IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Doug Boehner Trucking & Excavating Ltd. v. United Gulf Developments Ltd., 2004 NSSC 180

Date: 20040914
Docket: SH 192466
Registry: Halifax

Between:

Doug Boehner Trucking & Excavating Limited, a body corporate

Plaintiff

and

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

Defendants

Date: 20040914
Docket: SH 192467
Registry: Halifax

Between:

Doug Boehner Trucking & Excavating Limited, a body corporate

Plaintiff

and

United Gulf Developments Limited, a body corporate, Greater Homes Inc., a body corporate, R. & D. Haverstock and Sons Limited, a body corporate and Mitchell Brison

Defendants

Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	October 30, 2003, in Halifax, Nova Scotia **(Supplementary Decision to 2004 NSSC 034 of LeBlanc, J. Dated February 9, 2004)**
Counsel:	Ann E. Smith, for the Plaintiff William A. Moreira, Q.C., for the Defendants

By the Court:

[1] At a hearing held on October 30, 2003, the plaintiff (respondent on the present application) sought summary judgment against the defendant (and other named defendants) on counterclaims arising in two proceedings. The facts are set out in my decision of February 9, 2004, granting summary judgment to the plaintiff in the amounts set out on the application (reported at (2004), 221 N.S.R. (2d) 101).

[2] Since the decision was released, the parties have been – in the plaintiff's words – "attempting to agree on the appropriate form of Order to reflect [the] decision and have not been successful" (plaintiff's brief, July 26, 2004, p. 1). The defendant/applicant raises two issues on the present application:

(1) Whether, as a matter of law, summary judgment is available in an action that has been commenced pursuant to the *Mechanics' Lien Act*;

and

(2) Whether the defendant should be granted leave to present new evidence to the Court (pursuant to Civil Procedure Rules 15.07, 15.08, 31.09, 31.10(1) and/or 37.18) in respect of the plaintiff's summary judgment application.

[3] The issues arising on this application were not raised in pre-hearing memoranda or in argument at the original hearing, but rather were brought to the court's attention several months after the decision was filed.

[4] Rule 15.07 provides that " [c]lerical mistakes in judgments or orders, or errors arising therein from any accidental mistake or omission, or an amendment to provide for any matter which should have but was not adjudicated upon, may at any time be corrected or granted by the court without appeal." This is the primary authority upon which the defendant relies in support of its contention that the Court should hear argument on the first issue, whether summary judgment is available in a mechanics' lien action.

AVAILABILITY OF SUMMARY JUDGMENT

[5] There is no Nova Scotia authority squarely on point. In an unreported decision, *Newell v. City and District Properties* (May 2, 1972, CC No. 19277), O'Hearn J.C.C. held that default judgment was unavailable in an action under the *Mechanics' Lien Act*, but commented that summary judgment might still be available to a plaintiff. Ten years later, in *McLanders Contractors Ltd. v. Eastern Flying Services Ltd.*, [1982] N.S.J. No.

69 (Co.Ct.) Judge O'Hearn granted judgment to an owner on the basis that there was no valid lien claim, the lien having been filed after the 45-day deadline. Judge O'Hearn said, at para. 2, that the application was "in some respects analogous to a summary judgment application." The defendant submits that Judge O'Hearn did not decide whether summary judgment was available in a mechanics' lien action. The plaintiff's view is that there is no Nova Scotia case law suggesting that summary judgment is not available to a mechanics' lien holder, and that the only case on point – *Newell* – clearly states (in *obiter*) that summary judgment is available.

[6] The defendant points to recent decisions in Prince Edward Island and New Brunswick as authority for the proposition that summary judgment may not be granted in an action under the Nova Scotia *Mechanics' Lien Act*. In *Blue Heron Enterprises Inc. v. Bradley* (1999), 174 Nfld. & P.E.I.R. 267 (P.E.I.S.C. – T.D.) Jenkins J. held that summary judgment was not available to a plaintiff in a mechanics' lien case:

> Summary judgment is precluded in this jurisdiction by the specific statutory process stipulated for enforcement of a lien in ss. 33-44 of the [Prince Edward Island] *Mechanics' Lien Act*. The mechanics' lien is a creature of statute. Both the right and the procedure for enforcement are stipulated by the statute. The summary judgment procedure is inconsistent with this legislation. [para. 5].

