IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

Citation: *Liannu Limited Partnership v. Modspace Financial Services Canada Ltd.*, 2016 NLCA 15
Date: April 8, 2016
Docket: 201501H0030

BETWEEN:

LIANNU LIMITED PARTNERSHIP
BY ITS GENERAL PARTNER
M&M ENGINEERING LIMITED — APPELLANT

AND:

MODSPACE FINANCIAL SERVICES
CANADA LTD. — FIRST RESPONDENT

AND:

CHAMPION HOME BUILDERS INC. — SECOND RESPONDENT

AND:

NALCOR ENERGY — THIRD RESPONDENT

Coram: Rowe, Barry and Harrington JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201401G2194 and 201401G2286

Appeal Heard: September 15, 2015
Judgment Rendered: April 8, 2016

Reasons for Judgment by Harrington J.A.
Concurred in by Rowe and Barry JJ.A.

Counsel for the Appellant: Peter A. O'Flaherty
Counsel for the First Respondent: Geoffrey A. Saunders & Geoffrey K. Penney
Counsel for the Second Respondent: R. Wayne Bruce
Counsel for the Third Respondent: No appearance

Harrington J.A.:

[1] The intended appellant, Liannu Limited Partnership (Liannu) seeks leave to appeal the interlocutory order of an applications judge which granted leave to the first respondent, ModSpace Financial Services Canada Limited (Modspace) to add six third parties to a multi-party consolidated mechanics' lien enforcement proceeding. Nalcor Energy (Nalcor), the third respondent, a statutory corporation, is the owner of the Muskrat Falls Hydro-electric Project (Project) in Labrador. Nalcor contracted with Liannu acting through M&M Engineering Ltd., a Newfoundland and Labrador corporation, for the construction and installation of an accommodations complex (Complex) for approximately 1,500 on-site construction trades persons (Main Contract).

[2] The Main Contract called for the design, engineering, procurement, fabrication, supply, installation and commissioning of the complex including sleeping quarters, catering and recreational facilities (Project). The Main Contract terms permitted subcontracting by Liannu with the approval of Nalcor but subject to the requirement that Liannu would remain liable to Nalcor as principal for the obligations of the contractor under the Main Contract.

[3] Liannu awarded a back-to-back subcontract to Modspace (Modspace Subcontract) with a scope of work which called for the latter to "design, fabricate, supply and deliver all the modularized units and associated components to be incorporated into the accommodations complex". The provisions of the Main Contract were incorporated by reference into the Modspace Subcontract by which Modspace covenanted to assume and perform the obligations of Liannu.

[4] Modspace subcontracted initially with Secto Bâtiments Modulaires, Inc. (Secto), a Quebec based company, for the construction of eleven dormitories, consisting of 330 modules, and a kitchen, dining and recreation facility consisting of 110 modules, to be transported to and installed at the construction worksite in Labrador. The pleadings allege that the Secto subcontract work included "design, engineering, design coordination, transportation, material delivery and site coordination of the 440 modules at a contract price of $48.4 million dollars".

[5] The schedule for the design, construction and installation of the facilities was not met. Nalcor notified Liannu of alleged deficiencies in the work by Secto under the Main Contract. Nalcor contractually required Liannu to be responsible for reimbursement. Liannu notified Modspace that it would be responsible to pay whatever liquidated damages arose from breaches of the Modspace Subcontract. Secto's contract was reduced substantially due to its alleged non-performance and a substantial portion of its work was assigned to Champion Home Builders Inc. (Champion).

[6] The contractual disputes regarding alleged non-performance led to the registration of lien claims and the commencement of lien enforcement proceedings. In one proceeding, Champion, one of Modspace's subcontractors is the plaintiff and Modspace is the defendant. Nalcor is also a defendant. In a second proceeding, Modspace is both a plaintiff and defendant by counterclaim and Liannu is a defendant and plaintiff by counterclaim. The two proceedings were consolidated by an order of an applications judge prior to the application by Modspace seeking leave to add six third parties.

