N O V A S C O T I A
COUNTY OF HALIFAX
To wit:

C.H. 08755, 09331
09560, 10612
09003

I N T H E C O U N T Y C O U R T
OF DISTRICT NUMBER ONE

BETWEEN:

E. S. MARTIN CONSTRUCTION LIMITED, a body corporate,

Plaintiff

- and -

PENHORN MALL LIMITED, a body corporate, BURNAC REALTY INVESTORS LIMITED, a body corporate and JOSEPH BURNETT,

Defendants

Frederick E. Clark, Esq., for Ponderosa Landscaping Limited, plaintiff.
Arthur G. H. Fordham, Esq., for Burnac Realty Investors Limited and Joseph Burnett, defendants.

1976, February 5, O Hearn, J.C.C.:- This is a motion to amend two statements of claim, delivered in separate actions that have been consolidated with this action under the *Mechanics Lien Act*, R.S.N.S. 1967 c. 178. The history of the matter has been dealt with rather fully by Mr. Justice Coffin in *Burnac Realty Investors Limited v. E. S. Martin Construction Limited et al.* (1975), 12 N.S.R. (2d) 331, 6 A.P.R. 331. With its interlocatory notice of application, Ponderosa Landscaping Limited has submitted a draft order which, if granted, would amend each statement of claim so as to add Burnac Realty Investors Limited and Joseph Burnett as defendants. This seems to be the only place where the nature of the desired amendment is specified. The purpose appears to be to bring the statements of claim in the two Ponderosa actions in accord with the statement of the parties in the action CH 09003, with which the other actions have been consolidated. The motion appears innocuous, at first sight, although it raises questions as to the proper or the

preferable procedure to be adopted in consolidated actions with many plaintiffs, but it is opposed by Mr. Fordham on behalf of the intended defendants on the ground that to permit the amendment would be to deprive the defendants of a defence arising from the limitation period for registering a lien and commencing an action under the Act.

(I am using the word 'action' because it is the word used in the *Mechanics Lien Act*, but chiefly because it is more convenient then the equivalent expression, 'proceeding commenced by originating notice (action)', in the *Civil Procedure Rules*.)

Mr. Fordham cited *Bank of Montreal v. Haffner* (1884), 10 O.A.R. 592, reversing 3 O.R. 183, (affirmed *sub nom., Bank of Montreal v. Worswick* Cass.S.C. 526) for the principle that the period of limitation applies to parties who are not 'owners' under the Act, and *Larkin v. Larkin* (1900), 32 O.R. 80, C.A., and *Mabro v. Eagle, Star & British Dominions Insurance Co., Ltd.*, [1932] 1 K.B. 485, [1932] All.E.R. 411, 101 L.J.K.B 405, 146 L.T. 433 C.A. Strictly speaking of course, permitting a plaintiff to add party defendants does not, in itself, defeat any statute of limitations: as Scrutton, L.J. pointed out in the last mentioned case, it is always possible to plead the defence; the court, however, will not permit the amendment where it is clear that the defence exists, because to allow the action to go forward in such circumstances would encourage needless proceedings and expense. The principle was applied by McLellan, J.C.C., in District Number Four, in *Saltzman v. East Side Holding and Brokerage Company Limited* 1970 C.C.L. #896, which was affirmed by our Appeal Division in 2 N.S.R. (2d) 265 (1970). There are similar decisions in Ontario and Manitoba: see Macklem and Bristow, *Mechanics' Liens in Canada* (3rd ed., Carswell Toronto 1972) p.333.

Since *Saltzman's Case* however, the *Civil Procedure Rules* have come into affect as of 1972, March 1, and rule 15.02 was

invoked by the Appeal Division in the instant case (in action CH 09003) to give relief, as it was designed, to do from one of the more rigid and harsher applications of the principle. That is, as the legal profession is aware, cases arise where a plaintiff sues a defendant and through ignorance or mistake misnames him, or sues him in a mistaken capacity. There are analogous situations arising, for example, where the title to land in dispute or against which a lien is claimed is obscure or in a complex state. Such a case was *Acme Lathing Company Limited et al. v. Centennial Properties Limited et al* (1970), 3 N.S.R. (2d) 723, which came before me first as a mechanics lien and had to be referred to the Trial Division of the Supreme Court, because of failure to name a party due to the confused state of the title. It was later tried by Gillis, J.

In the present case, as noted, the Appeal Division upheld my brother Anderson, in his order of May 15, 1975 (which on the record is improperly dated May 30, 1975) by which he allowed the plaintiff in the CH 09003 to amend its statement of claim to implead the predecessor of Burnac Realty Investors Limited as 'owner'. The history of the pleadings is of some importance in assessing the effect of the decision of the Appeal Division. It is as follows.

