IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Doug Boehner Trucking & Excavating Ltd. v. United Gulf Developments Ltd., 2004 NSSC 34

Date: 20040209
Docket: SH 192466
Registry: Halifax

Between:

Doug Boehner Trucking & Excavating Limited

Plaintiff

v.

United Gulf Developments Limited, a body corporate,
Annapolis Group Inc., a body corporate, and
Cemal Esiyok and Kathleen Houlihan

Defendants

Judge: The Honourable Justice Arthur J. LeBlanc

Heard: October 30, 2003, in Halifax, Nova Scotia

Counsel: Ann E. Smith, for the Plaintiff
William A. Moreira, Q.C., for the Defendants

By the Court:

[1] The applicant, who is the plaintiff in the main actions, seeks summary judgment and an order setting aside the counterclaims and set-offs pleaded by the respondent. These reasons for judgement are equally applicable to S. H. 192467.

FACTS

[2] The applicant, Doug Boehner Trucking and Excavating Ltd. (“Boehner Trucking”) concluded two contracts with United Gulf Developments (“United Gulf”), the “Glenbourne contract” and the “Hammonds Plains contract”. The Glenbourne contract, dated May 28, 2002, required Boehner Trucking to carry out street construction in the Glenbourne Development, for a price of $440,000.00. The Hammonds Plains contract, dated June 24, 2002, required Boehner Trucking to widen a road at a development in the Hammonds Plains area of the Halifax Regional Municipality for a price of $100,000.00.

[3] A third contract is also relevant to the proceedings. In a contract with Greater Homes Ltd. (“Greater Homes”) dated May 15, 2002, Boehner Trucking agreed to carry out utility trenching and foundation excavation and backfilling on the Forward Avenue development site (the “Forward Avenue contract”). Greater Homes is a related company to United Gulf. United Gulf acquires land and hires contractors to build roads and install services on the development, up to the point where municipal approval of individual lots is granted. At that point, Greater Homes takes over and oversees construction and sale of houses on individual lots.

[4] In the course of work on the Forward Avenue contract the applicant bought fill from W. Eric Whebby Ltd. (“Whebby”) and placed it on the Forward Avenue lots. The fill was eventually found to be contaminated with arsenic, lead and other materials, exceeding residential guidelines established by the Canadian Council of Ministers of the Environment. According to the affidavit of Kevin Riles, Boehner Trucking initially agreed to remove the material and remediate the Forward Avenue site, but then withdrew that proposal. As a result, United Gulf Undertook to remove the contaminated material and remediate the site at a cost of $548,701.55 as of October 23, 2003.

[5] Mr. Boehner states in his affidavits that work on the Glenbourne, Forward Avenue and Hammonds Plains projects was finished in late October and early November of 2002, and invoices supplied to the respondents accordingly. The respondents subsequently failed to pay. In December 2002 the applicant filed lien claims under the ***Mechanic's Lien Act*** for the amounts owing on all three contracts, and subsequently commenced actions in January 2003. The claim of lien on the Hammonds Plains contract was against the Estates of United Gulf, Greater Homes, R.D. Haverstock and Sons Ltd. and Mitch Brison, for $81,723.04. The

claim of lien on the Glenbourne contract, against the Estates of United Gulf , Annapolis Group Inc., Cemal Esiyok and Kathleen Houlihan, was for $499,380.30. The claim of lien on the Forward Avenue contract, against the Estates of United Gulf and Greater Homes, was for $54,768.75.

[6] In the defences filed in the Glenbourne and Hammonds Plains actions, the defendants claim that any services provided were of no value and so deficient as to be a total failure of consideration. They alleged that the materials supplied were not fit for their intended purpose and claimed the costs of remedial work that was necessary to correct the deficiencies in the plaintiff's work. They pleaded the doctrine of set-off, and counterclaimed for the remedial costs.

