IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *DEB Construction Ltd. v. Mondiale Development Ltd.,* 2023 BCSC 1167

Date: 20230710
Docket: S153168
Registry: Vancouver

Between:

Deb Construction Ltd.

Plaintiff

And

Mondiale Development Ltd.,
Total Station Layout Ltd., and
Pinnacle International (West First) Plaza Inc.

Defendant

Before: Master Robertson

Reasons for Judgment

Counsel for the Plaintiff:	S. Visram
Counsel for the Defendants Mondiale Development Ltd. and Pinnacle International (West First) Plaza Inc.:	A. Cameron A. Butler
No other appearances	
Place and Date of Hearing:	Vancouver, B.C. June 6, 2023
Place and Date of Judgment:	Vancouver, B.C. July 10, 2023

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[1] This is an application brought to have the action dismissed for want of prosecution, and the claim of lien as filed by the plaintiff, and letter of credit deposited with the registry to secure the lien, discharged accordingly.

Background

Overview

[2] Pinnacle International (West First) Plaza Inc. (“Pinnacle”) was the owner of the development lands on which a residential development was build. Pinnacle hired the defendant, Mondiale Development Ltd. (‘Mondiale”) as its General Contractor, and Mondiale sub-contracted to the defendant, Total Station Labour Ltd. (“Total Station”). In or around February 2014, Total Station further subcontracted with the plaintiff DEB Construction Ltd. (“DEB”) to provide labour and services related to concrete polishing and forming for the parking lots within the towers.

[3] Pinnacle and Mondiale (collectively these “Defendants”) are the applicants in respect of the relief being sought today.

[4] DEB alleges that the sum of $273,973.76 remains due and owing under their contract with Total Station.

[5] The dispute between the parties arises from an arrangement entered into due to concern by DEB that they would not be paid by Total Station, as Total Station advised the parties in October 31, 2014 that they could no longer work on the project. In order to address its concern, Mondiale agreed that it would pay DEB directly, notwithstanding that they had no contract in place between them. The allegation is that the final payment was made under that arrangement in the amount of $36,244.04 on November 21, 2014, at which time DEB signed an acknowledgment as follows:

> I, Donovan Espindola on behalf of DEB … for the above employees and for word done on Mondiale & Total Station… The acceptance of this letter confirms that all the amounts are paid in full and no other funds will be payable to your company thereafter for the period stated above.

[6] Notwithstanding that acknowledgement, on December 20, 2014 DEB filed a builder's lien in the amount of $273,973.76, and commenced this action to enforce the lien by filing the notice of civil claim on April 17, 2015. DEB's position is that the amounts that were paid were only in respect of the claims for wages owing to DEB's employees, and that the amounts owing for statutory deductions that DEB had to remit to the Canada Revenue Agency, and which were owing under their contract with Total Station as profit on the job remain unpaid. There is no dispute that the work was done by DEB. However, there is a dispute as to the quality of work.

[7] Pinnacle and Mondiale filed a response on May 29, 2015, raising substantive defences to the claims, including that the work undertaken contained multiple defects and deficiencies, and raising that there was in fact no privity of contract between Mondiale and DEB.

[8] A related petition proceeding was filed by Pinnacle on July 30, 2015 pursuant to s. 24 of the *Builder's Lien Act,* S.B.C. 1997, c. 45 (the "*BLA*"). By order pronounced in those proceedings on July 31, 2015, DEB's lien, as well as others, were cancelled from title to Pinnacles' lands, with a letter of credit being deposited with the registry to stand as security on August 12, 2015. Since then, almost liens have been resolved, leaving only this claim of lien, and one other in the amount of $70,833.60 to be resolved. The letter of credit has, as a result, been replaced by a new letter of credit deposited on May 3, 2017 in the amount of this lien.

Litigation History

[9] As noted, the notice of civil claim was filed April 17, 2015, with these Defendants filing their response on May 29, 2015.