[7] Modspace had engaged three subcontractors to carry out the design and fabrication of modular components for the complex. One of the subcontractors was Champion.

[8] Champion disputed its responsibility to Modspace with regard to the costs associated with its allegedly deficient work relating to the facilities and its potential liability to pay liquidated damages. Champion registered a claim for lien against the Project. Modspace also registered a claim for lien against the Project under its subcontract with Liannu. Liannu vacated both claims for lien by the provision of security in a substantial sum. Champion and Modspace filed statements of claim against Liannu and Nalcor for the enforcement of their lien claims. Liannu claimed set-off and counterclaimed against Modspace.

[9] The primary issue on appeal is whether the applications judge when granting the order joining six third parties erred in his interpretation of the relationship between the *Mechanics' Lien Act*, RSNL 1990, c. M-3 (*Act*) and the *Rules of the Supreme Court, 1986,* SNL 1986, c. 42, Schedule D (*Rules*), governing the criteria for the addition of third parties to mechanics' lien enforcement actions.

[10] Champion claimed a lien under the *Act* for $935,062.38 upon the interest of Nalcor as the owner of the lands on which the Project was being constructed. As required under the Back-to-Back subcontract, Modspace vacated the Champion lien by the provision of security under section 26(4) of the *Act*. Modspace also claimed a lien under the *Act* for $15,434,115.20. The Modspace lien was vacated with the provision of security by Liannu as required under the Main Contract at a first year cost of approximately $230,000.

[11] Modspace filed a Statement of Defence and Counterclaim seeking $8,337,530.00 against Champion. Liannu filed a Statement of Defence, Set-off and Counterclaim against Modspace.

[12] Modspace filed a Statement of Defence to the Counterclaim by Liannu asserting *inter alia*, a claim for apportionment of damages under the *Contributory Negligence Act*, R.S.N.L. 1990, c. C-33 among Liannu, Champion, Modspace and the "entities Modspace will seek to add as third parties…to this consolidated action". Modspace subsequently made application to add six third parties. An application judge granted leave to add the six third parties.

LEAVE TO APPEAL

[13] This appeal arises from an interlocutory order. Leave to appeal such an order to this Court is required (see *Pennecon Energy Ltd. v. Metal World Inc.*, 2013 NLCA 67, 344 Nfld. & P.E.I.R. 32 at para. 7 (*Metal World*)). The parties agree that leave to appeal ought to be granted pursuant to Rule 57.02(4)(c) since the interpretation of the *Act* in conjunction with Rules 12 and 18 is a matter of importance. Having considered the subject matter of the appeal, this Court agrees with the position of the parties that leave to appeal should be granted.

STANDARD OF REVIEW

[14] The standard of review arising from the grant of an order for the issuance of a third party notice was considered by this Court in *Ryan v. Dew Enterprises Limited*, 2014 NLCA 11, 347 Nfld. & P.E.I.R. 274 (*Ryan*):

> [33] On appeal, the court will only interfere with such a discretionary order where the judge who made it has exceeded his or her jurisdiction, has failed to apply or has misapplied an applicable principle or made a palpable and overriding error in his or her appreciation of the facts, or the failure to interfere would otherwise cause a manifest injustice: *Langor v. Spurrell* (1997), 157 Nfld. & P.E.I.R. 301 (NFCA).

Consolidation Order

[15] Consolidation of lien enforcement proceedings is permitted under section 34 of the *Act* which states:

> Where more than 1 action is brought to realize liens in respect of the same land, the court may, on the application of a party to any of the actions or on the application of another interested person, consolidate all those actions into 1 action and award the conduct of the consolidated action to a plaintiff that the court considers just.

[16] Modspace applied for consolidation of the two proceedings. Champion consented to consolidation. Liannu was willing to consent to consolidation provided Modspace did not seek the right to add third parties to the proposed consolidated proceeding. A hearing was held before the first applications judge regarding the Modspace application for consolidation. In his reasons for granting the requested order, the first applications judge cited the object of the *Act* as being the expeditious resolution of mechanics' lien enforcement litigation which principle had been affirmed by this Court in *Metal World* at paragraphs 44, 50 and 55.

