COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Darwin Construction (BC) Ltd. v. PC Urban Glenaire Holdings Ltd.,* 2023 BCCA 436

Date: 20231128
Docket: CA48462

Between:

Darwin Construction (BC) Ltd.

Appellant/
Respondent on Cross Appeal
(Plaintiff)

And

PC Urban Glenaire Holdings Ltd. and PC Urban Glenaire 2 Holdings Ltd.

Respondents/
Appellants on Cross Appeal
(Defendants)

Before: The Honourable Mr. Justice Harris
The Honourable Madam Justice Fenlon
The Honourable Justice Griffin

On appeal from: An order of the Supreme Court of British Columbia, dated July 5, 2022 (*Darwin Construction (BC) Ltd. v. PC Urban Glenaire Holdings Ltd.*, 2022 BCSC 1121, Vancouver Docket S207688).

Counsel for the Appellant/Respondent on Cross Appeal:	K. Martin, K.C. A.C. Laurino
Counsel for the Respondents/Appellants on Cross Appeal:	S.A. Griffin A. Cameron A.B. Gray
Place and Date of Hearing:	Vancouver, British Columbia September 19, 2023
Place and Date of Judgment:	Vancouver, British Columbia November 28, 2023

Written Reasons by:
The Honourable Justice Griffin

Concurred in by:
The Honourable Mr. Justice Harris
The Honourable Madam Justice Fenlon

Summary:

The appellant entered into a contract with the respondents for the construction of a townhome project. The parties got into a dispute about the work, and the respondents terminated the contract. The appellant filed a claim of lien against the land. The respondents applied to cancel the lien. The appellant appeals the order of the Chambers Judge dismissing the respondents' application to cancel the lien but reducing the lien security from just over $3 million to $500,000. The respondents cross appeal, taking the position that the Chambers Judge erred in failing to cancel the lien or reduce the lien security to a nominal amount.

Held: Appeal dismissed, cross appeal allowed. The appellant put forward no evidence to explain the basis of its excessive lien claim. The lien claim was an abuse of process pursuant to s. 25(2)(b) of the Builders Lien Act and should be cancelled.

Reasons for Judgment of the Honourable Justice Griffin:

Introduction

[1] This appeal concerns a builders' lien claim.

[2] The appellant Darwin Construction (BC) Ltd. ("Darwin"), a general contractor, appeals an order made in Supreme Court Chambers on July 5, 2022. The order reduced the amount of its builders' lien security from just over $3 million to $500,000.

[3] The order was made on the application of the respondent companies to cancel the lien in its entirety or reduce the amount of the security for the lien to a nominal amount of $1.

[4] The respondent companies, PC Urban Glenaire Holdings Ltd. ("Glenaire") and PC Urban Glenaire 2 Holdings Ltd. ("Glenaire 2") were in a partnership to develop property (together the "Partnership"). Darwin was the general contractor. The parties got into a dispute about the work and the Partnership terminated the contract, giving rise to a further dispute about whether the Partnership owed any money to Darwin.

[5] The Partnership cross appeals, taking the position that the Chambers Judge erred in failing to cancel the lien or to reduce the lien security to $1.

[6] The significant impediment to Darwin's appeal is that, despite an extended opportunity to do so, it filed neither evidence nor a formal response to the Partnership's application to cancel the lien. The only evidence before the Chambers Judge was evidence from the Partnership supporting its position that it owed no money to Darwin and on any view of the facts, the lien claim was excessive. As I will explain, Darwin's silence in the face of the Partnership's application and evidence is fatal to Darwin's appeal and must result in the success of the Partnership's appeal.

Relevant Legislation

[7] There are several sections of the *Builders Lien Act,* S.B.C. 1997, c. 45 [*BLA*] that are relevant, as follows:

> 2 (1) Subject to this Act, a contractor, subcontractor or worker who, in relation to an improvement,
>
> (a) performs or provides work,
>
> (b) supplies material, or
>
> (c) does any combination of those things referred to in paragraphs (a) and (b)
>
> has a lien for the price of the work and material, to the extent that the price remains unpaid, on all of the following:
>
> (d) the interest of the owner in the improvement;
>
> (e) the improvement itself;
>
> (f) the land in, on or under which the improvement is located;
>
> (g) the material delivered to or placed on the land.
>
> (2) Subsection (1) does not create a lien in favour of a person who performs or provides work or supplies material to an architect, engineer or material supplier.
>
> …
>
> 16 (1) If an owner enters into a single contract for improvements on more than one parcel of land, a lien claimant providing work or material under that contract, or under a subcontract under that contract, may choose to have the lien follow the form of the contract and be a lien against each parcel for the price of all work and material provided to all of the parcels of land.
>
> (2) If a lien is claimed under subsection (1) against several parcels of land, on application to the court by any person with an interest in or charge on the land, the court may apportion the lien among the parcels for the purpose of determining the lien claimant's rights as against persons having rights in particular parcels.