[10] On June 9, 2015, DEB issued a demand for information pursuant to s. 41 of the *BLA,* by which a lien holder may, by written request, require an owner to provide the following information without 10 days:

a) the terms of the head contract or contract under which the lien holder of beneficiary claims, including the names of the parties to the contract, the

contract price and the state of accounts between the owner and the head contractor;

b) the name and address of the savings institution in which a holdback account has been opened, and the account number;

c) particulars of credits to and payments from the holdback account, including the dates of credits and payments, and the balance at the time the information is given; and

d) particulars of any labour and material payment bond posted by the contractor with the owner in respect of the head contract or contract under which the lien holder or beneficiary claims.

(the "s. 41 Demand")

[11] These Defendants initially filed an application on July 9, 2015, returnable July 24, 2015 and delivered by courier on July 10, 2015, by which they sought an order striking out the whole of the notice of civil claim and discharging the lien security. DEB did not file any responding materials until the night before the application, at which time they raised that they required cross examination on affidavits, and that no response to the s. 41 Demand had been received and sought an adjournment. An adjournment was granted by consent, with DEB sending a follow up letter on July 24, 2015 to reiterate its request for a response to the s. 41 Demand, and granting an extension for response, and seeking available dates for the cross examinations which were agreed to. They also requested a list of documents.

[12] Thereafter, counsel for these Defendants replied by letter dated July 31, 2015 advising that, due to scheduling issues, they would not be able to conduct cross examinations until the fall. They also confirmed that they would be providing a list of documents, and requested that DEB do the same.

[13] By letter dated August 31, 2015, these Defendants provided a response to the s. 41 Demand, however, it appears that receipt of the letter was missed by DEB.

[14] By letter dated February 9, 2016, DEB sent a letter asking for a reply to its July 24, 2015 letter, in response to which, that same day, these Defendants re-sent their August 31, 2015 letter.

[15] On July 28, 2016 the examination of the Mondiale's deponent took place.

[16] After the examination of Mondiale's representative, DEB sought production of documents from these Defendants. The correspondence between the parties on these further discovery issues is as follows:

a) on October 3, 2016 counsel for DEB provided copies of invoices supporting their claim on USB drive, and requested copies of the documents that had been requested at the July 2016 examination, namely:

   i. copies of the releases signed by Total Station;

   ii. advise whether invoice number 501 was paid;

   iii. copies of al purchase orders for "The One Project" from May 2014 to November 15, 2014;

   iv. documentation that would establish that invoice number 597 was paid by Mondiale;

   v. documentation that establishes that the payment on or around May 26, 2014 that Mondiale made to workers were made on behalf of Total Station;

   vi. a list of the names of individuals who were doing the work on the forming and placing, for Total Station; and

   vii. details as to how the $770,495.88 payment was arrived at.

   (the "Outstanding Requests")

b) by email of November 21, 2016, counsel for these Defendants emailed plaintiff's counsel regarding examination dates of DEB's representative, stated "I will work with my client to provide you with written answers to the requests made at your examination on July 28, 2016", and confirmed that they should reserve five days for any trial. There was also some discussion as to scheduling a case planning conference.

c) by email of December 7, 2016, DEB followed up to the request for dates for its representative to be examined.

d) on January 6, 2017, plaintiff's counsel wrote to acknowledge receipt of an appointment for the cross examination of DEB's representative, note that the Outstanding Requests remained outstanding, and to advise that an application would be brought for their production if nothing provided within the next 10 days;

e) on January 23, 2017 an amended appointment to cross examine on affidavit was sent to DEB by these Defendants;

f) by letter dated February 9, 2017, but emailed February 14, 2017, DEB's counsel wrote in response to, and confirming the rescheduling of DEB's cross examination and enclosed a draft application to compel responses to the Outstanding Requests, returnable February 21, 2017.

g) on February 15, 2017, these Defendants' counsel wrote noting that a hearing date of February 21, 2017 provided insufficient notice, that they were unavailable on that date, and that there was no urgency in having the application heard before the cross examination on DEB's affidavit. In addition, these Defendants advised as to their position that there was no right to production of documents arising from a cross examination on affidavit, and on that basis, the application should be withdrawn as improper. However, counsel also stated that they did not object to

producing the documents “that are relevant and producible in the context of this proceeding” and will do so by way of a list of documents.

h) on February 16, 2017, counsel for DEB wrote to confirm that the application for production of documents would be adjourned to an agreeable date and on proper notice, saying that DEB “is adamant that he wants to review the documents that have been requested” and that his cross examination should be adjourned until they are produced. The application was never re-set.

i) On February 24, 2017, DEB’s representative was examined by these Defendants.

