# SUPREME COURT OF NOVA SCOTIA

**Citation:** *Guildfords Inc. v. Gamma Windows and Walls International* Inc., 2024 NSSC 158

**Date:** 20240527
**Docket:** 515144
**Registry:** Halifax



**Between:**

Guildfords Inc.

*Plaintiff*

v.

Gamma Windows and Walls International Inc., Queen's Marque Developments Limited, Queen's Marque Limited, Queen's Marque North Limited, The Residences at Queen's Marque Limited, and Queen's Marque South Limited

*Defendants*

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| **Judge:** | The Honourable Justice Diane Rowe |
| **Heard:** | December 7, 2023, in Halifax, Nova Scotia |
| **Final Written Submissions:** | December 20, 2023 |
| **Counsel:** | Geoffrey Saunders, for the Plaintiff<br>Nathan Sutherland, for the Defendant, Gamma Windows and Walls International Inc.<br><br>William Ryan, KC, for the Defendants, Queen's Marque Developments Limited, Queen's Marque Limited, Queen's Marque North Limited, The Residence at Queen's Marque Limited, and Queen's Marque South Limited |

**By the Court:**

[1] This is a motion by the Plaintiff, Guildfords Inc. (“Guildfords”), in this proceeding seeking an order granting summary judgment on the evidence against the Defendant, Queen’s Marque Developments Limited (“Queen’s Marque”), pursuant to *Nova Scotia Civil Procedure Rule* 13.04, with respect to its claim for an amount owed it pursuant to a Builders Lien holdback retained by Queen’s Marque (“Guildfords Lien”).

[2] Guildfords action is against the Defendants, Gamma Windows and Walls International Inc. (“Gamma”); Queen’s Marque Developments Ltd. (“Queen’s Marque”); and Queen’s Marque North Ltd., the Residences at Queen’s Marque Ltd. and Queen’s Marque South Ltd. , (collectively “QM Entities”).

[3] Guildfords’ Lien was vacated by consent Order between Guildfords and Queen’s Marque, as against the Queen’s Marque and QM Entities properties as identified in the Order, and was issued by the Court on December 20, 2023. The Order provides that as Queen’s Marque posted security pursuant to s. 29(4) of the *Nova Scotia Builders’ Lien Act* R.S., c. 277, s. 1; 2004, c. 14, s. 2., in the amount of $1,019,007.55, inclusive of Guildfords’ Lien, plus interest, and costs of 25%,

that the Guildfords Lien registration is vacated. This security is held by the Prothonotary.

[4] The Court notes that the Defendant, Gamma, took no position in the hearing of Guildfords' motion for summary judgment and attended as a watching brief.

[5] There was no cross-examination of witnesses on the affidavits filed in support of each party to the motion.

[6] The Court received additional caselaw from the Defendant, Queen's Marque, at the hearing, which was relied upon in additional submissions not referenced in the brief it had filed. The Court requested that Guildfords prepare its written response to these new submissions and law, and then permitted a written reply for Queen's Marque.

**Background**

[7] Queens' Marque is a multi use commercial and residential development located in the heart of Halifax Harbour. Queen's Marque, and associated QM Entities, engaged Gamma as its contractor for construction. Gamma, in turn, engaged Guildfords as its subcontractor for work and materials.

[8] There is also ongoing separate litigation between Queen's Marque and Gamma, writ large. That dispute was most recently the subject of a decision by Norton, J. in *Queen's Marque Developments Limited v Gamma Windows and Walls International Inc.*, 2024 NSSC 85, granting an amendment to the defence filed by Gamma, and permitting the addition of a counterclaim as against Queen's Marque. Gamma's own claim of lien is registered as against the same Queen's Marque development properties that was the subject of the Guildfords lien.

[9] Guildfords, in its pleadings in this Action, seeks: a declaration that it is entitled to a Builder's Lien against Queen's Marque lands in the amount of $848,582.56 plus interests and costs; an order for sale in the event that the Defendants do not pay this amount; an order for judgment against Gamma for the deficiency (if any) between the amount recovered by Guildfords from the sale of the Queen's Marque lands and the amount of the Guildfords' Lien, and costs.

[10] Queen's Marque and Gamma each filed defences, and counterclaims as against the other Defendant, in response. Interrogatories have been filed, and were considered on the motion, with the affidavits in support.