[7] The applicant claims the materials were supplied and delivered in accordance with the contracts. It is apparent that the goods were supplied and delivered. No credible evidence has been brought forward that the Glenbourne and Hammonds Plains contracts were not completed appropriately. The statements of defence in those proceedings claim a lack of consideration and breakdown of the contracts, but this has no substance in fact. The defendant has not alleged that there should be a set-off for work and services performed and materials provided in

respect of those contracts. The only such averment is in relation to the Forward Avenue contract. Doug Boehner, the president and owner of Boehner Trucking, states that the respondents have not provided any basis for the claims of unfit materials and workmanship on the Hammonds Plains and Glenbourne contracts. It is clear from the affidavits that the defects of which the respondents complain are with respect to the Forward Avenue contract, not the contracts that are the subjects of these two actions.

[8] Mr. Riles stated that United Gulf withheld payments in respect of each of the contracts because of the contaminated fill supplied under the Forward Avenue contract. He also says the contract required the applicant to provide estimates for road construction, and to retain excavated materials for further use on the site as necessary, for backfilling individual building lots. Not being in possession of sufficient fill, the applicant purchased additional fill from another site. Due to a complaint from a resident near the Forward Avenue development, the fill was analyzed and found to be contaminated. After being asked to remove the fill and remediate the site, and following discussions with its liability insurer, the applicant declined to take such steps. The respondent took its own steps to remove the material and remediate the site.

[9] Mr. Riles states that although the Forward Avenue contract was signed by Greater Homes, it was a typical contract which Greater Homes would enter with the contractor for preparation of individual lots, once preparatory work, including streets and services, had been completed by United Gulf. At para. 16 he says:

> It is my understanding, and it is the position of United Gulf Development Ltd., that the delivery of materials [later found to be contaminated] by Doug Boehner Trucking and Excavating Ltd. to the Forward Avenue project was part of the scope of work to be performed by Doug Boehner Trucking and Excavating Ltd. under its contract with United Gulf Development Ltd. and not part of the scope of work to be performed under its contract with Greater Homes Inc.

[10] Neither Mr. Boehner nor Mr. Riles were cross-examined on their affidavits.

ISSUE

[11] Is the applicant entitled to summary judgment?

LAW

Rule 13.01 permits an application for summary judgment:

> **13.01.** After the close of pleadings, any party may apply to the court for judgment on the ground that:
>
> (a) there is no arguable issue to be tried with respect to the claim or any part thereof;

> (b) there is no arguable issue to be tried with respect to the defense or any part thereof; or
>
> (c) the only arguable issue to be tried is as to the amount of any damages claimed.

[12] The Court's powers on the application are set out in Rule 13.02. Pursuant to Rule 13.05 summary judgment is available with respect to a counterclaim or third-party proceeding "to the same extent as if the counterclaim or third party proceeding was a separate proceeding."

[13] Rules 14.20 and 16.01 permit a defendant to plead set-off and counterclaim:

> **14.20.** Where a claim by a party to a sum of money, whether the amount is ascertained or not, is relied on as a defence to the whole or part of a claim made by an opposing party, it may be included in a defence and set-off against the claim, whether or not it is also added as a counterclaim.
>
> *** * ***
>
> **16.01.** (1) Where a defendant has a claim against a plaintiff in respect of any cause of action, whenever and however arising, he may, instead of bringing a separate proceeding, make a counterclaim in respect of the claim....

[14] Third party proceedings are provided for by Rule 17, which states in part:

> **17.02.** (1) A defendant may commence a third party proceeding against any person who is not a party to the main proceeding and who,
>
> (a) is or may be liable to the defendant for all or part of the plaintiff's claim;

> (b) is or may be liable to the defendant for an independent claim for damages or other relief arising out of,
>
> (i) a transaction or occurrence or a series of transactions or occurrences involved in the main proceeding, or
>
> (ii) a related transaction or occurrence or series of transactions or occurrences; or
>
> (c) should be bound by the determination of an issue arising between the plaintiff and the defendant.

