

No Special
Consideration

511

IN THE MATTER of the Wages Protection
and Contractors Liens Act
1939

BETWEEN TE AWAITI STEPHENS and
RICHARD CHARLES GREEN and
PETER EDWARD OLIVER
Plaintiffs

A N D HECTOR EDWARD RAMSAY
First Defendant

A N D METAL RECYCLING N.Z.
LIMITED
Second Defendant

A N D LAMIFORM FABRICATORS
LIMITED
Third Defendant

Hearing : 14th September 1979 (In Chambers for Court)

Counsel : E.M. Prichard for third defendant in support
M.P. Crew for plaintiffs to oppose

Judgment : 25 September 1979

JUDGMENT OF BARKER, J.

This is a motion under Section 44 of the Wages Protection and Contractors Liens Act 1939 (hereinafter called "the Act") for an order cancelling the registration of a lien registered by the plaintiffs against the land of the third defendant upon the grounds that the third defendant is "prejudicially affected" by the said registration.

During the months of June and July 1977, certain site, clearing and demolition work was carried out on land at Portage Road, New Lynn, described as lot 2 on Deposited Plan 65125, being all the land described in Certificate of Title 24C/250, containing 1 acre, 1 rood, 37.5 perches. This land was and is at all material times, registered in the name of the

third defendant, Lamiform Fabricators Limited. Adjoining this section of land is lot 1 on Deposited Plan 65125 containing 2 roods, 22 perches, being all the land described in Certificate of Title 24C/349. This latter piece of land was and is at all material times registered in the name of Hector Edward Ramsay, the second defendant. On 15th August 1977, the plaintiffs served on the first defendant a notice of lien and charge addressed to him alleging:

- (i) A subcontract between the plaintiffs and the second defendant, Metal Recycling N.Z. Limited; and
- (ii) That the second defendant was the "contractor" of the first defendant.

The notice sought both a charge on monies alleged to be payable by the first defendant to the second defendant and a lien on the first defendant's land (i.e. lot 1 on Deposited Plan 65125) on which land, the notice alleged, the plaintiff's work had been performed. The total of the claims of the three plaintiffs was \$11,196.

On 31st August 1977 the plaintiffs issued proceedings in this Court naming Mr Ramsay as first defendant and Metal Recycling N.Z. Limited as second defendant. Their initial statement of claim contained an allegation of, either an oral contract to perform work between the plaintiffs and the first defendant acting through the agency of the second defendant, or, alternatively, an oral contract between the plaintiffs and the second defendant. On 14th September 1977 the plaintiffs moved ex parte to join Lamiform Fabricators Limited as a third defendant; the motion came before me ex parte. I directed that the other defendants be served. In support of the motion, an affidavit was filed by the plaintiff's solicitor claiming that, through error, it was discovered that the postal address of the property to be affected by the lien was in fact Number 20B Portage Road and not Number 23. An amended joinder motion was

filed, on notice; on 28th October 1977, Speight, J. granted the plaintiffs' motion to join, without an appearance from the existing defendants, the third defendant.

Various amended statements of claim have been filed by the plaintiffs, the latest bearing date, 7th September 1979. This statement of claim, unlike the statement of claim filed with the writ, now alleges that the plaintiffs' work was performed on lot 2, Deposited Plan 65125; i.e. the third defendant's land. It alleges an oral contract, either:

- (i) On or about 12th June 1977, between the plaintiffs and either the first and/or third defendants acting through their agent, either actual or ostensible, the second defendant; or
- (ii) Alternatively, between the plaintiffs and the second defendant in its personal capacity.

The pleading seeks a lien on the third defendant's land (i.e. lot 2) and a charge on "moneys payable by the first and/or third defendants as to the second defendant under the contract referred to in paragraph 7." I pause to observe that such "all options open" pleading is undesirable in lien actions. Surely a plaintiff should know with whom he contracted. Moreover, the plaintiffs are in a better situation if they are sub-contractors - one alternative pleaded - than if they are head contractors - another alternative pleaded.