[17] When Modspace objected to the requirement that leave was necessary for the addition of third parties, the applications judge issued an order granting leave to consolidate the two proceedings having found that leave was required. He gave the following reasons:

> These two matters are Mechanic's [*sic*] Lien proceedings. Although the land has been replaced by money paid into Court, the nature of the proceedings is unchanged, and the principle of expeditious summary adjudication remains.

> Clearly third party proceedings have the potential to delay the proceedings and to involve issues beyond the claims of those who have performed services or supplied materials as contemplated by the *Mechanic's* [*sic*] *Lien Act*.
>
> Rule 18.01 allows consolidation of the proceedings on such terms as the Court "thinks just". Given the concerns raised by Liannu, I consider it appropriate, notwithstanding Rule 12, to require leave of the Court for any third party claim, including claims brought before a defence is filed. This will allow all issues of appropriateness to be dealt with and, if leave is granted, the provision of direction to facilitate the expeditious hearing of the primary claims.
>
> (Emphasis added.)

Decision Under Appeal

[18] A second applications judge heard an application by Modspace for leave to issue third party notices to six parties to the consolidated proceeding. Champion took no part in the application which was argued between counsel for Liannu and the first respondent, Modspace. The first intended third party was Secto Bâtiments Modulaires Inc., (Secto), a Quebec based subcontractor of Modspace. Its subcontract called for Secto to undertake "design, engineering, design coordination, material delivery and site co-ordination and transportation". The second proposed third party, Soccrent 2006, Société en Commandite (Soccrent), also a Quebec company, provided a performance guarantee to Modspace regarding Secto's subcontract. The third proposed third party, Mobilfab Inc., is a Quebec based contractor also subcontracted by Modspace as was Champion to assume a portion of Secto's contract. The remaining third parties are three Quebec-based architectural or engineering consulting firms which were contracted by Modspace "to continue the design services previously provided by Secto". The third party claims against these entities are pleaded in professional negligence of these consulting firms.

[19] In an oral decision granting leave to add six third parties, the second applications judge acknowledged that the "policy direction of the Legislature on the *Mechanics' Lien Act* is that the enforcement of a lien should be of a summary character having regard to the amount and nature of the liens in question" (section 43(1)). He made reference to section 43(2) which requires leave of the court to permit interlocutory proceedings while adhering to "… the policy direction that the matter or proceedings should be summary in nature". He acknowledged that the first applications judge had referred to the nature of mechanics' lien enforcement actions and

emphasized that the principle of expeditious summary adjudication was a key reason for issuing a consolidation order.

[20] The first applications judge had accepted Liannu's position that "lien claim procedures are statutory in nature and that the scope of such actions is limited and the normal procedures available in other litigation should not be readily available". The second applications judge referred to section 43(4) of the *Act* which refers to the procedural steps potentially applicable under the *Rules*. He found that there is "potentially an inherent tension between the rights that are available under the *Rules of Court* and the direction in the *Act* that the processes should be summary and expeditious in nature". He elaborated as follows:

> On the one hand the *Act* sets up a regime for expeditiously dealing with claims in construction matters. On the other hand, in some litigation involving large projects and many participants, the inherent complexities in those arrangements militate against the summary process mandated by the *Act*.

[21] The applications judge concluded that the nature of the contractual arrangements amongst the existing parties in the proceeding and the number of parties potentially involved militated against a summary process. He stated:

> … this is already a complex proceeding in that the simpler process contemplated by the *Act* [is] not appropriate in the circumstances of this case.

[22] The applications judge rejected Liannu's submission that the objects of the *Act* and the existing jurisprudence would not support the joinder of (i) three architectural, structural and engineering consulting firms retained by Modspace after Secto's failure to perform, or (ii) Secto's guarantor, Soccrent, as necessary third parties. The balance of the original Secto contract had by then been assigned by Modspace to Champion and Mobilfab. Liannu acknowledged the possibility that Secto might be added as a third party because of its contractual relationship with Modspace as the original main subcontractor to Liannu for fabrication and on-site installation of the original 330 modular units, which contract was subsequently reduced to 30 modules.

