

Date: 20150313

Docket: 14/86

Citation: *Metal World Inc. v. Pennecon Energy Ltd. et al*, 2015 NLCA 12

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

METAL WORLD INC.

APPELLANT

AND:

PENNECON ENERGY LTD.

FIRST RESPONDENT

AND:

VALE NEWFOUNDLAND AND
LABRADOR LIMITED

SECOND RESPONDENT

Coram: Green C.J.N.L., Welsh and White JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201201G0799
(2014 NLTD(G) 119)

Appeal Heard: February 6, 2015

Judgment Rendered: March 13, 2015

Reasons for Judgment by Welsh J.A.

Concurred in by Green C.J.N.L. and White J.A.

Counsel for the Appellant: Stephen Fitzgerald

Counsel for the First Respondent: Peter A. O'Flaherty

Counsel for the Second Respondent: No Appearance

Welsh J.A.:

[1] Metal World appeals the dismissal of its application for the payment out of money it had paid into court in order to release a mechanics' lien against property of a third party. In an earlier decision of this Court, the same matter between these parties was remitted to the Trial Division for reconsideration. At issue in this appeal is the extent of cross-examination on affidavits and the effect of errors as to the amount of the lien claim.

[2] Leave to appeal was granted on December 2, 2014, with reasons to be included in this decision.

BACKGROUND

[3] This is an appeal involving the same parties and the same issue after the matter had been remitted to the Trial Division for reconsideration. The foundation of the dispute is set out in the earlier decision of this Court (*Pennecon Energy Ltd. v. Metal World Inc.*, 2013 NLCA 67, 344 Nfld. & P.E.I.R. 32 (the "2013 Appeal Decision")):

[2] Pennecon Energy Ltd., claiming it was owed money from Metal World Inc., filed a mechanics' lien against property of Vale Newfoundland and Labrador Limited. This caused Vale to cease making payments to Metal World. The lien was vacated when Metal World paid the amount of the lien claim, \$1,850,000, into court. While the lien against Vale's property was vacated, the claim of lien remained in effect with the money being held in court.

[4] In the 2013 Appeal Decision, the Court determined that the applications judge had erred in the manner in which he had analyzed Metal World's allegation that the lien claim was grossly exaggerated. Accordingly, the matter was remitted to the Trial Division for reconsideration, to include cross-examination on Jerry White's affidavit which had been filed by Pennecon to support registration of the lien claim.

[5] Upon reconsideration, the applications judge, who was not the same judge as previously, dismissed Metal World's application for payment out of the money held in court. He concluded that Mr. White's affidavit was in compliance with the requirement of the *Act* that the claim be verified as true. Alternatively, at a minimum, he determined, the affidavit was in substantial compliance with the *Act*, and because Metal World had not established that it was prejudiced by the claim, there was no basis on which to vacate the claim for lien.

ISSUES

[6] Leave to appeal having been granted, the question is whether the applications judge erred in the manner in which he dealt with, first, cross-examination on the affidavits and, second, errors in the amount of the lien claim.

ANALYSIS

Leave to Appeal

[7] This is an interlocutory appeal for which leave to appeal is required (2013 Appeal Decision, at paragraphs 5 to 11). In this instance, I would rely on two factors set out in rule 57.02(4) of the *Rules of the Supreme Court, 1986*:

(c) the Court considers that the appeal involves matters of such importance that leave to appeal should be granted,

...

(e) the Court is of the view that the interests of justice require that leave be granted.

[8] A review of the applications judge's decision, together with the written and oral submissions of the parties, leads to the conclusion that there is some uncertainty as to the applicable law in this area. Clarification of the law is an important component of this Court's mandate. Accordingly, leave to appeal was granted.

Issues Arising from the Affidavits

Characterization of Mr. White's Affidavit

[9] Section 17(1) of the *Mechanics' Lien Act*, RSNL 1990, c. M-3, provides for the registration of a claim for lien in respect of a "sum claimed as due". A supporting affidavit is required by section 17(2), which provides:

The claim shall be verified in duplicate by the affidavit of the person claiming the lien, or of his or her agent or assignee who has a personal knowledge of the matters required to be verified, and the affidavit of the agent or assignee shall state that he or she has that knowledge.