…

24 (1) A person against whose land a claim of lien has been filed, and a contractor, subcontractor or any other person liable on a contract or subcontract in connection with an improvement on the land, may apply to a court to have the claim of lien cancelled on giving sufficient security for the payment of the claim.

(2) The court hearing the application under subsection (1) may, after considering all relevant circumstances, order the cancellation of the claim of lien on the giving of security satisfactory to the court.

(3) The value of the security required under an order under subsection (2) may be less than the amount of the claim of lien.

(4) The registrar or gold commissioner in whose office a claim of lien is filed must, on receiving an order or certified copy of the order made under subsection (2), file it and cancel the claim of lien as to the property affected by the order.

(5) The giving of security for the payment of a claim of lien under subsection (1) does not make the owner liable for a greater sum than provided for in section 34.

…

25 (1) An owner, contractor, subcontractor, lien claimant or agent of any of them may at any time apply to the court, registrar or gold commissioner and the court, registrar or gold commissioner may cancel a claim of lien if satisfied that

> (a) a lien is extinguished under section 22 or 33,
>
> (b) an action to enforce the claim of lien has been dismissed and no appeal from the dismissal has been taken within the time limited for the appeal,
>
> (c) an action to enforce the claim of lien has been discontinued, or
>
> (d) the claim of lien has been satisfied.

(2) An owner, contractor, subcontractor, lien claimant or agent of any of them may at any time apply to the court and the court may cancel a claim of lien if satisfied that

> (a) the claim of lien does not relate to the land against which it is filed, or
>
> (b) the claim of lien is vexatious, frivolous or an abuse of process.

(3) An application under subsection (1) or (2) may be made without notice to any other person.

[Emphasis added.]

Background

[8] As mentioned, the only evidence on the application below was that of the Partnership. I rely on that evidence to set out the background facts.

[9] In 2018, the Partnership commenced a multi-phase residential townhouse development project based in North Vancouver, known as Holland Row.

[10] There are two lots at issue: Lot 1, legally owned by Glenaire; and Lot A, legally owned by Glenaire 2. Each of the properties are held in trust for the Partnership. Phase One of the development was to be the construction of townhomes on Lot 1. The construction on Lot A was to be Phase Two of the development.

[11] On September 10, 2018, Darwin entered into a standard form stipulated price contract, CCDC 2 – 2008, with the Partnership for the development of Lot 1 (the "Contract"). The Contract price was $14,758,947.00, exclusive of taxes, subject to approved change orders. Defective work was to be corrected at Darwin's expense.

[12] During the construction, the Partnership approved change orders totalling $439,417.56 to bring the total contract price to $15,958,282.79, inclusive of taxes.

[13] By the time the Contract was terminated, Darwin had invoiced the Partnership for $15,619,761.59, inclusive of taxes. The Partnership had paid the plaintiff a total of $14,004,124.84, inclusive of taxes, in relation to the project. This included amounts paid on account of Darwin's invoices, plus the portions of the holdback paid to Darwin.

[14] It was therefore the Partnership's position before the Chambers Judge that the maximum possible lien claim could be calculated as the difference between either the invoiced amount by Darwin, or the adjusted Contract price, less amounts the Partnership paid to Darwin. This meant the maximum possible lien claim would be in the range of $1.6 million or $1.9 million approximately.

[15] The Contract provided that time was of the essence and that the work would be substantially completed by February 28, 2020. The substantial completion date was later extended by an agreed change order to March 13, 2020.

[16] The Partnership alleges that Darwin's work was defective and that it failed to correct deficiencies or adequately supervise the work. It gave Darwin notice of default on June 8, 2020, approximately three months after the intended March 2020 completion date. In accordance with the Contract, the Partnership demanded that Darwin rectify its defaults within five days. Darwin did not take any steps to do so during the five-day period. Thus, on June 23, 2020, the Partnership took the position that Darwin had repudiated the Contract and that the Partnership accepted the repudiation, and the Partnership terminated the contract with Darwin.

[17] The Partnership's evidence was that the Contract was solely in relation to work on Lot 1 and did not provide for any materials or labour related to Lot A. Phase Two was to be built on Lot A, and it was a separate project from the Phase One project, including from an accounting, construction timing, and contracting perspective.