[23] The applications judge accepted the submission by counsel for Modspace that the decision of this Court in *Ryan* affirmed a broad test for the joinder of a third party beyond merely claims solely for indemnity and contribution to include all claims "related to or connected with the original

subject matter of the proceeding". In *Ryan*, Green C.J.N.L. reviewed the scope of Rule 12 at paragraphs 50-51 and 60 as follows:

> [50] Rule 12.02 (1) provides that where a defendant claims against any person "who is not a party to the proceeding" that that person is or may be liable to the defendant "for all or any part of the plaintiff's claim against the defendant", the defendant may (with or without leave, depending on the circumstances) join that person as a third party.
>
> [51] It is to be noted that the rule is not limited in express terms to claims for indemnity or contribution from the third party. There is only a requirement that the defendant assert some sort of claim "for all or any part of the plaintiff's claim against the defendant".
>
> …
>
> [60] With all due respect to the early English authorities (the English rules were amended in 1929 to allow third party claims, in addition to contribution and indemnity, where the defendant claimed relief "relating to or connected with the original subject matter of the action", i.e. in substantially the same terms as the authorizing statute), I would approach the matter differently. In my view, if the statutory provision confers jurisdiction on the Court to allow third party procedure where the claim is "related to or connected with the original subject matter of the proceeding", then that is the scope of the third party jurisdiction that the Court has. The rules of court are merely the means whereby the Court purports to give guidance as to how the Court's adjudicative jurisdiction will generally be exercised. If the rules are expressed or interpreted to circumscribe more narrowly the circumstances where third party proceedings will be allowed, that would effectively involve the Court in wrongfully declining its jurisdiction. …
>
> (Emphasis added.)

[24] The second applications judge in his reasons granted the request by Modspace to add the six intended third parties on the basis that they were "clearly related to or connected with Liannu's counterclaim against it". He found that the litigation was at an advanced stage and acknowledged that it was "inevitable and self-evident that the addition of six parties would add complexity and delay". However, he reasoned that this result should be balanced against having all the relevant parties before the court given the likelihood that they would be involved in "other unspecified ways whether or not the third party notice was issued". The applications judge acknowledged that a complication would arise in the proceeding caused by the addition of the proposed third parties given that their contractual

arrangements were governed by the laws of other provinces, particularly those of the provinces of Quebec and Ontario.

[25] With respect to Mobilfab being added as a third party, Modspace was seeking to claim indemnity for that company's alleged failure to perform work contracted by Modspace after performance failures by Secto and Champion. The applications judge, applying the reasoning in *Ryan*, concluded that all of the six third parties were "related to or connected with the original subject matter of the main action" and it was appropriate to add them as third parties to the proceeding. He found that it was not possible "to make a significant distinction between Secto and the others". He concluded: "It seems to me that either all are in or none are in".

ISSUES

[26] The issues on this appeal are the following:

(i) did the applications judge err by failing to apply the primary statutory criteria for the joinder of third parties in a mechanics' lien enforcement proceedings under the *Act* as opposed to the criteria for third party joinder under the *Judicature Act* and under Rule 12 of the *Rules of the Supreme Court,1986*?

(ii) did the applications judge properly assess and determine whether the addition of any or all of the six proposed third parties was necessary for the proper conduct of the proceeding?

(iii) did the applications judge err by applying the grounds for the addition of third parties set out in *Ryan* to be applied to a mechanics' lien enforcement proceeding?

(iv) did the applications judge err in the application of the principle of proportionality?

