Date: 19981014 Docket: CA 145704

NOVA SCOTIA COURT OF APPEAL
Cite as: Hazmasters Environmental Equipment Inc. v. London Guarantee, 1998 NSCA 163

Chipman, Pugsley and Bateman, JJ.A.

BETWEEN:	
HAZMASTERS ENVIRONMENTAL EQUIPMENT INC., a body corporate	David P.S. Farrar and Erroll G. Treslan for the Appellant
Appellant	
- and -	
LONDON GUARANTEE and RIDEAU CONSTRUCTION INC., bodies corporate	John Kulik for the Respondents
Respondents	
	Appeal Heard: September 23, 1998
	Judgment Delivered: October 14, 1998

THE COURT: The appeal is allowed in part with costs as per reasons for judgment of Chipman, J.A.; Pugsley and Bateman, JJ.A., concurring.

CHIPMAN, J.A.:

This is an appeal from a decision of Nathanson, J. dismissing the appellant's actions against the respondents for the amount due the appellant from a sub-contractor of the respondent Rideau Construction Inc.

At the trial before Nathanson, J. counsel submitted an agreed statement of facts which was supplemented by **viva voce** evidence of James Barrie Nichols on behalf of the appellant (Hazmasters) and James Robert Sifton on behalf of the respondents.

In 1995 the respondent Rideau as general contractor entered into a contract with Her Majesty the Queen in Right of Canada for the installation of an air conditioning system at the Halifax International Airport. As the Airport was the property of the Federal Crown it was not subject to the **Mechanics' Lien Act**, R.S.N.S. 1989, c. 277: See **Canadian National Railway Company v. Corrosion Services Co. et al.** (1991), 81 D.L.R. (4th) 158 (N.S.S.C.A.D.). Rideau was required to furnish a Labour and Material Payment Bond which was issued by the respondent London Guarantee as Surety and Rideau as Principal. The Bond contained the following provision:

> (4) For the purpose of this Bond the liability of the Surety and the Principal to make payment to any claimant not having a contract directly with the Principal shall be limited to that amount which the Principal would have been obliged to pay to such claimant had the provisions of the applicable provincial or territorial legislation on lien or privileges been applicable to the work . . . Any such claimant shall be entitled to pursue a claim and to recover judgment hereunder subject to the terms and notification provisions of the Bond.
>
> (emphasis added)

Rideau engaged a sub-contractor, All Ports Insulation and Asbestos Services

Inc. to supply labour and materials. The value of this subcontract was $648,547.19. Between December, 1995 and March, 1996, Hazmasters supplied materials to All Ports, which were in turn supplied to Rideau under the terms of its subcontract with All Ports. As of March 11, 1996, All Ports owed Hazmasters $18,174.44 on account of the supply of these materials.

Prior to May 30, 1996, Rideau approved progress claims and extras from All Ports under the subcontract to a total value of $277,665.07 and paid on account thereof the sum of $249,898.57. In July of 1996, All Ports defaulted under the terms of the subcontract with Rideau by failing to complete work and by abandoning the job site. Prior to doing so, it submitted additional claims to Rideau totalling $45,206.06. No payments were made by Rideau to All Ports on account of these additional progress claims.

On July 5, 1996, Hazmasters submitted to London Guarantee a claim for payment under the terms of the Bond in the amount of $18,174.44 and notified Rideau of its intention to claim.

In his testimony on behalf of Hazmasters, Nichols said that upon learning that Hazmasters had filed a claim under the Bond, Jim Brennan of Rideau contacted Hazmasters on July 17 by telephone requesting that Hazmasters not send information to the bonding company, but rather send it direct to him and Rideau would pay the money from the All Ports account upon receipt of backup documentation for the claim, including invoices and delivery slips. Nichols testified that Brennan indicated that Rideau was not anxious to have the information going to the bonding company. He testified that Brennan stated that Rideau had about $136,000 to $150,000 of All Ports funds on hand at that time and that there would be no problem paying Hazmasters therefrom. Brennan then sent to

Hazmasters a fax in the following terms:

> Further to our conversation earlier today, Rideau Construction Inc. will issue payment direct to Hazmasters in the amount of $18,174.44 from Allports account. We will require a complete backup of these charges and upon receipt of that we will issue a cheque.