[7] Justice Jenkins reviewed the relevant provisions of the *Act*, including section 33, which provided that

> any lien may be enforced by an action in the court according to the ordinary procedure of the court, except where that procedure is varied by the *Act*. The *Act* does substantially vary the pre-trial and trial procedure. It provides, in effect, that a mechanics' lien action is a class action. Any number of lien claimants respecting the same land may join in an action, and an action brought by one lien claimant is deemed to have been brought on behalf of all other lien claimants....
>
> The provisions of the *Act* indicate an action must be disposed of at trial since that is the first time all parties and proper persons would be before the Court.... At the trial, the judge determines all questions which arise and adjusts the rights and liabilities of all the persons who have received notice and appear before the Court, and then gives all necessary relief to all parties to the action. [paras. 6-7].

[8] Justice Jenkins went on to cite comments from Macklem and Bristow, *Mechanics' Liens in Canada*, regarding the unavailability of default proceedings in a mechanics' lien action in Ontario and a similar result in British Columbia. He distinguished a contrary result in *Michaels Engineering Consultants Canada Inc. v. 961111 Ontario Ltd.* (1996), 29 O.R. (3d) 273 (Ont. Div. Ct.) on the grounds that "the Ontario legislation now contains specific provisions which enable summary proceedings.... The decision specifically recognized that interlocutory steps which are inconsistent with the mechanics' lien legislation must be rejected..." (para. 11).

[9] Léger J. of the New Brunswick Court of Queen's Bench referred to *Blue Heron Enterprises* in the course of deciding that summary judgment was unavailable under the New Brunswick *Mechanics' Lien Act* in *Diotte (c.o.b. E.M. Diotte Construction) v. ADI*

International Inc. (2001), 242 N.B.R. (2d) 356. The plaintiff had relied on the *Act*, which set out the process to be followed at ss. 33-42 (paras. 15-18). Justice Léger said:

> In my opinion, a lien holder cannot proceed by way of summary judgment proceeding. He must join the other lienholders and like them proceed under the provisions of the *Mechanics' Lien Act*.
>
> In this case, there are in fact justiciable issues to be decided by the trial judge.... Only the trial judge has the power to decide the issues that necessarily result from this type of action, once he or she has heard the evidence of all parties: plaintiffs, defendants or lienholders.
>
> I have considered the P.E.I. *Mechanics' Lien Act* and find that it is essentially the same as the New Brunswick *Act*. I find that it would be inappropriate to award summary judgment in this case.... [quotes *Blue Heron Enterprises*]
>
> In my opinion, it would be contrary to the spirit of the *Mechanics' Lien Act* to award summary judgment under these circumstances [paras. 19-22].

[10] The plaintiff has argued that Justice Léger did not actually rule out summary judgment in all circumstances. I conclude, however, that the decision excludes summary judgment from any action under the New Brunswick *Mechanics' Lien Act*. The defendant submits that *Diotte* and *Blue Heron Enterprises* are persuasive because the language of the respective Acts resembles that of the Nova Scotia *Act*, arguing specifically that all three statutes

> provide for the commencement of mechanics' lien actions to which the Rules of Court apply except as varied by the *Act* (NS s. 34(1); NB s. 33; PEI s. 33); all three deem that the action is brought on behalf of all other lienholders (NS s. 34(4); NB s. 38; PEI s. 39); and, most critically, all three expressly require trial of the action (NS s. 35(1); NB ss. 40, 43(1); PEI ss. 40, 44(1)).