Under Section 36(2) an action is deemed to be brought on behalf of all other claimants of the same order of priority; i.e. workers, subcontractors, head contractors. Such vague pleadings would make it difficult for a potential claimant to assess whether he could "join on" under Section 36 because he would be uncertain whether he was of the same class of claimant.

The District Land Registrar registered a copy of the first amended statement of claim which sought to charge the

third defendant's land on 29th November 1977. No lien has been registered on the land of the first defendant, the subject of the notice of 15th August 1977.

Mr Prichard's submission was that no notice had been given to the third defendant charging its land as required by the statute; such notice was a condition precedent to the commencement of proceedings and that the notice of 15th August 1977 which described the wrong land and was addressed to the wrong person was ineffective.

Mr Crew submitted that a notice under Section 28 was not a prerequisite to the commencement of an action. I cannot accept this submission. It is the commonly held view in the legal profession that a notice under Section 28 and/or Section 29 must be given prior to the commencement of an action. This is the view of the learned author of Wilson, Contractors' Liens and Charges (2nd Edition) p.51 where he says of section 34:

"Subsection (1) provides a remedy only for those who have given notices of lien or charge, under s 28(1) or s 29(1). 'Subject to the provisions of this section' appears to refer particularly to the provisions of subsection (2), (4) and (6)."

Having considered Section 34 in the manner suggested by the learned author, I am in respectful agreement with him.

The learned author's view is further reinforced by the wording of Section 28(1); i.e.:

"Every person who intends to claim a lien of any land or chattel shall give notice to the owner specifying the amount and particulars of his claim and stating that he requires the owner to take the necessary steps to see that it is paid or secured to the claimant."

I refer to the discussion at pages 4 and 5 of the learned author's work of the essential nature of the lien or

charge. He refers to the well-known decision of Edwards, J. in Re Williams, ex parte Official Assignee, (1899), 17 N.Z.L.R. 712, 723:

"... the lien or charge is created by this Act and not by the notice, but that until the notice is given, the charge is a floating charge and liable to be defeated to the extent and in the manner provided by the statute."

The characteristics and effect of the "floating charge" were considered in the Court of Appeal by Gresson, P. in J.J. Craig Ltd. v. Gillman Packaging Ltd., (1962) N.Z.L.R. 201, 210, where he said:

"It appears to me that though, as has been authoratively held, the charge is created by the statute, and not by the notice, the giving of the notice is essential to perfect it, such notice to be given within the time prescribed by the Act, when (and not until then) the charge will become effective." (Emphasis supplied)

Later, he said:

"It appears to me implicit in the judgment (In Re Williams) that the charge though created by the Act is nevertheless of such a floating or inchoate character as to require the giving of a notice to perfect it."

And later again:

"... the giving of a notice is a condition precedent to the prosecution of a claim or lien or charge and without such a notice a floating charge would not crystallise and become fixed. An event causing a floating charge to attach is the essence of a floating charge ..." (Emphasis supplied)

It seems to me clear that the giving of a proper notice is a necessary condition precedent for the institution of an action under Section 34(1). It is true, as Mr Crew pointed out, that in Wilson (op. cit.) at pages 5 and 6, there is a discussion whether the statement of claim itself can constitute a notice. In my view, that discussion refers only to

persons who, under Section 36(2) of the Act, join in an action already properly commenced. There appears to be a good argument that such persons do not need to give a notice although their failure to do so may affect their priority. The plaintiffs are not in that situation. They have commenced this action. If there should be another action brought by some other subcontractor doubtless the plaintiffs can "climb on board" such other action, which may have been properly commenced in respect of the same head contract.