[18] During the course of the Contract, the Partnership separately engaged Darwin to do tree removal on Lot A, and for a traffic management plan for Phase Two of the project. Darwin did the work, and as agreed, billed the Partnership separately for the work in February 2019, in the amount of $17,173.11, exclusive of taxes. The Partnership paid the invoice in full, inclusive of taxes, in March 2019. This work that was performed on Lot A was separately billed and paid for, and did not form any part of the Contract. No other work was performed on Lot A by Darwin.

[19] On July 24, 2020, Darwin filed a builder's lien in the amount of $3,085,612.93, against both Lot 1 and Lot A. This was followed on July 31, 2020, by Darwin filing a notice of civil claim against the Partnership ("NOCC") to enforce the lien. The NOCC contained no breakdown or explanation of how Darwin arrived at the exact lien amount in excess of $3 million. Darwin also filed certificates of pending litigation against Lot 1 and Lot A.

[20] In August 2020, the Partnership brought a petition and obtained an order to discharge the lien and certificates of pending litigation, on deposit of a lien bond in the amount of the lien claim. The order was without prejudice to the Partnership's right to claim that the lien was improper or defective and to apply for an order varying the form or reducing the amount of security.

[21] Subsequent to the termination of the Contract, the Partnership incurred additional expenses:

a) It made a number of payments to subcontractors and suppliers directly, totalling $242,642.67, inclusive of taxes (Reasons, para. 20(a));

b) It made payments of holdback amounts directly to subcontractors in the amount of $680,054.60, inclusive of taxes (Reasons, para. 20(b));

[22] The above additional payments totalled $922,697.27.

[23] In addition, the Partnership incurred costs to correct defects and deficiencies said to arise from Darwin's failures on the project, totalling $921,595.78. These out-of-pocket additional expenses to complete the construction thus totalled $1,844,293.05.

[24] The Partnership also incurred expenses resulting from an approximate six-month delay in completing the project. The Partnership provided evidence that it incurred delay expenses totalling $1,212,935.39.

[25] Further, the Partnership posted letters of credit for liens filed by subcontractors (Reasons, para. 20(c), (d)). Darwin objects to any consideration of the amounts of the letter of credit security posted by the Partnership.

[26] In any event, the "extra" expenses that the Partnership's evidence identified as being incurred and paid by it as a result of Darwin's failure to perform the Contract totalled over $3 million.

[27] As of the hearing before the Chambers Judge, the cost of the lien bond for security for Darwin's lien was $92,568.00.

[28] The Partnership's counsel made several requests of Darwin to provide an accounting that explained the basis for its lien claim, all to no avail.

[29] On November 10, 2021, the Partnership filed and served an application to cancel the lien or to reduce it, relying on ss. 25 and 24 of the *BLA*, respectively.

[30] On November 26, 2020, the Partnership filed a Response to Civil Claim disputing the lien claim and characterizing it as excessive and an abuse of process; as well as alleging that the lien claim was improperly filed against Lot A. The Partnership also filed a counterclaim, making the same allegations plus advancing claims in relation to the additional expenses it incurred after the termination of the Contract.

[31] In support of its application, the Partnership filed and served a detailed affidavit setting out the invoices on the project and the amounts it paid, as well as providing evidence to support the claim that it had incurred expenses in excess of $3 million as a result of Darwin not completing the work.

[32] In summary, the Partnership's position, supported by its evidence, was that the maximum lienable amount by Darwin was in the range of $1.6 million to $1.9 million; but this amount was not due because the Partnership had its own counterclaim and had incurred expenses totalling over $3 million.

[33] Darwin did not file a response to the application below, or deliver evidence in accordance with the time requirements of the *Supreme Court Civil Rules*, despite several opportunities to do so, and despite repeated requests and demands from counsel for the Partnership.

[34] In the face of repeated unsuccessful attempts to obtain a response to its application to cancel the lien, the Partnership set down its application for hearing on

March 29, 2022. It gave notice of the hearing date to Darwin's counsel (different counsel than on appeal).

[35] On March 25, 2022, the Friday before the scheduled hearing, Darwin's counsel delivered a letter of the same date to the Partnership's counsel (the "March 25 Letter").

[36] In the March 25 Letter, Darwin's counsel set out a short summary of its position regarding the breakdown of its lien claim, but did not provide evidence. The letter requested an adjournment on the basis that efforts were ongoing to provide a response.

[37] The Partnership agreed to an adjournment on terms that required Darwin to deliver its response to the application. These terms formed part of a consent order made on April 7, 2022 (the "Consent Order"), ordering that any application response or document to be relied upon by Darwin in response to the application to cancel the lien must be delivered by no later than Friday, April 15, 2022.