[10] Because they were filed to support the claim for lien, the affidavits of Mr. White, filed by Pennecon, are the same as the affidavits considered in the 2013 Appeal Decision. In that decision, the contents of the affidavits are set out:

[15] Pennecon provided two affidavits from Jerry White. The first contains only one paragraph which states:

“That I am the Chief Financial Officer of Pennecon Energy Ltd. and have full knowledge of the facts set forth in the Claim attached hereto and that the said Claim is true to the best of my knowledge, information and belief.”

In a subsequent two-paragraph affidavit, Mr. White states:

“That I, Jerry White, was a director of Pennecon Energy Ltd. on December 6, 2011;

2. That I continue to be a director of Pennecon Energy Ltd.”

[11] In the 2013 Appeal Decision, the Court proceeded on the assumption, based on the language of the affidavits, that Mr. White was acting as an agent of Pennecon, and that the affidavits were, on their face, adequate to satisfy section 17(2) of the *Act*. The following paragraphs are apposite:

[18] Metal World appealed the applications judge’s decision that Mr. White was not signing his affidavit as Pennecon’s agent, but as the person claiming the lien. It is unnecessary to decide this issue for purposes of the appeal. Mr. White’s affidavit uses the additional language that applies when the affiant is an agent as opposed to the lien claimant. That is, Mr. White swears not only that the claim is true (the language applicable where the affidavit is endorsed by the lien claimant), but also, that he has full knowledge of the facts set forth in the claim (the additional information required for an agent’s affidavit).

...

[20] Before addressing that issue, some comment on the interpretation of s. 17(2) of the **Act** and Form 4 is apposite. First, on a plain reading of s. 17(2), it is clear from the punctuation that references to requiring an affiant to have personal knowledge of the matters to be verified and a statement to that effect in the affidavit apply only where it is the affidavit of an agent or assignee. The legislation presumes that the lien claimant has the requisite knowledge to verify the claim. The purpose of the additional clauses is to ensure that, in verifying the claim, the agent or assignee has the necessary knowledge. ...

[21] ... [Regarding a difference in language between the **Act** and the Form], it must be assumed that the two terms [full knowledge and personal knowledge] are synonymous in this context and that a person swearing that he has full knowledge means that he has personal knowledge of the matters required to be verified. ...

[22] Finally, s. 17(2) of the **Act** states that the claim “shall be verified” by affidavit. Form 4, mandated by the regulations, requires the affiant to state that “the claim is true”. Reading these together, the conclusion follows that “verified” means verification of the claim as true. ...

...

[24] Ordinarily, the phrase, “to the best of my knowledge, information and belief”, is used where the affiant may be lacking direct or complete knowledge and, therefore, cannot attest unequivocally to the contents of the affidavit. ... In the instant case, Mr. White swore that he had full knowledge of the facts underpinning the claim. Accordingly, the additional words, “to the best of my knowledge, information and belief”, may be characterized as superfluous. That is, assuming Mr. White had, as he attested, full knowledge regarding the claim and was verifying it as true on that basis, I would, in the circumstances, accept the affidavit, on its face, as adequate to satisfy s. 17(2) of the **Act.** ...

(Emphasis added.)

[12] In the reconsideration of the matter, the applications judge proceeded to analyze whether Mr. White’s affidavit could be supported on the basis that it was an affidavit of the corporation rather than that of an agent. This was not necessary as this Court had already validated the affidavit as that of an agent which was, on its face, in compliance with the *Act*. The real question is whether there is any other ground, based on the evidence elicited from Mr. White on cross-examination, or from other sources, for concluding that the affidavit is nonetheless non-compliant.

Cross-examination on the Affidavits

[13] Section 26(2)(b) of the *Act* provides that the court may, upon application, vacate a lien on an “appropriate ground”. The ground on which Metal World relied in this case was gross exaggeration of the claim by Pennecon. In light of this and the 2013 Appeal Decision, a central issue before the applications judge was the extent of cross-examination to be permitted on the affidavits.