Mr. Brennan was not called to testify.

Nichols sent the requested information by courier on that same day. Receipt was confirmed by telephone, but Rideau did not make payment. It was shortly after this that All Ports abandoned the job site.

On or about July 26, 1996 Rideau was served by Revenue Canada with a requirement to pay pursuant to s. 227(10.1) of the **Income Tax Act** and on August 2, 1996 Rideau received a demand from the Director of Labour Standards for Nova Scotia pursuant to s. 85 of the **Labour Standards Code**. When Nichols called Rideau looking for the promised cheque, he was advised of these developments and was advised that Rideau had consulted counsel respecting priorities. Lawyers became involved and no funds were forthcoming.

Had the **Mechanics' Lien Act** been applicable, the theoretical lien fund that would have been available to sub-contractors of All Ports would have been the greater of the amount owed by Rideau to All Ports or 10% of the value of the work completed by All Ports at the time it abandoned the job site. The parties agree that the amount of the theoretical lien fund would have been less than the amount of the demands made by Revenue Canada and Labour Standards against Rideau. Indeed, it is clear that the claim of Revenue Canada exceeds such fund and therefore it is necessary only to make

reference to that claim hereafter.

Hazmasters then commenced actions against Rideau and London Guarantee claiming the unpaid monies **inter alia** on the basis of Rideau's promise to pay them and on the basis of the liability of London Guarantee under the Bond.

The two actions were tried before Nathanson, J. on December 15, 1997 and by decision dated December 30, 1997 they were dismissed. Nathanson, J. dealt with two issues. First, he held that Hazmasters had no cause of action in contract against Rideau. Second, he held that Hazmasters was not entitled to recover against London Guarantee as surety under the Bond because any amount which Rideau Construction would have been obliged to pay lien claimants, had the **Mechanics' Lien Act** been applicable to the work, was subject to the prior claims of Revenue Canada and the Minister of Labour. Hazmasters would not have been entitled to recover anything by way of lien proceedings.

On this appeal, Hazmasters raises the same two issues as were before Nathanson, J. and as an offshoot of the second, claims that it was not established either on the evidence or the agreed statement of facts that Revenue Canada or the Minister of Labour had, in fact, valid claims which would have taken priority to the appellant for any monies which would otherwise be available to satisfy liens under the **Mechanics' Lien Act**.

1. Whether there was a contract between Hazmasters and Rideau:

In resolving this issue adversely to Hazmasters, Nathanson, J. found that there was no intention to contract, no promise to pay and no valuable consideration. The argument before us centred on the meaning of the promise contained in the verbal discussions and confirmed in the fax of July 17, 1996 and on whether the promise

contained therein was supported by consideration. It cannot, in my opinion, be seriously suggested that, if there was a promise to pay which was supported by consideration, there was not a clear intent on the part of the parties to enter into a legal relationship. These were serious business communications arising out of an unfortunate shortage of funds due to a sub-contractor's default. As is stated in Cheshire Fifoot & Furmston's, **Law of Contract**, Thirteenth Edition at p. 118:

> In commercial agreements it will be presumed that the parties intended to create legal relations and make a contract . . .

There is nothing in the evidence to rebut the presumption here. See for example **Carlill v. Carbolic Smoke Ball Co.**, [1893] 1 Q.B. 256.

On its face, the faxed message of July 17 makes a promise to pay which is qualified only by the requirement that Hazmasters submit a complete backup of its charges as therein requested. It is not disputed that this was done by Hazmasters on the same day. The promise was to pay $18,174.44 "from All Ports account". The uncontradicted evidence of Nichols was that at the time of the telephone conference on July 17 Brennan advised that Rideau had sufficient funds on hand in the so-called All Ports account to pay the claim of Hazmasters. The shortfall only arose as a result of subsequent developments, including the demands of Revenue Canada and the Director of Labour Standards.

There was, in my opinion, an unequivocal promise to pay Hazmasters' claim from the All Ports account upon the submission of backup material, and the evidence establishes that such backup material was provided at a time when there was ample monies in the All Ports account to make payment as promised. Payment was not, in fact, made.

