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Docket: CI 22-01-36635
(Winnipeg Centre)
Indexed as: Sterling Parkway Residences Inc. v. Gypsum Drywall Interiors Ltd.
Cited as: 2022 MBKB 218

COURT OF KING'S BENCH OF MANITOBA

APPLICATION UNDER: *The Builders' Liens Act*, R.S.M. 1987, c. B91

B E T W E E N:

STERLING PARKWAY RESIDENCES INC.,)	<u>Appearances:</u>
)	
applicant,)	JASON D. KENDALL and
)	<u>JESSE A. GIETZ</u>
- and -)	for the applicant
)	
GYPSUM DRYWALL INTERIORS LTD.,)	
)	<u>TYLER J. KOCHANSKI</u>
respondent.)	for the respondent
)	
)	JUDGMENT DELIVERED:
)	November 18, 2022

REMPEL J.

Introduction

[1] This is an application by an owner of land to vacate a lien filed under the provisions of *The Builders' Liens Act*, C.C.S.M. c. B91, (the "**Act**"). In particular the owner of the land relies on s. 55(3) of the **Act** for an order vacating the lien without conditions and in the alternative seeks an order under s. 55(2) of the **Act** vacating the lien on condition that the owner pay funds into court as security.

Background

[2] The applicant, Sterling Parkway Residences Inc. ("Sterling") is the owner and developer of a multi-unit residential complex in Winnipeg that is currently under construction (the "Project"). In 2019 Sterling hired Boretta Construction 2002 Ltd. ("Boretta") to act as general contractor for the Project.

[3] The respondent, Gypsum Drywall Interiors Ltd. ("GDI"), was hired by Boretta as a sub-contractor to work on the Project. GDI provided materials and performed drywall work on the Project pursuant to two separate contracts with Boretta (the "2019 Contracts"). On August 17, 2021 Sterling terminated Boretta as the general contractor on the Project (the "Termination Date") and rather than hiring a new general contractor, it assumed responsibility for that task.

[4] Construction on the Project continued without any effort on the part of Sterling to terminate the 2019 Contracts or to enter into a new contract with GDI. GDI subsequently raised a concern with Sterling over unpaid invoices for work done prior to the Termination Date. Sterling responded to this concern by stating it had already paid all the GDI invoices prior to the Termination Date by virtue of the fact that it had paid Boretta in full under the contract Sterling had with Boretta (the "Prime Contract"). Sterling does not deny that Boretta failed to pay GDI but insists it has no legal responsibility for Boretta's failure to pay GDI for work and materials provided under the 2019 Contracts prior to the Termination Date.

[5] GDI filed a lien against the title for \$245,772.48 when the Project was under construction pursuant to the **Act**, which Sterling now seeks to vacate.

Issue

[6] The issue before me is whether the lien filed by GDI should be discharged at this stage of the proceedings.

Decision

[7] I am satisfied the issues in dispute must be resolved at trial and not by way of the summary process to vacate liens set out in ss. 55(2) and 55(3) of the **Act**. Sterling's application to vacate the lien filed by GDI is therefore dismissed. My reasons follow.

Facts

[8] Prior to the Termination Date Sterling was not party to any contracts directly with sub-contractors. The Prime Contract required Boretta, in its capacity as general manager of the Project, to enter into contracts directly with sub-contractors and suppliers. The Prime Contract further required a third party hired by Sterling to act as a payment certifier to authorize payments that were properly due and owing to sub-contractors. There is no dispute that Sterling made the payments authorized by the payment certifier prior to the Termination Date.

[9] The 2019 Contracts required GDI to supply materials and perform certain work on the Project under the exclusive direction of Boretta. Unhappy differences arose between Sterling and Boretta that led Sterling to terminate the Prime Contract. The legal consequence of Sterling's termination of the Prime Contract,

its general contractor, was that it had no direct contractual relationship with GDI or with any other sub-contractor for that matter.