[11] The defendant goes on to argue that the Acts of Newfoundland and Ontario are not persuasive authority in Nova Scotia, due to their explicit inclusion of summary procedures (see s. 43(1) of the Newfoundland and Labrador *Mechanics' Lien Act* and s. 67(1) of the Ontario *Construction Lien Act*). Both statutes provide that the procedure in an action under the *Act* shall be "as far as possible of a summary character". In *Marco Ltd. v. Newfoundland Processing Limited*, [1995] N.J. No. 168 (S.C.) Green J. held that the "summary trial" procedure under Rule 17A of the rules of court "meshes nicely" with the philosophy of the legislation that procedure, as far as possible, be 'of a summary character'." A similar result occurred under the Ontario *Act* in *Michaels Engineering*, *supra*. I am satisfied that the explicit reference to summary procedures in the Ontario and Newfoundland Acts makes them less useful as guidance on this point.

[12] I am also convinced that the Alberta and Saskatchewan statutes are unhelpful in interpreting the Nova Scotia *Act*. The Alberta *Builders' Lien Act* uses language similar to that of Ontario and Newfoundland, requiring enforcement proceedings to be "of a summary character, so far as is possible" (see s. 49(6)). The Saskatchewan *Builders' Lien Act* diverges significantly from ours, in that it provides that "any issue may be tried on *viva voce* or affidavit evidence". These statutes, which use the word "summary" or

explicitly contemplate decisions based on affidavit evidence, are of limited assistance in interpreting the Nova Scotia *Act*.

[13] The *Builders' Lien Act* of Manitoba and the former *Builders' Lien Act* of British Columbia (R.S.B.C. 1979, c. 40, superseded by S.B.C. 1997, c. 45) are more helpful in interpreting the Nova Scotia legislation. The current British Columbia *Act* provides no procedural guidance at all, stating only that a lien claim "may be enforced by an action according to the Rules of Court" (s. 26). However, the former *Act* provided contained different requirements, which were reviewed in several decisions. A judge of the British Columbia County Court held that the former *Act* required a trial and excluded summary judgment in *Dukowski (c.o.b. Oakridge Plumbing & Heating) v. Unique Custom Woodwork & Design Ltd.* (1982), 39 B.C.L.R. 391. This decision was effectively overruled by the British Columbia Court of Appeal in *Jordan Electric Co. Ltd. v. Post 83 Co-Operative Housing Association et al.* (1984), 12 D.L.R. (4th) 386, where Esson J.A. said, at pp. 388-390:

> The principal contention before us is essentially a jurisdictional one. It is submitted that the court has no power to grant judgment on a builders' lien claim under Rule 18(1) of the Supreme Court Rules.
>
> That submission is based upon the opening words of s. 29(2) of the *Builders' Lien Act*:

> 29(2) On the trial of an action to enforce a claim of lien, the court may hold that the claimant is entitled to a lien for the amount found to be due....

The contention is that, whether or not there is any matter in issue between the parties, the court has the power to grant relief only at a trial. That contention has been dealt within a number of cases [including *Dukowski*] and, I think it is fair to say, has generally been accepted. There is, however, no decision of this court directly on the point. [...]

In my respectful view, the conclusion that the issues can only be dealt with at trial places too much emphasis on the opening words of s. 29(2) and gives inadequate recognition to the clear words of s. 29(1) which reads as follows:

> 29(1) Subject to section 18(2) and section 20(6), a claim of lien or liens for any amount may be enforced by action in the court according to the practice and procedure of the court, including third party practice and procedure, except where it is varied by this *Act*. Where an action is brought to enforce a claim of lien in respect of an improvement made on land in the boundaries of more than one county, the court of one of the counties has full power to enforce the claim of lien for the whole improvement, and the claimant has the right to select the court of any one of the counties in which to bring his action.

In particular, I refer to the words of that section that a claim of lien may be enforced by action in the court according to the practice and procedure of the court, except where it is varied by this Act.

Rule 18 is part of the practice and procedure of the court. It gives a very wide power to grant summary judgment in all kinds of cases, a power which, of course, was not present prior to the coming into effect of the present rules....

I am of the view that practice and procedure is not varied by this *Act* in any way which precludes the granting of the relief, including a declaration of lien and ordering the payment out of the money which was paid into court to secure the lien, which it was contended in this action the chambers judge had no power to grant....