[14] After the 2013 Appeal Decision in which Mr. White’s affidavit was under review, Pennecon submitted an additional affidavit, that of Stephen

Penney. The purpose was to respond to the affidavit of Mr. Butler, which Metal World had submitted prior to its first application in order to support its position that the lien claim was exaggerated. Mr. Penney stated that he “was personally involved with the project management” of the relevant contract and was “the main field representative of Pennecon”. His affidavit responds to individual paragraphs in Mr. Butler’s affidavit. The responses fall into three categories: first, credits were, in fact, payable to Metal World; second, no amount should be credited to Metal World; and, third, without further information it was not possible to determine whether a credit was due to Metal World. Based on the first category from Mr. Penney’s affidavit, the applications judge found a credit of \$66,576.42 payable to Metal World.

[15] The applications judge permitted cross-examination of Mr. White in respect of events prior to December 6, 2011, the date the lien claim was filed. He refused cross-examination on Mr. Penney’s affidavit which dealt with Metal World’s allegation that the claim was exaggerated. He allowed cross-examination of Mr. Butler relating to how Metal World responded to Pennecon’s filing the lien, the basis for the allegation that the lien was exaggerated but not details regarding that allegation, and the issue of prejudice to Metal World.

[16] The extent of cross-examination permitted by the applications judge was determined by taking into account evidence appropriate in an application to vacate a claim for lien under section 26(2)(b) of the *Act* in contrast to the evidence appropriate in a trial of the claim. As noted in the 2013 Appeal Decision:

[43] In the instant case, the details in Mr. Butler’s affidavit, with no affidavit in response by Pennecon, challenged the validity of the lien particularly as to the amount claimed which, according to Metal World, was grossly exaggerated. While on its face Mr. White’s affidavit complied with s. 17(2) of the *Act*, cross-examination would have provided an opportunity for the Court to consider the validity of Metal World’s allegations and for Mr. White to explain the manner in which the amount of the lien claim was determined by Pennecon. It was open to the applications judge to restrict the scope of the cross-examination if necessary to prevent the application turning into a trial of Pennecon’s claim against Metal World. ...

[17] Based on these considerations, in the 2013 Appeal Decision, the question of vacating the lien was remitted to the Trial Division to permit cross-examination on Mr. White’s affidavit, together with any additional

cross-examination or evidence considered appropriate by the applications judge (2013 Appeal Decision, at paragraphs 28 to 33).

[18] Determining the extent of appropriate cross-examination begins with reference to the objective of mechanics' lien legislation. Section 43(1) of the *Act* provides:

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.

Further, the legislation has a two-fold purpose: to protect the party doing work or providing services on the one hand, and to protect the party for whom the work was done or the services provided on the other hand. The requirement that the claimant verify the claim as true is directed to the second of these (2013 Appeal Decision, at paragraph 35).

[19] Accordingly, where the party against whom the claim is registered provides sufficient information to question verification of the claim as true, the lien claimant risks having the lien vacated if clarification or adequate explanation is not provided. In this case, as noted in the 2013 Appeal Decision, the issue as to the validity of the lien claim arose because Mr. White's affidavits were skeletal and Mr. Butler had filed an affidavit setting out information requiring some response from Pennecon. At the reconsideration hearing, additional information was provided by means of the cross-examination of Mr. White and the affidavit of Mr. Penney.

[20] Mr. White testified as to his position and responsibilities in the company, the system used to produce invoices, and the need for and his reliance on employees to provide financial information to be used for purposes such as registering the mechanics' lien in this case.

[21] Metal World submitted that Mr. White did not have full knowledge of the facts because he "had no personal knowledge of any of the details such as number of hours, amount of materials, equipment rental charges or subcontractor charges which made up the various invoices" (decision of the applications judge, 2014 NLTD(G) 119, at paragraph 53). The applications judge rejected the proposition that this level of information was required.