[10] The options open to Sterling at the Termination Date were limited. If it hired a new general contractor for the Project, the new general contractor would negotiate new contracts with all the sub-contractors for all future work. This would result in not only delay, but also higher pricing for Sterling given the effect of inflation, which was particularly acute in the construction industry during the Covid-19 pandemic.

[11] Sterling decided against the option of hiring a new general contractor and chose instead to take on the duties and responsibilities of being its own general contractor. This in turn triggered another choice for Sterling; it could either negotiate new contracts with the sub-contractors like GDI or assume the existing contracts these sub-contractors initially negotiated with Boretta in 2019.

[12] Sterling chose the latter option and this changed the nature of the legal relationship it had under the **Act** with its sub-contractors, as they now became “contractors” to Sterling. In these circumstances, each individual contract with a contractor gives rise to a new series of rights and responsibilities under the **Act**, including the owner’s duty to separately maintain a holdback for each separate contract in order to protect the rights of each sub-contractor working at a construction site.

[13] Sterling demanded that GDI continue to work on the Project without interruption under the terms and conditions of the 2019 Contracts under their

exclusive direction. A written notice to GDI from Sterling on August 17, 2021, stipulated that:

- a) Sterling had “terminated the Contracts” of Boretta;
- b) Sterling was taking possession of the work on the Project with the intention of finishing it;
- c) GDI’s work on the Project was to continue uninterrupted;
- d) GDI’s sub-contracts with Boretta were being “assigned” to Sterling;
- e) Sterling would be making payment directly to GDI for work performed prior to Boretta’s termination, including for work performed in June and July of 2021; and
- f) GDI was to stop taking any direction from Boretta with respect to the Project.

[14] The written notice issued by Sterling did not seek GDI’s consent to the assignment of the 2019 Contracts and clearly provided that GDI was to continue work on the Project “...under the same sub-contracts.” Nothing in the written notice indicated that the apparent assignment entailed Sterling assuming all of the rights ascribed to Boretta under the 2019 Contracts with an option to ignore certain obligations Boretta owed to GDI.

[15] Sterling took no steps prior to the unilateral assignment of the 2019 Contracts to determine what, if any, amounts Boretta owed to GDI. Further, no effort was made by Sterling to establish the correct holdback amounts Boretta was required to maintain on the 2019 Contracts under the **Act**.

[16] GDI continued to work on the Project as stipulated in the terms of the 2019 Contracts under the direction and instruction of Sterling through a project manager it hired, namely Bockstael Construction ("Bockstael"). Sterling also took steps to assert its rights under the 2019 Contracts with respect to work GDI had already completed prior to the Termination Date by insisting on changes to work GDI had already completed and demanding GDI attend to the remediation of alleged deficiencies to this work. As recently as September of 2022, Sterling exercised its right under the 2019 Contracts to demand changes to work GDI performed prior to the Termination Date under the direction of Boretta.

[17] In August of 2021, Boretta filed a lien on the Project for \$5,928,915.22. Sterling applied to vacate that lien in another proceeding before this court (CI 21-01-33651). GDI had no notice of that litigation and did not participate in it. Bock, J., by way of an Endorsement in that matter dated February 3, 2022 (the "Bock Endorsement"), ordered that Boretta was entitled to security for its lien of well over \$2.3 million or such other amount as the parties could agree to. The Bock Endorsement confirms that the security for the specified amounts were "*obviously not a final determination of entitlement to payment of these amounts. The evidence at trial may ultimately lead to a different conclusion*" (at para. 24).

[18] The status of the amounts owing to sub-contractors, including GDI, as at the Termination Date gave rise to considerable confusion. In September of 2021 Sterling confirmed its intention to pay all of Boretta's sub-contractors and it needed GDI to provide copies of its invoices and accounting records to ensure that all

trades were paid in full in order *"... to ensure that all of the contractual relationships with trades and suppliers are properly set up and dealt with."*

[19] The written notice of assignment of the 2019 Contracts in August of 2021 and the notice of intention to pay the following month were more than opaque – they included factually incorrect statements by Sterling. At the time of the written notice in August, Sterling was aware that Boretta was not able or willing to assign the 2019 Contracts and was still attempting to secure Boretta's consent to an assignment as late as November of 2021. The fact that Boretta had informed Sterling that there was no legal basis for the assignment of the 2019 Contracts was also not disclosed to GDI. Sterling failed to disclose this information from GDI and demanded instead that GDI continue to carry on with its work under the 2019 Contracts as if the assignment was legally binding. GDI never learned of the fact that the assignment of the 2019 Contracts never took effect prior to the filing of this application, by which time GDI had completed the work required by the 2019 Contracts.