It will, of course, be important, having in mind the complexities that beset actions of this kind, to be sure that all interested parties are given notice

> of an application for summary judgment and that the granting of the order does not prejudice the interest of anyone....

[14] The Manitoba Court of Appeal reached a similar conclusion in *Gateway Construction Co. v. Provincial Drywall Supply Ltd.*, [1988] M.J. No. 128. Huband J.A. said:

> In the section of *The Builders' Liens Act* under the heading "Enforcement of Lien" s. 60 provides as follows:
>
> > 60 A lien for any amount may be realized by an action in the court and the ordinary procedure of the court, except where varied by this Act, applies to the action.
>
> That section, and those that follow after it, contemplates an action initiated by statement of claim, where the timeliness of registration of the lien, and the amount of the claim will be decided by the trial process. It would be open to the parties, where appropriate, to avail themselves of such pre-trial procedures as examinations for discovery, interrogatories, and discovery of documents. In short, the trial process, following the issuance of a statement of claim, is the method by which the lien claimant will establish his entitlement to moneys.... It was not intended that, without commencing an action at all, a lien claimant might simply bring a motion asking that the moneys be paid out of court, based upon an averment in an affidavit.
>
> Not every case need proceed to trial. Where the pleadings disclose that the lien claimant has a valid claim, the lien claimant is entitled to move for summary judgment in the same manner as in any other cause of action; see the judgment of the British Columbia Court of Appeal in *Jordan Electric Co. Ltd. v. Post 83 Co-Operative Housing Association et al.....*

[15] The defendant submits that neither of these decisions is persuasive. In the case of *Jordan Electric*, the defendant points out that the statute under consideration did not state

that the judge "shall" try the action (as our *Mechanics' Lien Act* does), and thus the reasoning is "inapplicable and unpersuasive".

[16] As to *Gateway Construction*, defendant says Huband J.A.'s comments about summary judgment were *obiter dicta*. It further argues that, in citing *Jordan Electric*, the Court relied upon an authority that was inconsistent with the Manitoba *Act*. That *Act*, unlike the British Columbia *Act*, provided that the court "shall" try the action. The Manitoba Court of Appeal, the defendant suggests in its second brief, "appears not to have been directed to this critical difference between the then-BC statute and its own." In other words, the defendant claims that *Gateway Construction* was decided wrongly.

[17] At this point a review of the statutes that I have identified as akin to our own – namely Prince Edward Island, new Brunswick, Manitoba and the former British Columbia *Act* – might be helpful. The Nova Scotia *Mechanics' Lien Act* provides (at s. 34(1)) that

> The liens created by this *Act* may be enforced by an action to be brought and tried in the Supreme Court of Nova Scotia, whether the amount claimed is over fifty thousand dollars or not, and according to the ordinary procedure of such court, except where the same is varied by this *Act*.

[18] Similar provisions appear in the other statutes. Thus the New Brunswick *Mechanics' Lien Act* states that a lien "may be enforced by action in the court, according

to the ordinary procedure of that court, except where the same is varied by this *Act*" (s. 33) and nearly identical words appear in the Prince Edward Island *Mechanics' Lien Act* at s. 33, the Manitoba *Builders' Liens Act* at s. 60 and the pre-1997 British Columbia *Builders' Lien Act* at s. 29(1). A plain reading of all of these provisions leaves no doubt that they are to a similar effect: an action on a mechanics' or builders' lien will proceed according to the regular procedure of the court, unless that procedure is varied by the statute.

[19] The Nova Scotia *Act* goes on to provide for the commencement of an action and its setting down for trial. Subsection 35(1) states:

> After the delivery of the statement of defence, where the plaintiff's claim is disputed, or after the time for delivery of defence in all other cases, where it is desired to try the action otherwise than at the ordinary sittings of the court, 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 make an appointment fixing the day and place of trial, and on the day appointed, or on such other day to which the trial is adjourned, 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 (Form I).