[15] I will also set out certain relevant provisions of the ***Mechanic's Lien Act***:

> **Right of action to enforce lien**
>
> **34 (1)** The liens created by this *Act* may be enforced by an action ... whether the amount claimed is over fifty thousand dollars or not, and according to the ordinary procedure of [the] court, except where the same is varied by this *Act*.
>
> **Third party procedure**
>
> **(2)** The jurisdiction of the ... 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 the subject of the lien claim.
>
> **Application to fix trial date**
>
> **35 (1)** After the delivery of the statement of defense, where the plaintiffs claim is disputed, or after the time for delivery of defense in all other cases ... either party may apply to a judge who has power to try the action to fix a day for the trial thereof, and the judge ... shall proceed 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 him, or upon whom the notice of trial has been served, and at the trial shall take all accounts, make all inquiries, and give all directions, and do all things necessary to try and otherwise finally dispose of the action, and of all matters, questions and accounts arising in the action, or at the trial, and to adjust the rights and liabilities of, and give all necessary relief to, all parties to the action, or who have been served with the notice of trial, and shall embody all results in the judgment....

[16] The applicant maintains that a set-off and counterclaim can only be a defence against a claim on the contract in respect of which remediation is sought. It argues that neither the ***Civil Procedure Rules*** nor the ***Mechanic's Lien Act*** permit the respondent to claim the costs of remediation against unrelated contracts.

SUMMARY JUDGMENT

[17] Chambers judges must not engage in findings of fact or credibility on an application for summary judgment. If the applicant requires this assessment, the matter must proceed to trial. There must be a real distinction or difference of evidence requiring the court to make a determination of credibility. In ***Bank of Montréal v. Scotia Capital Inc.*** (2002), 210 N.S.R. (2d) 78 (S.C.) at paragraph 14 Goodfellow J. cited ***Guarantee Company of North America v. Gordon Capital Corp.***, [1999] 3 S.C.R. 423, where the Court set out the following test at para. 27:

> The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para 15; *Dawson v. Rexcraft Storage and Warehouse Inc*. (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at pp. 267-68; *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.) at pp. 550-51. Once the moving party has made this

> showing, the respondent must then "establish" his claim as being one with a real chance of success" (*Hercules*, supra, at para. 15).

[18] Goodfellow J. commented, at paragraph 15:

> It seems that in Nova Scotia the burden on a party opposing summary judgment is not as heavy as in Ontario in that Nova Scotia Civil Procedure Rule 13 specifically references an arguable defence "no arguable issue to be tried" and the requirement in Ontario of establishing a claim with a real chance of success is a much higher threshold.

[19] Goodfellow J. discussed the argument put forward by the appellant, a guarantor of the debts of her husband's company. At para. 20 he said:

> Mr. Copp raises as a fairly arguable defence that the pledge agreements relate solely to "securities" and that as the securities were changed from stock shareholding to cash, that somehow the pledge agreement was rendered a nullity or released Cathy Lewis from the clearly established intent which was clearly carried out to make available the holdings in her account with Scotia as security by way of pledge. She understood the need to make a pledge of such security beyond the guarantees she executed and this understanding came from her husband. Cathy Lewis wishes now to take the position that cash was not a part of her pledge of additional security. This is an argument but surely the mere fact a person opposing summary judgment raises an argument does not of itself reach the threshold, albeit ... an extremely low threshold, as directed by our Court of Appeal, of an arguable issue. Saying something does not, by itself, establish it. Mr. Copp was unable to submit any case law or authorities for this proposition. The evidence contained in the pleadings, documents and affidavits leaves one with an inescapable and unequivocal conclusion that her support of her husband's business endeavour was total and complete and constituted guarantees and the posting of her holdings with the Scotia limited only to the clear amount pledged, of which she had unequivocal knowledge each and every time it was raised.

[20] I agree with Goodfellow J. that the threshold is indeed very low. However, it must be established that there is an arguable issue.

