

**IN THE SUPREME COURT OF NOVA SCOTIA**

**Citation:** Joe Dugas Construction v. Surf Homes Ltd., 2008 NSSC 24

**Date:** 20080128

**Docket:** SH 265364

**Registry:** Halifax

**Between:**

Joe Dugas, carrying on business under the firm name  
and style, Joe Dugas Construction

Plaintiff

and

Surf Homes Limited, a body corporate and Jeffrey Dooks

Defendants

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**C O S T S D E C I S I O N**

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**Judge:** Justice Suzanne M. Hood

**Heard:** October 4, 2007 in Chambers, Halifax, Nova Scotia

**Final Written  
Submissions:** November 28, 2007

**Written Decision:** January 28, 2008

**Counsel:** James D. MacNeil for the applicants  
W. Brian Smith, Q.C. for the respondent, William Fitzgerald  
Frank W. MacDonald for the respondent, Eastwing Products  
Limited

**By the Court:**

[1] In chambers on October 4, 2007, Surf Homes Limited and Jeffrey Dooks (hereinafter “Surf Homes”) made an application to discharge four liens, two of which had been perfected by the filing of *lis pendens* and two which had not. The claims of the former had been settled and the applicant said that the claims of William Fitzgerald (“Fitzgerald”) and Eastwing Products Limited (“Eastwing”) should be vacated.

[2] Counsel for Fitzgerald and Eastwing appeared in opposition to the application to have their liens vacated. A brief was filed by counsel for Fitzgerald on the day before the chambers application. In it, Fitzgerald said that sheltering under the *Builders’ Lien Act*, R.S., c. 277, s. 1; 2004, c. 141 still exists and his client was therefore able to shelter under the perfected liens. Counsel for Eastwing agreed with the position taken by Fitzgerald.

[3] At the chambers hearing, counsel for Surf Homes said that sheltering had been abolished by amendments to the *Builders’ Lien Act*. Because this was an important issue and the brief on behalf of Fitzgerald had been filed late, I asked the parties for further submissions in writing on the issue of whether sheltering still

existed. Written submissions were to be made by November 2 with any reply to be filed November 9. On October 26, counsel for Surf Homes provided a detailed brief on the issue of sheltering providing copies of four case authorities, the *Mechanics' Lien Act*, the *Builders' Lien Act* as well as reports of the Law Reform Commission and the proceedings of the Legislature as recorded in Hansard.

[4] Counsel for Fitzgerald, instead of filing written submissions on November 2, wrote on November 5 saying his client had instructed him to withdraw his opposition to the Surf Homes application. On the same day, counsel for Surf Homes wrote asking to be heard on the issue of costs. As a result, I asked counsel to give me written submissions on the issue of costs.

[5] Counsel for Surf Homes seeks either solicitor/client costs or costs of \$2,000.00 against Fitzgerald and \$500.00 against Eastwing.

[6] Counsel for Eastwing asked me to deny the request for costs as did counsel for Fitzgerald. Alternatively, counsel for Fitzgerald said, if I were to award costs, it should be only in a small amount.

[7] Some irrelevant matters were raised in correspondence from counsel for Fitzgerald and Eastwing. I will disregard those irrelevant matters.

[8] The gist of the issue is that two parties objected to having their liens vacated. In response to my request for further written submissions on the issue of whether sheltering still existed in Nova Scotia, only the written submission of the applicant was received. After its receipt, the court was advised that the positions of the opposing parties had changed.

[9] In my view, that led to costs being thrown away by counsel for Surf Homes. The position of the opposing parties had changed and notification was not given of that change of position until after counsel for Surf Homes had filed its written submissions. Furthermore, the reason why written submissions on the issue of sheltering were necessary in the first place was because of the late filing of the brief by counsel for Fitzgerald for the October 4 chambers hearing.

[10] In all the circumstances of this case, I exercise my discretion to award costs in the amount of \$1,000.00 against Fitzgerald and \$250.00 against Eastwing. The lead role in opposing the application by Surf Homes was taken by Fitzgerald. It

was the Fitzgerald brief that was filed late and it was only after the filing deadline for written submissions on the issue of sheltering that the court and counsel for Surf Homes were advised that Fitzgerald was withdrawing his objection to Surf Homes' application.

Hood, J.