[20] Reduced to its essentials, this means that the judge shall try the matter after it has been set down for trial. Similarly, s. 43 of the New Brunswick *Act* provides:

> (1) At the trial the judge shall proceed to determine all questions that arise therein, or that are necessary to be tried to dispose of the action completely and, subject to section 42, to adjust the rights and liabilities of the persons appearing before him or upon whom the notice of trial was served.
>
> (2) At the trial the judge shall take all accounts, make all inquiries, 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, and, subject to section 42, to adjust the rights and liabilities of an d give all necessary relief to all parties to the action or who have been served with the notice of trial.

[21] Section 44 of the Prince Edward Island *Act* contains nearly identical wording. Subsections 65(1) and (2) of the Manitoba *Builders' Liens Act* provide for a similar trial process to those in Nova Scotia, Prince Edward Island and New Brunswick:

> (1) Subject to subsection (3), on the trial of an action the judge shall try all questions that arise therein or that are necessary to be tried in order to dispose of the action finally and completely and to adjust the rights and liabilities of, and to give all necessary relief to, the persons appearing before him or upon whom a notice of trial has been served, including all questions of set-off and counterclaim arising under the contract or out of the work done, services provided or materials supplied in respect of the land against which the claim of lien is registered.
>
> (2) On the trial of an action the judge shall take all accounts, make all inquiries, give all directions, and do all things, necessary to try and to dispose finally and completely of the action and of all matters, questions and accounts arising therein or at the trial as provided in subsection (1) and he shall embody all the results in the judgment.

[22] The Manitoba *Act* goes on to provide for separate trials on certain issues where the court is satisfied that the issue cannot be conveniently tried with the action, or if it would likely cause undue prejudice to other lien claimants.

[23] The former British Columbia *Builders' Lien Act*, as found in the 1979 *Revised Statutes* (the version under consideration in *Jordan Electric*), provided, at ss. 29(2) and (3):

> (2) On the trial of an action to enforce a claim of lien, the court may hold that the claimant is entitled to a lien for the amount found to be due, and that in the event the amount found to be due is not paid may order and direct the sale of the land, or the improvement, or the materials placed on the land, or the interest of the owner or any of them, and further proceedings may be taken for the purposes mentioned as the court thinks proper, and any conveyance under its seal shall be effectual to pass any estate or interest sold.
>
> (3) A defendant in an action to enforce a claim of lien may set off or set up by way of counterclaim any right or claim arising out of the same transaction for any amount, whether the set off or counterclaim sounds in damages or not, and the court has power to pronounce a final judgment in the same action on the claim of lien, set off and counterclaim.

[24] The defendant relies upon the use of the word "may" as opposed to "shall" in s. 29(2) of the British Columbia *Act* to establish the claim that cases under that *Act* are unhelpful in interpreting the requirements of the Manitoba or Nova Scotia Acts. I do not agree that the phrase "[o]n the trial of an action ... the court may hold that the claimant is entitled to a lien..." in British Columbia's section 29(2) carries a meaning drastically different to Manitoba's s. 65(1) ("... on the trial of an action the judge shall try all

questions that arise therein or that are necessary to be tried in order to dispose of the action finally and completely...") or Nova Scotia's s. 35(1) (at trial 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...").

[25] In any event, I cannot see how these words can be taken to exclude summary judgment. Specifically in the case of the Nova Scotia *Mechanics' Lien Act*, the trial procedure clearly has effect after the matter has been set down for trial. It is not clear why, as the defendant suggests, this should prevent a plaintiff from seeking a resolution other than by trial. There is no evidence in the *Act* that such pre-trial procedures as interrogatories are foreclosed by the trial procedures set out therein. Why, then, should summary judgment be taken to be excluded? In this regard, the words of Huband J.A. in *Gateway Construction* are helpful: "It would be open to the parties, where appropriate, to avail themselves of such pre-trial procedures as examinations for discovery, interrogatories, and discovery of documents."