E. S. Martin Construction Limited filed its lien against Penhorn Mall Limited in 1974, on November 1. On December 17 that plaintiff issued a statement of claim against Penhorn Mall Limited and C.N.A. Investors, Inc. as defendants, and filed a certificate of *lis pendens* on the same date. In 1975, on February 14, before any defence had been filed, E.S. Martin Construction Limited filed an amended statement of claim, which added Joseph Burnett as a party and added a claim against C.N.A. Investors, Inc. and Joseph Burnett for damages for breach of contract. Rule 15.01 permits a party to amend any document filed by him in a proceeding, other than an order, once without

the leave of the court, if the amendment is made at any time not later than twenty days from the date the pleadings are deemed to be closed, or five days before the hearing under an originating notice.

Penhorn Mall Limited filed a defence on March 20, and C.N.A. Investors, Inc. and Burnett filed a combined defence on March 26. On May 15 my brother Anderson granted an order, allowing the statement of claim to be amended to plead C.N.A. Investors, Inc. to be 'owner', which order was sustained by the Appeal Division on July 24. Meanwhile on May 29 an order was taken out changing the title and the name of C.N.A. Investors, Inc. to Burnac Realty Investors Limited, and on that date a further amended statement of claim was filed, which expanded the claims of the plaintiff considerably. On June 3 an amended defence for Burnac and Burnett was filed, in which for the first time it was pleaded that the liens had absolutely ceased to exist against Burnac and Burnett as 'owners', as no claim was made against either, as owner, until more than thirty days had elapsed after registration of the claim.

On October 10, last, the first consolidation order was made, in which three actions, not including the Ponderosa actions, were consolidated under CH 09003. In 1976, on January 28, there was a pre-trial conference in which a further order to consolidate so as to include the Ponderosa action was discussed, as well as Mr. Clark's motion now before me. These were deferred to the date set for trial, February 2, so that parties not present at the pre-trial conference could be heard if they attended; none did. On the day set for trial, February 2, the second consolidation order was granted and Mr. Clark then moved to amend the statements of claim in CH 09561 and CH 10612. The point was reserved and the trial was adjourned without day at the request of the parties, as there is some prospect of a settlement.

The decision of the Appeal Division was based on Civil Procedure Rule 15.02, which provides as follows:

> **Amendments by the court**
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> 15.02. (1) The court may grant an amendment under rule 15.01 at any time, in such manner, and on such terms as it thinks just. [E. 20/5(1)]
>
> (2) Notwithstanding the expiry of any relevant period of limitation, the court may allow an amendment under paragraph (1),
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> (a) to correct the name of a party, notwithstanding it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake was genuine and not misleading or such as to cause any reasonable doubt as to identity of the party intending to bring or oppose the proceeding; [E. 20/5(3)]
>
> (b) to alter the capacity in which a party brings or opposes a proceeding if the capacity, after the amendment is made, is one in which at the date of issue of the originating notice, third party notice, or the making of the counterclaim, the party might have brought or opposed the proceeding. [E. 20/5(4)]
>
> (3) The court may allow an amendment under paragraph (2) notwithstanding the effect of the amendment will be to add or substitute a new cause of action, if the new cause of action arises out of the same or substantially the same facts as the original cause of action. [E. 20/5(5)]

As pointed out by the Appeal Division, rule 15.02 is comparable to English O.20, r.5: our rule obviously derives from the English rule and deals with the same problem by giving the court powers of much the same sort in very similar language. The principle involved is clearly that, since the defendant would not have had the benefit of barring the action by invoking the expiry of a period of limitation, had the plaintiff not made an initial mistake as to the name, identity or capacity of the defendant, or in his own capacity, or in the precise cause of action, the court in granting an amendment is not defeating any period of limitation but is merely correcting an error. This reading of the rule seems to coincide with that of Coffin, J.A. and Macdonald, J.A.

on the appeal in the present case and also with the views expressed in the English cases noted in their decisions.

Without the final consolidation order however, I do not think the motion could succeed. I see nothing in rule 15.01(2) and (3) that would permit me to allow parties to be added, except by way of substitution and that is not what is being asked. Does the last consolidation order make a difference? I think it does, even if its effect is merely to make explicit the class nature of mechanics lien actions as enacted by s.33(3), '...any action brought by a lien holder shall be taken to be brought on behalf of all other lien holders on the property in question', a very common provision in the Acts.

