C.A. No. 104447

NOVA SCOTIA COURT OF APPEAL

Cite as: Glasswall Ltd. v. 2009861 Nova Scotia Ltd., 1994 NSCA 187
Freeman, Jones and Pugsley, JJ.A.

BETWEEN:

GLASSWALL LIMITED, A.E.A.D. MANAGEMENT LIMITED (McConnell Construction Services), METRO FOUNDATION SPECIALISTS LIMITED, and DAVID VAUGHAN, carrying on business as Action Plumbing & Heating	)	Michael J. O'Hara for the Appellants
Appellants	)	
- and -	)	
2009861 NOVA SCOTIA LIMITED and INDEPENDENT CAPITAL INCORPORATED	)	A. James Musgrave for the Respondents
Respondents	)	
	)	Appeal Heard: September 27, 1994
	)	Judgment Delivered:

THE COURT: The Appeal is dismissed with costs per reasons for judgment of Freeman, J.A.; Jones and Pugsley, JJ.A. concurring.

FREEMAN, J.A.:

The issue in this appeal is whether a collateral security mortgage recorded out of order just prior to the deed and fully advanced before work was performed on the property can have priority over subsequent mechanics' liens registered pursuant to the **Mechanics' Lien Act** , R.S.N.S. 1989, c. 277.

The mortgage between the respondent Independent Capital Corporation as mortgagee and the respondent 2009861 Nova Scotia Limited as collateral mortgagor was for $185,000. The money was advanced to the mortgagor 2083763 Nova Scotia Limited, described as a sister company to 2009861 with the same principals. It was secured by property of 2083763 on North Street in Halifax together with the four unit commercial property of 2009861 on Main Street in Dartmouth as collateral. 2083763 advanced $85,000 of the mortgage funds to 2009861 toward the purchase of the Main Street property, that company's only asset.

A further $55,000 mortgage from Independent to 2009861 is not in issue, nor is the first mortgage of $565,000 from Royal Trust, with respect to which the $185,000 mortgage was postponed. Another mortgage for $277,500 from Independent to 2009861 was paid out from the Royal Trust mortgage and released.

The deed conveying the Main Street property to 2009861 was dated October 8, 1991 and recorded October 10, 1991 in Book 5144 at Page 1179. The mortgage was also dated October 8, 1991; it was recorded October 9, 1991, in Book 5144 at Page 524. The appellants' position is that the mortgage must be considered unregistered because it was registered out of order. The relevant provision of the **Registry Act** is s. 18 which provides:

> 18 Every instrument shall, as against any person claiming for valuable consideration and without notice under any subsequent instrument affecting the title to the same land, be ineffective unless the instrument is

> registered in the manner provided by this Act before the registering of such subsequent instrument.

2009861 carried out extensive construction at the Main Street property in 1992. The appellants are four of the twelve unpaid lien claimants whose claims were proved before Justice Stewart of the Supreme Court of Nova Scotia in February, 1994 in the total amount of $245,000. The appellants' liens are in the following amounts: Glasswall Limited, $10,603.70; A.E.A.D. Management Limited (McConnell Construction Services), $73,749.89; Metro Foundation Specialists Limited, $62,175.58 and David Vaughan, carrying on business as Action Plumbing and Heating, $6,552.68. It appears that the liens will not be paid if the mortgage has priority.

This appeal is from Justice Stewart's finding that the mortgage is a valid charge prior to the liens. The grounds of appeal are (1) that the trial judge erred in finding that a prior mortgage need not be registered and that a registered lienholder does not have priority over a prior unregistered mortgage; (2) alternatively, that she erred in finding the mortgage was of a kind to be afforded priority under s. 8(3) of the **Mechanics' Lien Act**, and (3) in the further alternative that she erred in finding that Independent did not consent to the work of the lienholders for the purposes of s. 8(3).