[26] It should be noted as well that each of the lien Acts I have discussed incorporates the regular rules of court unless varied by the *Act*. In the Nova Scotia *Act* s. 34(1) addresses this point. Summary judgment is provided for in our **Civil Procedure Rules**. Moreover, Rule 1.03 provides that "the object of these Rules is to secure the just, speedy

and inexpensive determination of every proceeding." It is worth pointing out that these procedures are available to defendants and plaintiffs equally. Hence, in a lien case, where the plaintiff had no basis for a claim, it would be open to a defendant to seek summary judgment; and that defendant would be equally entitled to the "just, speedy and inexpensive" determination of the proceeding. As Esson J.A. put it in *Jordan Electric*, the rule permitting summary judgment "is part of the practice and procedure of the court" which is "not varied by this Act in any way which precludes the granting of the relief...".

[27] A further objection – one which received great weight in *Blue Heron Enterprises* and *Diotte* – arises from the "class action" nature of a lien claim. This may indeed serve as an obstacle to summary judgment where there appear to be additional potential lien claimants. But this problem can be overcome in the manner suggested by Esson J.A. in *Jordan Electric*:

> It will, of course, be important, having in mind the complexities that beset actions of this kind, to be sure that all interested parties are given notice of an application for summary judgment and that the granting of the order does not prejudice the interest of anyone.

[28] The defendant's argument implies, on one hand, that all procedures not set out in the *Act* are therefore forbidden, and, on the other hand, that once a plaintiff commences an action under the *Act*, it can only be resolved by trial. Neither conclusion can be

reconciled with Rule 1.03, nor with the statement in the *Act* itself that the regular **Civil Procedure Rules** apply unless varied. The plaintiff takes the position that nothing in the *Mechanics' Lien Act* precludes summary judgment and accordingly the **Civil Procedure Rules** – including Rule 13 – apply in these circumstances. Counsel for the plaintiff makes the point that, in addition to the silence of the *Act*, what little Nova Scotia caselaw does exist contradicts the defendant's position. I agree. There is no convincing reason to conclude that summary judgment is excluded by the fact that the *Mechanics' Lien Act* provides for a trial procedure. As Esson J.A. said in *Jordan Electric*, to argue otherwise places insufficient emphasis on the clear statement that the **Civil Procedure Rules** apply unless they are varied by the *Act*.

NEW EVIDENCE

[29] The applicant seeks leave to introduce evidence consisting of an analysis of accounting records, performed between November 3, 2003 and March 26, 2004, which it claims raises a substantial factual dispute as to the amount owing to the plaintiff in the actions upon which the plaintiff sought summary judgment.

[30] The late introduction of new evidence is governed by two decisions of the Court of Appeal: *Federal Business Development Bank v. Silver Spoon Desserts Enterprises*

Ltd. (1999), 189 N.S.R. (2d) 133 and *Griffin v. Corcoran* (2001), 193 N.S.R. (2d) 279. In *Silver Spoon Desserts* the appellant sought to reopen a foreclosure proceeding and introduce "newly discovered" evidence under Rule 15.08, five years after the decision and deficiency judgment. Rule 15.08(a) provides that "[w]here a party is entitled to: (a) maintain a proceeding for the reversal or variation of an order upon the ground of a matter arising or discovered subsequent to the making of the order ... He may apply in the proceeding for the relief claimed." Roscoe J.A., for the Court, said (at para. 10):

> ... In order to succeed on an application of this nature pursuant to Rule 15.08(a), where all appeals and other statutory variation proceedings have been exhausted, in my view, the applicant must prove that:
>
> (1) the matter or evidence arising or discovered subsequent to the original order, is such that it was not previously capable of being obtained or discovered by the exercise of reasonable diligence;
>
> (2) the new evidence is apparently credible; and
>
> (3) when examined with the complete record of the previous proceeding, the new evidence is such that it would be practically conclusive of the issue in favour of the applicant, provided that, in a case of obvious and substantial injustice, if the second and third requirements are met, the necessity to prove due diligence, should not be applied as strictly.