There is very little case law on the effects of a consolidation order, either in this class of actions or in actions generally, but the effect is undoubtedly to constitute one single action out of the separate actions that have been consolidated, so that all the plaintiffs become plaintiffs in the consolidated action (whether named in the title or not), and all the defendants become defendants (whether so named or not). The English practice would impose a strict requirement of a single solicitor for the plaintiffs and a single statement of claim. Where one party is given the conduct of the action, undoubtedly his address for service becomes the address for service of the plaintiffs in the action, and his solicitor has the out-of-court function of channeling the proceedings but this does not prevent separate counsel appearing for the different plaintiffs as their interest may appear, although this is discouraged by the costing system unless there is some substantial reason for the party to be represented by counsel separately.

In mechanics-lien cases, since actions are commenced by filing and issuing a statement of claim and since this is now in effect the practice generally in Nova Scotia (although concealed by the technical requirement that the originating

document be an originating notice) it is not practicable to require a single statement of claim for all the plaintiffs. How then should a plaintiff whose action is consolidated proceed to plead his claim?—presumably he has already issued a statement of claim. If not served, it should be served in the consolidated action, probably with the title amended. If served, he can rest upon it as it will be a document in the consolidated action. If he wishes to amend however, he should be prepared to amend the title of his statement of claim to conform to the title in the consolidated action, as well as to amend it in the substantial sense desired.

Another and slightly different approach, might be to direct the plaintiff to file and deliver a statement of claim in the consolidated action, but this would be subject, of course, to any defeasance that might arise from pleading new matter or impleading new defendants not to be found within the original statement of claim in the principal action.

The proper procedure for lien claimants who are not plaintiffs in actions that are consolidated, or who are not made parties, is that indicated by s.33(5): 'Every such lien holder who is not a party to the action shall file his claim, verified by affidavit'.

In the instant case, I think the applicant gets the benefit of s.33(3) to the extent that the parties sought to be added by the amendment are already parties in the principal action consolidated, CH 09003, having been made so in the case of Burnac Realty Investors Limited in the original statement of claim (under its former name), and in the case of Joseph Burnett by the amended statement of claim of February 14. That is, they are already parties in an action brought for the benefit of Ponderosa, and the consolidation order merely enables Ponderosa to make explicit its claim, in a formal way, through a statement of claim where it would have been enabled to do so

in any case, in a slightly different way, under s.33(5) if it had not been made a party. I think, therefore, that the amendment can be granted and ought to be granted so that the court may be able to 'try the action and all questions which arise therein, or which are necessary to be tried to fully dispose of the action and to adjust the rights and liabilities of the persons appearing before [the judge], or upon whom the notice of trial has been served', as provided in s.34(1).

Before closing I should deal with one objection that Mr. Fordham raised. That is, that Ponderosa could not shelter under E.S. Martin Construction Limited's action because that action was not commenced 'in the meantime' under s.25(1), which provides:

> **25** (1) Every lien for which a claim has been registered shall absolutely cease to exist on the expiration of ninety days after the work or service has been completed or materials have been furnished or placed, or after the expiry of the period of credit, where such period is mentioned in the claim for lien registered, or in the cases provided for in subsection (5) of Section 23, on the expiration of thirty days from the registration of claim, unless in the meantime an action is commenced to realize the claim or in which the claim may be realized under this Act, and a certificate is registered as provided by Section 24.

The short answer which, however, I think is decisive is that given in *Eadie-Douglas v. Hitch & Co.* (1912), 27 O.L.R. 257, 9 D.L.R. 241, 4 O.W.N. 147, C.A., where the Ontario Court of Appeal in considering a similar provision held that it merely had reference to the expiration of the period mentioned, and that any proceeding taken during the existence of the lien is taken 'in the meantime', if taken before the expiration of the period mentioned. The case contains a clear discussion of the different possible meanings of 'in the meantime'. I would respectfully follow this decision, which appears to me to be unanswerable.

I would stress that neither this decision nor, apparently, the decision of the Appeal Division in the present case precludes the defence from raising any applicable period of limitation as

a defence. As Mr. Justice Macdonald pointed out in the Appeal Division, the actual limitation applicable depend, very much here, on the evidence to be adduced on the point. I must confess, with respect, that I do not have the same difficulty with s.23(5) as he had: it would appear, by its wording, to permit the lien claimant to take advantage of either period of limitation mentioned, whichever is the later and that seems to be the sense in which it is applied in Ontario; for example: see Macklem and Bristow, above. That, however, is a question that may or may not arise in the further course of this action. The distinction between substantial completion and final completion is also a matter that may not require further comment and, accordingly, I refrain from any comment now, other then to point out that substantial performance is part of a statutory definition of 'completion of the contract', incorporated fairly recently in the *Mechanics Lien Act* of Ontario, and does not necessarily have any effect on our jurisprudence, which has not to date been governed by any such provision. See R.S.O.1970 c.267, s.1(1)(a).

P. T. Shannon

Judge of the County Court of
District Number One