SCOPE OF THE MECHANIC'S LIEN ACT

[21] The applicant relies on ***P.P.G. Industries Canada Limited v. J. W. Lindsay Enterprises Limited et al.*** (1982), 52 N.S.R. (2d) 267 (S.C.A.D.). In that case the court was called upon to determine whether a counterclaim for an amount exceeding the County Court's monetary jurisdiction of $50,000.00 could be entertained in a proceeding under the ***Mechanic's Lien Act***. At trial, O'Hearn Co. Ct. J. took a broad view of the word "action" in the ***Act*** as including "counterclaim", in light of the definition of "action" in the ***Judicature Act***. The Court of Appeal held that the counterclaim could not be initiated because the ***Act*** did not permit it, despite the fact that the ***Civil Procedure Rules*** allowed counterclaims and third-party proceedings. There was an apparent discrepancy between the statute and the ***Rules***.

[22] The Court referred (at para. 15) to Macklem and Bristow, ***Mechanics' Liens in Canada*** (4th edn. at p. 309), noting that the right to counterclaim and set-off had been created in several provinces by amendments to the statutes, though only British Columbia had provided for third-party procedure (para. 19). Jones J.A. continued:

> Historically, all Provinces have had a provision comparable to our s. 34 which allows a judge to finally dispose of the action and of all matters and questions arising in the action. That provision, coupled with the application of the Supreme Court procedure, has led to the argument in favour of broadening the scope of the original action. The approach to the interpretation of the *Act* has been to strictly construe the statutory provisions creating a right to a lien. Once the existence of a valid lien is recognized the applicable procedural provisions are to be liberally construed. See text Mechanics' Liens in Canada, supra, p. 295. [para. 19]

[23] The Court held that a restrictive interpretation of "action" was required:

> I have noted that our *Act* refers repeatedly to an action to enforce a lien. The *Act* was intended to provide an expeditious remedy to lien claimants. It was never the intention of the legislature that lien claimants would be forced to wait for the determination of their claims, while the owner or, in many instances, the contractor pursued claims against third parties which were totally unrelated to the original claim or of no concern to the lienholder. With respect for the views expressed by Judge O'Hearn in the Trynor Construction Company Case, the Legislature obviously intended a restricted meaning to the word "action" under the *Mechanics' Lien Act*. It is restricted to an action by the lien claimants "to enforce the lien" against the defendant property owner; these alone are the "parties to the action" whose rights and liabilities inter se may be [adjudicated] by the Judge under s. 34. The *Act* also relates the claim for a lien to the contract, if any, under which

> the lien arises. This again restricts the scope of the action contemplated by the *Act*.... [para. 20]

[24] The Court held that section 34, on its own, did not include a counterclaim within the definition of "action". However, the combined effect of section 33.7 (providing for the form of a defence) and the ***Rules*** were sufficient to confirm that a counterclaim was available by way of a defence to a lien claim. Rule 14.20 provided that a set-off may be included in a defence, whether or not it is also added as a counterclaim. Thus, a defence could include a set-off under the ***Act***. The court also found that the limit of the county court to a jurisdiction of $50,000 did not limit the amount of a counterclaim under the ***Mechanics' Lien Act***, "as a counterclaim must relate to and is a defence to the action it follows that it is unlimited by any one restriction under the *County Court Act*" (paras. 21-23).

[25] Despite this liberal interpretation of the ***Mechanics' Lien Act***, the court was prepared to place limits in respect of counterclaims. Referring to Section 32 of the Ontario ***Mechanics' Lien Act***, which provided that a judge had power to dispose of the action and all questions of set-off and counterclaim arising under the "building contract or out of the work done or materials furnished to the property in question", the Court held that although these words were not contained in section 34.1 of the

Nova Scotia ***Act***, they were implicit in the context and particularly the limited scope of the original action for lien (para. 24). As such, the Court held that a set-off or counterclaim under the ***Act***

> must relate to the lien claim and arise out of the building contract or the work done or materials furnished to the property in question as between the parties to the original lien action.
>
> ... [T]he subject matter of the counterclaim must arise out of the contract or the work done or the materials furnished. It is too broad a test to say the counterclaim may arise "out of the same set of facts as does the original action". In my view the original counterclaim filed by Citadel by way of defence meets the appropriate test. It related to the contract giving rise to the lien and was between the parties to the original action. On the other hand, the originating notice (counterclaim) issued by Citadel against CPI is not a proper counterclaim under the *Act*. It involved an entirely separate action for negligence against a third party which was not directly related to the lien claim. [paras. 25-26]

