



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

**Citation:** *Mastec Canada Inc. v. FMR Management Inc.*,  
2022 NLCA 27

**Date:** April 28, 2022

**Docket Number:** 202101H0021

**BETWEEN:**

MASTEC CANADA INC.

FIRST APPELLANT

**AND:**

MASTEC CANADA PROJECTS INC.

SECOND APPELLANT

**AND:**

FMR MANAGEMENT INC.

FIRST RESPONDENT

**AND:**

NSP MARITIME LINK INCORPORATED    SECOND RESPONDENT

**Coram:**    Welsh, O'Brien and Butler JJ.A.

**Court Appealed From:**    Supreme Court of Newfoundland and Labrador,  
General Division 201701G6009

**Appeal Heard:**    January 18, 2022

**Judgment Rendered:**    April 28, 2022

**Reasons for Judgment by:**    Welsh J.A.

**Concurred in by:**    O'Brien J.A.

**Concurring Opinion by:**    Butler J.A.

**Counsel for the First and Second Appellants:** Raymond G. Critch

**Counsel for the First Respondent:** Cletus Flaherty

**Counsel for the Second Respondent:** No Appearance

**Authorities Cited:**

**Welsh J.A.:**

**CASES CITED:** *Penney v. Lush* (1996), 139 Nfld. & P.E.I.R. 113 (Nfld. C.A.); *Pennecon Energy Ltd. v. Metal World Inc.*, 2013 NLCA 67, 344 Nfld. & P.E.I.R. 32; *Allen v. Sir Alfred McAlpine & Sons Limited*, [1968] 1 All E.R. 543.

**STATUTES CONSIDERED:** *Mechanics Lien Act*, RSNL 1990, c. M-3, sections 23, 26.

**RULES CONSIDERED:** *Rules of the Supreme Court, 1986*, rules 17A, 40.11.

**Butler J.A. (concurring opinion):**

**CASES CITED:** *Ring v. Canada (Attorney General)*, 2010 NLCA 20, 297 Nfld. & P.E.I.R. 86; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Metal World Inc. v. Pennecon Energy Ltd.*, 2013 NLCA 67, 344 Nfld. & P.E.I.R. 32; *Penney v. Lush* (1996), 139 Nfld. & P.E.I.R. 113 (Nfld. C.A.); *Murray v. Danielski*, 2011 NBQB 173; *Omni-Mechel Ltd. v. 284800 Ontario Ltd.* (1984), 24 A.C.W.S. (2d) 252, 5 C.L.R. 169 (Ont. S.C.); *Haugen v. Farm Credit Corp.* (1981), 34 A.R. 204, 11 A.C.W.S. (2d) 409 (Alta. C.A.); *Westfab Homes Ltd. v. Duncan*, 1996 ABCA 382; *1361556 Alberta Ltd. v. Ristorante Cosa Nostra Inc.*, 2021 ABQB 157; *Kaulback v. Burke*, [2000] N.S.J. No. 256, 186 N.S.R. (2d) 194 (NSSC); *Re Driden Industries Ltd. v. Sieber et al.*, [1974] A.J. No. 251, 44 D.L.R. (3d) 629 (Alta. C.A.); *Lackie Industrial Contractors Ltd. v. Kinetics Technology International Corporation*, [1985] A.J. No. 595, 65 A.R. 392 (Alta. Q.B.).

**STATUTES CONSIDERED:** *Mechanics' Lien Act*, RSNL 1990, c. M-3, sections 17, 21, 23(4), 26(2), 26(3), 26(6); *Mechanics' Lien Act*, RSNB 1973, c. M-6, section 52.1(1); *Mechanics' Lien Act*, RSO 1980, c. 261, section 24(3);

*Builders' Lien Act*, RSA 1970, c. 35, section 33(2); *Builders' Lien Act*, RSA 2000, c. B-7, section 46(2).

**RULES CONSIDERED:** *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D, rules 17A, 40.

**Welsh J.A.:**

[1] This is an appeal by Mastec Canada Inc. and Mastec Canada Projects Inc. (together, “Mastec”) against the order of a judge dismissing Mastec’s application for cancellation of a bond which it had deposited in lieu of a lien registered pursuant to the *Mechanics’ Lien Act*, RSNL 1990, c. M-3.