[31] *Silver Spoon Desserts* involved a situation where an order had been issued. Where, as here, there has been a decision but formal judgment has not yet been issued, the Court (*per* Cromwell J.A.) had this to say in *Griffin v. Corcoran* (at paras. 59-60 and 62):

> [59] It will be helpful at this point to set out the legal principles relating to reopening a trial after the judge has made a decision and issued reasons but before the formal judgment has been issued....
>
> [60] As noted, a trial judge has a discretion to reopen the case prior to the entry of the formal judgment. While aspects of this discretion are codified or supplemented by the Rules, including Rule 15.07, it derives from the inherent power of the Court....
>
> * * *
>
> [62] The principles which guide the exercise of this discretion attempt to balance the requirements that parties bring forward their whole case and that there must be finality in litigation with the need to reach a result that is just in substance. In other words, the judge must take account of the, at times, competing goals of employing fair procedure and achieving right results.

[32] Cromwell J.A. said the reopening of a trial after a decision has been given "is an extraordinary and rare step that must be undertaken with great caution" (para. 64). He went on to describe the principles to be applied by trial judges in exercising this discretion. Cromwell J.A.'s comments in this regard are worth quoting at length:

> [65] The decision must be informed by a balancing of the risk of both procedural and substantial injustice to both parties. These fundamental concerns were well-expressed by MacDonald J.A. in [*Clayton v. British American Securities Ltd. et al.*, [1935] 1 D.L.R. 432 (B.C.C.A.) At pp. 440-441]:
>
> > If the power [to reopen a trial] is not exercised sparingly and with the greatest care fraud and abuse of the Court's processes would likely result. Without that power however injustice might occur. If, e.g., a document should be discovered after pronouncement of judgment – but before entry showing that the judgment was wrong and the trial Judge was convinced of its authenticity no lack of diligence by solicitor in producing it earlier should serve to perpetuate an injustice. The prudent course is to permit the trial

> Judge to exercise untrammelled discretion relying upon trained experience to prevent abuse, the fundamental consideration being that a miscarriage of justice does not occur. [emphasis added by Cromwell J.A.]

[66] An application by one party to reopen a trial presents obvious risks of procedural injustice to the other party and, more generally, of undermining the orderly conduct of litigation. Civil litigation is not a judicial inquiry; a trial judge has no roving commission to examine every aspect of the relationship between the parties. The parties themselves must advance the issues they wish determined by the Court and put forward the evidence they consider necessary to advance their positions. They must disclose the relevant documentation to each other and be subject to extensive discovery. A trial proceeds by each side having the opportunity, in turn, to present its case. A party must bring forward the whole of the evidence on which it intends to rely. This is particularly true of the plaintiff who is not permitted to seek tactical advantage by "splitting" the case: that is, by holding back evidence known to be relevant from the outset until after the defendant has started calling its evidence.

[67] Reopening a trial for further evidence may be offensive to all of these important principles and therefore may be procedurally unfair to the opposite party. And this may not only affect the case at hand. If allowed routinely or too readily, the possibility of reopening will provide an incentive to ignore these principles to gain tactical advantage. If the rules are not enforced, they will tend to be ignored.

[68] While fair and orderly procedure is essential, so is reaching a correct result on the merits. Genuine mistakes, oversights or even poor judgment should rarely defeat a just cause. If key evidence has been overlooked or an untruth only lately detected, there are strong arguments of justice in favour of allowing the court to reopen its consideration of the matter. The more important the evidence would be to the outcome of the case, the stronger the argument in favour of its reception. To rephrase a familiar adage, justice must not only appear to be done; it must in fact be done.

[69] In my opinion, the decision to reopen must consider and weigh the aspects of both procedural and substantial justice to which such a decision inevitably relates....

[33] The Court held that the trial judge's decision not to reopen the matter had been based exclusively on the fact that the evidence could have been presented at trial, and that she had thus "acted on the basis of the risk of procedural injustice to [the respondent] if the case were reopened and did not consider the risk of substantial injustice to the plaintiffs if it were not" (para. 69). He referred to the test from *Silver Spoon Desserts* as "more onerous" than that applicable where there was not yet a final judgment, but noted that the third principle discussed in *Silver Spoon Desserts*

> recognizes that procedural injustice resulting from a party's lack of diligence in obtaining evidence at trial will give way to the interests of substantial justice where the "new" evidence is credible and so important that a substantial injustice will occur of the matter is not reopened. [para. 71]

[34] A "similar measure of flexibility" was required when the application to reopen arises after trial and decision but before there has been formal judgment. Cromwell J.A. commented that "[p]rocedural concerns such as diligence should generally give way to the demands of substantial justice where failure to do so is likely to result in an obvious injustice" (para. 72). The present case involves an application to reopen an interlocutory application rather than a trial, but I see no reason why different principles should apply in these circumstances.

