

Limited to engineer, plan, prepare tender documentaton and supervise the construction of the park. Following the award of the contract to T.A.G., that company entered into a contract with Turf Masters Landscaping Limited for all labour and materials required to complete the work. Turf Masters brought an action in the County Court against T.A.G. and the city under the **Mechanics' Lien Act** for the balance due for labour and material provided under the contract. In an amended statement of claim dated December 21, 1989, Turf Masters alleged:

"8. Dartmouth retained the professional consulting firm of CBCL Limited (hereinafter referred to as 'CBCL') to carry out the site engineering design and landscape planning to be constructed and placed upon the Lands and appointed CBCL as Dartmouth's agent to perform on its behalf all services in connection with overseeing the construction and landscaping of the Lands (which construction and landscaping are hereinafter collectively referred to as the 'Work').

9. The Plaintiff claims that at all times material hereto CBCL was the duly authorized agent of Dartmouth, acting in the normal course of its employment and within the scope of its authority."

The statement of claim went on to allege that Turf Masters relied on the plans and specifications as supplied by the city and C.B.C.L. and that the subsurface conditions rendered the land unfit for the performance of the work in accordance with the design criteria. The plaintiff also alleged that the city knew of these conditions and failed to disclose them thereby putting the subcontractor to additional expense. As a result of the allegations in the statement of claim the city served a third party notice and statement of claim on C.B.C.L. Limited. In the notice the city claimed against C.B.C.L. for any damages which the city was liable for to Turf Masters as a result of negligence of C.B.C.L.

The plaintiffs moved to strike the third party notice. Bateman, J.C.C. granted the motion with costs against the city and struck the notice.

The trial judge reviewed the authorities in this Court in **P.P.G. Industries Canada Limited v. J.W. Lindsay et al** (1982), 52 N.S.R. (2d) 267 and **Tri-Corp General Contracting and**

Sales Limited et al v. Oceanside Construction Limited et al (1987), 81 N.S.R. (2d) 346. No reference was made to the decision of this Court in **Fuller Construction (1958) Limited v. Centennial Group of Companies Limited and Prince George Hotel Limited** (1987), 82 N.S.R. (2d) 73.

The learned trial judge stated:

"Were this not a mechanics' lien action CBCL would be an appropriate third party. Without question it would be 'economical' in the legal sense to have all matters determined in a single action. The potential liability, however, of CBCL to Dartmouth is the subject matter of a separate contract, the contract between CBCL and the City of Dartmouth. This issue is of no concern to Turf. Whether the alleged extra work and materials provided by Turf was precipitated by a wrongful act of CBCL or the City of Dartmouth, or simply flowed from relatively benign circumstances, is the only issue to be determined in the context of the mechanics' lien action. If Dartmouth is found liable, it may or may not choose to pursue an action against CBCL. Dartmouth may be found not to be liable or, alternatively, Dartmouth may be found to be liable in circumstances which would not support a claim against CBCL. In other words, litigation surrounding the relationship between Dartmouth and CBCL is not inevitable."

In **P.P.G. Industries Canada Limited and J.W. Lindsay, supra**, this Court decided that the **Mechanics' Lien Act** did not provide for third party proceedings. As a result the **Act** was amended to add s. 34(2) which provides:

"(2) The jurisdiction of the county court under this **Act** includes a third party procedure where the amount claimed relates to the lien claim and arises out of the building contract or the work done or the materials supplied that is subject of the lien claim."

The third party action is limited by the words in the section which I have emphasized and which was referred to by Matthews, J.A. in **Tri-Corp General v. Oceanside, supra**. Having regard to the pleadings in this case we are satisfied that the third party claim against C.B.C.L. Limited arises out of the construction contract and the work and materials supplied. While not a party to the contract between the city and T.A.G., C.B.C.L. was the agent for the city in the preparation, planning

and the carrying out of the project. For all practical purposes the agents and servants of C.B.C.L. will be full participants in the litigation. It is both convenient and appropriate that the company be added as a party so that all issues of liability will be determined at the same time.

We are satisfied that the issues raised in the third party claim are not extraneous to the issues raised by Turf Masters in the lien action.

Leave to appeal is granted, the appeal is allowed and the judgment and order are set aside. We express no opinion as to whether the mechanics' lien action in this case is still

extant. The costs will be costs in the cause.

J.A.

Concurred in:

Hallett, J.A.

Matthews, J.A.