**BACKGROUND**

[2] A lien was registered by FMR Management Inc. on August 18, 2017. Its statement of claim was issued on September 8, 2017. Upon application by Mastec, on September 21, 2017, pursuant to section 26(2) of the *Mechanics Lien Act*, the Court ordered that the lien “is vacated”, to be replaced with security in the form of a bond “which shall take the place of the Property” upon which the lien is claimed.

[3] Thereafter, the proceedings continued during 2017 to 2019 with filings of defences and counterclaims, demands for particulars, lists of documents, and examinations for discovery. On October 24, 2019, Mastec applied for a summary trial pursuant to rule 17A of the *Rules of the Supreme Court, 1986*. That application was adjourned *sine die*.

[4] Delays occurred in the proceedings related, among other things, to governmental actions imposed to deal with the covid-19 pandemic. Also on October 24, 2019, Mastec applied for an order under section 26(6) of the *Mechanics Lien Act* for delivery of the bond for cancellation. As set out in the decision, in September 2020, Mastec again applied, this time, pursuant to section 23(4) of the *Act*, to have the bond cancelled due to the passage of time.

[5] The applications judge was satisfied that regular steps to advance the matter had been taken with the agreement of all the parties. While the judge

recognized that Mastec was suffering “serious prejudice” through the expenditure of significant funds to maintain the bond in place, she dismissed the application for an order cancelling the bond.

[6] It is unclear in the oral decision of the applications judge whether she was proceeding under section 23 or 26 of the *Act*, and whether she was referring to both the certificate of action and cancellation of the bond when she dismissed Mastec’s application. However, on appeal, Mastec’s submissions were addressed to cancellation of the bond, the lien having been vacated in an earlier decision. The request for relief is for cancellation of the bond. Accordingly, it is cancellation of the bond that is the subject of this appeal, and to which the decision and reasons of the Court are properly directed. I am concerned about addressing issues that were not argued by the parties, and are not properly before the Court on the appeal.

[7] NSP Maritime Link Incorporated took no part in the proceedings in this Court or in the court appealed from.

## ISSUES

[8] At issue is whether:

- (1) The legislation authorizes the court to order a bond, deposited pursuant to section 26(2) of the *Act*, to be delivered up for cancellation under section 23(4) of the *Act*; and
- (2) The applications judge applied the appropriate factors in determining whether to grant Mastec’s application to have the bond delivered up for cancellation.

## ANALYSIS

### The Legislation

[9] Section 23 of the *Mechanics Lien Act* provides for registration and subsequent vacating of a certificate of action and related liens:

...

- (2) Upon an action under this Act being started, a certificate of action shall be registered in the registry.

...

(4) Where a certificate of action has been registered for 1 year or more in the registry and no appointment has been taken out for the trial of the action, the judge may, upon the unilateral application of an interested person, make an order vacating the certificate of action and discharging all liens depending on the certificate of action.

[10] Section 26 of the *Act* authorizes the substitution of security for the claim to take the place of a lien, and provides, in relevant parts:

...

(2) Upon application, the court may

(a) allow security for or payment into court of the amount of the claim of the lien ..., and order that the registration of the claim for lien and the registration of the certificate of action be vacated;

...

(4) Money paid into court, or a bond or other security for securing the amount and satisfactory to the court, takes the place of the property discharged and is subject to the claims of every person who has at the time of the application an existing claim for lien or given notice of the claim under subsection 12(6) or under section 15 to the same extent as if the money, bond or other security were realized by a sale of the property in an action to enforce the lien, but the amount that the court finds to be owing to the person whose lien has been so vacated is a first charge upon the money, bond or other security.

...

(6) Where money has been paid into court or a bond deposited in court under an order under subsection (2), the court may, upon notice to the parties that the court may require, order the money to be paid out to the persons entitled to the money or the delivery up of the bond for cancellation.

...

### Application of the Legislation

#### Section 23(4) of the Act

[11] Mastec submits that an order may be made under section 23(4) of the *Act* to deliver up for cancellation a bond, which was deposited pursuant to section 26(2) in substitution for the lien and which resulted in the lien being vacated. In making this submission, Mastec is relying on the authority in section 23(4) for an “interested person” to apply to vacate a certificate of action and lien where

“the certificate of action has been registered for 1 year or more in the registry and no appointment has been taken out for the trial of the action”. The basis for the submission is that the bond takes the place of the lien, and should, therefore, be treated similarly to a lien.