[26] Although the ***Act*** did not provide for third-party proceedings when P.P.G. was decided, it has since been amended to do so in a limited way. Third party claims must relate to the lien claim and arise "out of the building contract or the work done or the materials supplied that is the subject of the lien claim" (s. 34.2). Therefore, the change in monetary limits by virtue of the repeal of the ***County Court Act*** does not limit the applicability of this decision to the circumstances before me.

[27] In ***Fuller (Thomas) Construction Company (1958) Ltd. v. Centennial Group of Companies Ltd. and Prince George Hotel Ltd.*** (1987), 82 N.S.R. (2d) 73 (S.C.A.D.) the Court applied the principle from ***P.P.G. Industries*** that a counterclaim "must relate to the lien claim and arise out of the building contract or the work done or materials furnished to the property in question as between the parties to the original lien action" (para. 4). The respondent contractor (Fuller), had commenced a mechanics' lien action against the owners, who counterclaimed. The respondent joined Consolidated, a subcontractor and the appellant as third parties. The appellant contended that the County Court had no jurisdiction to hear the third party action. In the second action, Consolidated began a lien action against the owner and Fuller; the latter counterclaimed against another appellant, Canadian Surety, for indemnity under a performance bond provided by Consolidated under the head contract (paras. 2-3). The trial judge had held that the action arising out of the counterclaim could be heard in the County Court, following ***P.P.G.*** He also found that the County Court could hear the third party proceeding, relying on (then) ss. 33(1A), which provided for such jurisdiction "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 the subject of the lien claim." He said:

> The applicant is joined as a third party because it is a bondsman for Consolidated, one of the third party subcontractors. It certainly relates to the claim against Consolidated which relates to the counterclaim and thus to the lien claim. In my opinion, the amounts claimed in the various third party proceedings definitely relate to the lien claim, the amounts of the third party claims are part of the dollar amount of the original lien claim and relate to the same facts. The performance bond issued by the applicant is definitely referable to the contract between Consolidated and the respondent and involves the same amount as might be the responsibility of Consolidated under the third party proceeding.
>
> There are, of course, various degrees of relationship but so long as some relationship exists, however minimal, and so long as there is no extraneous issue involved which would frustrate lien claimants' rights under the *Act*, in my opinion, third party proceedings would lie and the court has jurisdiction....
>
> Further, in my opinion, the third party proceeding certainly arises out of the work done or materials supplied that is the subject of the lien claim. The lien claim is based on the general construction contract which covers all work done and materials supplied including that of the subcontractors. I find it difficult to conceive that a third party proceeding as we have in this case cannot arise out of the work done or materials supplied. The claim is for indemnity for delay, incomplete or deficient work by the subcontractor Consolidated which is definitely related to the lien claim by the respondent. [paras. 7-8]

[28] The appeal was dismissed.

[29] I am satisfied that ***P. P. G. Industries*** is binding authority on me which restricts set-offs and counterclaims in an action under the ***Mechanic's Lien Act*** to those that arise out of the contract or work done or materials furnished to the property in question as between the parties to the original lien action. For the

purpose of these proceedings I do not distinguish between Greater Homes and United Gulf.

LEGAL AND EQUITABLE SET-OFF

[30] In ***Holt v. Telford***, [1987] 2 S.C.R. 193 the Supreme Court of Canada confirmed that there were two types of set-off, legal and equitable. Legal set-off requires the fulfilment of two conditions: both obligations must be debts and the debts must be mutual. In ***Rocovitis v. Argerys Estate et al.***, (1988) 63 O.R. (2d) 755 (Ont. H.C.J.-Div. Ct.) the Court held that "debt" does not include an unliquidated claim for damages. In ***Diewold v. Diewold***, [1941] 1 D.L.R. 561 (S.C.C.) Hudson J. adopted the definition of "debt" found in Stroud's ***Judical Dictionary***, as "a sum payable in respect of liquidated money demand, recoverable by action."