[20] On January 24, 2022, Bockstael provided a new updated reconciliation showing that GDI was owed \$245,772.48 for work approved by the payment certifier as completed by GDI prior to the end of May 2021. When GDI demanded payment of \$245,772.48, Sterling suggested GDI pursue Boretta for payment because it had already paid Boretta that amount prior to the Termination Date. Boretta failed to respond to a demand for payment by GDI and has not admitted what if any amounts it may have received from Sterling for the work performed by

GDI. The disputed lien in the amount of \$245,772.48 was filed when it became apparent to GDI that neither Sterling nor Boretta would pay the amount owing.

[21] Sterling has confirmed, in response to a request from GDI, that it is not maintaining separate **Act** holdbacks specific to the 2019 Contracts, and that it is instead maintaining a general holdback for Phase 1A and 1B of the Project as a whole.

Position of Sterling

[22] Sterling relies on s. 27(1) of the **Act** as a full answer to its request for an order vacating the liens. That section provides:

Effect of payments made with holdback

27(1) Where the person primarily liable for payment under a contract has deducted and retained the holdback in accordance with this Act, all payments under the contract in excess of the holdback, made in good faith by the person primarily liable for the payment, before the registration of a lien by a person claiming a lien as against the owner, and payments permitted under section 25, operate as a discharge, pro tanto of the lien.

[Emphasis mine]

[23] Sterling maintains that since it is the “person primarily liable for payment” in this scenario and it made all of the payments to Boretta as directed by the payment certifier prior to the Termination Date and no liens were on title at the relevant time, it meets the “good faith” standard prescribed in s. 27(1) of the **Act**. According to Sterling the payments it made to Boretta pursuant to the authorization of the payment certifier entitles it to a discharge in the amount of, and to the extent of (“*pro tanto*”), the lien.

[24] In support of its argument under s. 27(1) of the **Act**, Sterling points to the decision of the Manitoba Court of Appeal in ***South Westman Regional***

Health Authority Inc. v. Accurate Dorwin Co., 2001 MBCA 127 (CanLII), 156 Man. R. (2d) 284. In **South Westman**, the owner applied to discharge a number of builders' liens that had been registered by sub-contractors on two construction projects. The owner had a stipulated price contract with the general contractor and made all certified payments required of it under that contract. One of the sub-contractors then registered a builders' lien (the "Gagnon lien"), alleging that the contractor had not paid that sub-contractor. The owner made a further payment to the contractor as required of it after the registration of one lien, and within a few days, the contractor abandoned the projects. The contractor's abandonment triggered several other sub-contractors to register builders' liens of their own.

[25] Sterling argues that the fact scenario in **South Westman** is substantially similar to its predicament here, as it is being asked to "pay twice" for the work described in the invoice. In **South Westman** the Manitoba Court of Appeal described the scenario faced by the owner as follows:

7 South Westman proposed to pay into court the holdback plus an additional \$2,678.30 with respect to the Gagnon lien since South Westman had notice of this lien, but no other, prior to the last progress payment to the contractor. The lien claimants disagreed, maintaining that South Westman's knowledge of the Gagnon lien disentitled it to the protection offered by sec. 27(1) of the *Act* — which as we shall see provides that payments made by an owner in good faith before the registration of a lien operates as a discharge *pro tanto* of the lien — with the result that the owner was obliged to pay into court the statutory holdback and, as well, to pay again not only the Gagnon lien, but the entire \$128,864.43 January 19, 2000 progress payment.