[38] The hearing of the Partnership's application was then adjourned to May 17, 2022. Darwin did not file any response or evidence by April 15, 2022, or at all.

[39] However, Darwin's counsel attended the May 17, 2022 hearing of the Partnership's application and sought an adjournment. The Chambers Judge refused the adjournment application. He allowed Darwin's counsel to make submissions subject to the proviso that the Chambers Judge might decide to give those submissions no weight. The Chambers Judge later stated in his ruling that he had disabused his mind of those submissions. Darwin takes no issue on appeal with the Chambers Judge's rulings in this regard.

[40] At the hearing, Darwin's counsel made submissions based on assertions contained in the March 25 Letter. No one attested to the truth of its contents.

[41] Despite the Chambers Judge's ruling that he would disabuse his mind of the submissions of Darwin's counsel, it appears that these submissions did unintentionally influence the judgment.

[42] The content of the March 25 Letter alleged by Darwin to support the lien claim, was set out by the Chambers Judge in his Reasons:

> [15] In support of the application before me is correspondence from Darwin's counsel dated March 22, 2022. It contains a summary of the amounts included in Darwin's lien claim as follows:
>
> | **Category** | **Amount Claimed** |
> |---|---|
> | Contract Sum | 14,758,947.00 |
> | Change Orders (1 to 118) | 439,417.56 |
> | Contemplated Change Orders | 10,011.10 |
> | Request for Change Orders | 169,102.69 |
> | Change Directives | 129,506.89 |
> | Additional Costs | 631,450.51 |
> | Potential Subtrade Delay Claims | 50,000.00 |
> | Delay Claim | 247,267.00 |
> | Less: Paid to Date | (13,337,261.78) |
> | Less: Balance of Incomplete-Work | (159,761.99) |
> | | 2,938,678.98 |
> | GST 5% | 146,933.95 |
> | | 3,085,612.93 |

[43] The March 25 Letter was the first time that Darwin had provided its position regarding a breakdown of the alleged basis of the lien. It was written after the Partnership filed its Notice of Application and supporting affidavit material. On appeal, the Partnership takes the position that not only was the March 25 Letter

inadmissible, the Partnership cannot be faulted for not having anticipated the positions taken in that letter when preparing its own evidence. The Partnership takes issue with the truth of the contents of the letter.

Application and Reasons

[44] Again, the Partnership's application was for an order to cancel Darwin's lien and to release the security; or in the alternative, to reduce the security, pursuant to ss. 25 and 24 of the *BLA* respectively.

[45] The first ground advanced by the Partnership for cancellation of the lien was that the lien ought not to have been filed against Lot A, as the work did not relate to that lot. The Partnership relied on its affidavit evidence as well as s. 25(2)(a) of the *BLA*.

[46] In his submissions in Chambers, counsel for Darwin suggested that work was performed on Lot A during the course of the Contract, and billed pursuant to a change order that mentioned Phase Two. The change order was in the evidence filed by the Partnership, as part of a bundle of the approved change orders. However, the Partnership did not have advance notice that Darwin would suggest the language in a change order mentioning Phase Two could be interpreted as meaning that Darwin performed work on Lot A and billed it under the Contract. No witness had given this evidence, and it was contrary to the Partnership's affidavit evidence.

[47] The Chambers Judge appears to have been influenced by the argument from Darwin's counsel, as he noted that there was evidence an invoice for the work on Lot A was included in Darwin's account for work performed on Lot 1: Reasons, paras. 50–58. As such, he found that s. 16(1) of the *BLA* applied, which permits a lien claimant to file against all properties where improvements were performed. He noted that no application had been brought to apportion the work as between Lot 1 and Lot A, pursuant to s. 16(2). The Partnership states the judge erred in this regard, misunderstanding the invoice.

[48] The Chambers Judge next moved to the argument of the Partnership that the lien should be cancelled pursuant to s. 25(2)(b) of the *BLA*, as vexatious, frivolous or an abuse of process.

[49] The Chambers Judge analyzed this issue as relating to the question of whether work was done on Lot A. The Chambers Judge concluded:

> [67] …I find that, insofar as Darwin's entitlement to place a lien against Lot A, there are at least arguable claims respecting the work done and that the lien should not be removed under s. 25(2)(b). I do not find that Darwin's lien is frivolous, vexatious, or an abuse of process, and I am satisfied that there is a question to be tried.
>
> [Emphasis added.]