[11] The most recent appellate guidance concerning the test for a motions court to apply on a motion for summary judgment on the evidence is found in *Arguson*

*Projects Inc. v Gil-Son Construction Limited* 2023 NSCA 72. This also concerned a builders' lien action. At paragraphs 31- 43, Bourgeois, J.A. wrote:

> [31] The principles governing a motion for summary judgement on evidence have been set out and explained in multiple decisions. See *Burton, Shannex, SystemCare Cleaning and Restoration Limited v. Kaehler*, 2019 NSCA 29 ("SystemCare"), *Harding v. 3021386 Nova Scotia Limited*, 2021 NSCA 4, and most recently *Risley v. MacDonald*, 2022 NSCA 76 ("Risley"). I will attempt to provide a useful consolidation of the relevant principles.
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> [32] A motion for summary judgment is brought pursuant to *Civil Procedure Rule* 13.04, which provides:
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> **13.04 Summary judgment on evidence in an action**
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> **(1)** A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
>
> (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
>
> (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
>
> **(2)** When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
>
> **(3)** The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> **(4)** On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine

issue of material fact and a question of law depend on the evidence presented.

**(5)** A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.

**(6)** A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:

(a) determine a question of law, if there is no genuine issue of material fact for trial;

(b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

[33] In *Shannex*, Justice Fichaud set out five sequential questions to be asked when summary judgment is sought pursuant to the then recently amended Rule 13.04 (paras. [34] through [42])[2]:

1. Does the challenged pleading disclose a genuine issue of material fact, either pure or mixed with a question of law?

2. If the answer to above is No, then: does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?

3. If the answers to the above are No and Yes respectively, does the challenged pleading have a real chance of success?

4. If there is a real chance of success, should the judge exercise the discretion to finally determine the issue of law?

5. If the motion for summary judgment is dismissed, should the action be converted to an application, and if not, what directions should govern the conduct of the action?

[34] A motion judge who fails to ask the questions in the above order, or combines one or more of them, risks falling into error.

[35] The first question's focus is solely whether there is a dispute of material fact. A material fact can be one that stands on its own (*i.e.*, whether an email was sent and received) or it can be mixed with a question of law (*i.e.*, an email was sent, but does it constitute a "decision" pursuant to the notice provisions of the contract?). At the first stage, a motion judge looks only at whether the material fact – was an email sent and received – is in dispute. It is irrelevant at this stage whether there is a question of law mixed with the material fact (*i.e.*, the application of the contractual provisions in determining the legal significance of the email) – that consideration belongs in the second step.

[36] In *Shannex*, Justice Fichaud noted " a 'material fact' is one that would affect the result. A dispute about an incidental fact – *i.e.*, one that would not affect the outcome – will not derail a summary judgment motion" (para. [34]). And further:

The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all the evidence from any source. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes.

[37] Identifying a material fact is anchored in what has been alleged in the pleadings. To identify a material fact, it is helpful to ask what needs to be proven to answer the allegations pled by a party. If a fact is necessary to prove the allegation, then it is material.

[38] To determine whether there is a dispute of material fact, Rule 13.04(4) makes clear that it is the evidence presented on the motion that must be considered. As noted recently by Justice Farrar in *Risley*, bald assertions in a responding affidavit, without more in terms of an evidentiary foundation, will not give rise to a dispute of material fact. It is critical to emphasize that a dispute of material fact cannot arise from the submissions of counsel, or a judge's speculation about legal issues not raised by the pleadings or what evidence could possibly be called at the time of trial.

[39] The second question requires a court to determine whether a question of law arises from the pleadings. If there is no dispute of material fact and no question of law, either pure or mixed with fact, then summary judgment must follow. For the purposes of this appeal, the interpretation of a contract is a question of law. As referenced above, the application of contractual provisions to the factual context, is a question of law mixed with fact.

[40] If there are no disputed material facts, but there is a question of law, the motion judge must proceed to the third question – does the challenged pleading have a "real chance of success"? In *Shannex*, Justice Fichaud wrote:

Nothing in the amended *Rule* 13.04 changes *Burton*'s test. It is difficult to envisage any other principled standard for a summary judgment. To dismiss summarily, without a full merits analysis, a claim or defence that has a real chance of success at a later trial or application hearing, would be a patently unjust exercise of discretion.

It is for the responding party to show a real chance of success. If the answer is No, then summary judgment issues to dismiss the ill-fated pleading.