The only question that remains is whether there was consideration for the promise.

As **Chitty on Contracts**, Twenty-Seventh Edition, states at para. 3-004:

> The traditional definition of consideration concentrates on the requirement that "something of value" must be given and accordingly states that consideration is either some detriment to the promisee (in that he may give value) or some benefit to the promisor (in that he may receive value) . . .

Generally, it can be said that something done by a party which that party is legally obligated to do anyway is not consideration. Here, there was no legal obligation on Hazmasters to furnish the backup material in support of its claim to Rideau. On its face, the fax sets out the thing which must be done by (or here, a detriment to) Hazmasters, that is to say sending the backup of the charges totalling $18,174.44. This alone, when done, is sufficient consideration and it is unnecessary to consider whether the evidence shows a further consideration consisting of abstention on the part of Hazmasters to file a claim under the Bond.

This is a clear case where a simple promise was made to pay upon the performance by the promisee of an act, which was in fact performed. The result was the formation of a binding contract on the part of Rideau to pay $18,174.44.

2. <u>Liability of London Guarantee under the Bond</u>:

The conclusion that Hazmasters has established a claim against Rideau by direct contract does not determine the issue whether London Guarantee is also liable on the Bond. Counsel for London Guarantee takes a position that the establishment of the contractual claim does not immediately have an effect on the Bond claim. I agree and am

of the opinion that the Bond claim should be addressed.

The extent of the liability of London Guarantee as Surety of Rideau as Principal is provided for in the Bond as follows:

> NOW, THEREFORE, THE CONDITIONS OF THIS OBLIGATION are such that, if payment is promptly made to all Claimants who have performed labour or services or supplied material in connection with the Contract and any and all duly authorized modifications and extensions of the Contract that may hereafter be made, notice of which modifications and extensions to the Surety being hereby waived, then this obligation shall be void; otherwise it shall remain in full force and effect, subject, however, to the following conditions:
>
> (1) For the purpose of this bond, a Claimant is defined as one having a direct contract with the Principal or any Sub-Contractor of the Principal for labour, material or both, used or reasonably required for use in the performance of the Contract . . .
>
> (4) See Provision (4) quoted above.

In my view, the contract which resulted from Rideau's fax of July 17 and Hazmasters' action in response does not amount to a contract "for labour, material or both used or reasonably required for use in the performance of the Contract" within the meaning of the Bond. It is simply a contract to pay money upon the performance of the act of sending backup material supporting a claim of $18,124.44.

It remains to be determined whether Hazmasters has a claim against Rideau as Principal and hence London Guarantee as Surety in its capacity as a claimant having a direct contract with a sub-contractor (All Ports) of the Principal (Rideau) by virtue of the provisions (1) and (4) of the Bond set out above, limited to that amount which the Principal (Rideau) would have been obliged to pay Hazmasters had the provisions of the

Mechanics' Lien Act been applicable to the work. Nathanson, J. held that there was no such claim because the claim of Revenue Canada would take priority over a potential lien claimant such as Hazmasters to monies that would have been available had the **Mechanics' Lien Act** been applicable to the work. He referred to and relied on **Dias v. MacLean** (1993), 10 C.L.R. (2d) 178 at 183 (N.S.S.C.).

In **Dias v. MacLean, supra**, the headnote reads:

> The owners hired F Ltd. to construct a home at the contract price of $114,000. The home was substantially complete on December 31, 1992. The balance of the contract price, including the statutory holdback, after adding extras, was $23,072.65. Liens were filed against the property on January 12 and 13,1993. By that time, F Ltd. had ceased construction on the property. Revenue Canada made a third party demand upon the owners' solicitors claiming an interest in moneys the owners owed F Ltd. On March 10, 1993, F Ltd. made an assignment in bankruptcy. The owners subsequently paid $18,500.28 into court on an interpleader. This represented the balance of the contract price, including the statutory holdback, less the amount necessary to complete the home. The amount Revenue Canada claimed exceeded the amount the owners paid in. The lien claimants applied to determine entitlement to the funds in court as between themselves and Revenue Canada. The sum in dispute was a combination of statutory "holdback funds" and moneys in excess of the holdback, sometimes called "contract funds".
>
> **Held** - Revenue Canada had priority.
>
> It was clear from the plain meaning of s. 13(4) of the **Mechanics Lien Act** (N.S.) that the lien claimants were, with respect to ss. 224(1.2 and (1.3 of the **Income Tax Act**, "secured creditors" since they were holders of a security interest. It is settled law that Revenue Canada has priority over secured creditors. Accordingly, Revenue Canada was entitled to the funds paid into court in priority to the lien claimants.