[22] Rather, the judge relied on the following relevant factors: Mr. White was a director and chief financial officer of Pennecon; only in rare circumstances would one person "have personal knowledge of exactly what

amounts are properly chargeable” under a contract of the type here; invoices and accounts receivable on which Mr. White relied were prepared by the relevant comptroller of Pennecon with the assistance of staff; invoices were “based on the information provided by the people on site at Long Harbour where the actual work was being performed”; the invoices provided to Mr. White “were entered into the accounting system of Pennecon known as a Jonas system”; “backup or supporting documentation” was included with the invoices; in determining the amount of the claim for purposes of his affidavit, Mr. White relied on an accounts receivable listing obtained from the Jonas system; the list was printed on December 5, 2011, the day before completing his affidavit in support of the lien claim; Mr. White testified that he “was relying on the existence of systems and support staff which [Pennecon] had in place as part of its business operations” (applications judge’s decision, at paragraphs 56 to 59).

[23] The applications judge therefore concluded:

[60] In circumstances, such as this, where you have a large corporation with staff and systems in place for keeping track of the details required for the preparation and issuance of invoices, I am of the view that an individual who is the Chief Financial Officer and a director of the lien claimant, with access to such staff and systems, and who checks with those staff and systems, can certainly be said to have “full” or “personal knowledge” of the “sum claimed as due”. ...

[24] I agree. However, I would emphasize that considerations such as these and a similar analysis would apply regardless of whether the affiant was the person registering the claim or the agent of that person. In either case, where the affidavit is challenged, the affiant must be in a position to verify the claim as true. What is required for that verification will depend on the particular circumstances. Due diligence, appropriate to the nature of the work or services and type of contract, is a short-hand way of describing what is required of the affiant.

[25] In this case, the extent of detail suggested by Metal World would not be appropriate in light of the above considerations and given the purpose of the *Act*, which is to provide protection for both parties to a contract. As discussed in the 2013 Appeal Decision, the legislation provides for vacating a lien claim on an appropriate ground such as where the amount claimed is based on a gross estimate or a false or misleading affidavit. However, I would distinguish, as engaging different considerations, the situation, as in this case, where the person against whom the lien is registered applies to

have the lien vacated based on details not apparent on the face of invoices or accounts receivable that were relied upon by the lien claimant's chief financial officer.

[26] It was for the applications judge to determine the extent to which cross-examination on the three affidavits would assist in assessing Metal World's application to vacate the lien. Clearly, in view of the challenge to Pennecon's claim resulting from Mr. Butler's affidavit, cross-examination on Mr. White's affidavit was necessary (2013 Appeal Decision, at paragraph 45). Given the nature of Mr. White's evidence, which did not involve detailed analysis of individual invoices, but information regarding the generation of invoices and the accounts receivable listings, the fact that the judge limited cross-examination to the period prior to registration of the lien was both practical and consistent with the legislative objective.

[27] The applications judge also permitted cross-examination on Mr. Butler's affidavit to facilitate the Court's understanding of the foundation for Metal World's application. Again, limiting cross-examination to issues such as how Metal World responded to Pennecon's filing the lien, the basis for the allegation that the lien was exaggerated, and the issue of prejudice to Metal World, but precluding examination directed to details of individual invoices, was consistent with an appropriate approach to assessing the application to vacate the lien.

[28] Similarly, the applications judge's refusal to permit cross-examination on Mr. Penney's affidavit is consistent with the appropriate analytical approach. While the affidavit provided evidence that assisted in giving context to the other two affidavits, the judge was satisfied that cross-examination would result in addressing a level of detail regarding individual invoices that would be necessary for a trial, but not appropriate for purposes of the application.

[29] Guidance as to when cross-examination generally is appropriate is set out in *Tucker v. AXA General Insurance*, 2014 NLCA 36, 355 Nfld. & P.E.I.R. 354. White J.A., in an application to reinstate an appeal under rule 57.20(8), identified three factors relevant in assessing whether cross-examination on an affidavit may be appropriate:

[27] In determining whether to allow cross-examination, there is some judicial guidance as to what a court should consider:

- a. Whether the facts in the affidavit are in issue ...;
- b. Whether cross-examination is necessary to challenge the facts deposed to in the affidavit ...; and/or
- c. Whether the affidavit is contentious or the statements deposed to are in dispute

The disjunctive “or” indicates that any one of the listed factors is sufficient. In addition, the list is meant as guidance rather than a closed list beyond which cross-examination will not be permitted.