To dispose first of the second ground, in which the appellant argues that a collateral mortgage should not be protected against liens because the funds were not used on the subject property, the authority followed by Justice Stewart appears conclusive. She found there was nothing in s. 8(3) of the **Mechanics' Lien Act** to suggest that a collateral mortgage cannot be a prior mortgage, citing the judgment of the late Chief Justice Laskin in **Dorbern Investments Limited v. The Provincial Bank of Canada,** [1981] 1 S.C.R. 459 at p. 466:

> I do not think that any supportable distinction can be drawn between a collateral mortgage which, as here,

> was given as additional security for a previous advance made to finance construction on the land on which a lien is claimed and a collateral mortgage given as additional security for an advance not related to construction on the particular land. It was pointed out by counsel for the respondent and conceded by counsel for the appellant the **Mechanics' Lien Act** does not purport to control the destination of advances made on security of land on which a lien arises. They may be put to uses other than for construction and improvement of the mortgaged land, save as the mortgage itself, through the requirement of progress certificates to support further advances as stipulated in the mortgage, provides some control. In the present case, therefore, I find no basis upon which the collateral mortgage, by reason only of being collateral, may be subordinated to an unregistered or later registered lien claim of which the mortgagee had no previous notice.

In considering whether the mortgage in question is a prior mortgage within the meaning of s. 8 of the **Mechanics' Lien Act,** Justice Stewart found:

> A "prior mortgage" is usually a "lump sum mortgage fully advanced before commencement of work on the land" (**Riviera, The Home of Siding, et al v. Chalker Properties Limited** (1983), 55 N.S.R. (2d) 424). It is a mortgage that exists, in fact, before the lien arises (**Cook v. Belshaw** (1893), 23 O.R. 545, (Ch. Div); **Marshall Brick Company v. York Farmers Colonization Company** (1916), 54 S.C.R. 569; **Cook v. Koldoffsky** (1916), 35 O.L.R. 555). I am satisfied, despite the plaintiff's argument that the money was not advanced under the mortgage, that I am dealing with a prior mortgage or other charge on the subject property, pursuant to s. 8(3) of the **Mechanics' Lien Act,** as distinct from a subsequent mortgage and s. 15(1).
>
> The issue, simply put, is: does a prior mortgage have to be registered under the **Mechanics' Lien Act**?

The following provisions of the **Mechanics' Lien Act** have relevance to this consideration:

> 2(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
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> (i) upon whose credit,

(ii) on whose behalf,

(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.

. . .

8 (1) The lien shall attach upon the estate or interest of the owner in the property mentioned in Section 6.

(2) Where the estate or interest upon which the lien attaches is leasehold, the fee simple may also, with the consent of the owner thereof, be subject to the lien, provided that such consent is testified by the signature of the owner upon the claim of the lien at the time of the registering thereof, verified by affidavit.

(3) Where the land upon or in respect of which any work or service is performed, or materials are placed or furnished to be used, is encumbered by a prior mortgage or other charge and

(a) the selling price of the land is increased by the work or service, or by the furnishing or placing of the materials; and

(b) the mortgagee consents to the performance of such work or service or the furnishing, or placing of such materials.

the lien shall attach upon such increased value in priority to the mortgage or other charge.

. . .

(9) Such lien, upon registration, as in this Act provided, shall attach and take effect from the date of the registration as against subsequent purchasers, mortgagees or other encumbrancers.

. . .

> 15 (1) The lien shall have priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after the lien arises, and over all payments or advances made on account of any conveyance or mortgage after notice in writing of the lien to the person making such payments or after registration of a claim for such lien as hereinafter provided.
>
> (2) Where there is an agreement for the purchase of land, and the purchase money or part thereof is unpaid, and no conveyance has been made to the purchaser, he shall, for the purposes of this act, be deemed a mortgagor and the seller a mortgagee.
>
> . . .
>
> 23(1) Where the claim for lien is so registered the person entitled to the lien shall be deemed the purchase *pro tanto* and within the provisions of the *Registry Act,* but, except as in this Act provided, the *Registry Act* shall not apply to any lien arising under this Act.
>
> (2) A mortgage lender who has registered his mortgage obtains priority with respect to funds advanced in good faith, over any lien then existing for which a claim for lien had not been filed at the time the funds are paid to the owner.