The reasoning of Bateman, J. (as she then was) supporting this conclusion

appears at p. 183:

> Section 13(4) [**Mechanics Lien Act**] states:
>
> > The lien **shall be a charge upon the amount directed to be retained** by this Section **in favor of subcontractors** whose liens are derived under persons to whom such moneys so required to be retained are respectively payable.
>
> In my view the lien claimants are, as regards ss. 224(1.2 and 1.3) of the **Income Tax Act**, “secured creditors,” being holders of a security interest. That is the plain meaning of s. 13(4).
>
> The argument that the funds paid into court would never become “payable to” the tax debtor (Fundy), is initially attractive. Those funds are, however, under the contract, payable by the owners to Fundy and to no one else. The **Mechanics Lien Act** simply creates a statutory scheme to divert those funds to the lien claimants in certain circumstances. Although diverted through the operation of the Act, the funds are nevertheless payable (to the lien claimants) on behalf of Fundy. The Act simply operates to suspend the movement of funds to ensure the security interest of the lien claimants is satisfied.

I agree with this reasoning which led Nathanson, J. to conclude that if the **Mechanics’ Lien Act** applied to this project, the theoretical lien fund would have been subject to the prior claim of Revenue Canada in its entirety, leaving nothing for Hazmasters as a theoretical lien claimant.

Paragraph (4) of the Bond provides that the liability of the Surety and the Principal to make payment to a claimant not having a contract directly with the Principal, (here Hazmasters):

> . . . shall be limited to that amount which the Principal would have been obliged to pay such claimant had the provisions of the applicable . . . legislation on lien or privileges been

applicable to the work.

These words are clear and unambiguous. The matter is approached just as if the **Mechanics' Lien Act** applied. If it did, the situation would be exactly as it was in **Dias v. MacLean, supra**.

Hazmasters contends that the only application which the **Mechanics' Lien Act** has with respect to the Bond is for the purpose of ascertaining the amount payable thereunder. Hazmasters says London Guarantee does not owe any money to All Ports. Accordingly, the money which Hazmasters is claiming is based upon the terms of the Bond rather than on any actual holdback, or money owing to All Ports. In other words, the actual money which Hazmasters is claiming is not owed to All Ports, as Hazmasters claim is under the Bond against London Guarantee.

It is therefore submitted that any claim by Revenue Canada does not serve to displace the contractual rights accruing to claimants such as Hazmasters. Reference is made to s. 224(1.2) and s. 224(1.3) of the **Income Tax Act**.

> 224(1.2) **Idem** - Notwithstanding any other provision of this Act, the Bankruptcy and Insolvency Act, any other enactment of Canada, any enactment of a province or any law, but subject to subsections 69(1) and 69.1(1) of the Bankruptcy and Insolvency Act and section 11.4 of the Companies' Creditors Arrangement Act, where the Minister has knowledge or suspects that a particular person is, or will become within one year, liable to make a payment
>
> (a) **to another person (in this subsection referred to as the "tax debtor") who is liable to pay an amount assessed under subsection 227(10.01) or a similar provision,** or
>
> (b) **to a secured creditor who has a right to receive the payment that, but for a security interest in favour of**

> **the secured creditor, would be payable to the tax debtor,**

> the Minister may in writing require the particular person to pay forthwith, where the moneys are immediately payable, and in any other case as and when the moneys become payable, the moneys otherwise payable to the tax debtor or the secured creditor in whole or in part to the Receiver General on account of the tax debtor's liability under subsection 227(10.1) or the similar provision, and on receipt of that requirement by the particular person, the amount of those moneys that is so required to be paid to the Receiver General shall, notwithstanding any security interest in those moneys, become the property of Her majesty to the extent of that liability as assessed by the Minister and shall be paid to the Receiver General in priority to any such security interest.