[26] Sterling argues s. 27(1) of the **Act** is designed to protect owners who act in good faith by making prescribed payments in full in the absence of liens

registered against title. This is akin to the common law protections offered to *bona fide* purchasers who pay fair market consideration in the absence of notice of competing claims. This principle is addressed by the Manitoba Court of Appeal in ***South Westman*** in the following paragraphs:

47 As the authorities just reviewed indicate, the purpose of staying the hand of the owner is to deal with liens of which the owner has notice – under the Act this means registration. While one of the paramount “policies” of the *Act* is undoubtedly to protect lienholders and to protect lien rights, protection is also provided for other parties including owners and contractors. If an owner proceeds in good faith without notice of a lien (i.e. registration) or with notice and chooses to proceed in any event, the owner’s liability, it seems to me, is restricted to liens that have been registered as at the date of payment.

48 This interpretation comports with commercial reality, the policy of the Act, the history of the legislation, and the authorities above reviewed.

49 The appeal is accordingly allowed with costs. *South Westman* is entitled to an order under sec. 55(2) of the *Act*, that all liens against both projects be vacated upon payment into court of the statutory holdback, plus the amount of the Gagnon lien.

[27] Sterling insists that its good faith payments to Boretta relieve it of all its responsibility to GDI under the ***Act*** or at law and GDI must pursue Boretta for a breach of trust or some other monetary remedies that might exist at law. Section 4(1) of the ***Act***, according to Sterling, creates a statutory trust for situations exactly like this, when a contractor like Boretta, has not paid a sub-contractor with the funds that it has received from an owner.

[28] Sterling concludes by stating the ***Act*** cannot be read in a way that could permit registration of a lien for amounts that have already been paid in good faith and where no contract has been breached. In legal terms, Sterling insists GDI’s lien rights were extinguished when Sterling paid \$245,772.28 to Boretta for GDI’s

work that the contract manager had certified as complete and GDI should not have an opportunity to double dip by way of an improperly registered lien.

The Law

Legislation like the **Act** is remedial in nature, as it intends to protect parties who perform work and/or supply materials at construction sites without the benefit of a direct contractual relationship with the owner of the land who is benefiting from their work or materials. The text by David I. Bristow, Duncan W. Glaholt, R. Bruce Reynolds and Howard M. Wise, *Construction, Builders' and Mechanics' Liens in Canada*, 7th ed. (Toronto: Thomson Carswell, 2011)(Loose-leaf, release 9), states at p. 1-12, at para. 1.1, that "... [o]nce entitlement to claim the benefit of the statute is established, the courts will give effect to the spirit rather than the letter of the statute ...".

[29] The rights of an unpaid sub-contractor or contractor include a right of lien and enforcement of its rights under the trusts created by **Act** and also the right to pursue contractual remedies. The owner of the land cannot dictate which options an unpaid party can pursue.

[30] The *Construction, Builders' and Mechanics' Liens in Canada* text also confirms that owners of land inherit all of the obligations created by contracts they assume from a contractor in cases where a contractor is terminated or abandons a construction project and new contracts are not agreed to (at pp. 3-36 and 4-35):

Where the owner dismisses the contractor, or where a contractor abandons the work and the owner then agrees with the subcontractors that if they will finish the work they will be paid, the owner cannot avoid liability by saying that the contractor is liable on the basis that its

agreement with the subcontractors were merely a promise to answer for the debt, default or miscarriage of another. ...

.

When an owner takes over a contract abandoned by its contractor and agrees to pay the subtrades, the owner will be liable for the full amount of the subtrades' liens. ...

[31] After the contractual relationship between an owner and contractor is terminated or breached, the owner inherits all of the contractual duties and obligations between the ex-contractor and the sub-contractors unless the terms of new contracts are agreed to. In those circumstances, the law is clear that an owner does not have the option to choose which duties and obligations it may wish to comply with.