These provisions have proven somewhat confusing, particularly with respect to their interaction with the more familiar provisions of the **Registry Act.** Even though a mortgage and a registered lien are "instruments" within the meaning of s. 18 of the **Registry Act**, it is clear from the scheme of the **Mechanics' Lien Act** and particularly s. 21 that the rights of lienholders and those with competing rights to the lands are governed by the **Mechanics' Lien Act** and only secondarily by the principles of the **Registry Act**.

The late Judge O' Hearn of the County Court of District Number One, whose mechanics' liens decisions are well known, commented on the interaction of the two acts in **Riviera, the Home of Siding et al. v. Chalker Properties Limited** (1983), 55 N.S.R. (2d) 424 at p. 432:

> After the lien arises (i.e., from the time the services or materials have commenced to be furnished) the lien has priority over all judgments, executions, assignments, attachments, garnishments and receiving orders, recovered, issued or made thereafter by virtue of the first part of s. 14(1) (Now s. 15(1)). This is without reference to the *Registry Act*. When the *Registry Act* ss. 18ff comes into play, the situation becomes more complicated, but it is to be distinguished from the situation of a mortgage, because it has been held that a judgment, etc., is like a drag-net that catches only what really belongs to the judgment debtor. The question is fully discussed in *Silver v. Seeton*, supra ((1977), 74 D.L.R. (3d) 212). A mortgage, on the other hand, is like any other conveyance of land, which by prior registration under the *Registry Act* can defeat unregistered titles that are otherwise valid. As above noted, a lien may gain priority over advances under a mortgage, made subsequent to notice in writing of the lien to the person making the advances or after registration of the claim of lien, by virtue of the second part of s. 14(1) (now s. 15(1). This subsection also provides for priority over payments on a conveyance through the employment of similar means. Section 7 (now s. 8) provides for the lien *attaching* upon the estate or interest of the owner in various circumstances, and in subs. (3) gives a limited priority over a prior mortgage, and these rights appear to be quite independent of registration, although possibly defeasible by a conveyance of the owner's estate or interest that is registered. Otherwise, the priorities given by the *Mechanics Lien Act* depend upon registration and the affects of ss. 22 and 8 (now ss. 23 and 9).

A lien exists from the time it "arises" when work is done or goods are furnished upon a property. But it is enforceable under the **Mechanics' Lien Act**, that is, it "attaches" to the land, only after it has been registered in accordance with the **Registry Act**. If it is never recorded it is never enforceable. Once it is recorded under the **Registry Act** it attaches and the **Mechanics' Lien Act** governs.

A determination of priorities must therefore take into account the fact that typically a lien is in existence for a significant period of time before it is recorded. It has priority over some encumbrances, principally subsequent purchasers, mortgagees "or other encumbrances" pursuant to s. 9, only from the date it is recorded. Over others,

particularly judgments and the various remedial orders mentioned in s. 15(1), recording has a retroactive effect, giving the lien priority from the date it arises.

Under s. 8(1) a lien, like a judgment, attaches only to the actual estate or interest of the owner. It cannot attach to interests - mortgages or other charges - which were conveyed away by deeds, mortgages or other instruments, recorded or unrecorded, before the registration of the lien. Once the estate or interest passes out of the owner's hands, it is beyond the reach of a lienholder claiming through the owner. The limited priority of a lien with respect to a prior mortgage provided by s. 8(3) requires the consent of the mortgagee and then only attaches to the additional value created by the work or materials of the lienholder. There is a narrow distinction between "consent" in s. 8(3) and "request" in s. 2(d) which, with the addition of one of the elements in s. 2(d) (i) to (iv), would promote a prior mortgagee to an "owner". Under s. 2(d)(iii) it is only necessary that a request by a person with an estate or interest in the property, which would clearly include a prior mortgagee's interest, be coupled with the related concept of "privity and consent" in order for the interest to be lienable against the mortgagee as "owner". In view of the limited ambit of s. 8(3), it is of interest that the legislature did not consider it necessary to include an equivalent of s. 8(3) in the **Act** when it was amended in 1899 by the addition of the equivalent of the present s. 9, as Judge O' Hearn noted out in **Riviera**.