[41] In *Burton*, Justice Saunders explained how to ascertain if there is a "real chance of success":

[42] . . .Instead, the judge's task is to decide whether the responding party has demonstrated on the evidence (from whatever source) whether its claim (or defence) has a real chance of success. This assessment, in the second stage, will necessarily involve a consideration of the relative merits of both parties' positions. For how else can the prospects for success of the respondent's position be gauged other than by examining it along with the strengths of the opposite party's position? It cannot be conducted as if it were some kind of pristine, sterile evaluation in an artificial lab with one side's merits isolated from the others. Rather, the judge is required to take a careful look at the whole of the evidence and answer the question: **has the responding party shown, on the undisputed facts, that its claim or defence has a real chance of success?**

[43] In the context of summary judgment motions the words "real chance" do not mean proof to a civil standard. That is the burden to be met when the case is ultimately tried on its merits. If that were to be the approach on a summary judgment motion, one would never need a trial.

[44] The phrase "real chance" should be given its ordinary meaning – that is, a chance, a possibility that is reasonable in the sense that it is an arguable and realistic position that finds support in the record. **In other words, it is a prospect that is rooted in the evidence, and not based on hunch, hope or speculation**. A claim or a defence with a "real chance of success" is the kind of prospect that if the judge were to ask himself/herself the question:

*Is there a reasonable prospect for success on the undisputed facts?*

the answer would be yes.

(Emphasis added)

[42] From the above, it is clear that the second and third questions are anchored in the evidence presented on the motion. As reiterated in *Shannex*, it is expected that each party "put its best foot forward":

> [36] **"Best foot forward":** Under the amended *Rule*, as with the former Rule, the judge's assessment of issues of fact or mixed fact and law depends on evidence, not just pleaded allegations or speculation from the counsel table. Each party is expected to "put his best foot forward" with evidence and legal submissions on all these questions, including the "genuine issue of material fact", issue of law, and "real chance of success": *Rules* 13.04(4) and (5); *Burton*, para. 87.
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> [43] As will become clear, the fourth and fifth questions posed in *Shannex*, are not engaged in the matter before the Court.

**Analysis**

[12] This Court will review and consider the submissions of counsel, the pleadings and the evidence on the motion for summary judgment in accordance with the steps outlined by Fichaud, J.A. in *Shannex, supra* and with the guidance as set out in *Arguson, supra*, above.

**(a) Step One** – does the pleading disclosure a genuine issue of material fact, either pure or mixed with a question of law.

[13] Guildfords submits there are no genuine issues of material fact. It pleads that the factual background is not in dispute and is set out in the defence of the Defendants and its Statement of Claim.

[14] In support of its motion, it has filed the affidavits of Robert Scarfo (Gamma's Vice President), and William Brown (Guildfords President). It has filed Laura Graham's solicitor's affidavit, containing copies of the land parcel registry

of Queen's Marque lands upon which the Guildfords lien is listed as a recorded security interest.



[15] The Guildfords statement of claim, defence and cross claim by Queen's Marque, and the defence and cross claim of Gamma concur on the following:

- Queen's Marque, and Entities, entered into a CCDC 17-210 contract on or about September 28, 2018, modified by Special Conditions, a Scope of Work Appendix and other items, with Gamma. (Prime Contract).
- Queen's Marque was defined as the "Owner" in the Prime Contract and retained Gamma as "Contractor" to build the Curtain Wall and Metal Panel Package for the project. Bird Construction was Construction Manager and payment certifier.
- On or about October 30, 2019, Gamma retained Guildfords to install panels in various portions of the project and lands as required under the Prime Contract. This was the Subcontract.
- The Subcontract was amended with Guildfords agreeing to take on further work for Gamma throughout the project and lands under the Prime Contract.
- Guildfords then worked to complete its obligations under the Subcontract until February 16, 2022 when its work ended as a result of Gamma's termination of the Prime Contract.
- On April 13, 2022, Guildfords registered a claim of lien against the Queen's Marque lands. It then proceeded to file its action for payment of the lien.

[16] Guildfords submits that the evidence it has tendered, as set out in the Scarfo Affidavit (para 9), indicates that the Prime Contract was terminated by Gamma, with all its work under the Subcontract then ending upon receipt of the

Termination Letter. The amount filed for claim of lien was for $848,582.65 (Brown Affidavit, para 12, and Graham affidavit with Exhibits).

[17] Queen's Marque's Response to Interrogatories and its Defence indicates that Queen's Marque retained a holdback of $2,179.150.35.