[12] That submission is not persuasive. The potential prejudicial effects of a lien and a bond are different. A lien has the effect of “one party encumbering another’s property before validity of the claim has been judicially determined” (*Pennecon Energy Ltd. v. Metal World Inc.*, 2013 NLCA 67, 344 Nfld. & P.E.I.R. 32, at paragraph 40). The owner’s ability to deal with the property pending a determination of the claim is accordingly restricted. For this reason, special provision is made in section 23(4) for vacating a lien based on the passage of a specified period of time.

[13] However, section 23(4) does not include reference to cancelling a bond which, as distinguished from a lien on property, is a financial obligation involving a promise to pay if certain circumstances arise. Given the difference in effect, the legislature has provided a separate means for cancelling a bond; that is, section 26(6) of the *Act*. It is this provision that is engaged when an application is made for delivery up of a bond for cancellation.

#### Section 26(6) of the Act

##### *General Principles*

[14] While the court has discretion to order delivery up of the bond for cancellation pursuant to section 26(6) of the *Act*, no factors are listed that would circumscribe the scope of that discretion. The applications judge considered three factors: inordinate delay, excuse for the delay, and prejudice to the parties. In identifying these factors, the judge made reference to the decision in *Penney v. Lush* (1996), 139 Nfld. & P.E.I.R. 113 (Nfld. C.A.). That decision is concerned with dismissal of an action for want of prosecution (rule 40.11 of the *Rules of the Supreme Court, 1986*). At issue in this appeal is whether those are appropriate factors to be considered in respect of cancelling a bond and, if so, how they are to be assessed.

[15] In *Penney*, Gushue J.A., for the Court, quoted from the decision in *Allen v. Sir Alfred McAlpine & Sons Limited*, [1968] 1 All E.R. 543, in defining a test to be applied where an application is made for dismissal of an action for want of prosecution:

[12] ... In order for such an application to succeed, the defendant must show:

(i) that there has been an inordinate delay. ... What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognize inordinate delay when it occurs.

(ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.

(iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties.

...

[13] In my view, counsel for the appellant is correct in his submission that the above must be demonstrated and that, if the first two requirements are satisfied, the onus still rests generally on the defendant to demonstrate that his or her right to a fair trial has been prejudiced by such untoward delay. ...

[16] Gushue J.A. went on to caution that “whether the principles as enunciated in *McAlpine* are relevant depends completely on the facts of any particular case”, and that the “surrounding facts must always be carefully considered” (*Penney*, at paragraph 15).

[17] Application of the criteria as they are stated and discussed in *Penney* must be considered taking into account the context in which they arise; that is, dismissal of a cause of action, which amounts to a final determination of litigation without adjudication of the issues. For that reason, dismissal for want of prosecution is available in very limited circumstances, and a high threshold must be met, as referenced in *Penney*.

[18] In considering how the *Penney* criteria may be of assistance in the context of cancelling a bond, it is helpful to review the purpose of mechanics’ lien legislation. The Court in *Pennecon* referenced the rationale underlying the statutory right to register a lien:

[35] ... In *Northern Electric Company Limited v. The Manufacturers Life Insurance Company*, [1977] 2 S.C.R. 762, at page 773, Laskin C.J.C., for the majority, noted parenthetically that the object of mechanics’ lien legislation is “to offer protection to persons doing work or providing services or furnishing materials in respect of any building or improvement”. However, in *Noranda Exploration Co. Ltd. v. Sigurdson*, [1976] 1 S.C.R. 296, Spence J., for the majority, included potential prejudice to the person against whom the lien is registered, and accepted that “the mechanics’ lien

statutes enacted in the various provinces of Canada have always contained this protection of the owner as well as protection of the labourer and material-men” (page 302). It is for this reason that, to obtain the benefit provided by the *Act*, the claimant is required to verify the claim as true.

...