[30] In this case, while the applications judge did not refer to these factors, he did set parameters for the cross-examination of Mr. Butler and gave reasons for refusing to permit cross-examination on both Mr. Butler’s and Mr. Penney’s affidavits in respect of the issue of exaggeration of the claim. The judge was satisfied that Mr. Penney’s affidavit dealt only with that issue and that the detail in respect of exaggeration would properly be considered at trial. In reaching that conclusion, the applications judge was, in fact, applying the first of the above factors. That is, he determined that detailed review of individual invoices was not in issue for purposes of the application.

[31] In the result, I conclude that the applications judge did not err in limiting cross-examination on the affidavits to the extent that he did. There was ample evidence to establish due diligence by Mr. White in verifying the claim as true. This standard is consistent with the objective of the *Act* to “enforce liens at the least expense” using a procedure, “as far as possible of a summary character, having regard to the amount and nature of the liens in question” (section 43 of the *Act*). The relevance of the errors conceded in Mr. Penney’s affidavit is discussed below.

Effect of Credit Payable to Metal World

[32] A new issue arising since the 2013 Appeal Decision relates to the effect, if any, of the \$66,576.42 credit admitted by Pennecon as a result of Mr. Penney’s affidavit. Further, there may be additional credits due given Mr. Penney’s position that, without further information, it was not possible to assess some of the allegations in Mr. Butler’s affidavit. The issue of credits, identified or to be identified, engages the question of whether this would be an appropriate ground for vacating the lien under section 26(2)(b) of the *Act*.

[33] I begin by noting that section 19, which deals with substantial compliance in particular situations, would not be engaged here. Section 19(1) provides:

Substantial compliance with sections 17, 18 and 30 is sufficient, and a claim for lien is not invalidated because of failure to comply with the requirements of those sections unless, in the opinion of the judge, the owner, contractor or subcontractor, mortgagee or other person is prejudiced by that claim, and then only to the extent to which he or she is prejudiced.

[34] That provision was discussed in the 2013 Appeal Decision:

[37] A review of ss. 17, 18 and 30 of the **Act** leads to the conclusion that s. 19(1) is directed to prejudice that may arise in the particular context of strict compliance with the procedural aspects of registering a lien. Section 17 sets out the facts to be specified in a lien claim and the requirement for a verifying affidavit; s. 18 provides for a lien claim against multiple properties or persons; and s. 30 sets out the particular procedure for enforcing a lien claim through the Trial Division.

[38] Clearly, s. 19 is concerned with ensuring that, subject to prejudice to another person, failure to comply strictly with the procedural requirements of the **Act** will not defeat a lien claim. However, applying the **Noranda Explorations** decision [[1976] 1 S.C.R. 296], this does not lead to the conclusion that prejudice cannot be considered in other contexts.

[35] The facts in a particular situation will determine whether the analysis should be conducted under section 19 of the *Act*, which would be engaged when the issue relates to substantial compliance in respect of the lien claimant's affidavit, or under section 26(2)(b) of the *Act*, which would be engaged when reliance is properly placed, without reference to section 19, on the "appropriate ground" basis for vacating a lien.

[36] Where the court is satisfied that the affidavit supporting registration of the lien meets the standard of due diligence, appropriate to the nature of the work or services and type of contract, errors should be considered under section 26(2)(b). The fact that the affidavit passes muster may be insufficient where errors in the amount of the claim are such as to provide an appropriate ground for vacating the lien.

[37] On the facts of this case, the analysis under section 26(2)(b) is the appropriate approach given that the due diligence requirement in respect of the affidavit was met. It is for this reason that I conclude that section 19 of

the *Act* is not engaged. For the same reason, the decision referenced by counsel in *Ken Gordon Excavating v. Edstan Construction*, [1984] 2 S.C.R. 280, is not of assistance. In *Ken Gordon*, no affidavit was provided, a situation that, in this jurisdiction, would engage section 19, based on the connection to the section 17 requirement for a supporting affidavit.

[38] In the 2013 Appeal Decision, the Court reviewed examples of situations when a lien has been vacated based on a challenge to the amount of the claim. In *Balasingham v. Dolphin Steel Systems Inc.*, 2008 NBQB 100, 334 N.B.R. (2d) 71, Baird J. wrote:

[16] The court agrees that defective, false, misleading or incomplete affidavits will invalidate a claim and will lead to dismissal.