[18] Finally, Guildfords directs the Court to the evidence that Guildfords and Gamma did reach a subsequent agreement on the amount owing to Guildfords under the Subcontract of $815,206.04 (as per the Scarfo Affidavit at para 11 and Brown Affidavit at para 14). It now requests in its submission that payment in this amount be awarded, in the event it is successful on the motion, rather than the amount in the Notice of Action.

[19] Guildfords submits that Queen's Marque refused to pay the Guildfords Lien as it was about to enter into litigation with Gamma on the termination of the Prime Contract. However, Guildfords was not a party to the Prime Contract, and while there is reference to the Prime Contract in the Subcontract, there is no privity of contract between Guildfords and Queen's Marque. Guildfords has not been added as a third party to the other litigation regarding the Prime Contract as between Gamma and Queen's Marque.

[20] It is acknowledged that the Queen's Marque holdback amount is in excess of the amount that Guildford claims and is unusual, but not material to Guildfords claim for the holdback release.

[21] Guildfords' lien was registered within 60 days of its last day of work as required under s. 24(1) of the *Builders' Lien Act*. It started the action and registered the *lis pendens* within 105 days as required under s. 26(1) of the *Builders' Lien Act*. This perfected its lien rights.

[22] Section 13(4) of the *Builders' Lien Act* provides that the lien shall be charged in favour of subcontractors. This action is for the release of the holdback amount retained by Queen's Marque, not a claim in damages as against Gamma or Queen's Marque.

[23] Queen's Marque submits that there is substantial uncertainty about the amounts outstanding on the subcontract between Gamma and Guildfords and that this uncertainty is a genuine issue of material fact.

[24] They direct the Court's attention to Gamma's defence, and counterclaim, at paragraphs 25-27, in which Gamma denies that "… any amounts remain outstanding under the Subcontract." It also requests that the Court consider the difference in Mr. Brown's affidavit, and his answer to Interrogatories dated August

17, 2023, as indicative that there is an amount in dispute that Gamma owed to Guildfords. It then also directs the Court to consider Mr. Scarfo's Affidavit at paragraph 11 where his evidence is that "On or about April 5, 2023, Guildfords reached agreement with Gamma on the amount outstanding under the Subcontract for $815,206.04."



[25] Queen's Marque interprets the disparity in the evidence as indicating that there is a genuine issue of material fact to be determined, as there is a dispute concerning the actual outstanding amounts owed to Guildfords by Gamma under the Subcontract. It submits that this disparity is indicative of a genuine fact in issue, as Gamma had issued statutory declarations to Queen's Marque that all outstanding payments to subcontractors had been made, with total amounts appended, as referenced in the affidavit of Douglas McIsaac (McIsaac Affidavit, Tab "B" at p. 262).

[26] On my review of the evidence presented on the motion, there is no genuine issue of material fact. Guildfords has satisfied its burden on this Step, as there is no evidence of a disputed issue of material fact concerning the creation and perfection of its statutory lien. All of the foregoing material facts are uncontroverted. There were no contradictory material facts in evidence offered by Queen's Marque but for the intimation that there was a disparity in the evidence that was unaddressed,

rather than a dispute of material fact. The amount agreed upon as outstanding is less than the amount in the Notice of Action.

[27] The inclusion of a reference to the Prime Contract in the subcontract between Gamma and Guildfords does not create a contract as between Guildfords and Queens Marque. This action is for repayment on the statutory lien, not breach of contract in the Prime Contract.

[28] Regarding evidence on the amounts claimed, Robert Scarfo's Affidavit at para 8, provided evidence that "work began under the Contract (Prime Contract) and the Subcontract in the Fall of 2019" and references extra work that Gamma requested Guildfords perform, in response to change requests by Queen's Marque.

[29] Mr. Brown's evidence in the Response to Interrogatories was that no deficiency list had been prepared concerning Guildfords work as the Subcontract was incomplete at the time of termination. Mr. Brown also stated that verbal requests were made for changes by Gamma to the work, with no written change orders.

[30] Further, Mr. Brown's Response to Interrogatories, uncontroverted by the evidence, was that 93.88% of the work under the fixed price portion of the Subcontract had been completed.

