LIENS OF SUBCONTRACTORS WHERE THE CONTRACT IS ABANDONED BY THE PRINCIPAL CONTRACTOR—THE MECANICS' LIEN ACT, ALBERTA—HORWITZ v. RIGAUX BUILDING ENTERPRISES, LTD.

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The case of *Horwitz* v. *Rigaux Building Enterprises Limited et al; Blankert & Anderson (Brick Contractors) Limited* v. *Horwitz and Rigaux Building Enterprises Limited,* came before the Alberta Supreme Court in February, 1960.[1] As a result of the decision in that case, the Mechanics' Lien Act was hastily and retroactively amended, in explicit derogation of the established principle that an amendment as to substance does not (in general) have retroactive effect.[2] Upon appeal to the Appellate Division, Smith, J. (as he than was) varied the trial judgment of Milvain, J. in a most ingenious manner, and, in the circumstances of the particular case, it seems probable that substantial justice was done to all the parties concerned. It is submitted, however, that Mr. Justice Smith did not base his judgment upon a literal reading of the Mechanics' Lien Act. It is further submitted, with great respect, that the decision in the Horwitz case together with the amendment upon which it was based leaves the law as to Mechanics' Liens in Alberta as obscure and unsatisfactory as it stood when *Horwitz* v. *Rigaux* first came before the Court.

The facts of the case were as follows. One Ida Horwitz (the owner) made a contract with Rigaux Building Enterprises Limited (the contractor) whereby the contractor was to erect for the owner a building to cost $41,050 upon land which the owner purchased from the contractor and which was valued at $8,950. After completing, as the court found, 45% of the work, the contractor abandoned the projects. Before abandonment the owner had paid in good faith to the contractor the sum of $20,000.00 upon account of the land and building. Valid liens under the Act were filed against the property in the total sum of $22,074.07. The owner prayed for a discharge of all liens upon payment into court of 15% of the value of the work done; the lienholders contended for $18,472.50, the value of the building as it then stood, less the $11,050.00 paid to the contractor upon account of the building, in good faith and before notice of the liens. The trial judge held that neither contention was correct, and gave judgment to the lienholders for the full amount of their liens. The results of this remarkable judgment was that the owner was now to pay, for an uncompleted building which the Court valued at $18,472.50, the sum of $33,124.07.

Upon appeal, Smith, J., adopting the findings of fact of the trial judge, found for the lienholders in the sum of $7,422.50, arrived at as follows:

Value of work done before abandonment		$18,572.50
Less difference between payment by owner	$20,000.00	
and the value of the land	8,950.00	11,050.00
		$ 7,422.50[3]

[1](1960) 30 W.W.R. 559.
[2]Macaulay & Bruce, *Canadian Mechanics' Liens,* The Carswell Company Limited, 1951; page 10.
[3]24 D.L.R. (2d) 684.

The amount of the hold-back required by the Act at a time when the building was 45% completed would have been $2,770.88. Counsel for the owner argued that he should have been entitled to a discharge of all the liens upon payment of this sum.

There were, then, at least three possible solutions to the controversy: first, discharge of the liens upon payment of the statutory hold-back; second, discharge of the liens upon payment of the balance of the 'value of the building', as it stood at the time of abandonment, and third, the solution of Milvain, J., which holds the owner responsible for the entire balance of the contract price less the amount paid in good faith: or, a possible lienable value of $30,000.00. His Lordship, at the trial, pointed out that the Act then stated:

> Except as otherwise provided in this Act, the lien does not attach so as to make the owner liable for a greater sum than the contraci price, less any sum of money that may have been duly paid to the contractor up to the time that the lien arises.[4]

Upon the authority of this section, the trial judge set the ceiling of liability at the full amount of the contract price less the $20,000.00 paid in good faith, or $30,000.00.