[50] The Partnership's Notice of Application and submissions advanced an argument that the lien amount was so excessive as to amount to an abuse of process and should be canceled pursuant to s. 25(2)(b), relying on *Atlas Painting & Restorations Ltd. v. 501 Robson Residential Partnership*, 2016 BCSC 2472 at para. 12. This argument applied to the quantum of the lien claim that was filed as against both Lot 1 and Lot A. The Chambers Judge did not expressly address this argument.

[51] The Chambers Judge then addressed the Partnership's alternative argument that the lien security should be reduced based on s. 24.

[52] The Chambers Judge found that on the evidence the security for the lien in the amount of over $3 million was excessive: para. 76.

[53] The Chambers Judge considered whether the lien security should be reduced. In analyzing this issue, the Chambers Judge relied on the March 25 Letter in which Darwin had set out the basis for its calculation of the lien amount. The Chambers Judge observed that Darwin's claim to a lien of over $3 million was not supported by evidence for "most of the claims". The Chambers Judge appeared, however, to rely on the March 25 Letter to conclude there was some basis for a "net" claim: paras. 77–79.

[54] Recognizing that the Partnership had counterclaims but that these had not yet been proven, the Chambers Judge concluded he would reduce the lien bond security to $500,000: Reasons, para. 82.

[55] The Chambers Judge awarded the defendants costs at Scale B.

Issues

[56] The parties have presented an over-abundance of issues on appeal and cross appeal, even though the subject matter of the hearing below dealt with only two rather routine questions: when should a builders' lien be cancelled, and when should a builders' lien amount be reduced.

[57] In my view, this appeal and cross appeal can be decided on the one argument overlooked by the Chambers Judge, namely, whether the lien should be canceled as an abuse of process pursuant to s. 25(2)(b), because it was so excessive and unsupported.

[58] Before I address that issue, I will briefly address the legal principles relating to varying or cancelling lien claims under ss. 25 and 24 of the *BLA*. I will also address the Partnership's argument that Darwin does not have standing to appeal.

Legal Principles Related to Varying or Cancelling Lien Claims

Cancelling Lien Claims Under s. 25

[59] The approach to applications to cancel a lien under s. 25, or alternatively to reduce the security posted pursuant to s. 24 of the *BLA*, was addressed in *West Fraser Mills Ltd. v. BKB Construction Inc.,* 2012 BCCA 89 at paras. 18–20, cited with approval in *Centura Building Systems (2013) Ltd. v. 601 Main Partnership*, 2018 BCCA 172.

[60] Under s. 25, the question is whether the lien is defective or has lapsed for any of the reasons set out in s. 25(1) or s. 25(2)(a); or whether it is vexatious, frivolous or an abuse of process under s. 25(2)(b).

[61] Here, the Partnership brought challenges to the lien under both s. 25(2)(a) and 25(2)(b).

[62] Under s. 25(2)(a), the Partnership argued that the lien was defective because it was filed on Lot A, not simply Lot 1, and because the work related only to Lot 1, the claim of lien did "not relate to the land against which it is filed", contrary to s. 25(1)(2)(a).

[63] The approach under s. 25(2)(b) on an application to cancel a lien, is for the court to determine whether the lien claimant has raised arguable claims, in the sense of raising a question fit to be tried, or whether the claims are vexatious, frivolous, or an abuse of process: *West Fraser* at para. 25.

[64] The threshold for maintaining a lien claim in the face of a s. 25(2)(b) challenge is low and the court is not to decide the case on the merits: *West Fraser* at para. 24. It is not to be treated as though it was a summary trial application, recognizing that in some cases lien claimants may not yet have access to evidence in the hands of the responding party that might help them prove their claims: *West Fraser* para. 28.

[65] While the "arguable claim" language is similar language to the approach for analyzing whether a pleading should be struck for failure to plead a cause of action, it is not exactly the same test in application. This is because on a challenge to pleadings for failure to plead an arguable claim, no evidence is admissible: *Supreme Court Civil Rules,* R. 9-5(2).

[66] When a lien is filed and challenged, evidence is admissible. The correct approach is to decide the question based on review of the affidavit evidence filed by the parties: *West Fraser* at para. 25.

Reducing Lien Amount Pursuant to s. 24

[67] Where the court is of the view that there is an arguable claim in support of the lien claim such that it is not vexatious, frivolous, or an abuse of process, but not to

the extent of the quantum of the claim, the court may employ s. 24 to reduce the lien security. This was the approach in *G.A.P Contracting Ltd. v. 0790643 B.C. Ltd.*, 2011 BCSC 1059, the case cited with approval in *West Fraser* at para. 25.