[31] There is no evidence put forward by Queen's Marque to contradict the evidence of Mr. Scarfo's evidence that Queen's Marque did not agree to or request changes to the work undertaken by Guildfords under the Subcontract or the subsequent amount owed. Neither witness was cross examined on their evidence. The Court can't engage at this Step in inferring what the evidence might be concerning the potential import of Mr. McIsaac's evidence of Gamma's statutory declarations that were provided in the context of the Prime Contract.

[32] Mr. McIsaac's Response to Interrogatories on behalf of Queen's Marque did not disclose any particulars of Guildfords deficiencies, and he was unable to identify with particularity which delays or deficiencies are attributable to Guildfords.

[33] Further, the Court finds there is no dispute of a material fact concerning the Subcontract, or the work undertaken by Guildfords, mixed with a question of law.

[34] Therefore, as per para 35 of *Arguson, supra*, the first question's focus is solely whether there is a dispute of material fact that "stands on its own or it can be mixed with a question of law."

[35] The answer, then, to Step One is "No".

**(b)** **Step Two** – If the answer to Step One is "No" then does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact.

[36] The Court has found that the Guildfords Lien was perfected pursuant to s. 24(1) and s. 26(1) of the *Builders' Lien Act.*

[37] Section 13(4) of the *Builders' Lien Act* provides as follows :

> (4) The lien shall be a charge upon the amount directed to be retained by this Section in favour of subcontractors whose liens are derived under persons to whom such moneys so required to be retained are respectively payable.

[38] Guilfords pleads that its lien is a charge on the holdback retained by Queen's Marque as its lien rights were derived under Gamma, from whom the monies were owed. It relies upon s. 13(2) of the *Builders' Lien Act* as support for the requirement that Queen's Marque was statutorily required to retain this holdback and submits that the holdback must be made available to satisfy legitimate lien claims of Gamma's subcontractors, of which Guildfords is the sole beneficiary.

[39] In support of its position, it requests that the Court consider *Jaron Construction v. McNeil* 1980, Can LII 2702. In that case, a number of liens were registered against a property by subcontractors of Pine King, which had abandoned its contract with the owner. The owner had retained the holdback amount to have

the liens vacated. The lien claimants applied for release of the holdback in partial satisfaction. Judge Anderson decided on the question of law, after citing s. 13(4) of the *Builders' Lien Act*, as follows at paras 12-17:

> [12] The owner in this particular case had a contract with Pine King and not with the subcontractors.
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> [13] Section 5 of the *Act* states, in part:
>
> 5. . . . any person who performs any work or service upon or in respect of, or places or furnishes any material to be used . . . or upon which such materials are placed or furnished to be used, limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing (except as herein provided) by the owner.
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> [14] Subsection (3) of s. 12 states:
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> (3) The lien shall be a charge upon the amount directed to be retained by this Section in favor of sub-contractors whose liens are derived under persons to whom such moneys so required to be retained are respectively payable.
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> [15] Pine King abandoned the project and it cost the owner an amount in excess of his initial contract to complete the job.
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> [16] In my opinion, the owner got the benefit of the subcontractors' materials and services and was not prejudiced by his payment into Court as the statute required. He made a bad contract, but it was Pine King who was in breach and not the subcontractors. The lienholders are entitled to the holdback funds.
>
> [17] This appears to have been a question of law to be decided, and whereas both parties suffered monetary loss in the transaction, no costs will be allowed.

[40] Guildfords pleads that it is settled law in Nova Scotia regarding the ability of subcontractors to claim as against the holdback held by the owner in respect of the prime contract, even when there is litigation concerning the Prime contract's breach.

[41] It also directs the court to consider *Dias v MacLean*, 1993 CarswellNS 221, in which the Court commented at para 29 that the *Builders' Lien Act* "…simply creates a statutory scheme to divert those funds to the lien claimants in certain circumstances. Although diverted through the operation of the *Act*, the funds are nevertheless payable (to the lien claimants)…"

[42] This portion of *Dias, supra* was quoted with approval in *Hazmasters Environmental Equipment Inc. v London Guarantee*, 1998 CarswellNS 410.

[43] Guildfords concedes that, even if the Court recognizes that a defence pleading for a bare dismissal of the claim raised a question of law, and proceeded to Step 3 of the *Shannex, supra,* test then it is a defence that cannot be considered to have a real chance of success. There is, it contends, simply no legal basis for denying that Guildfords be paid under the holdback retained by Queen's Marque, now secured. There is no reasonable prospect of success.