[17] Between February 24, 2017 and June 16, 2021, no further steps were taken by DEB. A notice of intention to proceed was filed by DEB on May 26, 2021, but not delivered until June 16, 2021.

[18] Thereafter, a further lapse of almost a year and half occurred. No further notice of intention to proceed was filed by DEB.

[19] The within application was then filed by these Defendants on January 27, 2023, returnable February 9, 2023, and delivered to DEB by email of Friday, January 27, 2023, at 3:42 p.m., although, based on the email headers, it appears to have been delivered on January 28, 2023 at 7:42 a.m. In response, counsel for DEB emailed to advise that he was out of town until February 10, 2023, and to seek an adjournment. In response, on January 30, 2023 these defendants sent a further email having noticed that pages had been missing from the original application materials, and sending a requisition to reschedule the application for February 22, 2023, with hard copies of the notice of application and requisition being couriered to DEB’s counsel on February 1, 2023, and delivered February 1, 2023.

[20] The application was then adjourned by agreement, to March 7, 2023. The application response of DEB was not filed until March 7, 2023 and as such, this application was adjourned further on that date with process orders being made,

including that the defendants would be entitled to further cross examine DEB's deponent on his affidavit, and an order being made for further response affidavits to be filed by April 7, 2023.

[21] A continuation of the cross examination of DEB's representative was conducted on March 24, 2023.

[22] No trial dates have been set. No examinations for discovery have been set, although there is some disagreement as to whether the cross examinations on the affidavits were limited in scope or constituted examinations for discovery. Thus, for the purpose of these Reasons, I will refer to them as examinations generally, and in doing so do not make any determination as to whether they were cross examinations or examinations for discovery.

[23] Total Station has not appeared or participated in the proceedings in any way.

Legal Framework

[24] Rule 22-7(7) of the *Supreme Court Civil Rules* provides as follows:

> If, on application by a party, it appears to the court that there is want of prosecution in a proceeding, the court may order that the proceeding be dismissed.

[25] In *0690860 Manitoba Ltd. v. Country West Construction Ltd*., 2009 BCCA 535 ("*Country West*"), the court of appeal confirmed the considerations on an application to dismiss for want of prosecution as follows:

> [27] These cases suggest to me that a chambers judge charged with the hearing of an application for dismissal of an action for want of prosecution is bound to consider the following:
>
> (1) the length of the delay and whether it was inordinate;
>
> (2) any reasons for the delay either offered in evidence or inferred from the evidence, including whether the delay was intentional and tactical or whether it was the product of dilatoriness, negligence, impecuniosity, illness or some other relevant cause, the ultimate consideration being whether the delay is excusable in the circumstances;
>
> (3) whether the delay has caused serious prejudice to the defendant in presenting a defence and, if there is such prejudice,

> whether it creates a substantial risk that a fair trial is not possible at the earliest date by which the action could be readied for trial after its reactivation by the plaintiff; and
>
> (4) whether, on balance, justice requires dismissal of the action.
>
> [28] I consider the fourth question to encompass the other three and to be the most important and decisive question.