Before the case came to appeal, the section above quoted had been amended to read:

> Except as otherwise provided in this Act, a lien does not attach so as to make the owner liable for a greater sum *than the sum owing and payable by the owner to the contractor.* (Italics provided)[5]

In the Appellate Division, no opinion was expressed as to the accuracy of the trial judge's interpretation of Section 15, as it then stood. Smith, J., however, construed the amendment as an expression by the legislature of an intention that the owner should not be held responsible to lien-holders for more than the amount "owing the contractor at any particular time"—and that he should be held responsible for the amount in full. Smith, J., found support for this proposition in the statement of McGillivray, J.A., in *Len Ariss & Co. v. Peloso*[6] which he quoted as follows:

His Lordship continued:

> There had been an abandonment by the contractor in the *Ariss* case; neverthelest it was held that the amount owing the contractor at a particular time. in that case up to the time when work was abandoned, must be aken to be the value of the work done. I agree with Mr. Justice McGillivray's views.[7]

With great respect, it is submitted that the facts in the *Ariss* case are markedly dissimilar from those in the *Horwitz case;* and the issue upon which McGillivray,, J.A. was pronouncing judgment was relative to the calculation of the hold-back. Peloso had appealed up the grounds that the amount of the percentage hold-back should be calculated upon the basis of the value of the work done, rather than upon the contract price.[8]

The pith and substance of the judgment of Smith, J., seems to be contained in the following brief paragraph:

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[4]R.S.A. 1955, c. 197, s. 15 (1).

[5]R.S.A. 1960, c. 63, s. 15 (1).

[6]14 D.L.R. (92d) 178 at p. 194; [1958] O.R. 643, at p. 656.
"The amount owing the contractor at any particular time, in this case up to the time when work was abandoned, must be taktn to be the value of the work done."

[7]*Horwitz v. Rigaux,* 24 D.L.R. (2d) 684.

[8]See *Len Aris v. Peloso,* footnote (6) above.

> Briefly, my view is that the lien claimants' liens in the first instance under s. 6 amount to 100% of the price of the work, services or materials remaining due to them respectively, subject to being reduced or adjusted i namount under the provisions of ss. 15, 16 and 20 interpreted together.[9]

Section 6 provides for the creation of a lien

> for so much of the price of the work, service or materials as remains due to him [the subcontractor] in the improvement and the land occupied thereby or enjoyed therewith, or upon or in respect of which the work or service is performed, or upon which the materials are to be used.[10]

These words, prima facie, according to the finding of fact at the trial (with which the Appellate Division did not interfere) would place the owner's liability at the full sum of $22,074.07. Section 15, however, as amended, limits the liability of the owner to 'the sum owing and payable by the owner to the contractor'[11] and provides that

> where the lien is claimed by a person other than the contractor, it does not attach so as to make the owner liable for a greater sum than the amount owing to the contractor for whom, or for whost subcontractor, the work has been done or the material has been furnishtd.[12]

It is worthy of note in this connection that both subsections of Section 15, above quoted, begin with the words "except as otherwise provided in this Act".[13]

As His Lordship has pointed out in the Court of Appeal, the amount owing to the contractors' on an entire contract might well, in the case of abandonment, be nothing at all; and in such a case, in order to make any debt whatsoever attach to the owner, it is necessary to pray in aid section 20 of the Act, which stipulates that

> Subject to the provisions of Section 15, a subcontractor may enforce his lien notwithstanding the non-completion or abandonment ofthe contract by a contractor or subcontractor under whom he claims.

Apart from any consideration as to the computation of the value of the project at the date of abandonment, and accepting for the moment the finding of fact of the trial judge, it is submitted that the provisions of the Act so far considered have to be read in tht light of Section 16 (6). It may be that a literal interpretation of this section should have affected the enforceability of the subcontractors' liens, beyond the amount of the statutory hold-back. As amended before the appeal in *Horwitz,* Section 16 (16) read:

> Payment of the percentage required to be retained under this section may be validly made. after the expiration of the statutory period set out in section 28, so as to discharge all liens or charges in respect thereof, unless in the meantime a claim for a lien has been registered or proceedings have been commenced to enforce a lien or charge against such percentage as provided by Section 30, in which case the owner may pay the percentage in court in such proceedings and such payment constitutes valid payment in discharge of the owner to the to the amount thereof
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> [R.S.A. 1942, c. 236, s. 14]
>
> *and a discharge of the liability of the owner to the lienholder for the amount of the liens.*
>
> [R.S.A. 1960, c. 63]
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> (Italics supplied)

If it is necessary further to distinguish the *Ariss* case, it might be pointed out that the Ontario statute under which that case was decided did not contain the italicized words above quoted, which were introduced into the Alberta statute

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[9] *Horwitz* v. *Rigaux,* 24 D.L.R. (2d) 684.

[10] R.S.A. 1955, c. 197, s. 6 (1).