[35] The defendant claims that had the proposed new evidence been available at the time of the original hearing – on October 30, 2003 – it would have been "practically conclusive" on the issue of whether there exists a genuine dispute of fact as to quantum, and there would therefore have been a finding that a triable issue existed. Thus, it argues, for the court to now refuse to accept the new evidence and enter judgment for the amount sought would be "an injustice in result and therefore one of substance" (see defendant's brief, July 2, 2004, p. 5). Incidentally, the defendant does not appear to argue that the Court would be unable to grant summary judgment for part of the amount claimed; this is evident from Rule 13.02(b), which permits the Court, "on such terms as it thinks just" to grant judgment, "on the claim or any part thereof" [emphasis added].

[36] The plaintiff emphasizes the "due diligence" requirement of the test for admitting new evidence set out in *Dawi v. Armstrong* (1992), 17 C.P.C. (3d) 196 (Ont. Gen. Div.), affirmed [1993] O.J. No. 3893 (C.A.). The Court in that case held that the proposed new evidence "must be such as it could not have been obtained by reasonable diligence before summary judgment." The plaintiff argues that the plaintiffs have known the amounts they were claiming under the two liens since October and December 2002, when they were filed, about one year before the original hearing. They had Mr. Boehner's affidavits supporting the claim on October 21, 2003, nine days before the

original hearing. The plaintiff says the defendants have shown no reason why, with the exercise of due diligence, they could not have analyzed the accounts before the summary judgment application – upon which they did not dispute the amounts claimed – rather than after it was completed. Further, and in any event, the plaintiff says the amounts claimed are accurate.

[37] I agree with the plaintiff that the exercise of reasonable diligence would have permitted the defendant to bring the proposed new evidence at the time of the original application. If this were the only consideration, this would be a simple decision. However, it is clear from the Court of Appeal's decision in *Griffin v. Corcoran* that the analysis must go further. I must also consider whether there is a risk of substantial injustice. This brings to mind Cromwell J.A.'s statement that "[g]enuine mistakes, oversights or even poor judgment should rarely defeat a just cause. If key evidence has been overlooked or an untruth only lately detected, there are strong arguments of justice in favour of allowing the court to reopen its consideration of the matter. The more important the evidence would be to the outcome of the case, the stronger the argument in favour of its reception." In this case, it appears that the new evidence is sufficient to raise an arguable issue as to the sum to which the plaintiff is entitled.

[38] Alternatively, the defendant seeks authority in Rules 31.09 and 31.10(1), extended to applications by Rule 37.18. In view of my conclusion that the evidence should be admitted under the principles in the caselaw above, I do not find it necessary to deal with this argument.

CONCLUSION

[39] As a result, I conclude that summary judgment is available in an action under the Nova Scotia *Mechanics' Liens Act*. I also find that the new evidence raises an arguable issue as to the amount the plaintiff should recover and should be admitted because of the risk of injustice arising if it is not admitted.

[40] The defendant's affidavit is thus admitted. It is open to the plaintiff to produce reply evidence. It is open to either party to cross examine on the affidavits,

and I leave it to them to contact the Court within ten days after the release of this decision in order to schedule a further hearing, if one is required.

[41] The plaintiff is entitled to summary judgment to the extent of the uncontested portion of the total claimed. According to the Affidavit of Kevin Nelson, “the total amounts unpaid by United Gulf to Boehner are, in respect of the Glenbourne project, $319,566.85, and in respect of the Hammonds Plains project, $57,500, both amounts including HST” (para. 17).

[42] I will grant the order in the form suggested by Ms. Smith and I will leave the issue of costs until the outstanding issues are determined or resolved.

J.