[26] The various principles which have been developed since in respect of these considerations has been summarized in various decisions including *Wiegert v. Rogers,* 2019 BCCA 334 ("Wiegert"), as follows:

> **Delay**
>
> a) inordinate delay is a delay that is immoderate, uncontrolled, excessive and out of proportion to the matters in question, but with it being relative in that some matters call for a more expeditious prosecution than others: *Wiegert* at para. 32.
>
> b) silence or absence of encouragement to proceed from a defendant should not weigh in the plaintiff's favour: *AAA Rebar Only Ltd. v. 1003708 B.C. Ltd.,* 2022 BCSC 1962 *("AAA Rebar*") at para. 18 citing *Callan v. Cooke,* 2020 BCSC 290 ("*Callan*") at para. 74.
>
> c) in terms of determining when the last step was taken, "step", has been interpreted as one that is formal, in that it is either required or permitted under the Rules and moves the action forward toward trial, such that general exchanges of correspondence between counsel, is not considered a step: *Canadian National Railway Company v. Chiu,* 2014 BCSC 75, at para. 7.
>
> d) filing a notice of intention to proceed is not a step, as it does not actually move the proceeding forward: *New Rightway Contracting ltd. v. 0790792 B.C. Ltd.,* 2023 BCSC 216 (*"New Rightway")* at para. 25, citing *Kelly v. Dyno Nobel Canada Inc.,* 2016 BCSC 1601 at para. 20.

e) one of the "special cases" which call for an expeditious prosecution are those in which liens have been filed under the *BLA*: *Parkerdean Plumbing and Mechanical Inc. v. Best Builders Ltd.,* 2019 BCSC 1969 ("*Parkerdean")* at para. 17, and *AAA Rebar*, at para. 19, citing *Creative Door Service Ltd. v. 3609987 Canada Inc.* 2006 BCSC 1676, at para. 23. The reason for this is that the *BLA* provides a special privilege of securing the full amount of a claim against property prior to any determination of the claim's validity. The lien is an extraordinary remedy for which an expeditious testing of the validity of the claim is essential: *Lebon Construction Ltd. v. Wiebe,* 1995 CanLII 216 (BCCA) at para. 41.

f) however, there is no hard and fast rule as to when time starts to run, when considering whether there has been a delay in prosecuting a matter: *Hanna's Construction v. Blue River,* 2006 BCCA 142 ("*Hanna's*") at para. 22.

g) while the court can consider whether a delay was tactical, the reason for why there might be a delay, including a tactical one, is just one of the factors in determining if the delay was inordinate: *Wiegert,* at para 34.

Is the Delay Excusable?

h) delay should be analysed holistically, and not in a piece-meal fashion. To the extent it can be excusable is highly fact dependent: *Ed Bulley Ventures ltd. v. The Pantry Hospitality Corporation*, 2014 BCCA 52 ("*Ed Bulley*"), at para. 28, and *Country West*, at para. 29.

i) delay and the excuse for it are often intertwined: *Hanna's* at para. 10.

j) where there is no credible excuse, delay is presumed to be inexcusable: *The Matryx Corporation v. Royal Trust Corporation of Canada,* 2019 BCSC 1993 ("*The Matryx*"), at para 74.

Prejudice

k) once a defendant establishes that the delay is inordinate and inexcusable, a rebuttable presumption of prejudice arises: *Busse v. Chertkow,* 1999 BCCA 313, at para. 18.

l) prejudice is the prejudice that a defendant could face in mounting and presenting a matter if it is to go to trial: *Country West* at para. 27.

m) in addition, there is a presumption of prejudice that arises when property or funds are held as security, which is supported upon the expiry of a limitation period: *Parkerdean* at para. 33, citing *Trak Energy Corporation v. Happy Valley Resort Ltd.,* 2015 BCSC 1928 ("*Trak Energy*")

n) whether or not it is in the interests of justice to dismiss the action is highly factually dependent, based upon such factors as the length of and reasons for the delay, the status or stage of litigation, the context of the delay and the role of counsel in the delay, although negligence on the part of a plaintiff's lawyer may not always amount to an excuse: *International Capital Corporation v. Robinson Twigg & Ketilson*, 2010 SKCA 48 at para. 45, *Country West*, at para. 29, and *Wiegert* at para. 33

[27] Ultimately, as noted in *Singh v. Media Waves Communications Inc.,* 2022 BCSC 1611:

> [40] Whether to dismiss an action for want of prosecution is a discretionary decision. It has been described as an order that should "not be made lightly", one that should be "made sparingly" and "one to be approached with great caution". It has variously been described as "draconian" and "an extreme and drastic measure". The discretion should only be exercised if the court is satisfied that the default was intentional or of such a degree that there is a substantial risk that a fair trial on the merits of the issues will not be possible.