I should add that further notices were purported to be given "without prejudice" in August 1979 to the second and third defendants, seeking to charge the correct piece of land. These notices alleged a contract between the plaintiffs and/or Mr Ramsay and/or Metal Recycling Limited. A valid notice, as I have held, is a condition precedent to the issue of proceedings. Moreover, the notices alleged, at least in the alternative, a contract between the plaintiffs and someone who was not an "owner"; i.e. the alternative allegation of a contract between the plaintiffs and the first defendant to do work on the land belonging to the third defendant. Section 28(2) requires the giving of a notice to the "employer" if the "owner" is not the "employer" as well as to "the contractor or subcontractor (if any) by whom he is employed, to every superior contractor, and to every other person who, to the knowledge of the claimant, would but for the claim be entitled to receive any money payable to that contractor or subcontractor or to any superior contractor". It follows that the first defendant should also have received another notice. However, the point is academic, since the issue of the notices was an empty exercise.

Mr Crew submitted that it was at least arguable that the notice given in August 1977, although addressed to the first defendant and seeking to charge his land when the work was performed on the third defendant's land, was not invalid. The Court, he submitted, should not cancel the lien unless

the claim to a lien was so clearly untenable that it could not possibly succeed. He referred, in the context of the Court's reluctance to exercise the inherent jurisdiction to strike out proceedings on the ground that no cause of action is disclosed, to the recent judgment of the Court of Appeal in Fletcher Turner Smith Limited and Another v. Shell B.P. and Todd Oil Services Limited per Richmond, P. I comment that Section 44 confers a statutory and not an inherent power and that Caldow Properties Ltd. v. Low & Associates Ltd., (1971) N.Z.L.R. 311, provides an example of a successful application under Section 44.

Section 30(1) reads:

"A notice of lien or charge may be in one of the forms in the schedule to this Act or to the like effect but its validity shall not be affected by any inaccuracy or want of form if the property or money sought and the amount of the claim can be ascertained with reasonable certainty from the notice."

The cases indicate that a mis-statement (usually, in practice, an over-statement) of the amount to be claimed does not invalidate a notice. However, the section requires the property sought to be charged to be ascertained with reasonable certainty from the notice. The property in the notice stated with reasonable certainty the wrong property owned by a different owner. In Pollock v. Mirimar North Building Deposit and Mortgage Co. Ltd. (1910), 29 N.Z.L.R. 1014, Stout, C.J. held that a notice was not sufficiently explicit which did not describe the land other than "your land"; reference was made in the notice to an area of more than 400 acres which included vacant lots where the claimant's alleged building work which could not possibly have been performed. Stout, C.J. held that the land to be charged was not reasonably ascertainable from the notice.

Mr Crew submitted that notice to the third defendant could be assumed from a notice addressed to the first defendant, who happened to be a director of the third defendant. He pointed to the affidavit filed by the first defendant in support of the present motion which demonstrates that the first defendant was aware that no work had been done by the plaintiffs on his own land, but knew that work had been done on the third defendant's land; he was one of several joint mortgagees of the third defendant's land.

I cannot accept this submission. There is no evidence to indicate the precise extent of the relationship between the first and third defendants. The Act requires that its provisions as to the notice to be given by subcontractors, contractors and workers should receive reasonable strictness as to essentials, if such persons are to receive the special benefits of the Act. To cancel a lien does not deprive the plaintiffs of any remedy they may have against any of the defendants under contract.

Mr Crew submitted that Section 44 enabled the Court to make such an order as may be "just" and that there was no evidence, other than the bald statement of the first defendant in his affidavit, that the third defendant was prejudicially affected by the presence of the lien on its title. I am prepared to accept that the presence of a lien on a title is a matter of concern for a registered proprietor and that he is entitled to have the registration cancelled, if the lien has no colour of right to be there.

Accordingly, I am of the view that the lien over the third defendant's land should be cancelled because there was no proper notice prior to the issue of proceedings. An order is made under Section 44.

The third defendant is entitled to costs of \$100.

R. D. Barker, J.

Solicitors:

Honorina Gray, Auckland, for plaintiffs to oppose.

Johnston, Prichard, Fee & Partners, Auckland, for third defendant in support.

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AUCKLAND REGISTRY

A.1060/77

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