[68] The approach to an application under s. 24 to reduce lien security has been addressed in three leading cases of this Court: *Q West Van Homes Inc. v. Fran-Car Aluminum Inc*., 2008 BCCA 366; *West Fraser*, and more recently, *Centura*. As *Centura* has the last word, I will refer to the articulation of the test in that decision.

[69] This Court in *Centura* said there were two stages to an application under s. 24. At the first stage, the question is whether the lien claimant has established a *prima facie* case: para. 28. Although similar to the test on a challenge to pleadings, it is not simply a pleadings issue. The evidence must be examined by the judge in order to determine whether it discloses a chance the claimant might succeed: paras. 32–33. The applicant has the burden of proof. However, where, as in this case, the applicant has met the burden of proof of showing an arguable claim that the lien is excessive or unwarranted, the lien claimant takes a significant risk in filing no evidence in response.

[70] This description of the first stage of a s. 24 application is very similar to the test under s. 25(2)(b) for cancelling a lien, except under s. 25(2)(b) the application is to cancel the entire lien; whereas under s. 24 the application may be simply to challenge some components of the lien claim: see discussion in *West Fraser* at paras. 39–40.

[71] In a case such as the present one, where the applicant has brought both a s. 25 and a s. 24 application, and there is no evidence from the lien claimant setting out components of the lien claim, I see no need to duplicate the analysis of whether there is an arguable claim. If the court concludes on the s. 25 application that the lien claimant has not raised an arguable claim, that will end the matter and the lien will be cancelled. That would not, of course, leave the lien claimant without a remedy. The lien claimant may continue to pursue civil causes of action such as breach of contract.

[72] If the lien claim survives the first stage of the test and has raised an arguable claim, then the second stage of a s. 24 application requires looking at the evidence as a whole to determine whether the security should be reduced.

[73] The scope of enquiry under s. 24 in reducing a lien claim is "approached with caution in order to avoid injustice to lien claimants": *West Fraser* at para. 40. The court should be especially cautious in considering a counterclaim for delay and should approach such claims conservatively: *Q West Van Homes Inc. v. Fran-Car Aluminum Inc.,* 2007 BCSC 823 [*Q West BCSC*] at para. 13, as cited in *Centura* at paras. 24–25. This is to avoid the risk of the lien claimant being left empty-handed after a successful trial on the merits of the lien claims.

[74] Nevertheless, there will be cases where the lien claim is "readily seen" as inflated and the court will be justified in ordering a lesser amount of security: *Centura* at para. 24, citing *Q West BCSC* at para. 11.

[75] Thus in *G.A.P.*, the lien claim was reduced from $386,000 to $297,000; in *West Fraser* the security for the lien claim was reduced from $1,404,973 to $440,000.

[76] The question of the proper quantum of the lien security is determined by a review of the evidence, appreciating that the claim does not have to be proven on the merits. This avoids setting too high a standard for lien claimants, while at the same time, avoiding the opportunity for abuse of parties who are subjected to exaggerated lien claims.

Analysis

Does Darwin Have Standing to Appeal?

[77] The Partnership submits that Darwin does not have standing to appeal, because it did not file a response to the application in the trial court and so did not have a right to appear on the application. Alternatively, the Partnership argues that the appeal is an impermissible abuse of process and a collateral attack.

[78] I do not accede to these arguments.

[79] Darwin was a named party to the proceeding in the court appealed from, and therefore fits within the definition of "appellant" in the *Court of Appeal Act*, S.B.C. 2021, c. 6, s. 1 [*CA Act*].

[80] I am not persuaded by the Partnership's argument that where an appeal is taken from an application, as opposed to a trial judgment, the definition of appellant must be construed narrowly to limit it to only those parties who actually appear in response to an application. That is not how the legislature chose to define "appellant" in the *CA Act*.

[81] The Partnership relies on two cases in support of its submissions, namely *British Columbia (Director of Civil Forfeiture) v. Crowley*, 2013 BCCA 89, and *R. v. Podolski*, 2015 BCCA 513.

[82] In *Crowley* the appellant, Mr. Crowley, had his response to civil claim struck and so was no longer a party of record. As a result, a chambers judge did not permit him to make submissions at an application determining the forfeiture of his home. The case does not stand for the proposition that Mr. Crowley had no standing on appeal. Mr. Crowley was entitled to appeal, and was successful on appeal in establishing that the judge erred in not allowing him to participate in the application. This Court found that even though he was not a party of record, Mr. Crowley was a "person who may be affected" by the orders that were sought and so should have been given a right to speak to the application. This Court noted that his rights were limited: he could not controvert allegations in the notice of civil claim, because those were deemed admitted: at paras. 68–69.