[32] Thomas G. Heintzman, Bryan G. West & Immanuel Goldsmith, *Heintzman and Goldsmith on Canadian Building Contracts*, 5th ed. (Toronto: Thomson Reuters, 2019), describes this as follows:

§ 12:10. Termination or Variation of the Main Contract: Effect on Subcontract

Since the existence of the subcontract is dependent on the existence of the prime contract, if the prime contractor's contract is terminated, the contractor will necessarily repudiate the subcontract unless the subcontract provides for such an eventuality. ... In this circumstance, the parties will be entitled to exercise their respective rights under the change order provisions of the contract, if any, or the subcontractor will be entitled to accept that repudiation and terminate the subcontract.

. . .

The subcontractor may, of course, decide not to accept the repudiation of the subcontract and keep it alive until the prime contract or performance under it is revived, if it is. The prime contractor can enter into a new contract with the subcontractor, or the owner or a new prime contractor can do. That contract may be an entirely new contract or it may arise by way of novation from the prior subcontract. ...

[33] The following quotation from *Heintzman and Goldsmith on Canadian Building Contracts* is also apposite:

12:16. Subcontractor's Claim to Payment from the Owner

However, a direct agreement may arise between the owner and subcontractor if, for example, the contractor defaults on the prime contract and the owner then requests the subcontractor to continue and complete its work. ...

[34] Apart from s. 27(1), which is already cited in these reasons, the following sections of the **Act** come into play in this dispute:

Definitions

1(1) In this Act,

...

"contract" means a contract entered into with the owner or his agent

(a) for construction, or

(b) for improving land, or

(c) for the doing of any work or the providing of any services in construction or in improving land, or

(d) for the supplying of any materials to be used in construction or in improving land,

but does not include a contract of employment;

"**contractor**" means a person who has entered into a contract with the owner or his agent;

.....

"**sub-contractor**" means a person other than a contractor, who has entered into a sub-contract but who does not have a contract directly with the owner or his agent;

.....

Receipts and moneys of owner constitute trust fund

5(1) Where, under a contract, sums become payable to the contractor by the owner on the basis of a certificate of a payment certifier, any amount, up to the aggregate of the sums so certified, that is in the hands of the owner or received by him at any time thereafter for payment under the contract constitutes, until paid to the contractor, a trust fund for the benefit of

- (a) the contractor and all sub-contractors and other persons who have supplied materials or provided services for the purposes of performing the contract or any sub-contract under the contract;
- (b) The Workers Compensation Board; and
- (c) workers who have been employed for the purpose of performing the contract or any sub-contract under the contract.

...

Duties of owner as to trust fund

5(3) The owner is the trustee of the trust funds created under subsections (1) and (2) and he shall not appropriate or convert any part of the trust fund to or for his own use or to or for any use not authorized by the trust until

- (a) the contractor has been paid all sums justly owed to him in respect of the performance of the contract; and
- (b) provision for the payment of other affected beneficiaries of the trust has been made

Exception

5(4) Notwithstanding subsection (3), where an owner has himself paid, in whole or in part,

- (a) any sub-contractor or other person who has supplied materials or provided services for the purpose of performing the contract or any sub-contract thereunder;
- (b) any assessment of The Workers Compensation Board arising out of work done in performing the contract or any sub-contract thereunder;
- (c) any worker who has been employed by the contractor or any sub-contractor for the purpose of performing the contract or sub-contract for work done in the performance of the contract or the sub-contract; or
- (d) any other affected beneficiary in respect of a claim arising out of the performance of the contract or any sub-contract thereunder;

the retention by the owner of a sum equal to the sum so paid by him shall be deemed not to be an appropriation or conversion thereof to or for his own use or to or for any use not authorized by the trust if, prior to the retention, all beneficiaries of the trust entitled under him have been paid in full.

.....

Devices to defeat liens and trusts

12

Every device by a person and every payment made for the purpose of defeating or impairing a lien or a trust created under this Act is against public policy and void.

ORIGIN AND NATURE OF LIEN

Creation of lien

13 Any person who

- (a) does any work; or
- (b) provides any services; or
- (c) supplies any materials to be used;

in performance of a contract or sub-contract for any owner, contractor or sub-contractor has, by virtue thereof, a lien for the value of the work, services or materials which, subject to section 16, attaches upon the estate or interest of the owner in the land or structure upon or in respect of which the work was done or the services were provided or the materials were supplied, and the land occupied thereby or enjoyed therewith.

