

## Case comment *W.S. Nicholls Construction Inc. v. Barton-Malow Canada, Inc.*<sup>1</sup>

This decision deals with the often raised issue of equitable claims for unjust enrichment or quantum meruit made in lien claims. The question is should an equitable claim of unjust enrichment and quantum meruit be permitted to continue against an owner, or in some cases a contractor, where security has been posted to vacate the liens, where there is no privity of contract between the lien claimant and the owner or contractor and where the plaintiff's claim for unjust enrichment is not supported by the pleadings or the evidence.

The defendant Covanta Durham York Renewable Energy Limited Partnership ("Covanta") brought a motion pursuant to section 47(1) of the *Construction Act*,<sup>2</sup> for an order dismissing the action against Covanta. The plaintiff's claim arises out of the construction of an improvement known as the Durham York Energy Centre, located in Clarington, Ontario (the "Project").

In December of 2011 Covanta entered into a sub-contract with CPP (a joint venture between Barton-Malow Canada, Inc. and Kenaidan Contracting Ltd.) for the supply of construction related services and materials in connection with the Project. CPP then entered into various sub-subcontracts with trade contractors for the supply of services and materials required to complete CPP's scope of work, including the plaintiff, W.S. Nicholls Construction Inc. ("WSN") pursuant to a subcontract dated June 7, 2012 (the "WSN Sub-Contract").

The plaintiff registered a claim for lien on February 13, 2015 and claimed that \$35,779,391.63 was owing to it by its payer, CPP. The plaintiff named CPP, Covanta and the two owner municipalities as defendants. This action was subsequently discontinued against the municipalities. The action continued against CPP and Covanta. In its claim, the plaintiff seeks payment from both of these defendants.

CPP also registered a lien on the Project, which lien was vacated pursuant to the order of Justice Salmers of February 10, 2015 after Covanta posted a bond in the amount of \$57,000,000.00. By order of Justice Glass of August 25, 2015, it was confirmed that the liens of the plaintiff and its sub-subcontractor, Insulcana, were subsumed within the lien of CPP and the bond previously posted by Covanta also stood as security for those liens.

Section 47(1) of the CLA provides that upon a motion the court may dismiss a lien action on any proper ground. A motion to dismiss under section 47(1) of the CLA is similar to a motion for summary judgment and the test is the same. The moving party must satisfy the court that there is no genuine issue requiring a trial.<sup>3</sup>

Citing from the decision of Justice Van Melle in *Ablesystems Mechanical Ltd. v. AER Comfort Mechanical Services Ltd.*, [2009] O.J. No. 6 (Ont. S.C.J., Master Muir held that the plaintiff would not be prejudiced in any way by the dismissal of the equitable claims of unjust enrichment and quantum

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<sup>1</sup> *W.S. Nicholls Construction Inc. v. Barton-Malow Canada, Inc.*, (2019) Ont. S.C., 5082, 2019 CarswellOnt 14068,

<sup>2</sup> The *Construction Act*, R.S.O. 1990, c. C30, as it pre-dated the amendments which came into effect with respect to contracts entered into on or after July 1, 2018 (where there was no applicable procurement process) or procurement processes commenced on or after July 1, 2018 did not apply in this case.

<sup>3</sup> See *DCL Management Ltd. v. Zenith Fitness Inc.*, 2010 ONSC 5915 (Ont. S.C.J.) at paragraph 4, as cited in *W.S. Nicholls Construction Inc. v. Barton-Malow Canada, Inc.*, (2019) Ont. S.C., 5082, 2019 CarswellOnt 14068,

meruit, noting that once a lien has been vacated upon payment of security into court under s. 44(6), the action against the owners should be dismissed. They are no longer necessary or proper parties to the action as there is no privity of contract between them and the plaintiff.<sup>4</sup>

Master Muir also noted that the equitable claims of unjust enrichment and quantum meruit made by the plaintiff are not permitted because of section 55(1) of the *Construction Act*,<sup>5</sup> which provides that only a claim for breach of contract may be joined with a lien claim. Reference was made to the decision of the Court of Appeal in *Yorkwest Plumbing Supply Inc. v. Nortown Plumbing (1998) Ltd.*<sup>6</sup> which held that section 55 of the *Construction Act* prohibits the joining of claims for unjust enrichment and quantum meruit in a lien action.

Master Muir also rejected the argument made that the court may award a lien claimant a personal judgment whether the claimant proves a lien or not, noting that all authorities cited by the parties invoking section 63 of the *Construction Act* involve situations where the parties have acknowledged the existence of a contract or near contract.

The court considered whether or not all of the elements of a claim for unjust enrichment as described in the decision of the Supreme Court of Canada in *Garland v. Consumers' Gas Co.*<sup>7</sup> had been satisfied:

1. There must be an enrichment of the defendant -- Covanta has paid all amounts owing to CPP for the work performed under that contract as determined by the arbitrator hearing the arbitration proceeding. (Covanta participated in a lengthy arbitration proceeding with CPP as required by their contract.) As such, there has been no enrichment.
2. There has been no deprivation to the plaintiff. Its contract claims will continue against CPP.
3. Absence of a juristic reason for the enrichment – The court rejected the argument that this was a unique case noting that the case at hand “is a very typical construction arrangement with the usual contractual relationships all agreed to by sophisticated parties including the plaintiff”.

The plaintiff also relied on the decision in *Haas Homes Ltd. v. March Road Gym & Health Club Inc.*<sup>8</sup>, wherein the court suggests that a claim based on unjust enrichment may arise where a special relationship can be shown by the indirect conduct of a non-contracting owner. However, Master Muir noted that the plaintiff has not pleaded a special relationship with Covanta or any facts that might support such a claim against Covanta. Noting that the plaintiff's claims are fully secured by the CPP Bond, the court determined that there will be no injustice to the plaintiff.

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<sup>4</sup> *Concord Carriers Ltd. v. Alnet Holdings Ltd.*, [2005] OJ No. 3748 (SCJ), as cited in *W.S. Nicholls Construction Inc. v. Barton-Malow Canada, Inc.*, (2019) Ont. S.C., 5082, 2019 CarswellOnt 14068, at para.20

<sup>5</sup> The *Construction Act*, as it pre-dated the amendments which came into effect with respect to contracts entered into on or after July 1, 2018 (where there was no applicable procurement process) or procurement processes commenced on or after July 1, 2018 did not apply in this case.

<sup>6</sup> *Yorkwest Plumbing Supply Inc. v. Nortown Plumbing (1998) Ltd.*, 2016 ONCA 305 (Ont. C.A) at para. 54

<sup>7</sup> *Garland v. Consumers' Gas Co.*, SCC 25 (S.C.C.) at paragraph 30

<sup>8</sup> *Haas Homes Ltd. v. March Road Gym & Health Club Inc.*, [2003] O.J. No. 2847 (Ont. S.C.J.) at paragraph 22