APPLICABLE LAW

[27] Mechanics' lien enforcement proceedings are governed by the *Act*, which incorporates the *Rules* to the extent that they are not incompatible with the *Act*. The relevant sections of the *Act* are 36(4)(a) and 43 which set out a procedural framework for the application of the *Act* and the *Rules* consistent with the guiding principles for their application. The sections read in material part:

> 36. ...
>
> (4) The Court shall
>
> (a) try the action, including set-off and counterclaim, and all questions that arise or that are necessary to be tried in order to completely dispose of the action and to adjust the rights and liabilities of the persons appearing before it or upon whom notice of trial has been served;
>
> …
>
> 43. (1) The object of this Act being to enforce liens at the least expense, the procedure shall be as far as possible of a summary character, having regard to the amount and nature of the liens in question.
>
> (2) Except where otherwise provided by this Act, interlocutory proceedings shall not be permitted without the consent of the court, and then only upon appropriate proof that those proceedings are necessary.
>
> ….
>
> (4) Unless otherwise provided in this Act, the Rules of the Supreme Court apply to proceedings under this Act.
>
> (Emphasis added.)

[28] The applications judge focused on the wording of section 43(4) "unless otherwise provided", regarding the extent of the application of the Rules, particularly Rule 12 when dealing with third party joinder. Rule 12.02(1) states:

> **12.02.** (1) Where a defendant claims against any person, who is a co-defendant or who is not a party to the proceeding, that the latter is or may be liable to the defendant for all or any part of the plaintiff's claim against the defendant, the defendant may, before the defendant files a defence or appears on a hearing under an originating application, issue and serve a third party notice without the leave of the Court, and thereafter with leave.

[29] There being no provision in the *Act* for the conduct of third party proceedings, the interpretation of sections 43(1), (2) and (4) is relevant. A primary issue is the extent to which Rule 12 applies to third party joinder in mechanics' lien enforcement proceedings given that section 43(1) of the *Act* mandates the enforcement of lien claims at the least expense, by a procedure that shall be as far as possible of a summary character. Further, section 36(4)(a) provides that only those questions that are "necessary" should be

resolved in a mechanics' lien action. In this respect, the court must have regard to the amount and nature of the liens in question. The Project is substantial in monetary value. The Modspace claim for lien is in the amount of approximately $15.4 million dollars. The premium for the lien bond is a substantial monetary amount. The main issue is whether the joinder of six third parties is necessary.

[30] Mechanics' lien legislation equivalent to the combination of sections 36 and 43 of our *Act* was derived from former Ontario legislation. The current *Construction Lien Act*, RSO 1990, c. 30 ("*CLA*"), contains a section very similar to our section 43, with one exception. While our *Act* provides that interlocutory proceedings can only be permitted where "necessary", the Ontario legislation was amended by adding criteria permitting third party joinder which would "expedite" the resolution of the issues in dispute.

[31] The Ontario legislation provides at section 67(1):

> (1) The procedure in an action shall be as far as possible of a summary character, having regard to the amount and nature of the liens in question. R.S.O. 1990, c. C.30, s. 67 (1).
>
> (2) Interlocutory steps, other than those provided for in this Act, shall not be taken without the consent of the court obtained upon proof that the steps are necessary or would expedite the resolution of the issues in dispute. R.S.O. 1990, c. C.30, s. 67 (2).
>
> (3) Except where inconsistent with this Act, and subject to subsection (2), the *Courts of Justice Act* and the rules of court apply to pleadings and proceedings under this Act. R.S.O. 1990, c. C.30, s. 67 (3).
>
> (Emphasis added.)

[32] The interaction of these legislative provisions equivalent to subsections 43(1), (2) and (4) of our *Act* was discussed in *2016637 Ontario Inc. (c.o.b. Balkan Construction) v. Catan Canada Inc.*, 2012 ONSC 2055, 23 C.L.R. (4th) 157 ("*Balkan Construction*"). The Court interpreted them as follows:

> [8] In my view, the two prongs of the test in subsection 67(2) of the *CLA* are distinct, as exemplified by the disjunctive "or" between them. The second prong focuses on the policy in favour of expediting the resolution of the issues on their merits. The first prong can encompass broader issues including the question of procedural fairness. The purpose of subsection 67(2) should be viewed in the context of the entire section, including subsection 67(1), which reads as follows:

> (1) The procedure in an action shall be as far as possible of a summary character, having regard to the amount and nature of the liens in question.
>
> [9] Subsection (1) recognizes that there may be a broad spectrum of lien actions, involving from the simplest home renovation project to the most complex commercial, industrial or institutional mega-project. The degree to which the procedure is to "summary" will vary with "the amount and nature of the liens in question" and will be summary only "as far as possible." The requirement for leave for interlocutory steps in subsection (2) is the mechanism by which the Courts acts as gate-keeper to ensure that the process is as "summary" as it should be, in the context of the amount and nature of the liens. The intent of section 67(2) is not, in my view, to eliminate considerations of procedural fairness by the court by means of application of the rules governing security for costs, or other rules of civil procedure. Its purpose is to permit the court to consider the degree to which a particular lien action should be summary in nature, having regard to the amount and nature of the liens in question, and in that context, to determine whether an interlocutory step is "necessary" to achieve procedural fairness, or would "expedite the resolution of the issues in dispute."
>
> (Emphasis added.)

[33] Section 43(4) of our *Act* refers inferentially to Rule 12 of the *Rules*, which permits the addition of third parties to an action when the required criteria are met. However, the recourse to Rule 12 must be subordinate to the gate-keeping objective found in the *Act*, which is intended to ensure that the procedure in a mechanics lien enforcement proceeding is as far as possible of a summary character. Further justification for such a position arises when lien security has been provided as is the case here. The inclusion of the word “necessary” in section 43(2) of our *Act* emphasizes that interlocutory proceedings are not permitted without leave and that a high threshold for permitting such proceedings is required (see *Prasher Steel Ltd. v. D. Grant & Sons Ltd*., 2014 ONSC 3576 at para. 6).

[34] In *Global Design & Building Inc. v. 1289193 Ontario Inc.*(2000), 2 C.L.R. (3d) 271, the Court interpreted “necessary” to mean “required or essential”. The Court said at paragraph 6:

> Giving the word "necessary" its plain and ordinary meaning, I believe the Legislature to provide a fair but summary way of resolving disputes arising from the filing of construction liens by limiting interlocutory proceedings to those that are required or essential to permit an action to proceed to trial or to permit the issues between the parties to be decided.”
>
> (Emphasis added.)

[35] With respect, the applications judge ought to have placed more weight on the provisions of the *Act* which promote the expeditious resolution of lien enforcement proceedings by requiring leave of the court before third parties will be added. The applications judge ordered the addition of third parties solely on the basis that all six proposed third parties were "related to or connected with" the original subject matter of the proceeding, leading to a conclusion that "all are in or none are in". I find that he erred in principle in this interpretation of the *Act* and the *Rule*.

[36] The applications judge referred to the desirability of having all relevant parties before the court based on the "likelihood that they will be implicated in other ways whether or not the third party notice was issued". With respect, this speculation as to what might occur in the course of the litigation was not a proper basis to support the addition of third parties. The applications judge referred to Liannu's counterclaim against Modspace as justification for giving leave to the latter for issuing third party notices.

[37] A key question that arises is whether the step taken by Modspace was necessary in order to determine the merits of its enforcement claim and that of Champion in the consolidated proceeding. An important consideration is the complexity of a multi-party proceeding with Secto, Champion and Mobilfab, parties which participated in different phases of the Project. Secto was first alleged to be in default, then Champion and Mobilfab, all of which were contracted by Modspace. Additionally, the necessity of adding Soccrent, the guarantor of Secto's performance and three consulting firms retained to advise Modspace after Secto lost the major portion of its contracted work, has not been established.

[38] The applications judge erred by basing his analysis on the principles governing the general right to add third parties under section 94 of the *Judicature Act* and Rule 12, discussed by this Court in *Ryan.* In *Ryan* this Court held that the Rules are subordinate to the governing statute which, in that case, was the *Judicature Act. Ryan* was a general construction case not a lien enforcement proceeding. The reasons of the applications judge here do not address the specific statutory criteria in the *Act* governing the standing of parties in the conduct of mechanics' lien enforcement actions. In this proceeding the primary focus is on the expeditious adjustment of the rights of the claimants in a proceeding.