[28] The parties each rely on different cases as to whether or not a matter has been dismissed for want of prosecution, however, as noted, each case is factually dependent. In any event, the following cases were specifically relied upon by these Defendants as being analogous:

a) *Parkerdean,* where there had been a delay of three years since the last step was taken, and four and a half since the notice of civil claim was filed in an action under the *BLA*. The court found the delay to be inordinate "particularly in the context of a builder's lien claim".

b) *AAA Rebar* where it has been six years since the action had been commenced, again in a builder's lien context.

[29] In contrast, DEB relies on *New Rightway*, where the court did not dismiss the claim despite it being a claim under the *BLA*, and over 9 years passing since the notice of civil claim had been filed.

Analysis

[30] During the application, these Defendants argued much of the merits of the case, including by introducing the transcript of the cross examinations of DEB's deponent in this respect, and in support of its argument that DEB's representative's evidence is not credible. For example, DEB's representative:

a) admitted during his examination that the amount of the lien should be reduced by some approximate $14,000 based on errors in their own calculations.

b) admitted at the examination that some of the funds received from Mondiale went towards profit, despite that he had previously sworn that it only went to pay workers' wages.

c) deposed that he had been "tricked" into signing the acknowledgment of payment, and was not allowed to read it, however, when asked at the examination how he was mislead or tricked, he gave evidence that Mondiale's representative covered the paper so he could not see what was written on it. When it was then put to him that there was a security camera in the room, he changed his evidence and said he could not remember what happened.

[31] In response, DEB spent some time setting out the basis for its claim, and how it was calculated, emphasizing the fact that there was no dispute that the work was done, but rather what was owing to DEB for it, given that only the employee's direct wages were paid out, and that the documents that have been sought and not provided by these Defendants all go to that issue.

[32] However, an application for dismissal for want of prosecution is not determined on the merits of either the claim or the defence, or the lack of cooperation of the defendants.

[33] Rather, the test is as set out above. I will address each of the factors for the court's consideration in turn.

Delay

[34] These Defendants argue that the delay has been inordinate in that it has been over eight years since the notice of civil was filed, or, even if counting from the time that the ongoing dialogue as to document disclosure came to an end in February 2017, six years.

[35] From April 2015, when the claim was filed, to February 2017, DEB was taking steps in that it was moving the matter forward towards a resolution, including through its demand for documents.

[36] DEB argued that they sent further letters evidencing their intention to proceed after February 2017, however, those were sent after receipt of this application. From February 2017 until January 17, 2023, meaning 5 years and 11 months, other than sending a notice of intention to proceed, nothing was done by DEB.

[37] In taking a holistic view of the whole of the matter there has been an inordinate delay by DEB in prosecuting this matter.

Excuse for Delay

[38] As to whether or not that delay was excusable, DEB relies on the refusal of these Defendants to provide the requested documents, or for that matter, a list of documents at all, despite indications that they would do so.

[39] DEB argues that they were led into a false sense of cooperation, specifically by virtue of the emails of November 21, 2016 and February 15, 2017 when counsel advised that the documents would be forthcoming. DEB argued that these Defendants were seeking a tactical advantage through their own delay and false promises.

[40] In addition, DEB repeatedly stated during submissions that they were waiting for the s. 41 Demand response, however, that was given, arguably twice. The plaintiff's evidence is that both of these responses were misfiled somehow, and did not come to his attention until March 24, 2023. Quickly thereafter, by letter of March 31, 2023, DEB then asked for various documents further to the s. 41 Demand. However, as noted by the Defendants, the s. 41 Demand does not entitle document production, or follow up inquiries, but rather the specific information to be provided as set out therein. Further, again, no follow up was done as would be expected if DEB had not received, as they believed they had not, any response within months thereafter.