[44] In response to this, Queen's Marque submitted that there are several questions of law for the Court to consider and determine in this action. They include as follows:

**(a) There is no payment of a holdback mandated by the *Builders' Lien Act***

[45] Queen's Marque states that there is no statutory provision mandating the release of a holdback with the language of sections 13(2) and 13(3) being permissive, rather than mandatory.

[46] Queen's Marque argues that as the Prime Contract and the Subcontract set out a scheme in which the holdback amount is due and payable after the issuance of a certificate, and as no certificate was completed in the circumstances by Queen's Marque, then the holdback is not payable.

[47] Guildfords replies this is not a reasonable interpretation of the statute advanced by Queen's Marque, and relies on the statute provisions and case law cited above.

[48] The Court finds that the lack of mandatory holdback release provisions negating the requirement for an owner to pay out a lien is not a reasonable interpretation of the *Act*, and if accepted, would overturn the purpose of the *Builders' Lien Act*. The legislation's intent is to mandate owners and contractors to retain a holdback to ensure that those who labour at their request receive some compensation for their work and materials. This is not an issue of law requiring determination by the Court in this matter.

**(b) Application of trust provisions of the Builders' Lien Act**

[49] Queen's Marque submits that s. 44A and s. 44B of the *Builders' Lien Act* creates a regime in which a contractor (Gamma) is deemed to be a trustee of funds paid to it which are in turn owned to its subcontractors. It cites *S&R Flooring Concepts Inc. v RLC Stratford LP*, 2013 ONSC 5288 as support for this interpretation of the *Builders' Lien Act*. In *S&R Flooring, supra* a contractor and subcontractor had reached agreement on payment, but the contractor had failed to pay. The Court in that decision held that there was a breach of trust when any part of a trust established to facilitate payment when it is converted to the contractor's own use.

[50] Guildfords replies that this is irrelevant to this litigation and requires the Court to engage in an interpretation of the Prime Contract between Gamma and Queen's Marque. It submits that it would be inappropriate, as even if it could be established that Gamma was in breach of its trust obligations, that it would be Guildfords that would advance a claim in addition to exercising its lien rights, which is not at issue in this matter. Queen's Marque is not a beneficiary of the trust and therefore can't make a claim under it.

[51] The Court finds that this is not an issue of law for determination in this litigation, although it may be in the other matter where Gamma and Queen's Marque are engaged.

### (c) Gamma and Guildfords Contractual breaches

[52] Queen's Marque submits that there have been contractual breaches committed by Gamma and Guildfords. In the submissions, there are allegations concerning change requests and lack of notice under the terms of the Subcontract, which incorporated terms of the Prime Contract. It submits that there is no legal basis for requiring Queen's Marque to pay twice for the same work.

[53] Guildfords response to the submission is brief. It states that it is not requesting the Court to have Queen's Marque "pay twice". It requests the Court consider that the holdback is no more than monies earned by Gamma under the Prime Contract with Queen's Marque, and was required to be retained under the *Builders' Lien Act* to protect subcontractors to Gamma.

[54] The Court can't discern a question of law in this submission with its application to this action for payment of the Guildfords Lien, beyond Queen's Marque denial of any claim, and which would require the Court's determination of a material fact in issue, of which there are none.

### (d) Deficiencies of the work

[55] Queen's Marque pleads that there is a question of law to be determined concerning Gamma's termination of the contract and its obligation to comply with

the contract up to the date of the termination concerning deficiencies. Queen's Marque claims significant deficiencies.

[56] It pleads that there is no basis in the Prime Contract or Subcontract to require Queen's Marque to pay Guildfords in full for deficient work and for Queen's Marque to then claim against Gamma.

[57] Guildfords relies upon *Jaron, supra* as establishing that the party retaining the holdback is not entitled to set-off against the same for any claim it may have against the party from whom it has withheld. Paying Guildfords from the statutory holdback does not preclude Queens Marque from seeking reimbursement from Gamma if it is found that the Prime Contract was inappropriately terminated.

[58] The Court considers this also a point of settled law, that does not require determination in this matter.

**(e) Guildford's lien is already discharged**

[59] Queen's Marque submits that, pursuant to s. 13(5) of the *Builders' Lien Act* that all payments up to 90% of the contract price made in good faith by an owner to a contractor, or to a contractor to a subcontractor, as the case may be, shall operate as a "discharge pro tanto of the lien".

[60] Queen's Marque's position is that the entire lien is therefore discharged, and the determination of that issue is a question of law.