[83] It is clear from *Crowley* that a court has inherent jurisdiction to allow a person to speak to an application. In the present case, the Chambers Judge exercised his inherent jurisdiction to allow Darwin's counsel to make submissions, although he concluded he would disabuse his mind of those submissions.

[84] I do not consider *Crowley* of assistance to the Partnership's argument that Darwin has no standing on appeal.

[85] *Podolski* is distinguishable. It stands for the position that a party that has no standing in the court below — because it has no legal interest in the matter being determined — also has no standing in the Court of Appeal to appeal the ruling. Here, Darwin clearly has a legal interest in the outcome.

[86] In my view it makes no sense to construe the *CA Act* narrowly in the way suggested by the Partnership, as it would mean that despite Darwin being a party to the proceeding below, and a party whose interests are affected by the order made in the proceeding below, it would have no right to appeal from that order simply because it did not file a formal response to the application in the court below.

[87] All of this leads me to reject the Partnership's narrow interpretation of the definition of "appellant" in the *CA Act*, s. 1.

[88] I also do not consider Darwin's appeal to be a collateral attack or abuse of process. In my view, the Partnership's argument goes too far.

[89] An adverse party to a proceeding may decide not to actively oppose an application, perhaps to save legal costs, perhaps for other reasons, but may expect that the application will be decided by the court in accordance with the relevant principles and relevant evidence and the scope of the Notice of Application. If something goes awry, the fact that the party did not actively appear on the application does not mean it has lost all rights to appeal. It still has a right to appeal, but it will be limited in the positions it can take by the fact that it did not formally challenge positions in the court below or lead evidence.

[90] Darwin did not consent to the order below. Darwin is a party to the proceeding and was affected by the Chambers Judge's order. Darwin has the right to appeal.

[91] Nevertheless, while Darwin does have standing to appeal, in my view it faces significant challenges due to the fact it did not formally oppose the application, and is

limited in the scope of arguments that it can advance. I agree with the Partnership that this Court cannot countenance Darwin treating the matter as a *de novo* hearing. Darwin is not entitled to raise all the arguments it might have raised in the court below but did not.

[92] Darwin is limited by the same basic premise that applies to other parties. Parties are generally not permitted to raise new arguments in this Court that they did not raise before the judge whose judgment is under appeal, absent exceptional circumstances that establish it is in the interests of justice to do so: *Quan v. Cusson*, 2009 SCC 62 at para. 37; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19 at para. 32; *Bartch v. Bartch*, 2018 BCCA 271 at para. 30–31.

[93] The discretion to allow a new issue to be argued requires consideration of the possible prejudice to the opposing party.

[94] It can be unfair to spring a new argument on a party on appeal, in circumstances where that party might have led evidence in the trial court to address that issue if the party had known it would be raised on appeal: *O'Bryan v. O'Bryan* (1997), 43 B.C.L.R. (3d) 296 (C.A.), 1997 CanLII 4045 (C.A.) at paras. 23–24, citing *The Conduct of an Appeal*, John Sopinka and Mark A. Gelowitz (Toronto: Butterworths, 1993) at p. 52.

[95] The general rule is that an appellant may not raise a point that was not pleaded, or argued in the trial court, unless all the relevant evidence is in the record: *Athey v Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 (SCC) at para. 51.

[96] There may be less prejudice where the issue is purely a new legal issue and additional evidence would not be relevant to the issue: *Bartch* at paras. 31–32.

[97] It also can work against the goals of the fair and efficient administration of justice, to have an appeal court decide issues that were not raised in the court from which the appeal is taken. An appeal court in such circumstances does not have the benefit of the trial process and the reasons of a trial court judge. Further, the efficient

use of legal and judicial resources would be undermined if the system permitted a party to choose not to appear in the trial court, while "saving" arguments for appeal.

[98] Darwin has not sought leave to raise new arguments in this Court, and it would be difficult to see how it would be in the interests of justice to allow it to do so, given that it had the opportunity to respond to the Partnership's application in accordance with the *Rules*, and chose not to do so.

[99] Furthermore, Darwin is not seeking to rely on evidence that it did not put in admissible form before the Chambers Judge. In my view, this means that Darwin cannot rely on the March 25 Letter as evidentiary support for its grounds of appeal.

[100] In the circumstances of this case, on appeal Darwin is limited to arguing that the Chamber Judge's order reducing the lien security was not open to him to make based on the evidence filed by the Partnership, the arguments made by the Partnership, and the applicable legal principles.

Did the Chambers Judge Err in Failing to Find That the Lien was an Abuse of Process?