An unpaid vendor's lien, typically unrecorded, is equated with a mortgage pursuant to s. 15(2) A judgment or execution or other remedial property right mentioned in s. 15(1), by contrast, does not diminish the owner's estate or interest in the land, although it may materially affect its value. A lien and, for example, a judgment may attach to the same property; their priorities are not determined by the order of registration but by s. 15 of the **Mechanics' Lien Act**.

What may be less clear is whether a recorded lien attaches to the estate or interest of the owner pursuant to s. 8(1) from the date of its registration or from the time it arises. It seems obvious that registration can only bind the estate or interest that the owner enjoys at the time of registration; it cannot attach to an interest or estate the owner has conveyed away prior to the recording of the lien. Therefore a lien which arose with respect to the whole property can attach, upon registration, only against the interest the owner has retained. It then follows from ss. 8(3) and 15, with respect to the interest or estate upon which it attaches at registration, the lien is effective from the time it arose.

It should be noted that the mechanics' lien statutes of all other provinces except Manitoba have been amended to require that a mortgage or other charge be recorded to prevail against a lien. Section 23(2) was a 1981 amendment to the Nova Scotia **Act** and gives a mortgage lender priority over existing but unregistered liens "with respect to funds advanced in good faith, over any lien then existing for which a claim for lien has been filed at the time the funds are paid to the owner." It does not, however, go as far as the other provinces in requiring that a mortgage be registered in order to have priority. The language of s. 23(2) makes it apparent that the mortgage lender would have priority for monies advanced in good faith before the recording of the mortgage, even if the lien is registered before the mortgage, that is, if the lien is registered between the advancing of the funds and the recording of the mortgage. The priority created by s. 23(2) of course flows from the **Mechanics' Lien Act**, not from the **Registry Act.**

Justice Stewart, therefore concluded that a prior mortgage does not have to be registered under the **Mechanics' Lien Act** in Nova Scotia. In interpreting s. 8(3) of the **Act** Justice Stewart considered Macklem and Bristow, "**Construction Builders and Mechanics Liens in Canada**" (6th), 1990 p. 5-1, where the authors point out that

Nova Scotia and Manitoba are the only provinces whose Mechanics' Lien Acts do not require a prior mortgage to be registered. She distinguished the comment of Judge O' Hearn in **Riviera v. Chalker (supra)** that " . . . an unregistered mortgage may always be defeated by the registration in good faith of a lien under the **Mechanics' Lien Act**," finding that he was considering not a prior but a subsequent mortgage. The judgment of Boyd C. in **Cook v. Belshaw** (1892), 23 O.R. 545 has been cited for more than a century as authority for the proposition stated in the unanimous judgment of the Supreme Court of Canada in **Marshall Brick Company v. York Farmers Colonization Company** (1916) 54 S.C.R. 569 as follows:

> . . . The priority of this "charge" on the land does not depend on registration but upon its existence as a charge before the lien arose.

Justice Stewart accepted that as the present law in Nova Scotia, noting that the **Marshall Brick** decision had been cited with approval by Hart J.A. of this court in **Burns v. Zelco Enterprises Limited** (1983), 58 N.S.R. 2d 387 at p. 392.

In my view Justice Stewart committed no error of law when she concluded:

> A prior mortgage need not be registered and a registered lienholder does not have priority over a prior unregistered mortgage.