[61] Guildfords responds that Queen's Marque is engaged in a misinterpretation of s. 13(5) of the *Builders' Lien Act*. It states that the discharge in s. 13(5) of the *Builders Lien Act* is "pro tanto" which is "to the extent" of the payments made, but not the holdback itself.

[62] "Pro tanto" is legal Latin for "to the extent" or "for so much." The Court finds that the interpretation of s. 13(5) is not an issue of law for determination by the Court as it is plain in its meaning and application in the statute.

**(f) The agreement between Guildfords and Gamma on the amount owing on the Subcontract was a material change in the litigation**

[63] This portion of Queen's Marque's argument was led at the hearing, with caselaw provided then, and was the subject of the later written submissions of counsel.

[64] Queen's Marque argues that the later agreement between Gamma and Guildfords on the amount owing under the Subcontract created a fundamental "… change to the litigation landscape.. " and is a question of mixed fact and law", with reliance on that finding in the *Skymark Finance Corporation v Ontario,* 2023

ONCA 234 decision (at para 51). It argued that the agreement on the price would have an impact on warranties and deficiencies.

[65] Guildfords disputes this submission, as a legal argument that is inapplicable in this litigation. The determination of whether an agreement or a settlement changes the entirety of the litigation landscape is specific to the matter, which is in this case a builders' lien action. The release of the holdback retained by Queen's Marque is the issue in this litigation, not the Guildfords' Lien perfection or the amount retained in relation to the Subcontract, as both parties to the Subcontract concur on the amount owed.

[66] Queen's Marque, as noted at the first step, does not specifically deny that Guildfords is owed money from Gamma for its work on the project. In paragraph 24 of the Queen's Marque defence it states that it was aware that Gamma had not paid Guildfords in full, with it also acknowledging that it was aware of its obligations under the *Builders' Lien Act* and had complied with its statutory requirements by retaining a holdback. When Guildfords registered its lien on April 13, 3033, Queen's Marque's obligations under the *Act* were set and it could not release or otherwise make use of the holdback pending a determination of the amount due to Guildfords.

[67] The Interrogatories established in detail Guildfords' claim for the price of its work, and Queen's Marque was advised on August 17, 2023 of the agreement between Gamma and Guildfords on the outstanding amount in advance of the motion for summary judgment. It is less than the amount in the Claim.

[68] Queen's Marque would have the Court agree that there are implicit pleadings in its defence and counterclaim, and that the evidence when paired with the pleadings, are supportive of a wide range of potential legal arguments.

[69] In keeping with the guidance set out in *Shannex, supra* and *Arguson, supra*, at the second Step of the test on a motion for summary judgment, a question of law or a question of mixed fact and law, should be discrete and apparent rather than speculative. Trial judges are careful when considering whether there are issues of material fact at the first Step, to ensure that the facts are not solely coming from the counsel table or are bare assertions in affidavits. This care is also equally taken on the second Step.

[70] Therefore, summary judgment must issue in favour of Guildfords.

[71] In the alternative, if the Court did find that there is a question of law concerning whether an agreement between a contractor (Gamma) and subcontractor (Guildfords) on an amount owing on a Subcontract is determinative

of the amount calculated for the holdback that an Owner (Queen's Marque) must retain, after litigation between the Owner and its Contractor was commenced, constitutes a "fundamental change in the litigation", and applied the third branch of the *Shannex*, *supra* analysis, the Court would find that this is not a pleading with a real chance of success in terms of this litigation. This litigation concerns the release of a statutory holdback pursuant to the *Builders' Lien Act*, with the percentage amount of the holdback retained to be determined by statute, and in harmony with an overarching legislative purpose to ensure that subcontractors will have an assurance there will be some money recovery for work and materials they provided on their subcontract. The agreement of the two parties with privity of contract on the amount owing under the subcontract would not alter the statutory obligation of the owner to retain funds in accordance with the statute.

[72] The question of law raised by Queen's Marque has no reasonable chance of success at trial as a defence to refuse payout of its holdback on the Guildfords Lien.

**Conclusion**

[73] The motion for summary judgment is granted, with the amount payable by Queen's Marque to Guildfords in this action in the amount of $815,206.04 payable,

with interests and costs. The Court notes that there is security posted with the Prothonotary currently reflective of the amount referenced in the now vacated Claim for Lien.

[74] The Court requests that Guildfords' counsel prepare the Order accordingly.

Diane Rowe, J.