[19] Given the difference between dismissing a proceeding for want of prosecution, which terminates a cause of action, and cancellation of a bond under section 26(6) of the *Act*, I am satisfied that it would not be appropriate to apply the criteria enumerated in *Penney* in the same manner as discussed in that case, which sets a high bar regarding “inordinate delay” that is “inexcusable”. However, if applied with due consideration for the context of mechanics’ lien legislation, the three criteria are of assistance in assessing whether the court’s discretion should be exercised to order a bond to be delivered up for cancellation.

[20] In conducting the analysis, all relevant factors must be considered. Where delay may be a factor regarding an order to deliver up the bond for cancellation, adjectives applied to “delay” such as unreasonable, excessive, unacceptable, inordinate, or prejudicial may be helpful in assessing the application. The causes of delay or reasons that explain it, as well as an excuse or responsibility for delay may also be relevant factors. The cost of maintaining the bond may be relevant to the analysis insofar as delay in the proceeding may result in prejudice to the party that deposited the bond.

[21] In summary, in an application under section 26(6) of the *Act*, delay in proceeding with the claim, reasons for the delay, and prejudice to either party in maintaining or cancelling the bond are valid factors to be assessed, along with any other considerations that may be relevant in the particular circumstances.

#### *Application of the Principles*

[22] In this case, the applications judge, while referencing *Penney*, applied the criteria, in context, to the facts of the case. In her oral decision, she accepted that delay was a relevant concern, but was satisfied that “the parties have engaged on a process advancing this litigation” (transcript, at page 25). The judge explained, at pages 24 to 25 of the transcript, that she was

... cognizant and agree[s] that one must look at the facts of each case, and on the facts of this case, while there has been a period of considerable time, 2017 to the present, relating to the setting of a trial date, I must also be guided by the procedural history

which I have set out and that that satisfies me that regular steps have been taken in this matter with the agreement of all the parties to the litigation. ... [D]iscoveries have been held, lists of documents have been filed ... .

[23] Regarding reasons or excuses for the delay, the judge referred to the impact of court closures and delays related in particular to the covid-19 pandemic, and the fact that the parties were taking steps to move the matter forward, including consideration of a summary trial which “is a more expeditious type of proceeding” (transcript, at page 27). The judge indicated that she understood that “some priority” applies in the case of mechanics’ lien litigation (transcript, at page 27).

[24] The applications judge also considered the question of prejudice (transcript, at page 27):

Serious prejudice, I think ... without doubt [Mastec] is expending money to keep its bond in place and has set out, I believe, that that’s to a tune now of \$75,000. [FMR Management] points out ... nonetheless this as being an appropriate matter to be recovered in the trial proceedings.

[25] Considering all these factors, the judge concluded that this was not an appropriate case to grant the application for cancellation of the bond, adding (transcript, at page 29):

... Nonetheless, [Mastec] is not precluded, should this matter not advance in a satisfactory manner, it is open to [Mastec] to again come back to the court with respect to this issue.

[26] I am satisfied that the applications judge considered appropriate factors, that is, delay in the proceedings, reasons for the delay, and prejudice to Mastec, in refusing to grant Mastec’s application. There is no basis on which to find that she erred.

### Costs

[27] The applications judge ordered costs in the cause. Given the nature of this uncompleted matter, I would make the same order in this appeal.

## SUMMARY AND DISPOSITION

[28] In summary:

1. Section 23(4) of the *Act* does not authorize an order for delivery up of a bond for cancellation; the provision that is engaged is section 26(6) which specifically provides for an application to cancel a bond;
2. The applications judge did not err in assessing Mastec's application. She considered, in the context of these circumstances, appropriate factors, that is, delay in the proceedings, reasons for the delay, and prejudice to Mastec, in determining that it would not be appropriate to grant Mastec's application to have the bond delivered up for cancellation.

[29] Accordingly, I would dismiss the appeal, and order costs in the cause.

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B.G. Welsh J.A.

I Concur: \_\_\_\_\_

F.P. O'Brien J.A.

### **Concurring Opinion of Butler J.A.:**

## INTRODUCTION

[30] I agree with my colleagues that this appeal should be dismissed but I would take a different approach.

[31] On this appeal the Court must address the interpretation and application of sections 23(4) and 26(6) of the *Mechanics' Lien Act* (the "*Act*") with respect to an application brought to vacate a certificate of action and to deliver a bond for cancellation.