.....

Holdback

24(1) The person primarily liable for payment under a contract under or by virtue of which a lien may arise shall, as the work is done or the services are provided or the materials are supplied under the contract, deduct 7.5% of each payment to be made by him in respect of the contract, and retain that amount for at least 40 days after

- (a) a certificate of substantial performance is given under section 46; or
- (b) the work to be done under the contract has been completed, the services to be provided under the contract have been completely provided and the materials to be supplied under the contract have been completely supplied; or
- (c) the work to be done under the contract, the services to be provided under the contract and the supplying of materials to be supplied under the contract have been abandoned;

whichever first occurs, so that the total holdback shall be equal to 7.5% of the contract price for the whole contract, or if there is no specific contract price, 7.5% of the total value of the work, services and materials done, provided or supplied in the performance of the contract.

...

Lienholders charge on holdback

26 Each lienholder who has a lien arising under a contract or sub-contract has a charge upon that part of the holdback to which the person through whom the lien is derived is entitled.

...

Amendment of contracts

29 Every contract and sub-contract under which a lien may arise shall be conclusively deemed to be amended in so far as is necessary to bring it into conformity with this Act.

.....

Vacating lien on payment into court, etc.

55(2) Upon application, a judge may order security or payment into court in an amount equal to the holdback required under this Act as it applies to a particular contract and any additional money payable with respect to that contract but not yet paid but not exceeding the total amount of the claims for liens then registered against a parcel of land and may then order that the registration of those liens be vacated.

Vacating registration on other grounds

55(3) Upon application, a judge may order that the registration of a lien be vacated upon any grounds other than those mentioned in subsection (2).

[35] The Bock Endorsement reviewed the case law in Manitoba interpreting the vacating of a lien under s. 55(2) of the *Act* and recites the following guiding principles for orders vacating liens beginning at para. 18:

- a) *Winfield Construction Ltd. v. B.A. Robinson Co.*, 1996 CanLII 12451 (MB CA), 110 Man. R. (2d) 41, teaches that the term “payable” in s. 55(2) of the *Act* is to be determined by the value of the work done by the sub-contractor making the lien claim as at the date of the filing of the claim, and not by whatever amount may then be defined as due or owing under the terms of the contract between the parties;
- b) The Winfield Test (above) applies with equal effect in cases involving disputes between a contractor and a sub-contractor and those between an owner and a contractor;

- c) Judges cannot make final determinations as to what is “payable” or breaches under the **Act** in the face of conflicting evidence in an application to vacate a lien under s. 55(2) of the **Act** because it is a summary process for the vacating a lien in exchange for alternative security or payment into court;
- d) Judges can exercise discretion to determine the value of work done as at the filing date of a lien in order to protect the interests of parties but they are under no obligation to accept the amounts of liens claimed as representative of the value of that work;
- e) It is open to judges to take a “middle position” on an application by ordering some form of security to protect a lien holder or an owner pending a final determination at trial (**Wowryk v. Orlikow**, 2001 MBQB 275(CanLII)); and
- f) Judges on an application to vacate are not performing the functions of a judge at trial. In disputed cases credibility assessments, the weighing of evidence and drawing appropriate inferences from all of the evidence are matters that should be left for the determination of the trial judge and not a judge hearing an application under ss. 55(2) or 55(3) of the **Act** (**1642190 Alberta Ltd. et al. v. Paragon Industries Ltd.**, 2014 MBQB 35 (CanLII)).

Analysis

Does GDI have a Right of Lien under the *Act*?

[36] Sterling has never disputed that GDI was not paid in full by Boretta for the labour and materials they provided on the Project. It simply maintains that GDI should look to Boretta for payment of any amounts owing prior to the Termination Date. This position is untenable for several reasons, the main one being that Sterling, through its words and conduct, put itself in a direct contractual relationship with GDI when it demanded that GDI carry on with the 2019 Contracts. Sterling is therefore responsible for any breaches of the 2019 Contracts regardless of when those breaches occurred.

