnt 529 (Ont SC). Those cases suggest that the non-contracting or deemed owner has the same liability as the contracting owner.

Other Matters

[201] I have reviewed a number of other cases cited to me by counsel, but have not specifically referred to them in this decision:

> ***Arres Capital Inc v Graywood Mews Development Corp***, 2011 ABQB 494;
>
> ***Broadview Glass Inc v Bridge City Properties Ltd***, 1983 CarswellSask 217 (Sask QB);
>
> ***Canadian Helicopters Ltd v Udo Stephen Building Materials Ltd***, 2003 ABQB 322;
>
> ***Canadian Patent Scaffolding Co v Capton Holdings Ltd***, 1985 CanLII 1341 (Alta QB);
>
> ***Clem v Hants-Kings Business Development Center Ltd***, 2004 CarswellNS 240 (NS SC);
>
> ***E Gruben's Transport Ltd v Alberta Surplus Sales Ltd***, 2010 ABQB 244;
>
> ***East Central Gas Co-operative Ltd v Henuset Ranches & Construction Ltd***, 1976 CarswellAlta 40 (Alta SC);

Encore Electric Inc v Haves Holdings, 2017 ABQB 803;

Enerkem Alberta Biofuels LP v Producits Metalliques Pouloiot Machinerie Inc, 2016 ABQB 524;

Fred H Blanchard & Son v Poetz Construction Co, 1953 CarswellAlta 33 (Alta SC);

Hazin (Re), 2011 ABQB 197;

Lighting World Ltd v Help-U-Build (Edmonton) Inc, 1998 ABQB 930;

Norson Construction Ltd v Clear Skies Heating & Air Conditioning Ltd, 2017 ABQB 188;

Permasteel Building Systems Ltd v Semon, 2000 ABQB 275; and

Thibeault Masonry Ltd v Philippe, 2006 ABQB 746.

Additional Comments

[202] I realize this decision will cause or continue financial hardship for many of the lien claimants. As stated by Thomas J in ***Con-Forte***:

> Also guiding me throughout this decision is the principle that one of the purposes of the *BLA* is to protect the interests of persons who provide goods and services to improve lands through the creation of a registration process which permits them to file liens against title.

[203] In most cases, the person or entity required by contract to pay for the work (here, Reid-Built) complies with its obligations. Builders' lien claims are generally remedies of last resort. Contractors may make a reasonable recovery as long as the owner's lands are not heavily mortgaged and the owner has some realizable equity in the property. Where claims are made by subcontractors and material suppliers (as is the case here), their lien remedies are generally limited by the 10 percent lien fund the owner is to hold back from the contractor. 10 percent of the total construction cost is rarely sufficient to pay subtrades and material suppliers more than a small percentage of their claim.

[204] Subcontractors and material suppliers have remedies outside the *BLA*. Most are, unfortunately, impractical. Asking contractors for security is likely to be ineffective and get bidders off the bid list, making future work unlikely. While section 15 of the *BLA* allows someone working for a contractor to provide written notice to the owner of its intention to look to the owner for payment, that too is impractical. The owner need only respond to the notice (promptly) by disclaiming responsibility, and a subcontractor or material supplier doing so is likely to incur the wrath of the contractor, making future work unlikely.

[205] The *BLA* has the effect of requiring landowners to pay lien claimants who have no contractual entitlement to be paid by the landowner. It has narrow operation, because these non-contracting landowners have little if any control over the construction activities taking place on their lands.

[206] As a remedy of last resort, the *BLA* frequently provides little or no remedy at all.

[207] I am mindful that in ***Acera***, Martin JA commented on the potential for unjust enrichment claims to be made in circumstances where someone may end up with an uncontracted-for windfall. I do not know that such remedies are available, but it is possible that equity might take over where legal remedies such as builders' liens are unavailable.

[208] I am grateful to counsel for their able written and oral submissions in this matter.

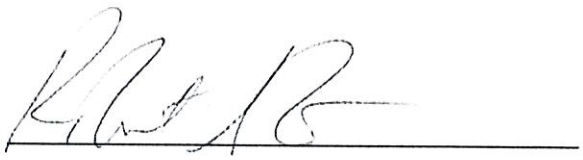
Costs

[209] I am not inclined to award costs with respect to the applications in the Reid-Built Receivership application. The liens were not frivolous and the lien claimants' efforts to enforce builders' lien rights and remedies were not unreasonable in the circumstances.

[210] Similarly, with respect to Georgetown, while it might ordinarily expect to have a measure of costs because of its success before the Master and on this appeal, I am mindful that Georgetown has received the likely benefit of construction activities for which it has not had to pay. The liens were not frivolously filed, and the proceedings to remove them were reasonably conducted.

[211] If there are other considerations at play regarding costs, however, I will reserve jurisdiction to decide any cost issues raised by any of the parties within 30 days from the date of this decision.

Heard on the 3rd day of October and 30th day of November, 2018
Dated at the City of Edmonton, Alberta, this 27th day of February, 2019.



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