[41] Finally, DEB relies on these Defendants' failure, or refusal, to comply with the *Supreme Court Civil Rules* themselves by not providing the most basic of document discovery as required in not even producing a list of documents.

[42] However, it was clear that by at least mid 2017 (to provide some leeway for an appropriate time to await production as indicated would be forthcoming) these Defendants were not going to produce documents as stated, or required under the *Rules*.

[43] As noted in *AAA Rebar*, these Defendants' silence and absence of encouragement to proceed with the application, even accepting that the one response was misfiled, should not weigh in DEB's favour as DEB seeks.

[44] In this respect, and as noted in *The Matryx*, where no credible excuse has been given, delay is deemed to be inexcusable.

[45] Here, DEB did nothing to move any aspect of this dispute forward for resolution, including what could have been relatively simple ones, such as resetting the extant application for production of documents, or perhaps filing a new one under R. 7-1(10) or (11) if it accepted the position that the Outstanding Requests were not producible in the context of a cross examination on affidavit.

[46] I find that there is no excuse for the inaction and delay that resulted.

Prejudice

[47] Having found that the delay was inordinate and inexcusable, a presumption of prejudice arises. This presumption of prejudice also arises given the nature of this claim as one where a lien has been filed under the *BLA* and, thus, property has been tied up since 2015, or over eight years, to stand as security for what remains at this point to be an unproven claim.

[48] While the lien has been removed from title to Pinnacle's lands, the deposit of a letter of credit, and the financial consequences of doing so, is prejudicial to the financial interests of these Defendants.

[49] DEB led little to no evidence to rebut the presumption of prejudice, other than to argue that this is primarily a documents case. However, DEB's evidence is that he was tricked into signing one of the documents heavily relied upon by these Defendants, that being the acknowledgement of payment in full. In addition, the evidence as to what these Defendants agreed they would pay to DEB directly in place of Total Station is in dispute. There is no written agreement as to that arrangement. As such, *viva voce* evidence may still be required.

[50] I suggested to counsel for these Defendants that such evidence may have already been preserved through the examinations, regardless of how they are characterized, these Defendants argued that the evidence that resulted from the examinations was limited to the topics in the affidavit, meaning that they were not examined on all material facts that may be relevant, however they did agree that some evidence as to the initial agreement and acknowledgment was canvassed. Nonetheless, they argue that given the conflicts in evidence and credibility issues that have raised, there is prejudice in the witnesses' memories fading.

[51] Specifically, the exact agreement as to what was to be paid directly to DEB is not in writing. It was an arrangement that was arrived at a meeting on May 7, 2014 involving representatives of DEB, Total Station and Mondiale. Thus, to the extent the terms of the agreement are in issue, the parties will each need to rely upon witnesses' memories.

[52] More importantly, there is, they argued, a presumption of the prejudice which DEB did not provide any evidence to rebut.

[53] DEB relies upon *Tundra Helicopters Ltd. v. Allison Gas Turbine,* 2002 BCCA 145 ("*Tundra*") at para. 36 where the court noted that it is misleading to approach this analysis by asking whether DEB offered evidence on that point, as in most cases it will only be the defendant who will be in a position to offer evidence as to the existence of prejudice. In contrast, DEB will generally only be able to point to the overall circumstances including that there is no actual prejudice to the defendants.

[54] This was confirmed in *New Rightway*.

[55] DEB points to the failure of these Defendants to tender evidence that employees have left and cannot be found, or similar evidence of actual prejudice, and sought to argue that the fact is that these Defendants made a profit on this project, which is entirely irrelevant to this analysis.

[56] It may be appropriate to consider the overall context of prejudice in an analysis such as this, and not rely strictly on the rebuttable presumption, however, in

this case these Defendants can in fact point to specific prejudice, that being that their security remains tied up on a lien that they depose as being "vexatious, frivolous or an abuse of process", and that they will be relying upon witness testimony given the credibility issues. As to that latter point, the court in *New Rightway* confirmed at para. 59 that it is not necessary to lead evidence as to memories fading.