[31] The question of mutuality arose in ***United Steel Corporation Ltd v. Turnbull Elevator of Canada Ltd.*** (1973), 34 D.L.R. (3d) 492 (Ont. C.A.). The issue was whether an assignee was entitled to set-off an amount owed to it. The plaintiff had defaulted on a debt. He had in the meantime sold goods to the

defendant for a total indebtedness of $18,397.66. The plaintiff was indebted to another company, a division of the defendant in excess of $40,000. This amount was reduced and the balance was assigned to the defendant. The receiver for the plaintiff sought to recover the debt owing to it on an insolvency basis, and the defendant claimed a set-off in respect of the assignment. In deciding whether there was a set-off the Court stated that two things were required: two debts and mutuality of those debts. Osler J. held that there was no mutuality as between the debts, a decision affirmed by the Court of Appeal. The court referred to ***N. W. Robbie & Co., Ltd. v. Witney Warehouse Co. Ltd.***, [1963] 3 All E.R. 613 (C.A.).

[32] In ***Canadian Imperial Bank of Commerce v. Tucker Ind. Inc. et al.*** (1983), 149 D.L.R. (3d) 172 (B.C.C.A.), an accounting firm sought to set off fees due from another against rental payments owed to the company. Before the rental fell into arrears, a receiver-manager was appointed, who attempted to recover the rents. The Court concluded that a set-off was not available to the accountants, adopting the test set out in ***United Steel***. Both conditions – two debts and mutuality – must be fulfilled at the same time.

[33] In ***Agway Metals Inc. v. Dufferin Roofing Ltd.***, [1991] O.J. No. 9 (Ont. Ct. – Gen. Div.); affirmed on set-off issue, [1994] O.J. No. 3671 (C.A.) at para. 1, the parties had a long-standing business relationship. The plaintiff sued for payment of two invoices for delivery of sheet metal flats. The defendant sought a set-off for previous shipments that it claimed had been of unsatisfactory quality. The product was sold by weight and for many years had never been weighed; eventually the defendant weighed the product, was not satisfied and claimed to have known all along that the product was underweight. In a subsequent delivery, the defendant attempted to set-off its claim against the plaintiff by refusing to pay for the last delivery. The last deliveries were in good condition. Each transaction was based on a specific invoice. The counterclaim was in respect of product delivered prior to those set out in the statement of claim. The issue was whether the defendant could claim damages as a set-off or counterclaim. The Court stated at p. 3 (Q.L.):

> The requirements of a legal set-off are ... as follows:
>
> > … statutory set-off (or set-off at law) requires the fulfilment of two conditions. The first is that both obligations must be debts. The second is that both debts must be mutual cross obligations.
> >
> > … 'mutual debts' means practically debts due from either party to the other for liquidated sums, or money demands which can be ascertained with certainty at the time of pleading

> In the case before me that there is no way in my view of determining how many of the prior shipments contained sheet metal flats weighing only 24 lbs. and the calculations provided by the defendant are at best an estimate based on assumptions. I find therefore, that there is no claim for liquidated damages and thus no right to legal set-off.

[34] As to the issue of equitable set-off, Then J. continued at pp. 3-4 (Q.L.):

> .... The principles of equitable set-off are set out in Spry, Principles of Equitable Remedies, (3d), 1984 at p. 175:
>
> > What generally must be established is a relationship between the respective claims of the parties which is such that the claim of the defendant has been brought about by, or has been contributed to by, or is otherwise closely bound up with, the rights that are relied on by the plaintiff and which is such that it would be unconscionable that he should be able to proceed without permitting a set-off.... I find that, on the facts before me, the defendant's claim has not been brought about by, contributed to, nor is it otherwise so closely bound up with the plaintiff's claim that it would be unconscionable to allow the plaintiff's claim to succeed....
>
> The plaintiff and the defendant have had an ongoing relationship for the purchase and sale of sheet metal flats since 1982. However, each shipment was ordered separately and accompanied by an invoice for that particular shipment. Furthermore, there is an agreement signed by both the plaintiff and the defendant giving the defendant a rebate to compensate them for any possible misunderstanding as to the weight with an understanding that there would be no further credits for shipments delivered prior to February 1, 1990.
>
> The defendant signed this agreement and then entered into a new contract to provide further sheet metal flats with full knowledge of the facts of any alleged deficiencies concerning the earlier shipments. There is no allegation that the materials received pursuant to the final agreement as set out in invoice nos. 16023 and