[37] Sterling cannot wash its hands of responsibility for a breach under the 2019 Contracts, for which it assumed full responsibility, simply due to the timing of any such breach relative to the Termination Date. The evidence unequivocally points to the fact that GDI has not been paid under the 2019 Contracts for which Sterling is fully responsible. This fact alone gives rise to clear and unequivocal lien rights under the *Act*.

[38] The “good faith” argument advanced by Sterling under s. 27(1) of the *Act* also fails, as its conduct cannot reasonably be described as meeting that standard. Sterling explicitly declared to GDI that the 2019 Contracts has been assigned to it when it knew this was not factually correct. Sterling also informed GDI that it fully expected GDI to continue working under the terms of the 2019 Contracts and they would be fully paid. GDI had no idea Sterling was resiling from both of those

statements until this litigation commenced. All of this confirms that Sterling was not acting in good faith.

[39] Had Sterling been transparent with GDI about its failed efforts to secure the assignment of the 2019 Contracts from Boretta or in the alternative told GDI that new contracts had to be negotiated, GDI would have been in a position to evaluate its legal position in a fair manner. The conduct of Sterling deprived GDI of that opportunity. As a result of Sterling's tactical decision, GDI had no clarity as to what the scope of its work post-termination would be and what it could charge for that work under a new contract in contrast to what it was still entitled to be paid for the work under the 2019 Contracts.

[40] Further, if GDI had been forthcoming about its failed efforts to secure the assignment of the 2019 Contracts, GDI would have been placed on notice that it had to take immediate action against Boretta for payment and that it would have to file a lien under the **Act** to protect its position. GDI could also have taken steps to secure the holdback. If Boretta had refused to remove GDI's lien in those circumstances, Sterling would have been required to post alternate security to ensure the removal of such a lien. Sterling is in that same position now and should not be rewarded now for its lack of transparency.

[41] Sterling maintained the façade of a full assignment of the 2019 Contracts for several months. This considerable delay prejudiced GDI as I have already noted, because it could not fairly assess its legal risk and take meaningful steps to protect its position. It is conceivable that Boretta will argue in future litigation that

the delay by GDI in asserting its rights deprives it of the protections and remedies offered by the **Act**.

[42] Sterling cannot maintain the fiction that it did not assume all of Boretta's obligations as general contractor by virtue of the *de facto* assumption of the 2019 Contracts and that it can now cherry pick through the obligations of a general contractor it wishes to comply with. Sterling, through its words and conduct, is contractually obligated to pay GDI directly for all of its work on the Project. Any payment by Sterling to Boretta, that ostensibly covered GDI's work does not absolve Sterling of its obligations under the 2019 Contracts or take away GDI's right of lien under the **Act**.

[43] The evidence is clear that Boretta has not admitted that it received the payment of GDI's invoice. This remains a live issue for trial and should not be decided by me in a summary way on a pre-trial application to vacate a lien.

[44] The suggestion by Sterling that any requirement for it to post security in the amount of the GDI lien in order to discharge GDI's lien constitutes an "overpayment" is not accurate. Sterling will continue to have an interest in the funds paid into court as security. Once a judge makes a final determination on the facts, any security determined to exceed liability can then be paid out to Sterling.

[45] Sterling's application to vacate the lien also fails because it cannot rely exclusively on the representations of the payment certifier that it retained to claim the lien amount was "already paid". The Winfield Test, as already noted, defines the term "*payable*" in s. 55(2) of the **Act** as the actual state/value of the work.

Sterling cannot rely on its payment of the amount deemed appropriate by the payment certifier as a fulfillment of all of its obligations under the 2019 Contracts or the **Act**. Ultimately, the question before the judge at trial will not be whether Sterling paid the certified amount approved by the payment certifier. The question will be whether Sterling paid Boretta for the actual state or value of the work done under the Prime Contract prior to the Termination Date and if Sterling paid GDI for the value of its work on the Project after taking responsibility for the 2019 Contracts. Sterling's assertion that it paid Boretta certain amounts that were intended for GDI, which has not been admitted by Boretta, remains to be proven.