> 1.3 **Definitions** - In subsection (1.2),

> **"Secured creditor"** means a person who has a security interest in the property of another person or who acts for or on behalf of that person with respect to the security interest and includes a trustee appointed under a trust deed relating to a security interest, a receiver or receiver-manager appointed by a secured creditor or by a court on the application of a secured creditor, a sequestrator, or any other person performing a similar function;

> **"Security interest"** means any interest in property that secures payment or peformance of an obligation and includes an interest created by or arising out of a debenture, mortgage, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for;

> **"Similar provision"** means a provision, similar to subsection 227(10.1) of any Act of a province that imposes a tax similar to the tax imposed under this Act, where the province has entered into an agreement with the Minister of Finance for the collection of the taxes payable to the province under that Act.

Hazmasters says that the monies claimed from London Guarantee would not be payable to "another person who is liable to pay an amount assessed under ss. 227

(10.1)" or "to a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor". No monies are payable by London Guarantee to either All Ports or Rideau which Revenue Canada can therefore claim. Whatever priority Revenue Canada has is with respect to money actually payable to the tax debtor or a secured creditor. Hazmasters contends that **Dias v. MacLean, supra**, is therefore inapplicable. It further buttresses its claim by reference to two cases: **Harris Steel Ltd. et al. v. Alta Surety Co.** (1993), 119 N.S.R. (2d) 61 (N.S.C.A.) and **Arnoldin Construction & Forms Ltd. v. Alta Surety Co. et al** (1995), 137 N.S.R. (2d) 281 (N.S.C.A.), which cases it says support the conclusion that such a Bond should be construed favourably to a claimant such as Hazmasters.

With respect, these arguments of Hazmasters are flawed.

I reject Hazmasters contention that the only application which the **Mechanics' Lien Act** has with respect to the Bond is for the purpose of ascertaining the amount payable thereunder. Clause (4) does not simply make the **Mechanics' Lien Act** applicable to the Bond. It assumes it to be applicable to the work. All the consequences of such an assumption, including competing priorities should inevitably follow

Moreover, the arguments of Hazmasters overlook the fact that London Guarantee is not a Principal debtor. It is a Surety for Rideau only. To reach London Guarantee under the Bond Hazmasters must show that, on the footing that the **Mechanics'**

Lien Act applies to the work, Rideau would be liable to it as general contractor to a lien claimant claiming through a sub-contractor. Only then would London Guarantee be liable and only then as Rideau's Surety. The only basis for liability of Rideau is the theoretical lien fund and, were such to exist, **Dias v. MacLean, supra**, is authority for the fact that Hazmasters would get nothing because of the priority of Revenue Canada.

Indeed if this argument were to prevail, London Guarantee as Surety would have recourse against Rideau as Principal and the latter being obliged to pay what would otherwise be the theoretical lien fund to Revenue Canada could then be faced with further liability to London Guarantee respecting the same theoretical fund. The result would be double jeopardy to Rideau as contractor and Principal, a result surely not contemplated under the terms of the Bond.

The claim on the Bond must fail. I would brush aside the argument that there is no proof on the record that All Ports owed Revenue Canada the sum of $136,446.89 as claimed in the demand. The agreed statement of facts can only be interpreted to mean that the parties considered this to be a valid demand. The point was first raised in this Court and as counsel put it, "for what it is worth". With respect, it is not worth anything. It appears to be an afterthought, and cannot prevail on the face of the clear intention of the parties.

I would allow the appeal in part. The judgment of Nathanson, J. should be

set aside except with respect to the dismissal of the action against London Guarantee. The appellant should recover from Rideau Construction Inc. the sum of $18,174.44, together with prejudgment interest at the rate of 5%. As to costs, both respondents were represented by the same counsel at trial and in this Court. The trial judge awarded costs of $2,500.00, plus disbursements. I would award Hazmasters costs of $2,500.00, plus disbursements against Rideau for both the trial and the appeal. London should neither recover nor pay any costs.

Chipman, J.A.

Concurred in:

Pugsley, J.A.

Bateman, J.A.