> 16062 are in any way deficient. On the basis of the facts before me, I must conclude that the earlier transactions are not so closely linked to the transaction which is the subject of this motion that an equitable set-off is available to the defendant.

[35] In ***Dominion Lumber Winnipeg Ltd. v. A. S. Builders Ltd.*** (1999), 139 Man. R. (2d) 8 (Q.B.) Monnin J. considered whether a set-off was available in a mechanic's lien action. The applicant contractor sought summary judgment. The developer did not deny the bill but claimed for damages suffered as a result of the contractor's failure to provide material in a timely fashion for another project. The counterclaim exceeded the amount of applicant’s claim. The developer wanted to set off any amount owing to Dominion under his claim for lien. The parties had a relationship of more than 20 years. The developer purchased from Dominion, with each purchase designated to a particular job site. Invoices would be issued for each purchase, with a statement at the end of each month for purchases made that month. Accounts were due at the end of the second month after the materials were supplied.

[36] Due to a change in business operations, Dominion discontinued supplying materials to large contractors. The developer indicated that it intended to no longer deal with Dominion. Despite this, some subcontractors still purchased from

Dominion for the “Rivergate Park” project. A dispute arose between Dominion and the developer concerning another project, involving the supply of floor and roof trusses. The developer claimed that they were not all delivered on time, delaying the project.

[37] The developer admitted to owing the entire amount of the claim. The only issue was set-off for damages – estimated to be about $125,000.00 – allegedly caused by the delay on the second project. As a claim for unliquidated damages, this did not amount to a debt under ss. 65(1) of the ***Court of Queen’s Bench Act***, by which, in an action for payment of a debt, the defendant might claim the right to set-off against a debt owed to it by the plaintiff, including a debt of a different nature.

[38] The Court considered the principles underlying equitable set-off as discussed in ***Holt v. Telford***.

[39] The developer took the position that given the nature of the long-standing relationship it was entitled to a set-off. It also claimed that there had been a practice of offsetting charges against payments owing. However, each contract was

independent of the others and it expected the plaintiff to clearly identify which project materials were being supplied. According to the developer's evidence, the plaintiff was required to identify the site on the invoice at the time of purchase. If it did not do so, the developer would reject the invoice until it was corrected.

[40] The developer sought to take each project separately and distinctly, and although there might have been charge backs from time to time against outstanding invoices, the Court was not satisfied that the amounts in a large dispute would be created in a similar fashion. The Court concluded that there was nothing to "suggest that the claim of the developer for late delivery of the trusses for the Windmill Way Project was brought about by, or was contributed to by, or was closely bound up with, a supply of materials to other sites such that it would be unconscionable to allow the plaintiff's claim to succeed."

[41] In ***Singer v. Sommex Maritime Ltd.*** (1996), 148 N.S.R. (2d) 118 (S.C.) the plaintiff received an assignment of accounts from EH Co. The defendant claimed a set-off, alleging the delivery of defective goods over a period of six years. The defendant had never complained of this until proceedings were instituted by the assignee. Summary judgement, though granted, was stayed pending a

determination of whether the set-off should be allowed in respect of recently delivered goods. Davison J. held that only the most recently-shipped goods were sufficiently connected to the claim to permit it to be reduced or eliminated by equitable set-off. There were different contracts and the orders and invoices were separate. The defendant had paid the invoices for six years without complaint, but now claimed that the goods were of poor quality. Davison J. observed, at paragraphs 14-15:

> A right of set-off may arise by agreement, at law or in equity. In this proceeding there is no agreement for a set-off. Before there can be a set-off at law there must be present two conditions. The conditions are that both obligations must be debts and the debts must be "mutual cross obligations". Here the one claim is for damages not a debt, and the assignment from Empire Headboard Co. Limited to the plaintiff of the account receivable destroys mutuality and destroys set-off at law.
>
> For a set-off in equity there need not be mutuality nor do the cross obligations have to be debts. ...