[46] Section 5(3)(b) of the **Act** clearly provides that Sterling cannot convert Project funds for its own use until provision has been made for the payment of other affected beneficiaries, such as GDI. Section 5(4)(a) of the **Act** only protects an owner like Sterling from a claim of conversion or breach of trust if the owner pays a contractor directly for their work and materials.

[47] Vacating the lien at this stage would cause severe prejudice to GDI, as the existence of a lien is a statutory requirement for GDI to make a claim against any Project holdback. Section 26 of the **Act** provides that a lienholder must first have a lien arising from a contractor or sub-contract before it will have a charge upon the Project holdback. This means that if GDI's lien is discharged, it will not be able to claim against any portion of the holdback(s) on the Project.

[48] Given that GDI was statutorily required to file a lien in order to protect its right to claim against any Project holdback(s), it cannot be fairly said that its lien has been improperly filed.

[49] Vacating GDI's lien at this stage would defeat or impair the lien rights of GDI. Section 12 of the **Act** provides every device by a person and every payment made for the purpose of defeating or impairing a lien or a trust created under this **Act** is against public policy and void.

Is Sterling Obligated to Maintain a Holdback Specific to the 2019 Contracts?

[50] As I have already mentioned, Sterling cannot maintain the fiction that it had no direct contractual relationship with GDI, or that GDI has been gratuitously working on the Project without a contract at all. Sterling by virtue of its decision to assume the mantle of the general contractor for the Project is bound by the 2019 Contracts to their full extent and is not merely entitled to the benefits that the 2019 Contracts offered. By electing to step into Boretta's shoes as contractor, GDI became a "contractor", as the **Act** defines that term. Under s. 24(1) of the **Act**, Sterling as the party primarily liable for payment under the 2019 Contracts took on the responsibility for personally maintaining a 7.5 per cent holdback specific to the entirety of 2019 Contracts.

[51] Sterling could have avoided taking on the risk of maintaining the entirety of the holdback(s) required under the 2019 Contracts by entering into new contracts with GDI that clearly defined the scope of the work to be completed after the Termination Date. Sterling clearly chose not to pursue this option. Sterling also failed to verify the status of any holdback(s) Boretta may have held under the 2019 Contracts and then attempt to negotiate an agreement to secure an acceptable amount for a holdback.

[52] Sterling's reliance on the findings made in the Bock Endorsement are of no assistance to it in this application. GDI was not a party to those proceedings and did not participate in them. The Bock Endorsement reaches no binding conclusions as to the rights of GDI under the 2019 Contracts or under the **Act**.

[53] For all of these reasons I am satisfied that Sterling is required to maintain a holdback specific to the 2019 Contracts and that Sterling is not entitled to an order vacating the lien filed by GDI.

Summary and Conclusion

[54] Sterling is not a victim of an "overpayment" scheme by virtue of the registration of GDI's lien. Sterling also does not meet the "good faith" standard set out in s. 27(1) of the **Act**.

[55] By taking on the role of general contractor and stepping into the shoes of Boretta, Sterling must assume all risks and responsibilities presented by the 2019 Contracts and fulfill its responsibilities under the **Act**, which include an obligation to maintain separate holdbacks for the full value of the 2019 Contracts.

[56] GDI has a valid lien right and requires a lien under the **Act** to advance a claim against the holdback on the Prime Contract.

[57] Based on my conclusion that that GDI has a valid lien right and that Sterling is obliged under the **Act** to maintain separate holdbacks on the 2019 Contracts, I am dismissing Sterling's application to vacate the lien filed by GDI. Sterling has the option to pay the full amount of the lien (namely \$245,772.48) into court as security if it wishes to vacate the lien.

[58] The parties may speak to costs if they cannot agree, provided they file written arguments in advance.

REMPEL J.