The parties accepted that the mortgage was an unregistered instrument on the authority of **Royal Bank of Canada v. Madill** (1981), 43 N.S.R. (2) 574. In **Madill** Coffin J.A. held that a debenture to a bank purporting to create a fixed and specific charge on "any other real property hereafter acquired by the company" could not affect the interest of a bona fide purchaser for value without notice of after acquired property. The debenture had been registered in three registries in February and April of 1974. The deed was not recorded until October of that year. He stated:

> It is conceivable that a careful searcher could examine the records in the Registry of Deeds and never see the mortgage in question. . . .
>
> If the person searching the title found this deed of October, 1974, he would come forward and find no reference to the Royal Bank debenture. If he were searching backwards, he would check to see when the grantors to Datone Holdings obtained the property and from whom. He could make a careful search of the records and never see the debenture.

It is therefore a question of fact dependent on the circumstances of each case whether a careful searcher, as in **Madill**, could make a "careful search of the records and never see the debenture." In the present case a searcher examining the grantor's index could hardly miss the reference to the mortgage recorded the day before the deed. It would be as obvious in the grantor's index as a mortgage recorded on the same day as the deed, or the day after, which would clearly be binding on anyone claiming title through 2009861.

Once the index entry was noted, a prudent searcher would not fail to follow up and examine a transaction so close to the date the deed was recorded. While there has been a failure to abide by the strict requirements of the order of registration which requires that an instrument be recorded before another to acquire priority under s. 18 of the **Registry Act,** a person seeking to rely on this provision could not claim to be unaware of the mortgage so as to be a "bona fide purchaser for value without notice." In my view the mortgage, recorded a day early, nevertheless gave the claimants notice of the prior encumbrance against the property. The postponement of the mortgage in favour of the Royal Trust mortgage might have given further notice of its existence in May of 1982, before the work giving rise to the liens was performed, but, unless 2009683 was a party to the postponement a careful searcher would not likely have seen it.

Madill was dealing with the priorities of competing instruments pursuant to s. 18 of the **Registry Act**. In the present case the priorities flow from the **Mechanics' Lien Act**; it is not clear from the references to registration in s. 23 (2) that registration out of order with the deed would deprive a mortgage lender of priority over the lienholder. It is not necessary to decide that question because of the conclusion that a prior mortgage or charge referred to in s. 8 need not be recorded.

The mortgage having been found to be a prior charge, the remaining issue raised by the grounds of appeal is whether the liens attach to the increased value of the property as provided in s. 8(3) **Mechanics' Lien Act.** There is no issue between the parties that the work and materials provided by the lien claimants increased the value of the property in an amount equivalent to their liens. The remaining question is whether the mortgagee consented to the work within the meaning of s. 8(3)(b).

The meaning of "consent" was considered by the late Judge McLellan of the County Court for District Number Six at the trial of **Burns v. Zelco** (1982), 54 N.S.R. (2d) 573. He concluded after a review of authorities that "'consent' is not a term of art but is to bear its ordinary meaning." He found that "direct dealing" between the mortgagee and the lienholder was not necessary to a finding of consent on the authority of the decision of Coffin J.A. in **Saccary v. Toronto Dominion Bank and Jackson** (1978), 23 N.S.R. (2d) 181, a proposition borne out by the distinction between "request" and "consent" referred to above. Justice Stewart considered the authorities and in my view committed no error in arriving at her conclusion:

> A review of the evidence, as a whole, does not justify the conclusion that the intervenor consented to the performance of these works to the exclusion of its priority over the mechanics liens. This is unfortunate for the plaintiffs, given that the property at Civic Number 168 Main Street, Dartmouth is the sole asset of the defendant company. However, the provision in the Nova Scotia version of the **Mechanics' Lien Act** makes such a conclusion unavoidable.

Whether or not the mortgagee has consented is a question of fact. There is no palpable and overriding error on the part of Justice Stewart which would justify an appeal court in interfering with this finding.

I would dismiss the appeal with costs which I would fix at $2,500 plus disbursements.

J.A.

Concurred in: Jones, J.A.

Pugsley, J.A.