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What's in a Name?



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with assistance from

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(full text of the decision)

In *Canbar West Projects Ltd. v. Sure Shot Sandblasting & Painting Ltd.*^[1] the respondent, Sure Shot negotiated was constructing facilities for use on its lands and negotiated a written fixed-price contract between Sure Shot and Can-West Projects Ltd. The Contract was duly executed.

The principals of the contractor had not yet incorporated Can-West Projects Ltd. when the agreement was executed. When they subsequently searched the name, they determined that it was already used and therefore they instead incorporated under the name "Canbar West Projects Ltd." A month after incorporation in October 2008 this new company registered "Can-West Projects" as a trade name. Correspondence, invoices and letter were for "Can-West Projects Ltd." and cheques were made out to "Can-West Projects Ltd." However, the cheques were deposited to Canbar's corporate account.

Canbar submitted three such invoices that were paid by Sure Shot in the fall of 2008. In early 2009, Canbar submitted two more "Can-West invoices that were approved by the project engineer but went unpaid. Builder's lien holdbacks from the earlier invoices also remained unpaid. In February of 2009 the project caught fire and demolition and reconstruction were necessary. Canbar and Sure Shot blamed each other for the fire. Canbar argued that Sure Shot had asked it to demolish the building. Canbar sued for its unpaid invoices and holdbacks, as well as for the cost of demolishing the building. Although compensated by its insurer, Sure Shot counterclaimed for its losses in relation to the fire.

Sure Shot brought an application to summarily vacate Canbar's builder's lien, and was successful in chambers. The chambers judge ruled that Canbar's builder's lien was invalid, as the party named in the contract was "Can-West Projects Ltd.", a corporation that never came into existence, and was therefore not entitled to a lien. The chambers judge also held that Canbar West Projects Ltd. failed to properly notify Sure Shot of its incorporation and its

role in the project, and failed to adopt the contract between Sure Shot and Can-West Projects Ltd. Finally, the chambers judge decided that upholding the lien would be prejudicial to the defendants, based on a real possibility of confusion with the existence of an actual company by the name "Can-West Projects Ltd."^[2]

Canbar appealed, and the Court of Appeal reviewed the chambers judge's interpretation of the *Builders' Lien Act* for correctness. The Court's analysis focused on sections 6(1) and 1(j) of the Act. Before setting out its interpretation of these sections, the Court recited the general rule from *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 and *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42 that "the words of the Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act and the intention of the legislature."^[3] The Court then stated:

"The general interpretive directives set out in *Rizzo* and *Bell* are subject to modification when builders' lien statutes are being interpreted. Specifically, courts are required to adopt a strict interpretation in determining whether a lien claimant is entitled to a lien, and a liberal approach with respect to those to whom the statute applies: *Ace Lumber Ltd. v. Clarkson Co.*; *Hett v. Samoth Realty Projects Ltd.* Builders' liens are business oriented statutes with practical, as opposed to formalistic, goals; their overall intent is to ensure that "the land that receives the benefit shall bear the burden": *Limoges v. Scratch; Schubert v. A-S4 Steel Ltd.*"^[4]

Applying these principles, the Court held that section 1(j) imposes a three-element evidentiary burden on lien claimants. Lien claimants must establish (1) that the person has an estate or interest in the land; (2) that the person expressly or impliedly requested the work; and, (3) that the work was done on his credit, with his privity and consent, or for his direct benefit. Only the second element was in doubt, as Sure Shot argued there it did not make a request of Canbar, and in the alternative submitted that Canbar did not do the work.

Section 6(1) in turn provides that a person who does work on an improvement or furnishes material for an improvement has a lien on the estate or interest of the owner of the land "for so much of the price of the work or material as remains due to the person".^[5]

Reading these two sections together, the Court concluded that a direct contact between the lien claimant and the owner is not necessary for a valid lien, provided the owner has requested the work or materials. Nothing in the Act explicitly requires such contact, and (when liberally construed) the requirement for an owner to have requested the work or materials does not imply that the request be directly to the lien claimant. Rather, the Court observed that "in many instances the owner will not know who actually performed the work or supplied the materials."^[6]

As it was not necessary for Sure Shot to have requested the work directly from Canbar, the only remaining issue was whether Canbar did the work. Here, the Court found the evidence before the chambers judge to be unequivocal that Canbar had done the work, operating under the trade name of "Can-West Projects" (despite the fact that some of the documents they used referred to "Can-West Projects Inc.").

The Court also noted that of the work done prior to Canbar's incorporation, only the 10% lien holdback relating to the work done prior to Canbar's incorporation was part of the lien claim. That work, the Court held, was "adopted" by Canbar after its incorporation, pursuant to section 15(3) of the Alberta *Business Corporations Act*, R.S.A. 2000, c. B-9. That section

provides two ways for a corporation to adopt a contract: where the contract is made in its name, and when a contract is made on its behalf.

In relation to contracts made in the new corporation's name, the Court held that the Chambers judge had erred in basing his decision on the minor difference in name between "Canbar West Projects" and "Can-West Projects". In the view of the Court, "minor variations in name surely must be included with respect to contracts made in the name of a then non-existent corporation."^[7] On whether the contract was "made on its behalf", the Court held that the contract was adopted by Canbar, as it "stepped into the shoes of the party that entered into the contract on its behalf" and was therefore entitled to the benefits of that contract and a lien for the work it did pursuant to the contract.^[8]

Sure Shot had also claimed it was prejudiced by the name issue, and that Canbar had failed to inform it of its actual name. The chambers judge had found that this amounted to prejudice as Can-West Projects Inc. might take action against Sure Shot claiming it had done the work. The Court of Appeal did not agree, calling this concern "at best artificial" as Can-West Projects Inc. had not done any of the work or supplied any materials for the project, had not asserted a right to a lien, and in any case would be out of time for filing a lien.

^[1] 2011 ABCA 107, 97 C.L.R. (3d) 294

^[2] Para 12

^[3] Para 13.

^[4] Para 14

^[5] Para 15

^[6] Para 16

^[7] Para 19

^[8] Para 20