## BACKGROUND

[32] NSP Maritime Link Incorporated (“NSP”) is the owner of land known as the Bottom Brook Maritime Link Construction Site (the “Site”).

[33] Mastec Canada Inc. and Mastec Canada Projects Inc. (together, “Mastec”) contracted with FMR Management Inc. (“FMR”) for the supply of materials and labour relating to construction work performed on the Site.

[34] Claiming that it was owed \$1,906,932.00 for the supply of materials and services to the Site pursuant to its contract with Mastec, FMR registered a lien against the Site on August 18, 2017 pursuant to section 17 of the *Act*. On September 8, 2017 FMR filed its related statement of claim in the Supreme Court which issued a certificate of action. This certificate was registered at the registry of deeds on September 19, 2017.

[35] On September 21, 2017 a judge of the Supreme Court, Trial Division, ordered:

Pursuant to section 26(2) of the *Mechanics’ Lien Act*, **Mechanics’ Lien No. 18564 is vacated** and in place thereof security in the form of a bond ... in the amount of \$2,193,000.00, which includes \$286,068.00 in respect of costs, ... shall take place of the Property upon which ... the subject Mechanics’ Lien is claimed...

(Emphasis Added.)

[36] The judge did not vacate the certificate of action.

[37] On October 24, 2019, Mastec filed two applications. One sought summary trial pursuant to rule 17A of the *Rules* and the other requested cancellation of the posted bond pursuant to section 26(6) of the *Act*. In its section 26(6) application Mastec alleged that the “entirety of FMR’s claim against Mastec was for delay costs” which it asserted were “beyond the scope of those rights recognized in section 6 of the *Act*” (the “First section 26(6) Application”).

[38] Subsequently on August 7, 2020, on the sole basis that FMR had failed to cause the matter to be placed on the trial list within one year of the registration of the certificate of action, Mastec applied:

...pursuant to section 23(4) and 26(6) of the *Mechanics’ Lien Act*, R.S.N.L. 1990 c. M-3 (the “*Act*”) for vacating of the Certificate of Action and the delivery up of the bond placed as security in this action on the grounds that the Plaintiff has failed to

cause this matter to be placed on the trial list within one year of the Registration of the Certificate of Action...

(Appeal Book, Tab 7, at para. 2)

[39] On November 3, 2020, a judge of the Supreme Court, Trial Division, gave directions on all three applications. The application for Summary Trial and the First section 26(6) application were adjourned *sine die*. The application for relief under **both** sections 23(4) and 26(6) of the *Act* was ordered to be set down for a hearing at the earliest available date after December 1, 2020 (Appeal Book, Tab 9, at para. 2).

[40] Memorandums of Fact and Law were filed on November 16 and December 3, 2020 respectively. Of note, Mastec did not respond to FMR's position on the law either in a Reply Memorandum or at the hearing held on January 27, 2021.

[41] The judge gave her decision orally on January 27, 2021. Relying solely upon the Memorandums of Fact and Law, the judge denied Mastec's application and ordered costs in the cause.

[42] Mastec's appeal alleges that the judge erred in the standard she applied to determine whether to exercise her discretion on the application.

## ISSUE

[43] In light of this background, the question is not, as my colleagues suggest, whether the legislation authorizes the Court to order a bond deposited pursuant to section 26(2), to be delivered up for cancellation under section 23(4) of the *Act*. This misconstrues the pleadings and the approach which the judge took on the application.

[44] I would characterize the issue to be determined on this appeal as whether the judge erred in dismissing the application. This requires a determination of the appropriate considerations on applications made under **both** sections 23(4) and 26(6) of the *Act*. Mastec and FMR agree that this is properly characterized as a pure question of law to be reviewed by this Court on appeal on a standard of correctness (*Ring v. Canada (Attorney General)*, 2010 NLCA 20, 297 Nfld. & P.E.I.R. 86, at para. 6, citing *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

## ANALYSIS

### Did the judge err in dismissing the application?

#### *Section 23(4)*

[45] At the commencement of her oral decision the judge stated:

So we're here today because the court has been asked to make a decision respecting whether the Certificate of Action in this matter should be vacated pursuant to subsection 23(4) of the *Mechanics' Lien Act*.