[101] The central question that must be grappled with in respect of the appeal and cross appeal is whether the Chambers Judge ought to have cancelled the lien pursuant to s. 25(2)(b), on the basis that it was vexatious, frivolous or an abuse of process.

[102] I respect that ultimately the Chambers Judge's approach to the s. 24 application was a practical one, in which he exercised his discretion largely in favour of the Partnership while attempting to protect any possible lien claim that might someday be properly supported by Darwin. However, in my view, implicit in the Chambers Judge's ruling is a conclusion that there was some arguable validity to the lien claim. In reaching this conclusion, he must have implicitly relied on there being some truth to the contents of the March 25 Letter: see Reasons at para. 79.

[103] I accept the Partnership's submissions that it appears the Chambers Judge's reasons overlooked the Partnership's application pursuant to s. 25(2)(b), and that

this application should have been determined first. This was an error in principle. Given the record, it would make little practical sense to send the matter back to the trial court, as this Court is in as good a position to determine the matter.

[104] The evidence revealed this, using approximate numbers: the quantum of the fixed price contract was roughly $15.9 million; Darwin invoiced the Partnership for $15.6 million; and the Partnership paid Darwin $14 million, leaving an approximate $1.6 million to $1.9 million gap. On the Partnership's own submissions, if all else was ignored, that was the best case for Darwin having a lien claim. Yet Darwin had filed a lien far in excess of this amount, for just over $3 million.

[105] On any analysis, Darwin's claim was grossly exaggerated.

[106] There are times that in the haste to secure a lien claim after termination of a contract, a lien claimant might miscalculate the lien. The conclusion that an exaggerated lien claim is an abuse of process and should be canceled might be avoided in such a case where the lien claimant explains the error and concedes that the claim can be reduced, as in *Atlas Painting*, at para. 12. However, that was not the situation in the present case.

[107] In the present case, there was additional context and evidence relevant to the s. 25(2)(b) application that the lien claim was so excessive as to be an abuse of process:

a) The lien claim was filed on July 24, 2020. It was in a very precise but large amount. Since then, the Partnership had repeatedly asked Darwin to provide information regarding the basis for its lien claim. Only after more than one year had passed and the Partnership filed its application and evidence did Darwin, through counsel, provide a letter containing an outline submission as to the basis for its claim, but without providing any detailed support. By the time the Partnership's application was heard, close to two years had passed and yet Darwin had not provided evidentiary support for its lien claim.

b) In November 2021, the Partnership provided Darwin with its Notice of Application to cancel the lien, plus its extensive affidavit evidentiary support filed as proof that the lien was excessive and that the Partnership had countervailing claims equal to or in excess of the amount of the lien. The application was adjourned once at Darwin's request, to allow it to provide responsive evidence. Darwin agreed it would do so as set out in the Consent Order. Despite this, Darwin provided no countering evidence.

[108] A lien claim is a powerful tool to protect contractors from being exploited but is also one that has significant consequences for those whose property or finances are tied up by the lien. Just as non-payment of a contractor can be used improperly to extract an advantage to under-pay a contractor, a contractor's excessive lien claim can also be used improperly to extract payment that is not due.

[109] When the party subjected to the lien claim has filed an application seeking to cancel the lien, the lien claimant has to be prepared to support an arguable case as to both the right to the lien and the amount of the lien. The threshold to establish an arguable claim is not high and is less than what would be required to support a conclusion in the lien claimant's favour at trial, but more than thin air is required.

[110] In the face of the Partnership's evidence, Darwin had a burden to file some evidence in support of an arguable lien claim if it hoped to resist the Partnership's application to cancel the lien. Darwin's evidentiary silence despite the Partnership's many requests to explain the basis of the lien claim, and the passage of time, colours the analysis of whether its excessive lien claim was an abuse of process.

[111] In the circumstances of this case, I would conclude that that the lien claim was an abuse of process pursuant to s. 25(2)(b) of the *BLA* and I would cancel the lien.

[112] It is therefore unnecessary to decide the other issues raised by the Partnership on cross appeal.

[113] I also consider it unnecessary to deal with Darwin's arguments on appeal. Darwin's appeal must fail because its arguments all turn on treating the March 25 Letter as evidence that some "components" of the lien claim were arguable, and that these components added up to more than the $500,000 security fixed by the Chambers Judge. However, the March 25 Letter was nothing more than submissions by Darwin's counsel, not evidence that there was any merit to the submissions. As I have already explained, the excessive amount of the lien claim was an abuse of process.

Disposition of Appeal

[114] I would dismiss Darwin's appeal. I would allow the Partnership's cross appeal and cancel the lien.

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Madam Justice Fenlon"