[17] As counsel for the Applicant pointed out, the Respondent has a right to pursue his claim by proceeding with an action. That right will not be affected by this order. If there are facts in dispute, which both counsel have acknowledged there are, that evidence and those facts can be more properly decided at a hearing.

[18] The court accepts the Applicant's submission that the Respondent's affidavit contained misleading or false statements of fact. The court finds that the affidavit is defective. It is the affidavit which forms the foundation of the lien.

[39] In *Steininger v. Woodland Home & Building Products*, 2003 SKQB 464, [2003] Sask. R. 245, Barclay J. vacated the liens on the basis that the claim was "grossly exaggerated" or "based on estimation only", and that the affiant failed to identify her relationship with Woodland, or how she was able to verify the amounts owing.

[40] In *Kleenaire Equipment Ltd. v. Dennis Commercial Properties Ltd.*, [1970] 3 O.R. 776 (Ont. H.Ct.J.), at paragraph 5, Osler J. refers to "an inflated amount" claimed in the affidavit as a possible reason for vacating a lien.

[41] Those cases stand in contrast to the situation where the lien claimant has relied on appropriate systems for generating invoices and accounts receivable which may, nonetheless, result in some errors requiring adjustment. Detailed review of specific invoices, particularly in a large or complex contract, would ordinarily be a matter properly dealt with by the trial process.

[42] In this case, taking into account that some additional credits may be identified upon a detailed review of the invoices, an error of approximately

\$66,000, must be considered in light of the nature and value of the contract. The contract involved significant work and equipment. The accounts receivable indicated an amount of approximately \$1,850,000 as due. In his cross-examination, Mr. Butler conceded that the problem was not that the amounts in the invoices were inconsistent with the amount of the lien claim, but rather, the problem was “within the invoices”, such as the number of hours that should have been charged for equipment.

[43] To divest a claimant of the right to maintain a lien claim may have a potentially significant detrimental effect. While the claimant retains the right to pursue its claim by proceeding with an action, the security afforded by a lien is lost. The value to the lien claimant of maintaining the lien must be balanced against the potential negative effect on the person against whom the lien claim is registered. Insofar as negative consequences may flow from the summary character of the lien proceedings, such as in this case where it was inappropriate to investigate individual invoices, the *Act* requires that the court deal expeditiously with the matter, avoiding any unnecessary delay (2013 Appeal Decision, at paragraphs 54 and 55). As noted in that decision:

[54] ... Where an application is made under s. 36(1) [to set a date for the hearing], it is incumbent on the judge to make any orders necessary and appropriate to ensure that the matter is dealt with expeditiously.

[44] As applied to this case, errors in the amount of the claim must be determined by detailed analysis of individual invoices. That exercise is properly accomplished by means of the trial process. Given the amount of credit payable to Metal World identified through Mr. Penney’s affidavit, considered in the context of the nature and value of the contract between the parties, Metal World has not shown an appropriate ground on which to vacate the lien under section 26(2)(b) of the *Act*.

[45] While the applications judge did not apply this analytical approach, he came to the same conclusion. Accordingly, he dismissed Metal World’s application for payment out of the money held in court.

SUMMARY AND DISPOSITION

[46] In summary, Mr. White’s affidavit and further explanation by means of cross-examination establish the due diligence, appropriate to the nature of the work and type of contract, necessary to satisfy the requirement that the lien claim be verified as true. The applications judge did not err in limiting

cross-examination on the affidavits to the extent that he did. Errors in the amount of the claim, identified or to be identified, will require detailed review of individual invoices, an exercise properly dealt with at trial, but not for purposes of an application to vacate the lien claim. Finally, the errors amounting to approximately \$66,000 identified in Mr. Penney's affidavit, without more detail from Metal World, are not sufficient to constitute an appropriate ground for vacating the lien.

[47] Accordingly, leave having been granted, I would dismiss the appeal. Pennecon is entitled to its costs on column 3 of the Scale of Costs.

B. G. Welsh J.A.

I Concur: _____

J. D. Green C.J.N.L.

I Concur: _____

C. W. White J.A.