(Transcript, at 13-14)

[46] The subsection states:

(4) Where a certificate of action has been registered for 1 year or more in the registry and no appointment has been taken out for the trial of the action, the judge may, upon the unilateral application of an interested person, make an order vacating the certificate of action and discharging all liens depending on the certificate of action.

#### *The Distinction between a Certificate of Action and the Action Itself*

[47] A review of her oral decision reveals that the judge proceeded on the basis that the test which would apply to an application to strike a statement of claim should apply to both the request to vacate the certificate of action under section 23(4) **and** to cancel the bond under section 26(6).

[48] In doing so the judge failed to appreciate the distinction between striking a statement of claim and vacating a certificate of action.

[49] As this Court recognized in *Pennecon*, at para. 2, when a lien is vacated but money is held in court (or a bond substituted), “the claim of lien” remains in effect.

[50] The September 21, 2017 Order vacated the lien and replaced it with a bond; title to the Site was no longer encumbered but because the certificate of action was not vacated, notice of the lien claim remained on the public record.

[51] However, the certificate of action is merely a notice that there is a legal action commenced under the *Act*. Vacating it would have no effect on the litigation (*Pennecon*, at para 2). The test which would apply to an application to strike a statement of claim has no relevance to a request to vacate a certificate of action.

[52] Had Mastec sought to strike FMR’s statement of claim on the basis of delay, rule 40.11 would apply. Alternatively, that request could have been made under section 26(2)(c) of the *Act*, which states:

- (2) Upon application, the court may
  - ...
  - (c) upon appropriate grounds, dismiss the action.

[53] In either or both of these instances, Mastec would be required to establish that there had been inordinate delay, which is inexcusable and by which delay Mastec was likely to be seriously prejudiced (*Penney*, at paras. 12-13). I will refer to this as the “inordinate delay test”.

### *Distinguishable Jurisprudence*

[54] On this appeal, Mastec acknowledges that counsel had referred the judge to jurisprudence from other jurisdictions that led her to apply an incorrect test to the application under **both** sections 23(4) and 26(6) (Appellant’s Factum, at paras. 27 and 30-47; see also Appellant’s Memorandum of Fact and Law, Appeal Book, Tab 10, at para. 20, and Respondent’s Memorandum of Fact and Law, Appeal Book, Tab 11, at paras. 3-11).

[55] The appropriateness of the inordinate delay test to Mastec’s requests under **both** sections 23(4) and 26(6) was therefore addressed by the parties and is properly before this Court on appeal.

[56] Mastec had referred the judge to *Murray v. Danielski*, 2011 NBQB 173, but section 52.1(1) of the New Brunswick *Mechanics’ Lien Act*, RSNB 1973, c. M-6, upon which the New Brunswick Court relied provides for the **deemed discontinuance of an action**:

52.1(1) An action to enforce a lien shall be deemed to be discontinued one year after the action is commenced unless

- (a) the action has been set down for trial, or
- (b) an application has been made to a judge of The Court of Queen’s Bench of New Brunswick for an order continuing the action and a copy of the notice of application has been served on the defendant to the action.

[57] In comparison, our section 23(4) neither uses mandatory language nor references discontinuance of the action.

[58] With similar result, FMR had referred the applications judge to *Omni-Mechel Ltd. v. 284800 Ontario Ltd.* (1984), 24 A.C.W.S. (2d) 252, 5 C.L.R. 169 (Ont. S.C.), which relied upon *Haugen v. Farm Credit Corp.* (1981), 34 A.R. 204, 11 A.C.W.S. (2d) 409 (Alta. C.A.), for the conclusion that the application to vacate the certificate should be “treated in much the same way as a motion to dismiss for want of prosecution, by examining whether there had been ‘inordinate delay’”.

[59] However, *Haugen* involved both an application to discharge liens under section 33(2) of the *Builders’ Lien Act*, RSA 1970, c. 35, (the predecessor section to section 46(2) of Alberta’s current *Builders’ Lien Act*, RSA 2000, c. B-7) **and** an application under the *Alberta Rules of Court* to strike the statement of claim. The inordinate delay test was not applied to the section 33(2) portion of the application.