[42] Davison J. referred to several authorities, including ***Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.*** (1985), 20 D.L.R. (4th) 689 (B.C.C.A.) and ***Federal Commerce and Navigation Co. v. Molena Alpha Inc.***, [1978] 3 W.L.R. 309 (C.A.), where Denning M.R. said:

> … it is not every cross-claim which can be deducted. It is only cross-claims that arise out of the same transaction or are closely connected with it. And it is only cross-claims which go directly to

> impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim.

[43] In assessing whether equitable set off was available, Davison J stated, at paragraphs 25-27:

> In my opinion any monies to which the defendant may be entitled arising from contracts or shipments of goods, other than the 176 beds received in May 1993, do not have a sufficiently close connection to the plaintiff's claim of $7,922.28 to permit that claim to be reduced or eliminated by an equitable set-off. They are entirely different contracts. The orders were separate. The invoices were different. Most, if not all, were between Empire and the defendant. It would not be manifestly unjust to order payment of $7,922.28 plus pre judgment interest without taking into account cross claims arising from other deliveries or contracts
>
> If the defendant can prove a cross claim arising from the contract to supply the 176 London beds, for which invoice number 6967 was issued, the defendant may have an arguable point for set-off. The only material advanced to the court relevant to this question is evidence from excerpts of examination for discovery. I have read them with care. When I attempted to make a finding that there is or there is not a cross claim which relates solely to the shipment of 176 beds in May of 1993, the discovery excerpts are not very helpful. At one point Mr. Avedis Balmanoukian states he sold the 176 beds at a loss and can quantify that loss in court. He also said he has had merchandise returned by customers, but it is impossible to check whether part of the merchandise which was returned relates to products represented by invoice 6967.
>
> There is a burden on the defendant to produce evidence of an arguable point, but that burden is not a heavy one. The material before the court satisfies me there may be an arguable point which can be advanced at trial for equitable set-off with respect to the one relevant shipment. I cannot in this summary application deprive the defendant of its right to put this issue before the trial judge.

[44] Davison J. also referred to the decision of ***Norbury Sudbury Ltd v. Noront Steel (1981) Ltd.*** (1984), 11 D.L.R. (4th) 686 (Ont. H.C.J.) where Krever J. (as he then was) relied upon the summary of equitable set-off given by Morris , L. J. in ***Hanak v. Green***, [1958] 2 All E. R. 141 (C.A.) "wherein it was said that equitable set-off involves those cases in which a court of equity would have regarded the cross-claims as entitling the defendant to be protected in one way or another against the plaintiff's claim" (***Singer*** at paragraph 19).

[45] And at para 24:

> As expressed in [*Featherstonhaugh v. Featherstonehaugh,* [1939] 2 D.L.R. 262], which received the approval of the Nova Scotia Court of Appeal, the burden of proof is upon the defendant to show the nature of the defence and to disclose facts which may be sufficient to entitle him to defend. In establishing his right to equitable set-off, it must be shown, as discussed by McFarlane, J.A. in *Coba Industries Ltd.* (supra) that **the equitable ground advanced "must go to the very root of the plaintiff's claim" for recovery of monies due and owing to him and "cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration of the cross-claim".** [emphasis added]

CONCLUSION

[46] I have concluded that the set-off and counterclaim cannot be maintained against the claim for lien in this proceeding and therefore the applicant is entitled to summary judgement for the amount sought and costs of $500.00. An order will issue for the amount sought in S.H. No. 192467 together with costs in the amount of $500.00.

J.