[11] *Ibid.,* s. 15.

[12] *Ibid.*

[13] *Ibid.*

[14] R.S.A. 1955, c. 197, s. 20.

as part of the amendment which followed upon the *Horwitz* case. Upon this point Smith, J., took the view that

> the effect of s. 16 (6) has not been altered by the amendment and that it is intended to mean and does mean that the owner is entitled to the discharge of the liens upon payment of the hold-back of 15% plus that proportion of the 85%, if any, of the value of the work done which is unpaid, or of the value of the work done which is unpaid plus payments not made in good faith, as the case may be.

The writer is loth to take issue with the Court of Appeal on a point of statutory construction. It is, however, suggested that, in view of the wording of the section, there is at least a plausible argument in favour of the position taken by the owner in the *Horwitz* caase.

The judgment of Smith, J., undoubtedly provides an eirenicon which draws together the better opinions advanced in the field of Mechanics' Liens, and which appear to have their provenance, for the most part, in the judgments of the Ontario superior courts and in sundry learned writing on the subject. It may well be that His Lordship, in his judgment in the *Horwitz* case, has given effect to the present-day spirit and intendment of the statute, and established in Alberta a position akin to that of the law in Ontario, where the Act was first introduced. It is submitted, however, that upon a literal reading of the Alberta Act, it could be taken that Section 16 is absolute and that the owner in *Horwitz* should have been entitled to discharge of all liens upon payment of the statutory hold-back.

It is submitted that if the legislature approves the result of the Horwitz case and wishes to perpetuate such a policy, the Mechanics' Lien Act should be further amended so as clearly to give effect to the spirit of the judgment. For instance, the Act might state:

> Notwithstanding anything in this Act, where the principal contractor has abondoned the contract before completion and liens of sub-contractors or material-men have been validly filed against the property upon which the improvements have been made, the owner shall be responsible to the sub-contractors or material-men to the extent by which the value of his property has been enhanced as a result of the work done or the materials furnished by the persons filing the lien.

In order to give effect to the suggested Section, it would be necessary to preface it with the words "notwithstanding anything in this Act", for otherwise it could be contended that the Section operates in direct contravention of Section 16 (6) of the present Act.

Valuation in cases of uncompleted contracts

A question which did not receive the attention of the Court in the *Horwitz* case was that of arriving at a figure which would adequately represent the increment in the value of the property. The increase in value was never in issue, and the amount assessed by the trial judge upon the basis of the percentage of the proposed work which was completed at the time of abandonment, was seemingly accepted by all the parties to the action. The computation of increment could, however, be a vitally important factor, if the spirit of the judgment in the *Hortwitz* case is to govern abandoned contracts in the future.

The most recent amendment to the Mechanics' Lien Act, which was passed by the Legislature during this year, being R.S.A. 1960, c. 64, and which is to come into force upon a date to be fixed by proclamation, has attempted to deal with valuation. The Act provides that

> value of improvements, for the purposes of Subsection (12) means the difference between the value of mortgaged land immediately before the salt thereof, as determined by the

court and the value of the mortgaged land immediately before the lien arose, as determined by the court.[15]

[Subsection (12) deals with the sale of mortgaged land by tender or public auction, and the apportionment of the proceeds as between lien-holders and mortgagees]. In the context of the Horwitz case, it is submitted that there could be many other factors contributing to an increase in the value of land of which account is not taken in the formula. Industrial developments and other, quite independent factors, can alter the market value of property in a very short time. The selling price of a given lot at date B, minus the selling price of the same lot at date A, does not necessarily indicate a figure which is referable to any improvements which have been made to the land. Also, in the case of a contract which has been abandoned, consideration should be given to the cost to the owner of completing the contract. Due to price fluctuations the owner may be servely prejudiced by the default of his principal contractor, and the cost to him of the building may be greatly increased. Quaery also the value to an owner of a project which is only half completed, and consider the extent to which, in many cases, the saleability of the land might be reduced, rather than enhanced, by the presence thereon of an unfinished building.

The claims of sub-contractors in this context are creatures of statute, and have no basis whatever in any contractual relationship with the owner. If it is the intent of the Legislature to render an owner responsible to sub-contractors beyond the 15 or 20% provided by the Act, it is submitted that such intent should be expressed in clearer terms than have to date been adopted.

[15]R.S.A. 1960, c. 64. Section 11 (1) (b).