[60] It is well established in mechanics lien jurisprudence that the inordinate delay test applicable to the dismissal of an action has no relevance on an application to vacate a certificate of action which merely gives public notice that a lien claim exists. In addition to *Haugen* see *Westfab Homes Ltd. v. Duncan*, 1996 ABCA 382, at para. 4, *1361556 Alberta Ltd. v. Ristorante Cosa Nostra Inc.*, 2021 ABQB 157, at paras. 31, 33, and 35-36, and *Kaulback v. Burke*, [2000] N.S.J. No. 256, 186 N.S.R. (2d) 194, at para. 13 (NSSC).

### ***No Appointment Has Been Taken out for the Trial***

[61] The initial onus on an application under section 23(4) lay with the applicant (Mastec) to establish that “a certificate of action has been registered for 1 year or more in the registry and no appointment has been taken out for the trial of the action.” Without this factual foundation, section 23(4) had no relevance.

[62] The judge erred in failing to assess whether this factual foundation was established.

[63] Interpretation of “no appointment has been taken out for the trial” in section 23(4) requires consideration of the manner in which matters are set down for trial. Consistent with this Court’s note in *Pennecon*, at para. 54 (in the discussion of section 36 of the *Act*), the language of section 23(4) heralds back to a different time when matters were placed on a trial list at the request of the plaintiff.

[64] The current rule 40 now speaks to a very different process. In particular rules 40.03 – 40.05 address what is required to make an application for a trial date. They reference disclosure of witnesses and documents, the filing of a Certificate of Readiness and the requirement of a pre-trial conference. It is no longer a simple matter of making a request to be placed on a trial list.

[65] The current *Rules* also provide for other means of dispute resolution which were not available when section 23(4) of the *Act* was enacted and which include summary trial under rule 17A.

[66] As previously noted, Mastec had applied for summary trial of FMR's claim and its own counterclaim and this application was adjourned *sine die* on November 3, 2020.

[67] Section 23(4) does not require that the plaintiff be the party taking "the appointment ... for the trial of the action" and Mastec's own application for summary trial would, in my view, be akin to taking "the appointment".

[68] I conclude therefore that while the judge erred in treating the request to vacate the certificate of action as akin to striking the statement of claim, her error did not make a material difference to the result. The factual foundation for the request to vacate the certificate of action pursuant to section 23(4) was not established and it would have been appropriate to deny the requested relief on this basis.

### ***Section 26(6)***

[69] Section 26(6) states:

Where money has been paid into court or a bond deposited in court under an order under subsection (2), the court may, upon notice to the parties that the court may require, order the money to be paid out to the persons entitled to the money or the delivery up of the bond for cancellation.

[70] Mastec sought to have the bond cancelled on the sole basis that "no appointment has been taken out for the trial of the action".

[71] I take a different approach from my colleagues but I reach the same conclusion that Mastec's request to cancel the bond was appropriately dismissed.

[72] First, I have already determined that Mastec had not established that "no appointment has been taken out for the trial of the action".

[73] Secondly, reliance upon an asserted failure to take an appointment for trial within one year as the basis to cancel a bond is not supported by the wording of section 26(6). Unlike section 23(4), section 26(6) makes no reference to a requirement to take an appointment for trial within one year.

[74] Thirdly, section 26(3) specifically speaks against the requirement of expediency in proceeding with the lien claim once a bond is substituted:

Notwithstanding sections 23 and 24, where an order to vacate the registration of a lien is made under paragraph (2)(a) or (b), the lien does not stop existing for the reason that no certificate of action is registered.

[75] For jurisprudence in support of my conclusion (that the requirement to proceed to trial within the time period specified when a lien is in place has no relevance once a bond is substituted), see *Re Driden Industries Ltd. v. Sieber et al*, [1974] A.J. No. 251, 44 D.L.R. (3d) 629, at para. 12 (Alta. C.A.), and *Lackie Industrial Contractors Ltd. v. Kinetics Technology International Corporation*, [1985] A.J. No. 595, 65 A.R. 392, at paras. 1, 8 and 12-13 (Alta. Q.B.).

[76] I would dismiss Mastec's appeal respecting the request to cancel the bond on this basis.

## **DISPOSITION**

[77] For these reasons I would dismiss the appeal.

[78] I agree with my colleagues' order for costs.

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G. D. Butler J.A.