[39] The applications judge failed to give proper weight to the provisions of the *Act* which require that mechanics' lien proceedings are to be

conducted at the least expense by means of a summary procedure as far as possible while meeting a threshold test as to whether the third party proceedings are necessary. The applications judge erred by failing to provide proper reasons as to why each of the six entities was a necessary party to be added and erred by concluding that their participation was justified on an "all are in or none are in" basis.

[40] The applications judge did acknowledge a concern that the addition of the proposed third parties could complicate the proceeding by virtue of the application of extra-provincial law relative to the interpretation of the contractual terms with the proposed third parties. However, the application judge failed to find this to be a relevant factor as to why third parties ought not be added.

[41] The applications judge failed to consider that there was already a substantial consolidated proceeding in place involving Nalcor, the project sponsor; Liannu, the primary contractor to Nalcor, Modspace, Liannu's primary subcontractor and lien claimant, Champion which militated against the addition of six additional parties.

Proportionality

[42] The applications judge sought to apply the principle of proportionality as it relates to the grounds for making orders and giving directions in summary proceedings where complex matters are at issue. The circumstances here are centered upon the contractual performance by Modspace of its contractual obligations to Liannu.

[43] In his analysis the applications judge limited his focus regarding the justification for the addition of third parties to the reasoning of this Court in *Ryan*. In his oral reasons he stated:

> While considering these factors I'm also obliged to consider the principle of proportionality. The Supreme Court in the *Hryniak* case, and the Court of Appeal in *Ryan and Dew* spoke of ensuring that the process followed is proportionate to the circumstances and the amounts involved. In my view proportionality leads me to the conclusion that the third party notices ought to be issued.

[44] He specifically cited the Supreme Court's reasons in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 stating: "civil proceedings in Canada have become overly complex and the courts should be directed to apply a principle of proportionality when applying or approving procedures

in the litigation process". With respect, this principle is of greater relevance to Liannu's position rather than to that of Modspace. The applications judge failed to focus upon the criteria of necessity and to explain how the addition of six third parties to a large construction lien enforcement case involving four major corporate entities would meet the objective of proportionality in relation to his order which resulted in a ten-party lien enforcement proceeding. The result runs counter to the notion of a summary, proportional and necessary proceeding.

[45] Further, the Supreme Court in *Hryniak*, at paragraph 31, cited *Szeto v. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311, where this Court decided at paragraph 53:

> Even where proportionality is not specifically codified, applying rules of court that involve discretion "includes . . . an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and impact on the litigation, and its timeliness, given the nature and complexity of the litigation".
>
> (Emphasis added.)

[46] The applications judge concluded that the reasoning in the *Ryan* and *Hryniak* decisions required him to ensure the process in the proceeding is "proportionate to the circumstances and the amounts involved". With respect, the applications judge ought to have reached the opposite conclusion based on the reasoning in *Szeto v. Dwyer*. No consideration was given of the cost of lien security posted by Liannu to release the liens or the timeliness of reaching a final result.

SUMMARY AND DISPOSITION

[47] I conclude that the applications judge erred by:

(i) failing to properly interpret and apply sections 36(4)(a) and 43 of the *Mechanics' Lien Act*; and

(ii) failing to consider the overriding principles for conduct of mechanics' lien enforcement proceedings in an expeditious and summary manner at the least expense without the addition of third parties unless it can be established that they are necessary parties for the proper conduct of the mechanics' lien proceeding.

[48] I would order that the appeal be allowed and the order of the applications judge adding six third parties be set aside.

[49] I would award costs on this appeal to Liannu against Modspace on Column 3 of the Scale of Costs.

_____

M. F. Harrington J.A.

I concur: _____

M. H. Rowe J.A.

I concur: _____

L. D. Barry J.A.