[57] In addition, the court in *New Rightway* considered at para. 66 that while having funds tied up by way of the posting of security was prejudicial, that that could be remedied by an award of interest. That presumes that an unsuccessful plaintiff is able to satisfy such a claim which, presumably, there was evidence of before the court as to that point. There is no such evidence here. Further, the amount in issue was less than half of what it is in this case. Finally, there is always the potential for other pure economic loss from not having access to funds that is not compensable. It is for this reason that lien claims are of the "special class" of ones that ought to be expeditiously pursued.

[58] In this respect it does not appear that *Trak Energy,* or the other cases considering that a builder's lien claim, is one of the special cases that requires timely prosecution.

[59] I find that DEB has not met the burden to establish that there is no actual prejudice to these Defendants.

Interests of Justice

[60] DEB argues that it is a small company, and that the amount due and owing in this matter is significant to it, such that, having regard to proportionality and the overall interest of justice, its claim should be dismissed.

[61] As noted in *Callan:*

> [70] While considerations of delay, excuse and prejudice are all important on an application to dismiss a case for want of prosecution, the overriding concern is that justice must be done.
>
> [71] In concurring reasons in *Rhyolite Resources Inc. v. CanQuest Resource Corp*., 1999 BCCA 36 at para. 26, Mr. Justice Lambert explained that:
>
> The dominant test on an application to dismiss an action for want of prosecution is the overall balancing of the interests of justice as that balancing affects all the parties. The first three tests are simply the conditions precedent to a consideration of the dominant test, though they raise some of the circumstances which constitute an important aspect of the prejudice to the defendant.

[62] To ensure that justice can be done, DEB argues that it should be given the opportunity to proceed with its application for production of documents that it brought in early 2017. In this respect, DEB suspects that the failure to provide the requested documents arises because they do not exist such that the defence position will not be sustainable.

[63] However, it is trite that the extraordinary remedies under the *BLA,* including the lien rights, require adherence to timelines that are more stringent than other matters. For example, to have the *in rem* rights of the lien, a lien must be filed within 45 days of certain trigger dates, and the claim of lien must then be preserved by filing a notice of civil claim within one year thereafter. In this case, the limitation period to preserve the claim of lien expired on December 20, 2015, seven and a half years ago.

[64] The position of DEB relies too heavily on what these Defendants' failed to do, as opposed to what DEB could and should have done to move the matter forward after 2017, as plaintiff.

[65] DEB relies on *New Rightway* as authority that, among other things, even where there has been a delay of nine years as was the case there, it may not be in the interests of justice to dismiss a claim in the builder's lien context.

[66] I agree, all of the factual context of the matter must be considered. The facts in *New Rightway* are not the facts before this court.

[67] In *New Rightway* there were large periods of time including an initial 3 years after the claim filing, as well as other blocks of time spent about a year or so apart, where efforts were made to move the matter forward by scheduling discoveries with issues as to the appropriate representatives to be put forward for that purpose. Document discovery was provided, and a trial had also been set for October 2019, which was then vacated as a result of the failure to secure examinations.

[68] Also of note is that the plaintiff in *New Rightway* had filed an affidavit stating that they routinely followed up with counsel and asked him to proceed expeditiously. No such evidence has been led by DEB in this matter, so as to enable me to in

[69] Ultimately, having regard to all of the circumstances, including but not exclusively considering the nature of this claim as a builder's lien matter, it is not in the interests of justice to have this matter proceed given the inordinate and inexcusable delay, and finding as to the prejudice in having the matter continue.

[70] In this respect, given the status of the litigation, with no trial date being set, and no document disclosure provided by these Defendants who are opposing the basis on which DEB seeks such production, any resolution is likely still to be over a year, possibly two from now, assuming these Defendants' application to strike was unsuccessful, such that the prejudice is not in any way resolving itself.

Conclusion and Order

[71] For the above reasons, the application of these Defendants is granted, with costs. Specifically, the relief sought in paras. 1 to 4 of the notice of application filed January 27, 2023 is granted.

"Master Robertson"